

## COMMENT

### THE AFTERMATH OF MEXICO'S FUEL- THEFT EPIDEMIC: EXAMINING THE TEXAS BLACK MARKET AND THE CONSPIRACY TO TRADE IN STOLEN CONDENSATE

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## I. INTRODUCTION

Organized crime has infiltrated the oil patch, creating a theft network with an annual value of \$2–\$4 billion.<sup>1</sup> Over the past decade, Mexican drug cartels have plundered mass amounts of natural gas condensate<sup>2</sup> produced by *Petróleos Mexicanos* (Pemex)—the governing Mexican agency for production and export of hydrocarbons.<sup>3</sup> The Mexican government

1. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 706 (2013) (estimating that Mexico's fuel-theft costs exceed \$1 billion annually); see also John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 53, 54, 58 (Robert J. Bunker ed., 2013) (relying on an estimate by David Shields, an energy analyst, which indicates that the black market for Mexican fuel "is now worth \$2 billion to \$4 billion annually"); Jeremy Martin & Sylvia Longmire, *The Perilous Intersection of Mexico's Drug War & Pemex*, J. ENERGY SEC. (Mar. 15, 2011), [http://www.ensec.org/index.php?option=com\\_content&view=article&id=283:the-perilous-intersection-of-mexicos-drug-war-aamp-pemex&catid=114:content0211&Itemid=374](http://www.ensec.org/index.php?option=com_content&view=article&id=283:the-perilous-intersection-of-mexicos-drug-war-aamp-pemex&catid=114:content0211&Itemid=374) (suggesting that the total theft network is estimated "at roughly \$2 billion annually" according to unofficial figures).

2. See PEP's Third Amended Complaint at 1, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 1 ("Natural gas condensate (or simply 'condensate') is a mixture of hydrocarbon liquids that is produced with natural gas. Condensate is generally transported in liquid form and used as feedstock for refineries and petrochemical plants."); see also 40 C.F.R. § 60.111 (2013) (defining condensate as "hydrocarbon liquid separated from natural gas which condenses due to changes in the temperature and/or pressure and remains liquid at standard conditions").

3. See PEP's Third Amended Complaint at 5, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶¶ 22, 24 ("In 1938, *Petróleos Mexicanos* (commonly known as Pemex) was created by Presidential decree to fulfill the mandate of the Mexican Constitution that the Nation shall exclusively carry out the exploitation [of] Mexico's hydrocarbon resources. . . . Pursuant to the *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* (the 'Mexican Petroleum Law'), Pemex and its subsidiaries are the only entities with

has not sat by idly. Pemex's production losses have skyrocketed from \$300 million, between 2006 and 2011,<sup>4</sup> to an estimated \$585 million in 2013 alone.<sup>5</sup> Taking into account derivative costs associated with these thefts, Pemex's annual losses reach into the billions.<sup>6</sup> Diversified and driven by profits derived from the U.S. black market for stolen fuel, the cartels have remained undeterred despite Mexico's equally diversified efforts to defend its "national patrimony."<sup>7</sup> Pemex has turned to U.S. courts for recourse, bringing with it theories of conspiracy and conversion.<sup>8</sup> It has filed three actions in the U.S. District Court for the Southern District of Texas since 2006, naming a number of oil and gas tycoons as defendants<sup>9</sup> and alleging an overarching conspiracy to purchase \$300 million in stolen condensate.<sup>10</sup> Pemex's complaint provides a telling metaphor: "In a reversal of the classic Western movie, Mexican criminals have sought refuge with their ill-gotten gains by crossing the Rio Grande to the North, where the Mexican government has no authority to follow."<sup>11</sup>

This Comment examines the rise of Mexico's fuel-theft epidemic and the reasons why Mexico's preventative efforts failed, ultimately leading Pemex to follow the trail north of the border in search of damages. Part II provides a brief synopsis of Pemex's pivotal role in the Mexican petroleum industry, the Mexican cartels' methods of annexation, and the Texas

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the legal authority to produce, export, and sell refined and unrefined Mexican hydrocarbons, including natural gas condensate.").

4. See *id.* at 9, 2011 WL 2435978, ¶ 51 (alleging "more than \$300 million worth of condensate [had] been stolen" between 2006 and June 2011, when Pemex filed its Third Amended Complaint).

5. See *Pipeline Explosion Injures Several People in Mexico*, FOX NEWS LATINO (Dec. 16, 2013), <http://latino.foxnews.com/latino/news/2013/12/16/pipeline-explosion-injures-several-people-in-mexico/> ("Pemex expects 2013 to be a record year in terms of stolen fuel, with losses totaling some 7.06 billion pesos (\$585 million).").

6. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 706 (2013) (estimating costs attributed to fuel theft to exceed \$1 billion annually); see also John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 53, 54, 58 (Robert J. Bunker ed., 2013) (citing to estimates that indicate the black market for Pemex's fuel "is now worth \$2 billion to \$4 billion annually").

7. PEP's Third Amended Complaint at 8, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 42.

8. *Id.* at 29, 33, 2011 WL 2435978, ¶¶ 165, 178.

9. *Pemex Exploración y Producción v. Murphy Energy Corp.*, 923 F. Supp. 2d 961, 963 (S.D. Tex. 2013).

10. PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 55.

11. *Id.*, 2011 WL 2435978, ¶ 50.

market for pirated black gold. Part III explores Mexico's unavailing intranational efforts to combat its domestic criminal organizations and Pemex's contingency plan to suppress the U.S. market by presenting new, transnational threats of liability under an old theory of conversion. Part IV reviews Pemex's various claims, applicable defenses, and methods to reduce exposure to liability.

## II. BACKGROUND: THE RISE OF A FUEL-THEFT EPIDEMIC

### A. *Petróleos Mexicanos*

President Cárdenas created Pemex by presidential decree in 1938, establishing Pemex and its subsidiaries as the sole authority over production, export, and sale of unrefined Mexican hydrocarbons “[p]ursuant to *Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo* (the ‘Mexican Petroleum Law’).”<sup>12</sup> As a government agency, the Mexican Treasury controls Pemex's revenues, preventing Pemex from reinvesting.<sup>13</sup> The Mexican petroleum industry has long been a state-owned monopoly, as Pemex has governed all upstream and downstream transactions.<sup>14</sup>

### B. *The Menace*

While drug trafficking remains the primary avenue for generating cartel revenues, many have diversified the scope of their criminal enterprises to include kidnapping, extortion, and fuel theft.<sup>15</sup> Between 2006 and 2012, many transnational criminal organizations were largely dismantled, but various remnant subgroups formed their own organizations.<sup>16</sup> Los Zetas emerged as the dominant criminal enterprise in Mexico,<sup>17</sup> and it is not by coincidence that most reported pipeline thefts are attributed to them.<sup>18</sup>

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12. *Id.* at 5, 2011 WL 2435978, ¶ 24.

13. Wolfgang Sterk & Florian Mersmann, *New Market Mechanisms: Prerequisites for Implementation*, 6 CARBON & CLIMATE L. REV. 384, 392 (2012).

14. *Id.*

15. *U.S.–Mexico Security Cooperation: An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the Comm. on Foreign Affairs*, H.R., 113th Cong. 46 (2013) (statement of Clare Seelke, Specialist in Latin Sec. Cooperation, Cong. Research Serv.).

16. *See id.* (examining “the successes and limitations of bilateral security cooperation under the Calderón Administration” and the evolution of cooperation under the Nieto Administration).

17. *Id.*

18. *See, e.g.*, Anthony Harrup & David Luhnnow, *Mexican Crime Gangs Expand Fuel Thefts*, WALL ST. J. (June 18, 2011), <http://online.wsj.com/news/articles/SB10001424052702303635604576391910225256264> (stating that suspicion has fallen on the Zetas cartel, which has “expanded its territorial control along swaths of Mexico’s eastern Gulf coast, the site of much of Pemex’s operations”).

The majority of illegal siphons occur in Veracruz, Nuevo Leon, Puebla, and Tamaulipas—territories known to be Zeta strongholds.<sup>19</sup>

The Zetas' founding members were comprised of Mexican Special Forces commandos trained in the United States.<sup>20</sup> The soldiers were enticed to leave the military and serve as "high-end bodyguards" in the 1990s by the Gulf Cartel's then-standing leader, Osiel Cárdenas Guillén.<sup>21</sup> The Zetas transitioned and expanded from the Gulf Cartel's hired militants to freelance mercenaries, becoming one of the most menacing cartels in Mexico.<sup>22</sup> They have essentially evolved into a "parallel government," commandeering vast stretches of Pemex's pipelines and profits.<sup>23</sup> "The U.S. State Department has described the Zetas as the most technologically advanced, sophisticated, and dangerous cartel operating in Mexico."<sup>24</sup>

### C. *The Method*

The condensate is stolen primarily from transfer and delivery systems remotely located throughout the Burgos Field.<sup>25</sup> Pemex employs an extensive pipeline network connecting its production stations to various

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19. See Patrick Corcoran, *Oil Theft Is Big Business for Mexican Gangs*, INSIGHT CRIME (Mar. 20, 2012), <http://www.insightcrime.org/news-analysis/oil-theft-is-big-business-for-mexican-gangs> (explaining the various geographical trends in illegal siphons, and noting that Sinaloa's recent emergence as a heavily targeted region indicates that the Sinaloa Cartel, though traditionally recognized for drug trafficking, has contributed to growing those trends); see also Edward Fox, *Million-Liter Fuel Find in Zetas Territory Highlights Oil Theft in Mexico*, INSIGHT CRIME (May 30, 2012), <http://www.insightcrime.org/news-briefs/million-liter-fuel-find-in-zetas-territory-highlights-oil-theft-in-mexico> (reporting that the Mexican military discovered "over 1.5 million liters of stolen oil in Veracruz state, a region dominated by the Zetas," highlighting the growing prominence of criminal diversification in Mexico).

20. See, e.g., William Finnegan, *Letter from Mexico: Silver or Lead*, THE NEW YORKER (May 31, 2010), [http://www.newyorker.com/reporting/2010/05/31/100531fa\\_fact\\_finnegan?currentPage=all](http://www.newyorker.com/reporting/2010/05/31/100531fa_fact_finnegan?currentPage=all) (claiming that "[t]he Zetas brought military expertise to narco-trafficking").

21. See, e.g., *id.* (noting that the Zetas quickly "earned a reputation for savage violence and efficiency" and conducted "boldly public" recruitment efforts, including hanging highway banners with contact information, "urging soldiers to defect and receive 'a good salary, food, and medical care for [their] families'").

22. *Id.* (quoting the Zetas' public challenge to the U.S. and Mexican governments, and claiming that their crimes are among the most atrocious committed in the drug war).

23. John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 17 (Robert J. Bunker ed., 2013).

24. Dwight Dyer & Daniel Sachs, *Los Zetas' Spawn: The Long Afterlife of Mexico's Most Ruthless Drug Gang*, FOREIGN AFF. (Aug. 5, 2013), <http://www.foreignaffairs.com/articles/139626/dwight-dyer-and-daniel-sachs/los-zetas-spawn> (internal quotation marks omitted).

25. PEP's Third Amended Complaint at 7, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶¶ 35–37.

export terminals and refineries in Mexico.<sup>26</sup> Mexican cartels have targeted Pemex's condensate by exploiting "the scope and remoteness of the Burgos Field,"<sup>27</sup> which spans over 70,000 square kilometers along the border.<sup>28</sup> Condensate produced from Pemex's gas wells is transported from the Burgos to 150 collection stations.<sup>29</sup> The condensate is then moved by pipeline to one of Pemex's transfer and delivery systems, and finally to its central storage facility by pipeline or tanker truck.<sup>30</sup> The thefts occur at some point during this chain of transportation.<sup>31</sup>

Cartels have carried out these thefts in a variety of ways. They have hijacked Pemex's loaded tankers at gunpoint, kidnapped Pemex employees, and forced collaboration through threats of violence.<sup>32</sup> Some have even constructed tunnels and pipelines to siphon fuel from remote gas pipelines, a process referred to in Mexico as "milking."<sup>33</sup> These illegal taps, known as "hot taps" or "clandestine taps,"<sup>34</sup> are effectuated with "high-tech drills, miles of rubber hose[,] and a fleet of stolen tanker trucks."<sup>35</sup>

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26. See *id.* at 6, 2011 WL 2435978, ¶ 30 (describing the transportation system employed by Pemex, which includes "150 collection stations" and "[fifty-two] transfer and delivery systems").

27. *Id.* at 7, 2011 WL 2435978, ¶ 36.

28. *Id.* at 6, 2011 WL 2435978, ¶ 29. See generally Appendix B (mapping the Burgos and other basins along the Gulf and northern border).

29. *Id.*, 2011 WL 2435978, ¶ 30.

30. PEP's Third Amended Complaint at 6, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 30.

31. See *id.* at 7, 2011 WL 2435978, ¶ 37 ("Most of the condensate was stolen from one or more of [the fifty-two] transfer and delivery systems").

32. See Mica Rosenberg, *Pemex Counts 100 Workers Linked to Mexico Fuel Thefts*, REUTERS (July 25, 2011, 9:30 PM), <http://www.reuters.com/article/2011/07/26/us-mexico-oil-idUSTRE76P0BC20110726> ("Armed gangs menace pipeline inspectors and some have even kidnapped Pemex workers, with [seventeen] victims since 2005").

