



REGULATORY CHALLENGES FOR PREVENTING FIREARMS SMUGGLING INTO MEXICO

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ABSTRACT. The recent surge in illegal firearms trafficking from the U.S. into Mexico has helped empower Mexican criminal groups to adopt highly confrontational strategies, contributing to a surge of violence throughout the country. This article addresses the regulatory asymmetries between Mexico and the U.S. with respect to the production, import, export, sales and possession of firearms. It reviews several important gun laws and explores why this asymmetry limits bilateral cooperation and encourages gray market activity. It also examines the autonomy of U.S. states to regulate firearms, as this creates a diverse regulatory map that complicates any effort to stem smuggling. The results are flourishing gray markets on one side of the border and violent criminal activity on the other.

KEY WORDS: *Organized criminal groups, regulation asymmetries, trafficking of firearms, gray markets.*

RESUMEN. El tráfico ilegal de armas ha hecho posible que organizaciones criminales en México adopten estrategias más violentas y de mayor confrontación. Por lo tanto, contribuyendo al aumento en los niveles de violencia en todo el país. Este artículo aborda flujo ilegal de armas de Estados Unidos hacia México. Asimismo sugiere que la asimetría en las regulaciones de armas de fuego en ambos países limita su margen de acción a través de la cooperación bilateral. Se hace una revisión de las principales regulaciones con el propósito de facilitar una mejor comprensión de los retos que surgen a partir de estas asimetrías. La autonomía que posee cada estado en Estados Unidos para decidir sus propias regulaciones en materia de armas representa otro reto, ya que crea un mapa regulatorio amplio que necesita ser considerado para la creación de herramientas e instrumentos que ayuden a frenar el tráfico ilegal de armas. Además, estas

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diferencias crean mercados grises que benefician las utilidades de la venta de armas en un lado de la frontera, mientras que fortalece a los grupos del crimen organizado en el otro.

PALABRAS CLAVE: *Grupos del crimen organizado, regulaciones asimétricas, tráfico de armas, mercados grises.*

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I. INTRODUCTION

Since 2004, firearms trafficking into Mexico has added to the nation's rising violence. Most Mexico-based violence is attributable to organized criminal cartels. High-impact crimes in which these organizations engage, including homicide, kidnapping, extortion and armed robbery, have overwhelmed the capacity of Mexican law enforcement agencies. Since 2004, the percentage of crimes committed with firearms has grown steadily. In less than ten years, the percentage grew from 58 percent¹ during 2004 to 65 percent during 2012. It reached its highest peak during 2011, where 78 percent of crimes were committed with a firearm.²

The most common type of firearms found in Mexico are the AR-15 and the AK-47, both classified as assault weapons. Unsurprisingly, these are the main weapons used by criminal organizations.³ The fact that a country with

¹ INSTITUTO CIUDADANO DE ESTUDIOS SOBRE LA INSEGURIDAD (ICESI), TERCERA ENCUESTA NACIONAL SOBRE INSEGURIDAD 2005 (2005).

² INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA (INEGI), ENCUESTA NACIONAL DE VICTIMIZACIÓN Y PERCEPCIÓN SOBRE SEGURIDAD PÚBLICA 2011 (2011).

³ Colby Goodman & Michel Marizco, U.S. Firearms Trafficking to Mexico: New Data And Insights Illuminate Key Trends And Challenges, THE WILSON CENTER 187 (2010) *available at* <http://www.wilsoncenter.org/sites/default/files/Chapter%206-%20U.S.%20Firearms%20Trafficking%20to%20Mexico,%20New%20Data%20and%20Insights%20Illuminate%20Key%20Trends%20and%20Challenges.pdf>.

highly-restrictive gun laws has high rates of violence in which most crimes involve the use of firearms raises important questions regarding the source of these weapons.

Although the illegality of firearms trafficking makes it difficult to measure, there have been several academic efforts to identify weapons sources. Studies published by diverse organizations including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) clearly place the United States as the main source of firearms trafficked illegally into Mexico.⁴ Shirk, Muggah, McDougal and Patterson estimate that around 253,000 firearms are smuggled across the border each year.⁵ The United States has one of the world's biggest firearms industry. Out of the 10 largest arms-producing companies in the world, 8 are U.S.-based.⁶ Since the repeal of the Federal Assault Weapons Ban (FAWB) in 2004, American firearms manufacturers renewed their production of high-caliber weapons such as the AR-15 rifle. According to an ATF report, annual U.S. rifle production increased from 1.3 million⁷ in 2004 to 3.1 million⁸ in 2012.

As high-caliber firearms in the U.S. market became more available, confiscation rates by Mexican authorities also increased.⁹ These weapons soon became the most common firearm type trafficked from the U.S. into Mexico.¹⁰

The United States has a different system to deal with gun laws than Mexico. While in the latter, all gun related laws and policies take place at the federal level, in the former, each state decides its own policies to regulate firearms with the exception of a few particular elements that are decided by federal law such as licensing and the oversight of gun dealers.¹¹ As a result, each state adopts different policies to regulate gun sales, trade, ownership and carrying. This creates different contexts that go beyond policy-making. It involves different cultures, backgrounds and opinions towards the same matter.

⁴ Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *International Firearms Trace Data Mexico 2008-2013* (2014) available at <http://www.atf.gov/content/About/statistics>.