33. See Angeles Rodriguez, *Fuel Theft: How Pemex Has Been Plundered by Criminals and Black-Marketers*, OIL & GAS MEX. (Apr. 27, 2012), <http://www.oilandgasmexico.com/2012/04/27/fuel-theft-how-pemex-has-been-plundered-by-criminals-and-black-marketers/> (describing "milking" as "one of the most pressing problems Pemex is currently facing").

34. See Mica Rosenberg, *Pemex Counts 100 Workers Linked to Mexico Fuel Thefts*, REUTERS (July 25, 2011, 9:30 PM), <http://www.reuters.com/article/2011/07/26/us-mexico-oil-idUSTRE76P0BC20110726> (identifying these illegally welded pipelines as "hot taps"); see also Edwin Mora, *Mexico's State-Run Oil Company: Pipeline Network Practically Taken Over by Organized Crime and Armed Groups*, CNSNEWS (Aug. 21, 2012), <http://cnsnews.com/news/article/mexico-s-state-run-oil-company-pipeline-network-practically-taken-over-organized-crime> (classifying the devices as "clandestine taps").

35. Steve Fainaru & William Booth, *Widespread Oil Theft by Drug Traffickers Deals Major Blow to Mexico's Government*, WASH. POST (Dec. 13, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/12/AR2009121202888.html>; see *Cartels Suspected of Stealing Oil Field Equipment in Texas*, KRGV (July 27, 2012, 7:04 PM), <http://www.krgv.com/news/cartels-suspected-of-stealing-oil-field-equipment-in-texas/> (reporting that, according to a Midland County Chief Sheriff Deputy, cartels have even traded narcotics for equipment stolen from the oil field to actuate the project).

#### D. *The Market*

Although cartels reportedly have forced Mexican gasoline vendors to purchase stolen crude,<sup>36</sup> the cartels generally must look north to move stolen condensate.<sup>37</sup> Condensate is used primarily as feedstock by refineries and chemical plants, facilities necessarily under the authority of Pemex and its subsidiaries.<sup>38</sup> As such, the only legal method for an end-user in the United States to acquire Pemex's condensate is to purchase directly through P.M.I. Trading, a non-governmental Pemex affiliate.<sup>39</sup> However, Pemex and its affiliates did not sell any condensate to U.S. consumers from 2006 to 2011; accordingly, Pemex deduced that all Mexican condensate crossing the border during that period was stolen.<sup>40</sup>

Because Pemex and its subsidiaries possess the sole authority over production, export, and sale of Mexican hydrocarbons,<sup>41</sup> the market for stolen condensate is limited within Mexico's borders<sup>42</sup> as Pemex would not likely purchase its own stolen property. Instead, cartels smuggle the condensate for refining in the United States.<sup>43</sup> Mexican cartels have targeted Texas and its neighboring states because of the geographical proximity and general demand.<sup>44</sup> Rented tankers haul the condensate

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36. Tracey Knott, *Mexican Gas Vendors Forced to Buy Fuel Stolen by Gangs*, INSIGHT CRIME (July 10, 2012), <http://www.insightcrime.org/news-briefs/mexico-gas-vendors-forced-to-buy-fuel-stolen-by-gangs>.

37. See PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 52 ("The stolen condensate ends up in the United States and particularly in Texas. There is no market for stolen condensate within Mexico.")

38. See *id.* at 1–2, 2011 WL 2435978, ¶ 1 ("Condensate is generally transported in liquid form and used as feedstock for refineries and petrochemical plants. Because condensate often contains few contaminants and is easily refined into high-value oil products, it generally competes directly with light crude oil in downstream oil markets.")

39. See *id.* at 7, 2011 WL 2435978, ¶ 33 (stating the only legal method for U.S. purchasers to secure Pemex condensate is by contract with Pemex, brokered through P.M.I., under which the "legal purchases are transported by trucking companies under contract with [P.M.I. or Pemex]").

40. See *id.*, 2011 WL 2435978, ¶ 34 ("Since August 2006, no Pemex entity has sold [Pemex] condensate. Thus, any Mexican condensate which entered the United States after August 2006 was stolen and brought in without title or right.")

41. See *id.* at 5, 2011 WL 2435978, ¶ 25 ("[A]ccording to the Mexican Petroleum Law, [Pemex] is responsible for exploration and exploitation of oil and natural gas; its transport, storage in terminals and commercialization.")

42. See PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 52 (emphasizing that the black market for stolen condensate only exists in the United States).

43. See *Oil Theft in Mexico: Black Gold on the Black Market*, ECONOMIST, Aug. 4, 2012, available at <http://www.economist.com/node/21559962> (explaining how oil is smuggled into the United States to be refined).

44. See PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF*

across the border, labeled under the guise of another chemical.<sup>45</sup> The U.S. black market, consisting of an “undetermined number of oil refineries and companies,” poses an alarming threat to Pemex and Mexico’s financial stability.<sup>46</sup>

### III. FAILING PREVENTATIVE MEASURES IN MEXICO

#### A. Pemex’s Financial Crisis

Mexico’s future is “closely tied to the future of Pemex,”<sup>47</sup> Latin America’s largest oil-producing firm,<sup>48</sup> as its revenue funds “everything from education and health care to public infrastructure and poverty alleviation programs.”<sup>49</sup> The significance of production is evidenced further by Pemex’s \$25.3 billion budget in 2013, from which a “lion’s share” was allocated to upstream activities.<sup>50</sup> But Pemex’s operating costs have exceeded revenues in recent years.<sup>51</sup> These financial struggles are largely due to: “an immense fiscal obligation to the Mexican state” that drains more than half of Pemex’s revenues;<sup>52</sup> significant declines in

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Corp., No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, at ¶ 52 (“Foreign markets other than Texas are too distant to economically transport the condensate, particularly since its illegal nature makes large scale operations difficult.”).

45. *Oil Theft in Mexico: Black Gold on the Black Market*, ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559962>.

46. John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 20 (Robert J. Bunker ed., 2013).

47. Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT’L L. 697, 699 (2013). Pemex is the “fiscal engine” of Mexico, accounting for 30–40% of the government’s income, and it “affects the lives of nearly all Mexicans.” *Id.*

48. *Id.*

49. *Id.*; see Clifford Krauss & Elisabeth Malkin, *Mexico Oil Politics Keeps Riches Just Out of Reach*, N.Y. TIMES (Mar. 8, 2010), <http://www.nytimes.com/2010/03/09/business/global/09pemex.html> (“Oil money is used for everything from building schools to fighting the war against drug cartels.”).

50. Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT’L L. 697, 704 (2013); see Anthony Harrup, *Mexico’s Pemex Plans Record \$25.3 Billion Investment in 2013*, WALL ST. J. (Feb. 28, 2013, 1:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323978104578332400579225008>

(“Chief Financial Officer Mario Beauregard said in a conference call with analysts that 79% of the total [budget was] earmarked for exploration and production, 17% for refining, and the rest for gas processing and petrochemicals.”).

51. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT’L L. 697, 705 (2013) (“Despite being the world’s third largest oil-producing company, Pemex has been operating at a loss in recent years.”).

52. *Id.* at 706; see David Alire Garcia, *Mexico to Keep Pumping Pemex for Tax Money Despite Promised*



production;<sup>53</sup> operational and technical deficiencies;<sup>54</sup> institutional barriers;<sup>55</sup> and the emergence of fuel theft.<sup>56</sup>

Growing trends in pipeline theft contribute to Pemex's recent financial woes by annually depriving the agency of billions in costs and lost revenue.<sup>57</sup> Mexico's war on drugs, violence, and the insurgency of Mexican cartels often overshadow fuel theft.<sup>58</sup> But considering over one-third of Mexican government expenditures are dedicated to oil, any hindrance in production or exportation poses an equally significant threat, both economically and symbolically.<sup>59</sup> Reported fuel-theft incidents have been growing rapidly for nearly a decade—between 2004 and 2009 illegal pipeline taps quadrupled.<sup>60</sup> By 2010, complications transitioned from

*Reforms*, REUTERS (Oct. 30, 2013, 1:01 PM), <http://www.reuters.com/article/2013/10/30/mexico-reforms-pemex-idUSL1N01B0 OI20131030> (noting that in 2012, “Pemex paid \$69.4 billion in taxes on \$69.6 billion in pretax profits, a 99.7[%] tax rate”).

53. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 701–02 (2013) (“Roughly 80[%] of Mexico's oil fields are currently in advanced or declining stages of production.”); see also STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEX., AND THE TRANSBOUNDARY AGREEMENT 3 (Comm. Print 2012) (“Oil production in Mexico peaked in 2003 at about 3.4 million barrels per day (mbd), falling to 2.6 mbd in 2010.”).

54. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 707 (2013) (“Decades of prioritizing short-term revenues have shortchanged spending on exploration, strategic reinvestment, technology, research and development, and infrastructure.”).

55. See *id.* at 708 (explaining that Pemex, until recently, was “prohibited from entering into horizontal arrangements with private companies” that would enable pooling of resources and technology—limitations that are “all the more critical when projects involve high costs, technical challenges, and significant risks”).

56. See *Oil Theft in Mexico: Black Gold on the Black Market*, ECONOMIST (Aug. 4, 2012) <http://www.economist.com/node/21559962> (“In 2011 outlaws made off with 3.35 [million] barrels of fuel belonging to Pemex . . . up from 2.16 [million] in 2010.”).

57. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 706 (2013) (emphasizing the annual costs of fuel theft); see also John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 19, 24–25 (Robert J. Bunker ed., 2013) (providing estimates by energy analysts as to the growing costs of fuel theft to the Mexican economy).

58. See John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 19 (Robert J. Bunker ed., 2013) (“While most analysis understandably focuses on the extreme violence and insecurity challenging the state, Mexican cartels and gangs are forging a petroleum black market that augments its lucrative drug trade and extends their array of criminal enterprises.”).

59. *Id.* at 19–20.

60. Chris Hawley, *Stolen Oil Fueling Mexico's Drug War*, ARIZ. REPUBLIC (May 30, 2010, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/20100530mexico-oil-drug-war.html>.

thievery to ouster due to instability following the abduction of five workers,<sup>61</sup> which thwarted efforts to reach certain northern installations and forfeited \$350,000 per day in lost production.<sup>62</sup>

Illegal siphons have continued to burgeon. In 2011, Pemex recorded 1,324 clandestine taps, amounting to 3.35 million barrels of stolen fuel and a one-third increase from 2010.<sup>63</sup> In 2012, hot taps expanded to 1,744 detected incidents, increasing more than 20% from the previous year.<sup>64</sup> In the first four months of 2013, hydrocarbon theft doubled,<sup>65</sup> and Pemex officials estimated losses of 5,000–10,000 barrels per day (bpd) from the 2.5 million bpd produced.<sup>66</sup> Pemex predicted a record year in 2013 with losses from stolen fuel totaling \$585 million,<sup>67</sup> compared to the estimated \$300 million lost from 2006 to 2011.<sup>68</sup> Pemex's net profits in 2012 were just less than \$400 million.<sup>69</sup>

### 1. Industry Reform and Privatization

Privatization has been a persistent topic of debate for more than a decade.<sup>70</sup> Shortly after the fuel-theft epidemic sounded alarms, the Mexican Congress finally embraced reformation in 2008—though limited

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61. See Tracy Wilkinson, *Mexico Under Siege: Mexican Cartels Cripple Pemex Operations in Basin*, L.A. TIMES (Sept. 6, 2010), <http://articles.latimes.com/2010/sep/06/world/la-fg-mexico-pemex-20100906> (explaining that these kidnappings paralyzed segments of Pemex's business, and noting that one of the kidnapped employees was a mechanic, and another a pump specialist).

62. *Mexican Petroleum Workers Targeted in Drug Gangs' War Zone*, DALL. MORNING NEWS (Nov. 12, 2010, 8:58 AM), <http://www.dallasnews.com/news/20101112-Mexican-petroleum-workers-targeted-in-drug-3951.ece>.

63. STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEXICO, AND THE TRANSBOUNDARY AGREEMENT 11 (Comm. Print 2012).

64. James Bargent, *Oil and Gas Theft in Mexico Doubled in 2013*, INSIGHT CRIME (May 10, 2013), <http://www.insightcrime.org/news-briefs/oil-and-gas-theft-in-mexico-doubled-in-2013>.

65. See *id.* (explaining that “[i]n the first four months of 2013[,] . . . Pemex recorded 730 illegal siphons,” compared to 377 over that period in 2012).

66. *Mexico's Pemex Says Losing Up to 10,000 bpd to Oil Theft*, REUTERS (June 6, 2013, 2:01 PM), <http://www.reuters.com/article/2013/06/06/mexico-pemex-thefts-idUSL1N0E11GL20130606>.

67. *Pipeline Explosion Injures Several People in Mexico*, FOX NEWS LATINO (Dec. 16, 2013), <http://latino.foxnews.com/latino/news/2013/12/16/pipeline-explosion-injures-several-people-in-mexico/>.

68. PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 51.

69. Anthony Harrup, *Mexico's Pemex Plans Record \$25.3 Billion Investment in 2013*, WALL ST. J. (Feb. 28, 2013, 1:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323978104578332400579225008>.

70. See Duncan Wood, *The Administration of Decline: Mexico's Looming Oil Crisis*, 16 L. & BUS. REV. AM. 855, 863 (2010) (discussing the prospect of reforming Pemex).

in scale—by adopting “four new laws and reform[ing] six existing laws.”<sup>71</sup> These changes restructured authorized operation and administration without diluting state ownership through foreign investment.<sup>72</sup> By opening the door for private parties to obtain service contracts with Pemex, the reforms expanded the ability of private parties to participate in “transportation, storage[,] and distribution of gas,” as well as the operation and construction of gas pipelines.<sup>73</sup> Some experts in the Mexican petroleum industry suggested that—instead of mitigating the problem with auxiliary resources—these reforms exposed Pemex to greater risk of corruption, bribery, and conspiracy.<sup>74</sup> Privatization pleas continued and perhaps intensified in the wake of recent contractions in production,<sup>75</sup> most of which centered on the need for private investors.<sup>76</sup>

In December 2013, Mexico’s Senate passed “the most far-reaching oil reform in [seventy-five] years,” ending Pemex’s monopoly over

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71. Antonio Riva Palacio Lavin, *Comments on the Reforms to the Mexican Energy Laws of 2008*, 15 ILSA J. INT’L & COMP. L. 629, 637–39 (2009).

The four newly enacted laws are: the Mexican Oil Law, the National Commission on Hydrocarbons Law, the Law for Sustainable Energy Use and the Law for the Use of Renewable Energy and Financing of the Energetic Transition. The six laws that underwent reforms are: the Law Public Works and Services related to such Works, the Law of Public Sector Acquisitions, Leases and Services, the Federal Law of Parastatal Entities, the Law Regulating Article 27 of the Constitution concerning Oil, the Law of the Commission for the Regulation of Energy and the Organic Law of the Federal Public Administration.

*Id.* (footnotes omitted).

72. *See id.* at 640 (noting that the enactment and reformation of these laws did not encompass a constitutional reform; thus, Mexico’s sole ownership of hydrocarbons within Mexican territory remains intact).

73. *See id.* at 642 (explaining that the contractual regime is no longer regulated by laws applicable to government activities, as contracts generally are assigned through public bidding procedures following the reform).

74. *See* David Biller, *Pemex Must Retake Control of Fuel Distribution to Combat Theft, Says Expert*, BNAMERICAS (June 24, 2011), <http://www.bnamericas.com/news/oilandgas/pemex-must-retake-control-of-fuel-distribution-to-combat-theft-says-expert1> (reporting at least one expert in Mexican energy believes Pemex must re-assume all control over distribution to combat the growing frequency of fuel theft).

75. *See* Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT’L L. 697, 700–01 (2013) (“Not by coincidence, Mexico’s newly elected president, Enrique Peña Nieto, identified energy reform as the ‘signature issue’ of his administration.”).

76. *See, e.g.*, Nathaniel Parish Flannery, *Investor Insight: Why the Time May Be Right for Energy Reform in Mexico*, FORBES (Oct. 28, 2013, 9:57 AM), <http://www.forbes.com/sites/nathanielparishflannery/2013/10/28/investor-insight-why-the-time-may-be-right-for-energy-reform-in-mexico/> (outlining the argument advanced by pro-reform advocates “that partnerships with private companies are essential for unlocking and harnessing Mexico’s abundant sub-soil wealth,” and that instead of “wasting money on loss-making operations, Pemex could be partnering with foreign companies who have the technical expertise and funds to successfully execute new projects”).

exploration, production, and refining of Mexican oil and gas by allowing for private investment.<sup>77</sup> Advocates hope private investment will triple Mexico's proven reserves by unlocking its subsoil and curing Pemex's inefficiencies.<sup>78</sup> Notably, however, the reform falls short of privatizing Pemex; rather, it allows international investors to operate beside Pemex.<sup>79</sup> The U.S. Senate Committee on Foreign Relations stated that privatization is essential to sustain and advance oil production in Mexico.<sup>80</sup> But because "Pemex is as much a bureau of the government as it is a company,"<sup>81</sup> conflicting interests among Pemex's board members complicate attempted solutions.<sup>82</sup> Some members of the Committee were skeptical as to whether Pemex board members place the company's interests "at the forefront of decision making."<sup>83</sup>

## 2. Impact of Pemex's Financial Crisis in the U.S.

Criminal insurrection in Mexico poses a threat to U.S. sovereignty.<sup>84</sup> The U.S. national economy is "inextricably linked to Mexico in terms of imports, exports[,] and direct foreign investment."<sup>85</sup> Pemex is one of the

77. Dolia Estevez, *Mexico Reverses History and Allows Private Capital into Lucrative Oil Industry*, FORBES (Dec. 11, 2013, 3:00 PM), <http://www.forbes.com/sites/doliaestevez/2013/12/11/mexico-reverses-history-and-allows-private-capital-into-lucrative-oil-industry/>.

78. See, e.g., Nathaniel Parish Flannery, *Investor Insight: Why the Time May Be Right for Energy Reform in Mexico*, FORBES (Oct. 28, 2013, 9:57 AM), <http://www.forbes.com/sites/nathanielparishflannery/2013/10/28/investor-insight-why-the-time-may-be-right-for-energy-reform-in-mexico/> (describing common arguments supporting and opposing privatization).

79. See Daniel Yergin, *Will Mexico Open Its Oil Industry to the World?*, CNBC (Dec. 2, 2013, 8:44 AM), <http://www.cnbc.com/id/101238412> (noting that despite the failure to privatize Pemex, the "reform is crucial to providing the energy supplies that a growing Mexican economy will require").

80. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEX., AND THE TRANSBOUNDARY AGREEMENT 4 (Comm. Print 2012) ("The stakes of [reformation] are high for the Mexican Government. PEMEX directly provides 40% of government revenues, including significant resources transferred to the individual Mexican states.").

81. *Id.*

82. See *id.* ("In defiance of conventional business sense[,] . . . multiple Ministries and a politically-appointed Board of Directors make key decisions, including deciding the amount and direction of investment in exploration and development of future production.").

83. See *id.* (explaining that the long-term decisions needed in Mexico's oil sector are often incompatible with the "short-term political considerations" and agendas of politicians on the Board who serve multiple constituencies, including "the petroleum worker's union and companies that thrive off the oil supply chain").

84. See, e.g., Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 4 (Robert J. Bunker ed., 2013) (claiming that the conditions in Mexico pose a negative economic impact on Mexico as well as the U.S.).

85. *Id.* at 6; see U.S.–Mexico Security Cooperation: An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs, 113th Cong. 3 (2013) (statement of Mr. Albio Sires, Member, Subcomm. on the W. Hemisphere of the H. Comm. on

three largest U.S. suppliers—along with Canada and Saudi Arabia—of foreign oil imports.<sup>86</sup> The United States receives 80% of Mexico's exports,<sup>87</sup> and Mexico receives 14% of U.S. exports.<sup>88</sup> As such, the Mexican energy industry also poses “broad implications for U.S.[–]Mexico relations.”<sup>89</sup> Mexico relies heavily upon Pemex's revenue to support cooperation with the U.S. on “trade, security, migration, and other international issues.”<sup>90</sup> Beyond the governmental relations and financial implications, the United States is also Mexico's foremost direct investment partner.<sup>91</sup> With industry reform relaxing constitutional constraints on foreign investment, U.S. oil companies will likely share technology and costs associated with exploiting Mexican reserves.<sup>92</sup> A potential increase in U.S. investment would extend the risk for these investors and the U.S. economy as a whole.<sup>93</sup> While oil theft is germinating a “dangerous

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Foreign Affairs) (observing that Mexico is the third largest U.S. trading partner, following only Canada and China, and that the combined annual trade between Mexico and the U.S. is \$460 billion).

86. Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 700 (2013).

87. See Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 6 (Robert J. Bunker ed., 2013) (asserting that this percentage also represents 10% of U.S. imports).

88. *Id.*

89. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 705 (2013) (“As the third largest supplier of foreign oil to the United States[,] . . . Mexico is a key partner in the U.S. energy trade. Yet, from the standpoint of U.S. security interests, the role of Pemex *within* Mexico—as a cornerstone of the government's fiscal stability—has now eclipsed the company's importance as a source of imported oil.” (footnote omitted)).

90. *Id.*

91. See *U.S.–Mexico Security Cooperation: An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 3 (2013) (statement of Mr. Albio Sires, Member, Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs) (noting that the U.S. is Mexico's primary trading partner and foreign investor); see also Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 7 (Robert J. Bunker ed., 2013) (stating that U.S. investment in Mexico exceeds \$11 billion).

92. Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 7 (Robert J. Bunker ed., 2013) (citing Clifford Krauss & Elisabeth Malkin, *Mexico Oil Politics Keeps Riches Just Out of Reach*, N.Y. TIMES (Mar. 8, 2010), [http://www.nytimes.com/2010/03/09/business/global/09pemex.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/09/business/global/09pemex.html?pagewanted=all&_r=0)).

93. See *id.* (“If the existing conditions continue in Mexico[,] the negative effects could be devastating to United States investors and indirectly cause significant damage to the United States economy.”).

intersection” with broad financial and security concerns,<sup>94</sup> it falls under the greater penumbra of widespread corruption in Mexico.<sup>95</sup>

### B. *Corruption and Bilateral Cooperation*

Mexico and the United States have taken steps forward in terms of trust and bilateral cooperation following the “successful partnership” built under the Mérida Initiative, fighting the same drug trafficking organizations now threatening Mexico’s cash cow.<sup>96</sup> The United States has assisted in training “more than 7,500 Federal and 19,000 state [judicial] sector personnel,” including 4,000 additional federal investigators.<sup>97</sup> The Mexican Government also passed *Ley Federal Anticorrupción en Contrataciones Públicas*—the federal anticorruption law in public contracting—in 2012 to combat the ongoing war against corruption,<sup>98</sup> but international concerns persist regarding the extent of corruption and the inability to prosecute sufficiently such incidents in Mexican courts.<sup>99</sup>

Within the energy sector, Pemex’s own workers and contractors have contributed to the growing prevalence of petro-crimes.<sup>100</sup> Hundreds of

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94. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEX., AND THE TRANSBOUNDARY AGREEMENT 13 (Comm. Print 2012) (noting that Pemex has recorded a growing number of clandestine taps, which cost Pemex more than \$1 billion in 2011 alone).

95. See Geoffrey Ramsey, *Mexican Oil Company Reports Surge in Fuel Theft*, INSIGHT CRIME (Dec. 6, 2011), <http://www.insightcrime.org/news-briefs/mexican-oil-company-reports-surge-in-fuel-theft> (stating that Pemex’s direct involvement and internal corruption is partly to blame for its losses).

96. See STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEX., AND THE TRANSBOUNDARY AGREEMENT 11 (Comm. Print 2012) (“The \$1.9 billion Mérida Initiative through which the United States provides equipment, training, and technical assistance to support [Mexico’s] battle against the narcotics trade and transnational crime has created a platform for greater bilateral cooperation.”); see also U.S.–Mexico Security Cooperation: *An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 3 (2013) (statement of Mr. Albio Sires, Member, Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs) (explaining that both governments have adopted a shared responsibility, as the United States appropriated over \$1.9 billion during Fiscal Year 2012, while Mexico invested over \$10 billion in furtherance of the Merida Initiative).

97. U.S.–Mexico Security Cooperation: *An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 3 (2013) (statement of Mr. Albio Sires, Member, Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs).

98. See Allie Showalter Robinson, *Developments in Anti-Corruption Law in Mexico: Ley Federal Anticorrupción en Contrataciones Públicas*, 19 L. & BUS. REV. AM. 81, 81 (2013) (indicating that the legislation demonstrates a continued commitment to battle corruption that “coincides with growing international interest in the country’s emerging markets”).

99. See *id.* at 83 (naming—as one source of skepticism—the recent Wal-Mart bribery investigations concerning “regular payments to Mexican officials to expedite the construction of new stores in its campaign for ambitious growth in [Mexico]”).

100. See Mica Rosenberg, *Pemex Counts 100 Workers Linked to Mexico Fuel Thefts*, REUTERS (July 25, 2011, 9:30 PM), <http://www.reuters.com/article/2011/07/26/us-mexico-oil-idUSTRE76P0BC2>

corrupt employees have collaborated with the cartels to intercept loaded tanker trucks and siphon fuel from “tens of thousands of miles” of Mexican pipelines.<sup>101</sup> Because transnational crime associated with the Mexican oil industry threatens economic stability in the United States,<sup>102</sup> the government has strategic policy interests in “using its national powers to defeat transnational criminal organizations,”<sup>103</sup> and to assuage the current instability in Mexico.<sup>104</sup>

### C. *Military Enforcement*

Felipe Calderón, who served as Mexico’s President from 2006 to 2012, launched an effort to defend “[Mexico’s] national patrimony.”<sup>105</sup> Pemex enlisted the Mexican army to patrol pipelines in the Burgos, created an anonymous hotline urging bystanders to report looting, and limited the levels of condensate in remote storage tanks to reduce risk exposure.<sup>106</sup> Pemex even installed an electronic monitoring system to detect changes in pressure when condensate is taken from its pipelines and gathering stations, with military helicopters awaiting notification.<sup>107</sup> Likewise, cartels have progressed in pace, advancing their efforts by injecting water to replace siphoned condensate and mask the drop in pressure.<sup>108</sup>

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0110726 (“Since 2001, [ninety-seven] workers and seven contractors, usually truck drivers, have been linked to fuel thefts . . .”).

101. *See id.* (explaining that some of these employees are skilled engineers with inside knowledge of Pemex operations).

102. *See* Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 8 (Robert J. Bunker ed., 2013) (observing that Alexander Hamilton and John Jay’s Federalist Papers essays each describe “the importance of trade with other nations and the necessity for the common defense of America”).

103. *Id.* at 10–11.

104. *See U.S.–Mexico Security Cooperation: An Overview of the Merida Initiative 2008–Present: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 3 (2013) (statement of Hon. Matt Salmon, Chairman, Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs) (professing that maintaining strong bilateral cooperation is paramount for the Mexican and U.S. economic health and national security); *see also* Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 10–11 (Robert J. Bunker ed., 2013) (noting that the Department of State’s mission is to “[a]dvance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system”).

105. PEP’s Third Amended Complaint at 8, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 42.

106. *Id.* at 8, 2011 WL 2435978, ¶¶ 43–45.

107. *Id.*, 2011 WL 2435978, ¶¶ 46–47.

108. *See* Mica Rosenberg, *Pemex Counts 100 Workers Linked to Mexico Fuel Thefts*, REUTERS (July 25, 2011, 9:30 PM), <http://www.reuters.com/article/2011/07/26/us-mexico-oil-idUSTRE76P0BC2>

Recent constitutional reforms to the Mexican energy sector—the implications of which have yet to materialize—may provide the necessary resources to adequately secure the Burgos's expansive geography.<sup>109</sup> The changes will permit Pemex to pool resources and technology, which are “all the more critical when projects involve high costs, technical challenges, and significant risks.”<sup>110</sup> In fact, Royal Dutch Shell (Shell) and ExxonMobil (Exxon) have expressed such interests,<sup>111</sup> Shell having previous ties to the Pemex condensate litigation.<sup>112</sup> Members of the U.S. Senate Committee on Foreign Relations also have suggested that “[t]he State Department should offer technical assistance in pipeline security.”<sup>113</sup>

#### D. *Criminal Impunity and Judicial Reform*

Benjamin Franklin presciently philosophized that “[a]n ounce of prevention is worth a pound of cure.”<sup>114</sup> But Mexican courts, currently encumbered with crowded dockets and disadvantaged by deficient resources, have afforded neither.<sup>115</sup> Pemex utilized Mexican courts in attempts to suppress the cartels' newfound hydrocarbon initiatives,<sup>116</sup> but concededly was incapable of overcoming the cartels' pursuit despite

0110726 (explaining that Pemex frequently finds illegal taps using one hose to siphon the fuel, while using another hose to simultaneously inject water and minimize pressure variations).

109. See Tim R. Samples & José Luis Vittor, *The Past, Present, and Future of Energy in Mexico: Prospects for Reform Under the Peña Nieto Administration*, 35 HOUS. J. INT'L L. 697, 707–09 (2013) (expressing the various changes in access to resources).

110. *Id.* at 708.

111. Dolia Estevez, *Most Mexicans Oppose President Peña Nieto's Plans to Open Up Pemex to Private Investment*, FORBES (June 26, 2013, 11:51 AM), <http://www.forbes.com/sites/doliaestevez/2013/06/26/most-mexicans-oppose-president-pena-nietos-plans-to-open-up-pemex-to-private-investment/>.

112. See Jeremy Heallen, *Pemex's Suit over \$300M Cartel Gas Theft Trimmed*, LAW360 (Feb. 12, 2013, 8:49 PM), <http://www.law360.com/articles/414857/pemex-s-suit-over-300m-cartel-gas-theft-trimmed> (identifying Shell as one of the defendants initially named in the Pemex litigation).

113. STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., OIL, MEX., AND THE TRANSBOUNDARY AGREEMENT 15 (Comm. Print 2012) (emphasis omitted).

114. Benjamin Franklin, *On Protection of Towns from Fire*, PA. GAZETTE, Feb. 4, 1735, at 1.

115. See David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 194 (2010) (explaining that these factors contribute to the failure of Mexican courts to administer justice, as only one-fifth of reported crimes are investigated, and “an even smaller fraction of these result in trial and sentencing”).

116. See PEP's Third Amended Complaint at 8, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 48 (noting that forty individuals allegedly involved in the thefts—some of them Mexican customs agents—were prosecuted in Mexico, but Pemex and Mexico's inability to abate fuel theft at the source has mandated an attempt to cure the black market for stolen condensate).



“extensive and costly” efforts to do so.<sup>117</sup> Pemex’s battle to adjudicate provincial crimes of international import before Mexican courts, and subsequent resort to the U.S. judiciary, is representative of Mexico’s lingering war against criminal impunity, as only “one or two out of every 100 crimes” in Mexico are estimated to actually result in sentencing.<sup>118</sup> Such criminal liberty has spawned a rigid distrust for law enforcement,<sup>119</sup> as well as the judiciary.<sup>120</sup>

Distrust surrounding the Mexican court system stems from chronic neglect of the administration of justice by the political system.<sup>121</sup> But the most ardent criticisms of Mexico’s criminal justice system are imputed to prosecutors and police officers rather than judges and courtroom procedure.<sup>122</sup> Plagued with institutional corruption, law enforcement agencies have traditionally been “an extension of autocratic or semi-authoritarian systems of control.”<sup>123</sup> Prosecutors frequently avoid accepting cases for political or personal reasons.<sup>124</sup> In 2008, the Mexican Congress passed a series of legislative and constitutional amendments that advocates believe will precipitate a more democratic judicial sector “by introducing greater transparency, accountability[,] and due process.”<sup>125</sup>

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117. *See id.* at 9, 2011 WL 2435978, ¶ 49 (“[A]s extensive and costly as [Pemex]’s and Mexico’s efforts have been, they cannot stop the cartels’ pursuit of Mexico’s condensate . . . . As long as there is a [U. S.] market for stolen Mexican condensate, the thievery will continue.”).

118. David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 194 (2010).

119. *See id.* at 192 n.5 (observing that survey results indicated even one-third of police officers perceived a “high degree of corruption on the force”).

120. *See id.* at 193 (“[T]he administration of justice through Mexico’s court system has also proved woefully inadequate.”).

121. *See id.* at 194 n.9 (“Post-independence political instability in the [nineteenth] century, the [thirty-four]-year dictatorship of General Porfirio Díaz (1876[–]1910)[,] and severely restricted terms of democratic competition during [seventy-one] years of uninterrupted rule by the Institutional Revolutionary Party (PRI) significantly impeded the development of judicial independence in Mexico . . . . [J]udicial appointments depended heavily on loyalty to the ruling party[,] and judicial decisions only rarely contradicted the elected branches of government controlled by the party.”).

122. *See id.* at 213 n.64 (recognizing that harsh penalties combined with flexible enforcement procedures provide police officers the power to exact bribes for overlooking infractions of any magnitude).

123. David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 191–93 (2010). Police forces were generally capable of imposing order, “but were also used as instruments of patronage and political coercion.” *Id.* at 193.

124. *See id.* at 210 (providing the caveat that recent reforms allow victims to file criminal motions “in certain cases, which will exert pressure on public prosecutors to investigate cases”).

125. *See id.* at 191 (explaining that the reforms, to be implemented through 2016, address most facets of the judicial sector, including changes in criminal procedure such as “new measures to promote greater access to justice[,] . . . new functions for law enforcement and public security agencies in the administration of justice, and tougher measures for fighting organized crime”).

The reforms, which received broad political support,<sup>126</sup> consist of four essential elements: (1) procedural changes introducing new adversarial procedures;<sup>127</sup> (2) expanded rights for the accused;<sup>128</sup> (3) further integration of police agencies into the administration of justice;<sup>129</sup> and (4) new measures to battle organized crime.<sup>130</sup>

Critics fear that these “reforms attempt to achieve too much in too little time.”<sup>131</sup> Given the far-reaching scope of change, the technicalities and financial commitment accompanying judicial reconstruction align with the critics’ conviction.<sup>132</sup> Mexico has only begun to implement these reforms,<sup>133</sup> and changes of this magnitude will mandate decades of reform, resources, and the requisite “trial and error.”<sup>134</sup> Some states have failed to demonstrate any “significant signs of activity aimed at adopting the [2008 judicial] reforms,” including Puebla, Sinaloa, Tamaulipas, and

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126. *See id.* at 202–03 (showing that these reforms received widespread political support due to the elevated influence of organized crime, which “took sharp upswings in 2007 and 2008”).

127. *See id.* at 207 (contrasting Mexico’s traditional inquisitorial model with the adversarial model, which “involves a different set of procedures and roles for the main protagonists” and is generally “associated with common law systems like the United States or the United Kingdom”).

128. *See* David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 203 (2010) (providing some examples of these rights, including “the presumption of innocence, due process and adequate legal defense”).

129. *See id.* at 213 (explaining that Mexico’s traditional system dedicated police agencies to preventative functions, which were “not considered central to the work of prosecutors and judges”).

130. *See id.* at 217–18 (identifying these measures to include “special mechanisms for detaining organized crime suspects” and pioneer wiretapping uses).

131. *See id.* at 191 (noting that judicial reform has been widely dissertated by Mexico’s scholars and experts, yet there remains “great urgency” among the international audience “to understand what progress has been made so far in Mexican judicial sector reform and what issues remain to be improved”).

132. *See id.* at 219–20, 223 (describing how federal and state governments were allotted only eight years to adopt reforms that necessitate radically revising then-existing legal codes; remodeling and equipping courtrooms; retraining judges and lawyers; disciplining police to conduct criminal investigations; indoctrinating Mexican citizens to comprehend and trust the new procedures; and that some estimates for the initial investment exceeded “\$750 million pesos” to reform two of Mexico’s most successful states alone).

133. *See* Carlos Nash Licona, *The Merida Initiative and Mexico’s Legislative and Constitutional Reforms*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 135, 138 (Robert J. Bunker ed., 2013) (observing that Mexico had only begun implementing changes as of 2012, and further corollary measures are needed, such as adjustments in Mexican law school curriculum, retraining of judges, police officers, and government employees, and restoring faith “in the rule of law”).

134. *See* David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 228 (2010) (speculating that Mexico is attempting to renovate “hundreds of years of a unique, independent legal tradition in less than a decade”).

Veracruz<sup>135</sup>—all of which are identified as hot spots for pipeline theft.<sup>136</sup> The continued pillage of Mexico’s “national patrimony” in these territories further fuels public apprehension in the judicial system’s capacity to restore justice and sustains the cycle of criminal impunity.<sup>137</sup> Public distrust of the judicial sector operates diametrically to military efforts to prevent fuel theft—such as the anonymous hotline<sup>138</sup>—because citizens are less likely to report crimes.<sup>139</sup> As process indicators remain sorely needed to gauge the progress of these reforms,<sup>140</sup> the government must reinstate public trust by uniformly accelerating reform implementation,<sup>141</sup> particularly in heavily targeted states.

#### IV. THE U.S. CONSPIRACY TO TRADE IN STOLEN CONDENSATE

Pemex claims that, because most large petrochemical companies regularly dealing in condensate would not knowingly purchase stolen hydrocarbons, there must have been a “coordinated conspiracy in the United States to pass the stolen condensate across the border, launder its source, and distribute and sell the stolen condensate to end-users.”<sup>142</sup> Pemex alleges that all defendants to its lawsuit in the U.S. “have

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135. *Id.* at 222 n.91. *Consejo de Coordinación para la Implementación del Sistema de Justicia Penal* (CCISJP), the “[eleven]-member Coordinating Council for the Implementation of the Criminal Justice System[.]” conducted this report in 2010. *Id.* at 220.

136. See Patrick Corcoran, *Oil Theft Is Big Business for Mexican Gangs*, INSIGHT CRIME (Mar. 20, 2012), <http://www.insightcrime.org/news-analysis/oil-theft-is-big-business-for-mexican-gangs> (surveying geographical trends in pipeline theft).

137. See David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 192 (2010) (“Mexican citizens distrust law enforcement officials not only because of the perception that authorities are unable to solve crimes, but because of the perception (and reality) that there is widespread corruption and criminal activity on the part of justice system operatives, most notably the police.”); see also William Finnegan, *Letter from Mexico: Silver or Lead*, THE NEW YORKER (May 31, 2010), [http://www.newyorker.com/reporting/2010/05/31/100531fa\\_fact\\_finnegan?currentPage=all](http://www.newyorker.com/reporting/2010/05/31/100531fa_fact_finnegan?currentPage=all) (observing when there is mistrust of the police or courts, criminal organizations seek to pervade their roles and functions).

138. See PEP’s Third Amended Complaint at 8, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶¶ 43–44 (detailing how the government initiated an anonymous hotline to exhort Mexican citizens to assist in the effort to prevent looting).

139. See David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 192–93 (2010) (correlating general distrust among Mexican citizens with results from victimization surveys, which “suggest 25% or fewer crimes are even reported,” rendering “the true incidence of crime a ‘black statistic’”).

140. See *id.* at 227 n.105 (pointing out the shortage of baseline indicators available to assess the reforms).

141. See *id.* at 222 (noting that, “with a total of 18 state-level elections in 2009 and 2010,” political obstructions have complicated the mobilization of reform initiatives).

142. *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2011 WL 9523407, at \*3 (S.D. Tex. Oct. 20, 2011).

participated and profited—knowingly or unwittingly—in the trafficking of stolen condensate in the United States and have thereby encouraged and facilitated the Mexican organized crime groups that stole the condensate.”<sup>143</sup> More than \$44 million in stolen condensate was allegedly purchased between April 2007 and March 2009.<sup>144</sup>

A. *The Trammo Pleading*

Pemex’s allegations that a conspiracy exists are not based on mere conjecture—multiple parties have conceded to their involvement.<sup>145</sup> While the scope of the U.S. conspiracy is indeterminate, the actual existence of a marketing scheme within the United States is well established.<sup>146</sup> Donald Schroeder, the former president of Trammo Petroleum (Trammo), initiated American ties to the stolen condensate scheme in a 2009 plea agreement.<sup>147</sup> Trammo reached a non-prosecution agreement with the U.S. government, paying nearly \$4.5 million in penalties.<sup>148</sup> Although many aspects of the scheme remain in dispute, Schroeder conceded to the following, as stated by the U.S. Assistant Attorney General:

[V]arious companies imported Mexican condensate stolen from [Pemex] into the United States. The stolen condensate was sold by these import companies to other U.S. companies . . . . These companies were in the United States. The companies . . . sold the condensate to larger companies in the United States, such as [BASF]. The import companies sent semi-truck

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143. PEP’s Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 54.

144. *Id.* at 10, 2011 WL 2435978, ¶ 62.

145. *See id.* at 16–17, 21, 23, 2011 WL 2435978, ¶¶ 96, 104, 130, 143 (stating that multiple defendants conceded to their respective roles in the conspiracy, including representatives from Trammo Petroleum, Valley Fuels, Petro Salum, and Y Gas and Oil).

146. *See id.* at 10, 2011 WL 2435978, ¶ 56 (explaining that law enforcement agencies in the United States, “including the Immigration and Customs Enforcement Agency (ICE) of the Department of Homeland Security,” have investigated the transportation and sale of stolen Mexican fuel in the United States).

147. Jesse Bogan, *Mexican Drug Gangs Diversify into Oil*, FORBES (Oct. 11, 2009, 8:30 PM), <http://www.forbes.com/2009/08/11/mexico-oil-theft-business-energy-drugs.html>.

148. *See* Michelle Roberts, *U.S. Returns 2.4 Mil. in Oil Money*, DAILY CT. REV. (Aug. 12, 2009), <http://www.dailycourtreview.com/Default.aspx?tabid=66&articleType=ArticleView&articleId=12879> (announcing that Trammo agreed to pay \$2.4 million to Mexican authorities as restitution and an additional \$2 million to the U.S. government after Schroeder admitted to “knowingly buying and reselling petroleum products stolen from Mexico’s oil monopoly”); *see also* PEP’s Third Amended Complaint at 16, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 97 (stating that Schroeder pled guilty on May 29, 2009 “to knowingly conspiring to receive and sell” condensate stolen from Pemex in his capacity as Trammo’s president).

tankers loaded with stolen condensate from Mexico into the [United States] via border ports of entry. The import companies then directed the tanker trucks to deliver the condensate to U.S. companies like Continental Fuels, which was located inside the Port of Brownsville, Texas. The import companies were then paid by wire transfer to various accounts.<sup>149</sup>

Prosecutors claimed the conspiracy involved nearly \$2 million in stolen condensate, and Trammo would have ultimately profited around \$150,000 from the scheme.<sup>150</sup> Following Schroeder's plea agreement, Pemex filed suit against a plethora of U.S. organizations in two individual actions—now consolidated—arising from the alleged conspiracy to purchase stolen Mexican condensate.<sup>151</sup>

#### B. *The BASF and Big Star Actions*

Pemex filed the “BASF action” in June 2010 and the “Big Star action” in May 2011.<sup>152</sup> In 2012, the U.S. District Court for the Southern District of Texas consolidated the actions,<sup>153</sup> and Pemex subsequently filed its third complaint.<sup>154</sup> Pemex's principal claims in the lawsuit are for federal racketeering<sup>155</sup> and conversion under Texas law.<sup>156</sup> The company's other claims include illegal possession and use of Mexican sovereign property;<sup>157</sup> unjust enrichment (or “money had and received”);<sup>158</sup> violation of the Texas Theft Liability Act (TTLA);<sup>159</sup> civil conspiracy under Texas common law;<sup>160</sup> and violation of sections 1962(c)–(d) of the

149. Pemex Exploración y Producción v. BASF Corp., No. H-10-1997, 2013 WL 5514944, at \*44 (S.D. Tex. Oct. 1, 2013).

150. Jesse Bogan, *Mexican Drug Gangs Diversify into Oil*, FORBES (Oct. 11, 2009, 8:30 PM), <http://www.forbes.com/2009/08/11/mexico-oil-theft-business-energy-drugs.html>.

151. *BASF Corp.*, 2013 WL 5514944, at \*1.

152. Pemex Exploración y Producción v. Murphy Energy Corp., 923 F. Supp. 2d 961, 964 (S.D. Tex. 2013).

153. *Id.* at 963.

154. *Id.*

155. See PEP's Third Amended Complaint at 29, Pemex Exploración y Producción v. BASF Corp., No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 165 (alleging that defendants engaged in “racketeering activity” each time they knowingly received or sold stolen condensate under the conspiring defendants' scheme).

156. See *id.* at 33, 2011 WL 2435978, ¶ 183 (asserting that all named defendants converted “sovereign property of the United Mexican States, without title or right”).

157. *Id.* at 32, 2011 WL 2435978, ¶ 183.

158. See *id.* at 34, 2011 WL 2435978, ¶¶ 194–95 (claiming that all named defendants were unjustly enriched and seeking “imposition of a constructive trust”).

159. See *id.* at 34, 2011 WL 2435978, ¶ 198 (explaining that the conspiring defendants unlawfully appropriated the property, which “[p]ursuant to the Texas Penal Code . . . is unlawful if ‘the property is stolen and the actor appropriates the property knowing it was stolen by another’”).

160. See *id.* at 35, 2011 WL 2435978, ¶ 201 (arguing that the conspiring defendants “had the

Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>161</sup> Judge Lake, the presiding judge, dismissed most of Pemex's claims as barred under Texas's two-year limitations period<sup>162</sup> and considered only those claims based on transactions occurring within the two years following Pemex's filing of its original complaint.<sup>163</sup> Yet, Pemex's claims for conversion survived by grant of leave to designate responsible third parties.<sup>164</sup>

The named defendants are divided into two groups: those who knew or should have known, and those who were ignorant to the fact that they were purchasing stolen goods.<sup>165</sup> The most prominent defendant named in the action is BASF FINA (BASF), the U.S. extension of a leading chemical company based in Europe.<sup>166</sup> The complaint lists a number of transactions through which BASF purchased stolen condensate from Trammo, which Trammo conceded to acquiring while "knowing it was stolen property."<sup>167</sup> BASF allegedly processed the stolen condensate at its facility in Port Arthur, Texas, which operates "the world's largest steam cracker."<sup>168</sup> BASF is claimed to be an "innocent end-user," in the sense that the company lacked intent to participate in the conspiracy.<sup>169</sup> Thus,

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objective of committing common law conversion," acted coordinately and overtly in furtherance of committing conspiracy, and consequently, they conspired "to accomplish unlawful purposes").

161. *See id.* at 35–38, 2011 WL 2435978, ¶¶ 203–20 (alleging that "[t]he [c]onspiring [d]efendants created an association-in-fact enterprise" and directly or indirectly participated in the enterprise's affairs through a pattern of racketeering).

162. *See Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944, at \*41 (S.D. Tex. Oct. 1, 2013) ("The majority of these transactions occurred in 2007 and are, therefore, time barred because they occurred more than two years before [Pemex] filed suit on June 7, 2010.").

163. *See id.* at \*43 ("[C]onversion claims . . . arising from purchases made more than two years before [Pemex] filed its Original Complaint are time barred. Thus, only six of the BASF purchases listed in [Pemex's] Third Amended Complaint remain viable . . .").

164. *See id.* at \*76 (holding that several oil companies' claims were sufficient to grant motions to designate responsible third parties); *see also* Jeremy Heallen, *Pemex's Suit over \$300M Cartel Gas Theft Trimmed*, LAW360 (Feb. 12, 2013, 8:49 PM), <http://www.law360.com/articles/414857/pemex-s-suit-over-300m-cartel-gas-theft-trimmed> (indicating that the responsible third parties are "drug cartels and Mexican officials who facilitated the sale of the stolen condensate in the first place").

165. PEP's Third Amended Complaint at 2, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 3.

166. *See id.* at 10, 2011 WL 2435978, ¶ 59 (describing BASF's self-proclaimed prominence in the chemical industry as the "world's leading chemical company" with world-wide operations and more than 100,000 employees").

167. *Id.* at 10–11, 2011 WL 2435978, ¶ 62.

168. *Id.* at 10, 2011 WL 2435978, ¶ 59.

169. *Id.* at 10, 2011 WL 2435978, ¶ 61. Because BASF was an innocent end-user, they were excluded from Pemex's allegations of conspiracy. *See* PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1,

the principal charge against BASF is conversion.<sup>170</sup> All remaining defendants are named as co-conspirators including Murphy Energy (Murphy),<sup>171</sup> Trammo,<sup>172</sup> Valley Fuels (Valley),<sup>173</sup> Continental Fuels (Continental),<sup>174</sup> Petro Source (Petro),<sup>175</sup> Petro Salum (Salum),<sup>176</sup> *Importadora Exportadora* (IE),<sup>177</sup> and Y Gas and Oil (Y Gas).<sup>178</sup>

### C. Potential Liabilities for Innocent End-Users

As Mexico continues its efforts to plug clandestine taps south of the border, the short-term solution appears to be confining the black market north of the border.<sup>179</sup> Despite being classified as innocent end-users, industry giants have been and likely will continue to be in Pemex's crosshairs until the hydrocarbon heists and subsequent transactions cease.<sup>180</sup> Texas refineries are exposed to enormous liability under a

2013), 2011 WL 2435978, ¶ 55 (“All of the Defendants, but BASF, actively and knowingly participated in a conspiracy to import and market the stolen condensate in the United States.”).

170. *See id.* at 10, 2011 WL 2435978, ¶ 61 (denying that BASF acted “with intent or knowledge[,] or that it was a part of any conspiracy”).

171. *See id.* at 14–16, 2011 WL 2435978, ¶¶ 79–91 (alleging that Murphy distributed the stolen condensate to Trammo Petroleum, which it had purchased from Continental Fuels).

172. *See id.* at 16–17, 2011 WL 2435978, ¶¶ 92–100 (discussing Trammo's role and noting that Schroeder was aware that the conspiracy extended beyond Trammo's individual involvement).

173. *See id.* at 17–18, 2011 WL 2435978, ¶ 103 (“Valley Fuels and [its president,] Pechenik[,] knowingly coordinated stolen PEP condensate deliveries by co-conspirator [importing and exporting] companies to Defendant Continental Fuels and Murphy Energy.”).

174. *See* PEP's Third Amended Complaint at 18–19, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶¶ 109–19 (including Continental's president, Brink, and Continental's wholly owned subsidiary, USPD, in allegations of purchasing and storing the stolen condensate it obtained from co-conspirators).

175. *See id.* at 19–20, 2011 WL 2435978, ¶ 122 (contending that Petro purchased over \$500,000 in stolen condensate from Trammo in 2008, which Trammo had purchased from Continental in Brownsville).

176. *See id.* at 20–21, 2011 WL 2435978, ¶¶ 127–35 (claiming that non-defendant Salum transported the condensate across the U.S. border from Mexico for delivery to Continental, and noting that Salum's authorized agent pled guilty to the same in 2010).

177. *See id.* at 22, 2011 WL 2435978, ¶¶ 136–39 (asserting that non-defendant IE was also involved in transporting the condensate into the United States for delivery to Continental, and “conspired to bribe Mexican customs officials”).

178. *See id.* at 22–23, 2011 WL 2435978, ¶ 145 (alleging that Y Gas coordinated deliveries by Continental and “conspired to bribe Mexican customs officials,” and noting that its president pled guilty in 2009).

179. *See* PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 45 (predicting at the outset of litigation that “the thievery will continue” until the Texas market ceases to exist).

180. *See id.* at 9, 2011 WL 2435978, ¶ 50 (comparing cartel strategy to the reversal of a “classic Western movie,” and observing that the Mexican government lacks authority to prosecute these

theory of conversion by which *any* transferee of stolen property is liable for its return or its value, with or without knowledge.<sup>181</sup> There are twenty-seven petroleum refineries located in Texas capable of processing more than 4.7 million bpd.<sup>182</sup> Several refineries “dominate the Fortune 500 list,” including Exxon, ConocoPhillips (Conoco), Valero Energy (Valero), Tesoro, Marathon Oil, and Western Refining.<sup>183</sup> While these refineries undoubtedly have procedures in place to identify suspicious purchases, error is inevitable. Indeed, multiple industry moguls—including Exxon, Conoco, Valero, Marathon Oil, Shell, and Sunoco—have, in some capacity, been involved in litigation arising from related transactions without any awareness of the overarching conspiracy.<sup>184</sup> The scope of the *BASF* lawsuit provides an opportunity for Texas refineries to develop preventative measures to protect against the purchase of stolen fuel, and to evaluate the viability of Pemex’s various claims to reduce liability exposure arising from pipeline theft.

#### 1. Conflict of Law Analysis

End-users accused of purchasing stolen condensate can expect to circumvent application of Mexican law, which places no limitations period on conversion claims.<sup>185</sup> In its 2011 action, Pemex sought standing based on claims arising from Mexican law, asserting that its applicability was of “paramount importance” given the action’s relation to “the theft of Mexico’s sovereign property and the sale and purchase of that

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criminals once their “ill-gotten gains” have crossed the Rio Grande).

181. *See* *Tri-State Chems., Inc. v. W. Organics, Inc.*, 83 S.W.3d 189, 195 (Tex. App.—Amarillo 2002, pet. denied) (reciting the general rule that “the owner of stolen property can recover it or its value from anyone who has received it and exercised dominion over it” (citing *Sinclair Hous. Fed. Credit Union v. Hendricks*, 268 S.W.2d 290, 295 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.))).

182. *Refineries*, TXOGA, <http://www.txoga.org/industry-sectors/refineries> (last visited Apr. 10, 2014).

183. *See id.* (“Refineries in the Houston area make up the largest refining center in the United States.”).

184. *See* Jeremy Heallen, *Pemex’s Suit over \$300M Cartel Gas Theft Trimmed*, LAW360 (Feb. 12, 2013, 8:49 PM), <http://www.law360.com/articles/414857/pemex-s-suit-over-300m-cartel-gas-theft-trimmed> (reviewing the twelve defendants initially named in the lawsuit).

185. *See* *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2011 WL 9523407, at \*7 (S.D. Tex. Oct. 20, 2011) (declaring that the court will apply Texas law in accordance with choice of law analysis regardless of whether Pemex has “carried its burden of furnishing clear proof of the relevant Mexican legal principles”); *id.* at \*9 (proclaiming that the absence of a limitations period under Mexican law would undermine the “legitimate objectives of statutes of limitation,” such as preventing stale claims and protecting against uncertainty tied to unsettled claims, and also “violate the defendants’ justified expectations that claims not brought within a certain period of time are time-barred”).



property.”<sup>186</sup> Pemex relied on Article 27 of the Mexican Federal Constitution and its enabling legislation to support that its claim of “Illegal Possession and Use of Mexican Sovereign Property” existed under Mexican law.<sup>187</sup>

Generally, laws of the forum will be upheld unless the party seeking application of foreign law establishes “with reasonable certainty the substance of the foreign principles of law.”<sup>188</sup> Because the Mexican legislation lacked any enforcement provision, the court held that the arguments advanced by Pemex did not clearly establish the requisite principles of Mexican law.<sup>189</sup>

However, Pemex’s failure to establish the necessary principles of Mexican law would ultimately be irrelevant following application of Texas choice-of-law analysis.<sup>190</sup> Applying the most significant relationship test,<sup>191</sup> the court determined Texas had the more significant relationship to the substantive issue,<sup>192</sup> and application of Texas law was supported by other various policy considerations.<sup>193</sup> The court added that if Pemex wished to enforce its claims under Mexican law, it was “free to file suit in a Mexican court.”<sup>194</sup>

## 2. Conversion

Pemex alleged that all named defendants, including BASF, “took possession of, and utilized sovereign property of the United Mexican States, without title or right.”<sup>195</sup> Pemex claims the defendants then

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186. *Id.* at \*1.

187. *Id.* at \*3–6.

188. *Id.* at \*2 (citing *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006 (5th Cir. 1990)).

189. *See Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2011 WL 9523407, at \*7 (S.D. Tex. Oct. 20, 2011) (explaining that a party seeking application of foreign law must “(1) give written notice of its intent and (2) furnish the court with clear proof of the relevant foreign legal principles” (citing FED. R. CIV. P. 44.1)).

190. *See id.* at \*7 (holding that even if Pemex had provided sufficient proof, the court would have applied Texas law “pursuant to Texas choice of law analysis”).

191. *See id.* (“[A]ll conflicts cases sounding in tort [are] governed by the most significant relationship test as enunciated in Sections 6 and 145 of the Restatement (Second) of Conflicts.” (quoting *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979)) (internal quotation marks omitted)).

192. *See id.* at \*8 (emphasizing that all disputed purchases are alleged to have taken place in the United States between U.S. companies and residents).

193. *See id.* at \*7–10 (stressing that Pemex filed suit in Texas alleging the activities occurred solely within Texas; that protecting Texas citizens’ rights is a substantial state interest; and that application of Texas law further promotes certainty, uniformity, and predictability).

194. *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2011 WL 9523407, at \*10 (S.D. Tex. Oct. 20, 2011).

195. *See PEP’s Third Amended Complaint* at 33, *Pemex Exploración y Producción v. BASF*

refused to return the property or in the alternative, to reimburse Pemex and Mexico for its use.<sup>196</sup> Although the court granted leave for BASF to designate responsible third parties,<sup>197</sup> BASF's motion for summary judgment on Pemex's conversion claims was denied.<sup>198</sup>

Conversion is "[t]he unauthorized and wrongful assumption and exercise of dominion and control over the personal property [belonging to] another," in a manner that is inconsistent with the rights of the true owner.<sup>199</sup> Minerals that have been severed from the realty—including condensate—are characterized as personal property<sup>200</sup> and may be subject to subsequent claims of conversion. To establish its conversion claim, Pemex must demonstrate that:

- (1) [Pemex] . . . owned, had legal possession of, or was entitled to possession of the property;
- (2) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with [Pemex's] . . . rights; and
- (3) the defendant refused [Pemex's] . . . demand for the return of the property.<sup>201</sup>

Pemex bears the burden of establishing the identity and value of the property.<sup>202</sup> The measure of damages is generally "the fair market value of the property at the time and place of conversion," limited to such amount as may be necessary to compensate the injured party for the natural and proximate injuries or losses resulting from the conversion.<sup>203</sup> Pemex would be entitled to either return of the property, including damages for deprivation, or to recovery of its market value.<sup>204</sup> Demand

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Corp., No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 188 (claiming that "the stolen property was the sole and exclusive property" of Pemex pursuant to the Mexican Petroleum Law).

196. *See id.* at 33, 2011 WL 2435978, ¶ 190 (adding that the named "[d]efendants' improper assumption and exercise of dominion and control over [Pemex's] property" interferes with and diminishes the government's rights in the condensate).

197. Pemex Exploración y Producción v. BASF Corp., No. H-10-1997, 2013 WL 5514944, at \*71 (S.D. Tex. Oct. 1, 2013).

198. *See id.* at \*40 (denying BASF's motion because it failed to prove that the condensate it purchased was not stolen, and consequently, its good faith purchaser defense lacked merit).

199. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971).

200. *See Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812, 817 (Tex. 1974) (holding that severance from realty creates personal property in the case of oil and gas ownership).

201. *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 792 (S.D. Tex. 2010) (citations omitted).

202. *See Bishop v. Geno Designs, Inc.*, 631 S.W.2d 581, 584 (Tex. App.—Tyler 1982, no writ) ("In a suit for conversion[,] the plaintiff must establish the identity of the property converted.").

203. *United Mobile Networks, LP v. Deaton*, 939 S.W.2d 146, 147–48 (Tex. 1997) (per curiam) (citing *Prewitt v. Branham*, 634 S.W.2d 122, 123 (Tex. 1982)).

204. *See Wiese v. Pro Am Servs., Inc.*, 317 S.W.3d 857, 862 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (specifying the two recovery options for plaintiffs successfully proving conversion); *see*

and refusal have been identified as additional elements,<sup>205</sup> but case law suggests that a refusal is not necessary if other evidence is available to establish the act of conversion.<sup>206</sup>

Generally, “it is no defense that the defendant acted in good faith” in an action for conversion.<sup>207</sup> An end-user need not possess a wrongful intent to convert Pemex’s property so long as it intends the act of conversion itself.<sup>208</sup> However, there is an exception if the party qualifies as a “bona fide purchaser for value.”<sup>209</sup> End-users can satisfy the common law qualifications for a good faith purchaser by proving: (1) the property was purchased in good faith, (2) with valuable consideration, and (3) without knowledge—actual or constructive—of outstanding third party claims.<sup>210</sup> To qualify as a good faith purchaser under section 2.403 of the Uniform Commercial Code (UCC), a defendant must only prove that it was “(1) a purchaser, (2) that gave value, and (3) acted in good faith.”<sup>211</sup> A lack of

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*also* *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123, 127–28 (5th Cir. 1982) (explaining that a transferee of stolen property is liable for the actual property or the equivalent value of such property under Mississippi law); *Tri-State Chems., Inc. v. First State Bank, Stratford*, 185 S.W.3d 519, 522 (Tex. App.—Amarillo 2005, no pet.) (“[T]he owner of personalty wrongfully taken from him may recoup it, or the proceeds or mutations thereof, from the possession of one who took it *or his transferee*.” (emphasis added)), *reh’g overruled* 185 S.W.3d 519 (Tex. App.—Amarillo 2005).

205. *See, e.g., Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.) (identifying the final two additional requirements that “the plaintiff demanded return of the property; and . . . the defendant refused to return the property”).

206. *See Presley v. Cooper*, 155 Tex. 168, 284 S.W.2d 138, 141 (1955) (holding that demand and refusal are “merely evidence of a conversion,” and may be necessary under some circumstances where the conversion “cannot otherwise be shown than by [the bailee’s] refusal to comply”); *see also Nat’l Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 328 (5th Cir. 1994) (“Formal demand and refusal are not necessary if demand would be useless, or ‘if the possessor’s acts amount to a clear repudiation of the owner’s rights.’” (quoting *Bures v. First Nat’l Bank, Port Lavaca*, 806 S.W.2d 935, 938 (Tex. App.—Corpus Christi 1991, no writ))).

207. *McVea v. Verkins*, 587 S.W.2d 526, 531 (Tex. Civ. App.—Corpus Christi 1979, no writ); *see Geders v. Aircraft Engine & Accessory Co.*, 599 S.W.2d 646, 651 (Tex. Civ. App.—Dallas 1980, no writ) (“[A] good faith but unauthorized retention of property can be a conversion.”).

208. *See McVea*, 587 S.W.2d at 531 (noting that the unauthorized possession of property, even in cases where it is held in good faith, may still constitute conversion).

209. *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944, at \*5 (S.D. Tex. Oct. 1, 2013) (citing *Carter v. Cookie Coleman Cattle Co.*, 271 S.W.3d 856, 858 & n.3 (Tex. App.—Amarillo 2008, no pet.)).

210. *Carter v. Cookie Coleman Cattle Co.*, 271 S.W.3d 856, 858 (Tex. App.—Amarillo 2008, no pet.) (citing *NGR Exp., Inc. v. Rauch*, 671 S.W.2d 649, 653 (Tex. App.—Austin 1984, writ ref’d n.r.e.)).

211. *Id.*; *see* TEX. BUS. & COM. CODE ANN. § 2.403(a) (West 2009) (“A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (1) the transferor was deceived as to the identity of the purchaser, or (2) the delivery was in exchange for a check which is

knowledge as to outstanding third party claims is not required under section 2.403 to achieve good faith purchaser status.<sup>212</sup>

BASF argued that it was entitled to summary judgment under section 2.403 of the UCC because its subsidiary purchased the condensate for value and received good title as a good faith purchaser.<sup>213</sup> The defense failed, however, because good faith will never defeat conversion of *stolen* property.<sup>214</sup> The mere good faith *purchase* of stolen property does not alone constitute conversion, but the law deems a conversion has occurred when “the title of the lawful owner is made known and resisted or the purchaser exercises dominion over the property by use, sale, or possession.”<sup>215</sup> This reasoning aligns with the well-settled principle that a party “who purchases stolen property from a thief, no matter how innocently, acquires no title in the property; title remains in the owner.”<sup>216</sup> BASF failed to qualify as a good faith purchaser for value under Texas common law or section 2.403 “because no one in the chain of title following a thief [can] transfer good title to a subsequent purchaser.”<sup>217</sup>

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later dishonored, or (3) it was agreed that the transaction was to be a ‘cash sale’, or (4) the delivery was procured through fraud punishable as larcenous under the criminal law.”)

212. *Carter*, 271 S.W.3d at 858 (citing *In re Samuels & Co.*, 526 F.2d 1238, 1243–44 (5th Cir. 1976)).

213. *See BASF Corp.*, 2013 WL 5514944, at \*39 (relating BASF’s argument that it purchased the condensate from Trammo in good faith, for valuable consideration, and “without actual or constructive knowledge of any outstanding claims by a third-party”).

214. *See id.* at \*40 (reciting that no person or entity “in the chain of title following a thief [can] transfer good title to a subsequent purchaser like BASF”); *see also* *A. Benjamini, Inc. v. Dickson*, 2 S.W.3d 611, 614 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that under section 2.403 of the UCC, transactions of purchase are limited to “voluntary transfers,” and “a thief who wrongfully takes goods . . . does not take the goods through a transaction of purchase within the meaning of Section 2.403”).

215. *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123, 128 (5th Cir. 1982) (quoting *Miss. Motor Fin., Inc. v. Thomas*, 149 So. 2d 20, 23 (1963)) (internal quotation marks omitted); *see also* *Sandford v. Wilson*, 2 Willson 188, 189 (Tex. Ct. App. 1884) (“When the possession of personal property is wrongfully acquired in the first instance, and is transmitted successively to several [parties], each possession is a new conversion.”).

216. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 216 (Tex. App.—Houston [14th Dist.] 1984, no writ); *see* *McKinney v. Croan*, 144 Tex. 9, 188 S.W.2d 144, 146 (1945) (“[I]t is well settled that one in rightful possession of personal property may maintain an action for its recovery against a thief or one holding under him.”); *Walker v. Caviness*, 256 S.W.2d 880, 883–84 (Tex. Civ. App.—Texarkana 1953, no writ) (holding that a livestock company was liable for the value of stolen cattle after selling the same, which were delivered by others who had purchased the stolen cattle from thieves). *But see* *Sinclair Hous. Fed. Credit Union v. Hendricks*, 268 S.W.2d 290, 295 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.) (arguing that under certain circumstances, money may be an exception to “the general rule is that the owner of stolen property can recover it or its value from anyone who has received it and exercised dominion over it” due to its transactional need to pass freely).

217. *See BASF Corp.*, 2013 WL 5514944, at \*40 (rejecting BASF’s motion for summary

### 3. Unjust Enrichment and Money Had and Received

In connection with its claims for conversion, Pemex alleged that all named “defendants were unjustly enriched by any profits, commissions, or other benefits received by the use of [Pemex’s] condensate,”<sup>218</sup> and “[a]ll defendants profited from their improper dominion of [Pemex’s] property, and therefore, they [held] money that in equity and good conscience belong[ed] to [Pemex].”<sup>219</sup> While damages for conversion are limited to the property itself or its fair market value, damages for unjust enrichment also encompass profits derived from the wrongful disposition of such property.<sup>220</sup>

Unjust enrichment occurs when a party “has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain.”<sup>221</sup> One is unjustly enriched when he or she “obtains a benefit from another by fraud, duress, or the taking of an undue advantage.”<sup>222</sup> BASF argued, and the court agreed, that Pemex failed to make such allegations and actually conceded that BASF acted without imposing any fraud or duress upon Pemex or taking undue advantage in purchasing the condensate.<sup>223</sup> End-users may pose another potential argument—that Pemex had another remedy at law—to preclude Pemex from recovering under a theory of unjust enrichment when a conversion action exists.<sup>224</sup> Money had and received is an equitable claim, which operates under the theory of unjust enrichment.<sup>225</sup> The plaintiff must demonstrate that the

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judgment because it “failed to establish that the condensate they purchased was not stolen”).

218. PEP’s Third Amended Complaint at 31, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 172.

219. *Id.* at 34, 2011 WL 2435978, ¶ 193.

220. *See Meadows v. Bierschwale*, 516 S.W.2d 125, 129 (Tex. 1974) (“[W]here the defendant makes a profit through the consciously wrongful disposition of the plaintiff’s property, [the defendant] can be compelled to surrender the profit to the plaintiff and not merely to restore to the plaintiff his property or its value.” (quoting RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt. d (1937))).

221. *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citing *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet. denied)).

222. *Id.* (citing *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)).

223. *See BASF Corp.*, 2013 WL 5514944, at \*37 (noting BASF’s assertion that Pemex’s pleadings “constitute binding admissions that [BASF] acted without any intent to defraud or take undue advantage” of Pemex).

224. *See Prostar v. Massachi*, 239 F.3d 669, 675 (5th Cir. 2001) (“Where a conversion action is available . . . a claim of unjust enrichment is not viable.”).

225. *See, e.g., Edwards v. Mid-Continent Office Distribs., LP*, 252 S.W.3d 833, 837 (Tex. App.—Dallas 2008, pet. denied) (declaring the appellant’s “cause of action for money had and received” is a “claim [that] ‘belongs . . . to the doctrine of unjust enrichment’” (quoting *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no writ))).

“defendant holds money which in equity and good conscience belongs to him.”<sup>226</sup> Because BASF was an end-user of the condensate as opposed to a *seller*, it did not receive any money “that in equity and good conscience” belonged to Pemex.<sup>227</sup>

#### D. *Potential Defenses for Innocent End-Users*

While Pemex’s conversion claim survived summary judgment, there are many viable defenses to the claim, in part or in whole. Some defendants have assigned claims against conspiring defendants during settlement negotiations with Pemex,<sup>228</sup> while the statute of limitations barred a number of transactions and reduced liability by nearly 90% for the alleged \$44 million scheme.<sup>229</sup> The court also granted BASF leave to designate responsible third parties under Texas’s comparative fault scheme.<sup>230</sup> Other pre-litigation measures exist that can minimize liability exposure. End-users should negotiate express indemnification provisions in future contracts for purchase,<sup>231</sup> and ensure adequate records are maintained regarding any subsequent commingling of the fuel.<sup>232</sup>

##### 1. Assignment of Contribution Claims

Some parties have successfully assigned their claims against conspiring defendants—including claims for fraud, breach of warranty, and breach of contract—as part of settlement negotiations with Pemex.<sup>233</sup> But conventional business sense indicates that Pemex would be unwilling to

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226. *Id.* (citing *Best Buy Co. v. Barrera*, 248 S.W.3d 160, 162–63 (Tex. 2007) (per curiam)).

227. *See BASF Corp.*, 2013 WL 5514944, at \*38 (holding that Pemex failed to produce evidence capable of establishing its claim for money had and received).

228. *See Pemex Exploración y Producción v. Murphy Energy Corp.*, 923 F. Supp. 2d 961, 973–75 (S.D. Tex. 2013) (dismissing Pemex’s assigned claims for lack of standing, for which Pemex settled its conversion claims against Valero Marketing and Supply (VMSC), Flint Hills Resources (Flint Hills), and AGE Refining (AGE)).

229. *See BASF Corp.*, 2013 WL 5514944, at \*36, 41 (listing the date and price of all allegedly illegal transactions and holding that most of these transactions were barred because they “occurred more than two years before [Pemex] filed suit on June 7, 2010,” barring all but six transactions and reducing liability from the alleged \$44 million scheme to just under \$5 million).

230. *Id.* at \*76.

231. *See, e.g., UMC, Inc. v. Coonrod Elec. Co.*, 667 S.W.2d 549, 554 (Tex. App.—Corpus Christi 1983, writ ref’d n.r.e.) (asserting that an express or implied contract is a prerequisite for the right to indemnity).

232. *See BASF Corp.*, 2013 WL 5514944, at \*22 (explaining that a refinery “bears the burden of pointing out his own goods” when it commingles with another’s goods, or else it will be liable for entire mass); *see also Holloway Seed Co. v. City Nat’l Bank*, 92 Tex. 187, 47 S.W. 95, 97 (1898) (declaring that this concept reflects “the principle that all things are presumed against the spoliator”).

233. *See Murphy Energy Corp.*, 923 F. Supp. 2d at 977 (“[Pemex] settled its conversion claims against [VMSC] and AGE for \$0 in return for an assignment of their warranty claims.”).

settle future conversion claims for these assignments, which were held to be invalid under Texas law as “claims for contribution from non-settling tortfeasors.”<sup>234</sup> Pemex lacked standing to assert these claims because the complaint was absent of any allegations or evidence that the assignors—rather than Pemex—had suffered an injury-in-fact allowing them to recover value for the goods purchased from any named defendants.<sup>235</sup> The assignors’ mere involvement in the transactions did not qualify as an injury-in-fact suffered by the assignors, nor did the assignors’ promise to reimburse Pemex for the stolen condensate.<sup>236</sup> The assigned claims “were not intended to secure damages from” the assignors; rather, they were intended to provide an avenue to recover against other named defendants.<sup>237</sup> Although assignment may have been a quondam success, other strategies may remain viable.

## 2. Statutes of Limitation

Multiple defendants attempted to bar Pemex’s conversion claims based on the two-year statute of limitations under section 16.003(a) of the Texas Civil Practice & Remedies Code.<sup>238</sup> Under Texas law, conversion, money had and received, and unjust enrichment claims are subject to a two-year statute of limitations.<sup>239</sup> In accordance with the legal injury test, the statute generally begins to run when the injury is suffered, “regardless of

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234. *See id.* at 976, 979 (holding that the claims were invalid because they were “intended to prolong [Pemex’s] litigation against the [named] defendants,” and the claims “distorted the litigation positions of the parties by placing [Pemex] in the dual role of original owner and last purchaser” of the allegedly stolen condensate).

235. *Id.* at 973.

236. *See id.* at 969 (“[I]nstead of establishing that the assignors suffered an injury by having admitted to liability, or having been held liable for purchasing [or] receiving stolen gas condensate, the agreements establish that the assignors (1) deny liability . . . , and (2) will not be held liable . . . [because Pemex agreed] not to seek reimbursement from the assignors . . . [or] pursue its claims against the assignors.”).

237. *Id.* at 979.

238. *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944, at \*10 (S.D. Tex. Oct. 1, 2013).

239. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West Supp. 2013) (providing that a plaintiff must bring an action for “trespass for injury to the . . . property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues”); *see also* *BASF Corp.*, 2013 WL 5514944, at \*10 (declaring that Pemex’s claims for conversion, money had and received, unjust enrichment, and civil conspiracy are all governed by section 16.003); *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870–71 (Tex. 2007) (per curiam) (holding that extra-contractual claims of unjust enrichment are also subject to section 16.003(a) for “taking or detaining the personal property of another”).

when the injury becomes discoverable.”<sup>240</sup> This remains true “even if all resulting damages have not yet occurred”<sup>241</sup> and regardless of whether the alleged wrongdoers have been identified.<sup>242</sup> However, Texas jurisprudence recognizes two doctrines that limit application of the legal injury test: the discovery rule and the doctrine of fraudulent concealment.<sup>243</sup>

Pemex argued that because it filed suit within two years from the time it knew or reasonably should have known of the relevant facts giving rise to its claims, limitations tolled with respect to those claims pursuant to the discovery rule.<sup>244</sup> The discovery rule “tolls the running of limitations until the time the plaintiff discovers, or . . . should have discovered the nature of the injury.”<sup>245</sup> Ascertainment of an end-user’s identity is not required to commence the limitations period,<sup>246</sup> but there is some authority indicating the discovery rule applies in cases involving fraud or deception, which may serve to toll the statute as to subsequent purchasers.<sup>247</sup> Application of the discovery rule is determined on a case-by-case basis.<sup>248</sup>

Fraudulent concealment of pertinent facts also prevents a defendant from relying on the statute of limitations.<sup>249</sup> Generally, Pemex would

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240. *BASF Corp.*, 2013 WL 5514944, at \*11 (stating that the two-year statute of limitations begins with the injury to the plaintiff); see *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 410 (5th Cir. 2004) (“Texas follows the ‘legal injury’ test, under which ‘[a] cause of action generally accrues, and the statute of limitations begins to run, when facts come into existence that authorize a claimant to seek a judicial remedy.’” (quoting *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 514 (Tex. 1998))).

241. *BASF Corp.*, 2013 WL 5514944, at \*11 (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (internal quotation marks omitted)).

242. *Id.* (citing *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 344 n.3 (Tex. 1992)).

243. *Id.* at \*12; see *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (observing a distinction between the discovery rule and the doctrine of fraudulent concealment “because each is characterized by different substantive and procedural rules”).

244. *BASF Corp.*, 2013 WL 5514944, at \*10.

245. *Autry v. Dearman*, 933 S.W.2d 182, 192 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

246. See *Steinhagen v. Ehl*, 126 S.W.3d 623, 626 (Tex. App.—Beaumont 2004, pet. denied) (explaining that once the plaintiff is aware or should be aware of the nature of the injury, “limitations commences, even if the plaintiff does not know the exact identity of the wrongdoer” (quoting *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998))). But see *Hofland v. Elgin-Butler Brick Co.*, 834 S.W.2d 409, 414 (Tex. App.—Corpus Christi 1992, no writ) (“[I]n cases in which it is difficult or impossible for a plaintiff to ascertain the true facts establishing the elements of the cause of action, the discovery rule applies.”).

247. See *Hofland*, 834 S.W.2d at 414–15 (applying the discovery rule to the class of conversion cases where unequivocal acts of conversion have occurred). But see *Autry*, 933 S.W.2d at 193 (distinguishing *Hofland* as applying to cases of conversion only where possession is initially lawful).

248. *Murphy v. Campbell*, 964 S.W.2d 265, 271 (Tex. 1997).

249. See *Pressure Sys. Int’l, Inc. v. Sw. Research Inst.*, 350 S.W.3d 212, 216 (Tex. App.—San



bear the burden of establishing the following: (1) an underlying tort existed; (2) the defendant knew of the tort and deceptively concealed its existence; and (3) Pemex reasonably relied on the deception.<sup>250</sup> Thus, this doctrine is inapplicable to innocent end-users that have no “knowledge of the facts supposedly concealed.”<sup>251</sup>

### 3. Comparative Fault

Texas courts apply modified comparative fault, which provides joint and several liability for defendants found liable for 51% or more of the plaintiff's injury.<sup>252</sup> Contribution claims are subject to a two-year statute of limitations, which does not run until the right to contribution accrues<sup>253</sup>—once Pemex recovers or settles the suit. Thus, a defendant need not assert a contribution claim in the primary lawsuit.<sup>254</sup> A defendant may still seek to designate a responsible third party even if the limitations period has run on those claims.<sup>255</sup> Contribution is authorized only among joint tortfeasors because “[a] defendant's claim of contribution is derivative of the plaintiff's right to recover from the joint defendant against whom contribution is sought.”<sup>256</sup> Settling defendants are exempt from contribution,<sup>257</sup> and provisions for comparative fault

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Antonio 2011, pet. denied) (“[F]raudulent concealment defers accrual of a cause of action because ‘a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run.’” (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996))).

250. *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944, at \*12 (S.D. Tex. Oct. 1, 2013) (citing *Jones v. Thompson*, 338 S.W.3d 573, 583 (Tex. App.—El Paso 2010, pet. denied)).

251. *Mowbray v. Avery*, 76 S.W.3d 663, 690 (Tex. App.—Corpus Christi 2002, pet. denied); see *BASF Corp.*, 2013 WL 5514944, at \*41 (holding the doctrine did not defer limitations on Pemex's conversion claims against BASF because it failed to establish that BASF concealed any pertinent facts or knew of any conspiracy).

252. CIV. PRAC. & REM. §§ 33.013, 33.015 (West 2008).

253. *Beaumont Coca Cola Bottling Co. v. Cain*, 628 S.W.2d 99, 100 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.).

254. See *In re Martin*, 147 S.W.3d 453, 459 (Tex. App.—Beaumont 2004, pet. denied) (“For various reasons, joinder of every joint tortfeasor in the primary lawsuit may not be possible or even desirable in the view of the parties or of the court.”).

255. See CIV. PRAC. & REM. § 33.004 (West Supp. 2013) (permitting a defendant, upon filing a motion, to designate responsible third parties); see also *Villarreal v. Wells Fargo Brokerage Serv., LLC*, 315 S.W.3d 109, 121 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (finding that section 33.004 permits a claimant to pursue its claims against responsible third parties “regardless of whether those claims [are] time-barred at the time suit [is] initially filed” because they are revived by designated responsible third parties).

256. *CBI NA-CON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 339 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

257. See CIV. PRAC. & REM. § 33.015(d) (West 2008) (“No defendant has a right of contribution against any settling person.”).

have no effect on indemnity rights provided under the express terms of a contract.<sup>258</sup>

#### 4. Indemnity from Direct Suppliers

Express or implied indemnity agreements provide another avenue for end-users to guard against dubious transactions. Unlike contribution, indemnity is an “all or nothing proposition,”<sup>259</sup> “promis[ing] to safeguard or hold the indemnitee harmless against either existing [or] future loss liability.”<sup>260</sup> A right to indemnity generally arises from express contractual provisions, which determine the nature and extent of that right.<sup>261</sup> When there is no express provision for indemnity, an implied obligation to indemnify may arise if the company, free of any fault, “is exposed to liability and compelled to pay damages on account of the tortious act of another, provided they are not joint tortfeasors.”<sup>262</sup> Thus, an innocent end-user may have a right to indemnification based on a breach of express warranty in the contract for purchase.<sup>263</sup> An indemnity claim accrues when all potential “liabilities become fixed and certain,” but an indemnitee may still bring its claim prior to judgment being rendered.<sup>264</sup>

### V. CONCLUSION

Fuel theft has placed a growing burden on Pemex and Mexico's financial stability, as predicted costs from theft in 2013 exceed Pemex's net profit from 2012.<sup>265</sup> Mexico's financial struggles and inability to guard

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258. *Id.* § 33.017.

259. *UMC, Inc. v. Coonrod Elec. Co.*, 667 S.W.2d 549, 554 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (citing James B. Sales, Comment, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 326 (1980)).

260. *Dresser Indus. v. Page Petrol., Inc.*, 853 S.W.2d 505, 508 (Tex. 1993).

261. *See, e.g., Coonrod Elec. Co.*, 667 S.W.2d at 554 (explaining that indemnification rights and obligations “generally spring from contract, express or implied, which contract determines the extent of the right to be indemnified, and in the absence of an express or implied contract a right to indemnity does not exist”).

262. *Id.*; *see St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 177 (Tex. App.—Amarillo 1997, writ denied) (observing that common law indemnity has been abolished “except in cases where the defendant's liability is purely vicarious,” or “based solely upon the relationship between the two [parties].” (citing *B & B Auto Supply v. Cent. Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980))).

263. *See St. Anthony's Hosp.*, 946 S.W.2d at 177–78 (observing that a cause of action exists under common law indemnity when the defendant's liability is based upon the contractual relationship (citing *B & B Auto Supply v. Cent. Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980))).

264. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 209, 210 (Tex. 1999).

265. *See Pipeline Explosion Injures Several People in Mexico*, FOX NEWS LATINO (Dec. 16, 2013), <http://latino.foxnews.com/latino/news/2013/12/16/pipeline-explosion-injures-several-people-in-mexico/> (relating Pemex's estimate that losses in 2013 will reach \$585 million); *see also* Anthony

against fuel theft pose a direct threat to U.S. economic stability and national security,<sup>266</sup> increase risks associated with U.S. investment,<sup>267</sup> and spawn liability exposure for U.S. refineries as innocent end-users of stolen fuel. Given the growing trends in fuel theft and the Mexican government's inability to reverse that trend in its own fields,<sup>268</sup> there is no foreseeably effective stopgap on the horizon. Refineries located in targeted states, including Texas, face significant financial liabilities associated with purchasing stolen condensate. Without sufficient protective measures—and subject to reductions for time-barred transactions, contribution, or indemnification—end-users could potentially forfeit multi-million dollar purchases or damages mirroring those purchases.<sup>269</sup>

The epidemic of clandestine taps has plagued the Mexican energy sector, revealing yet another symptom of the modern cartel business model. Organizations like the Zetas have diversified sources of revenue, they have built a horizontal organizational structure to expedite and exploit opportunities in various locales, and violence is merely the means by which they ease their entry into new markets.<sup>270</sup> Driven by profits, the Zetas

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Harrup, *Mexico's Pemex Plans Record \$25.3 Billion Investment in 2013*, WALL ST. J. (Feb. 28, 2013, 1:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323978104578332400579225008> (explaining that despite record sales in 2012, Pemex's net profit was just below \$400 million after taxes).

266. See Johnny M. Lairsey, Jr., *Strategy for Mexico?*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 3, 4 (Robert J. Bunker ed., 2013) (noting that current conditions pose a negative economic impact on Mexico and the United States, as unexpected increases in energy prices historically have correlated with economic recessions).

267. See *id.* at 7 (explaining that the continued existence and growth of fuel theft “could be devastating to United States investors” contributing over \$11 billion to Mexico's oil sector).

268. See PEP's Third Amended Complaint at 9, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶ 49 (admitting that Pemex and the Mexican government have been unable to deter the cartels' pursuit, despite “extensive and costly” efforts to do so); see also *Pipeline Explosion Injures Several People in Mexico*, FOX NEWS LATINO (Dec. 16, 2013), <http://latino.foxnews.com/latino/news/2013/12/16/pipeline-explosion-injures-several-people-in-mexico/> (estimating a record loss of \$585 million from fuel theft, nearly doubling losses from the previous seven years combined).

269. See PEP's Third Amended Complaint at 10, 33, *Pemex Exploración y Producción v. BASF Corp.*, No. H-10-1997, 2013 WL 5514944 (S.D. Tex. Oct. 1, 2013), 2011 WL 2435978, ¶¶ 62, 191 (alleging that BASF unwittingly purchased over \$44 million in stolen condensate in just two years, and seeking damages for conversion “measured by the market value of the condensate at the time BASF took possession”).

270. See Dwight Dyer & Daniel Sachs, *Los Zetas' Spawn: The Long Afterlife of Mexico's Most Ruthless Drug Gang*, FOREIGN AFF. (Aug. 5, 2013), <http://www.foreignaffairs.com/articles/139626/dwight-dyer-and-daniel-sachs/los-zetas-spawn> (outlining the Zetas' business model, describing it as “lucrative, efficient, and . . . quickly becom[ing] one of the most destabilizing forces in the Western Hemisphere”).

have targeted Pemex's remote pipelines in the Burgos Basin as an additional channel of revenue, and have further fueled their business model by "exploit[ing] cross-border black and grey markets . . . as a vehicle for money laundering to cleanse proceeds from other illicit businesses."<sup>271</sup> As such, the war against Mexican cartels has become increasingly important, "now directly intersect[ing] with the perilous energy situation that Pemex—and [Mexico]—is facing."<sup>272</sup>

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271. John P. Sullivan & Adam Elkus, *Open Veins of Mexico: The Strategic Logic of Cartel Resource Extraction and Petro-Targeting*, in MEXICAN CARTEL ESSAYS AND NOTES: STRATEGIC, OPERATIONAL, AND TACTICAL 19, 21 (Robert J. Bunker ed., 2013).

272. Jeremy Martin & Sylvia Longmire, *The Perilous Intersection of Mexico's Drug War & Pemex*, J. ENERGY SEC. (Mar. 15, 2011), [http://www.ensec.org/index.php?option=com\\_content&view=article&id=283:the-perilous-intersection-of-mexicos-drug-war-aamp-pemex&catid=114:content0211&Itemid=374](http://www.ensec.org/index.php?option=com_content&view=article&id=283:the-perilous-intersection-of-mexicos-drug-war-aamp-pemex&catid=114:content0211&Itemid=374).

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COMMENT

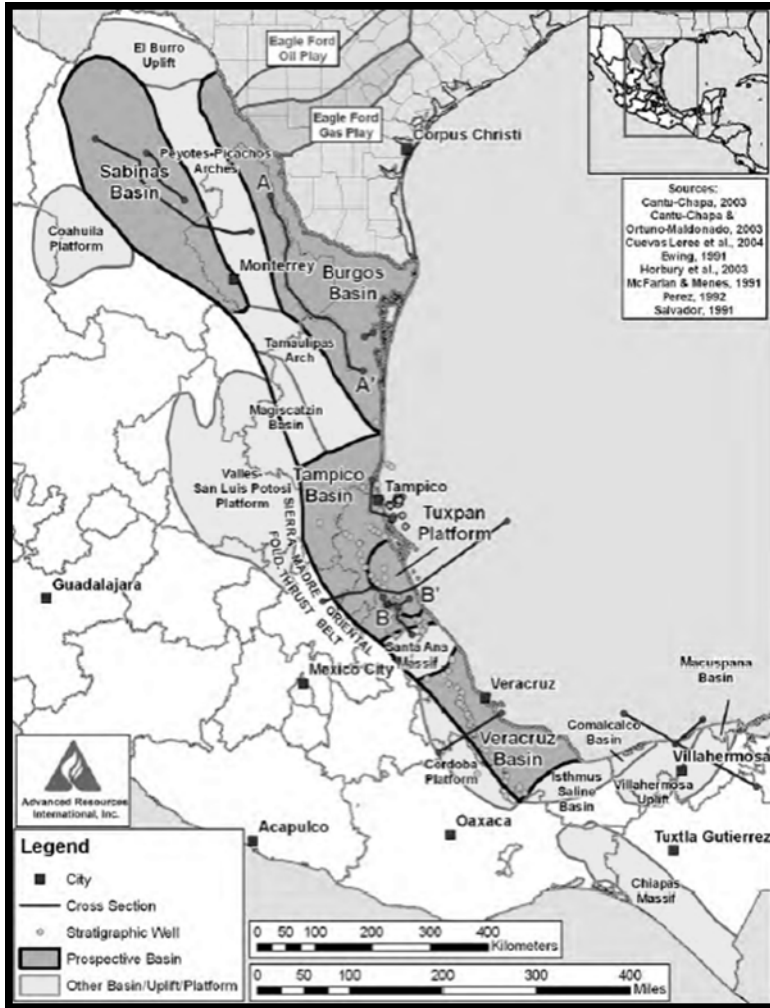
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APPENDIX A  
MEXICAN DRUG TRAFFICKING ORGANIZATIONS: AREAS OF OPERATION



Source: 2011 *Map of Mexican Cartel Territories*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/image/5-17-10\\_mexican-drug-cartels-map.jpg](http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/image/5-17-10_mexican-drug-cartels-map.jpg) (last visited Apr. 10, 2014).

APPENDIX B  
MAP OF BURGOS BASIN



Source: *Onshore Shale Gas Basins of Eastern Mexico*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/countries/cab.cfm?fips=MX> (last visited April 10, 2014).