⁵ Tophier McDougal, David A. Shirk, Robert Muggah & John H. Patterson, *The Way of the Gun: Estimating Firearms Trafficking Across the Border*, TRANS-BORDER INSTITUTE 5 (2013) available at http://catcher.sandiego.edu/items/peacestudies/way_of_the_gun.pdf.

⁶ Susan T. Jackson, *Arms Production and Military Services*, 2013 S.I.P.R.I. Y.B.

⁷ *Annual Firearms Manufacturers and Export Report 2004*, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

⁸ *Annual Firearms Manufacturers and Export Report 2012*, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

⁹ PRESIDENCIA DE LA REPÚBLICA, 2º INFORME DE GOBIERNO 2013-2014 (2014).

¹⁰ Small Arms Survey, *Captured and Counted: Illicit Weapons in Mexico and the Philippines*, SMALL ARMS SURVEY 289-290 (2013) available at <http://www.smallarmssurvey.org/publications/by-type/year-book/small-arms-survey-2013.html>.

¹¹ Arkady Gerney, Chelsea Parson & Charles Posner, *America Under the Gun: a 50-State Analysis of Gun Violence and Its Link to Weak State Gun Laws*, CENTER FOR AMERICAN PROGRESS 27 (2013) available at <http://cdn.americanprogress.org/wp-content/uploads/2013/04/AmericaUnderTheGun-4.pdf>.

Despite much recent gun-related violence, efforts towards enacting stricter gun control laws have lacked support by a clear majority of Americans. As opposed to Mexico, where gun laws and regulations are highly restrictive, many Americans view their right to gun ownership as protected under the Second Amendment of the U.S. Constitution.

The two nations' diverse approaches have resulted in deep "regulatory asymmetry" and thriving gray markets at the U.S.-Mexico border. Unfortunately, this has increased criminal organizations' tendency to employ violence to protect and expand their markets, resulting in a dramatic rise of high-impact crimes.

This article analyzes both nations' contrasting legal frameworks in the hope of clarifying debate regarding how to stem cross-border weapons smuggling. Put differently, understanding how and why weapons cross the border can improve bilateral efforts to combat organized crime.

This article has been divided into five sections. Section I provides a general description of the firearms market and its contribution to rising violence in Mexico. Greater firepower has empowered criminals to become more confrontational towards government, and increased their use of violence and intimidation towards civilians.

Section II analyzes the types of firearms that are currently being smuggled into Mexico. Evidence suggests that most firearms smuggled into the country are classified as "Small Arms"; *e.g.*, AK47 and AR15, which may serve to focus efforts on these specific classifications.

Section III includes a study of firearms regulations and analyze their implications for Mexico. It examines international regulations, Mexican and U.S. gun laws making emphasis on Texas. As mentioned above, Mexican and U.S. firearms laws diverge widely. To exacerbate matters, international efforts have been scarce; the Arms Trade Treaty approved by the United Nations General Assembly in 2013 will come into force on December 2014. It represents a long-awaited first step towards unifying international efforts to tackle this deadly trade. Analysis of these regulations is provided in Section IV, which in turn leads to the conclusions presented in the final section.

II. FIREARMS SMUGGLING INTO MEXICO

Not all firearms in Mexico are illegal or smuggled. As the next section explains, Mexico's Federal Law of Firearms and Explosives permits citizens to own certain types of guns, provided they are not classified for exclusive military use.¹² These include low-caliber pistols and hunting rifles. Since many

¹² Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Articles 8, 9, 10, 11, Diario Oficial de la Federal [D.O.] Enero 23, 2004 (Mex).

types of firearms are prohibited, however, they are smuggled across the border for use by criminals.

Unconventional Weapons such as nuclear or biological weapons will not be analyzed in this paper as no evidence currently exists that suggests their use by Mexican cartels. Conventional Weapons, on the other hand, form an integral part of bilateral agreements, including the Merida Initiative.¹³

Arms trade experts debate whether Small Arms and Light Weapons should be considered Conventional Weapons. The truth is, there is no universally accepted definition of what constitutes a small arm. However, during the 1997 UN Panel of Governmental Experts,¹⁴ there was a consensus on its distinctive characteristic: its portability, making it possible to be operated by a single person. These include handguns, revolvers, carbines, small machine guns and assault weapons.¹⁵

According to information gathered by the Small Arms Survey, 51 countries currently manufacture Light Weapons, of which the U.S. is the number one producer.¹⁶ In addition to leading production, the U.S. is one of only three countries (also the U.K. and Switzerland) which allows ordinary citizens to purchase light weapons such as machine guns with relatively minimal restrictions.¹⁷

The Small Arms Survey offers some useful examples to help understand the difference between small arms and light weapons (see Table 1). In this paper, emphasis will be given to small arms and light weapons, as they are the weapons most commonly smuggled and used by criminal groups.

TABLE 1. ARMS CLASSIFIED IN THE SMALL ARMS AND LIGHT WEAPONS CATEGORIES

| <i>Small Arms</i> | <i>Light Weapons</i> |
|------------------------------------|--|
| Revolvers and Self-loading Pistols | Heavy Machine Guns |
| Rifles and Carbines | Hand-held under-barrel and mounted grenade launchers |

¹³ See Merida Initiative's First Pillar: Disrupting the Operational Capacity of Organized Crime as discussed by Clare R. Seelke & Kristin Finklea, *U.S.-Mexican Security The Merida Initiative and Beyond*, CONGRESSIONAL RESEARCH SERVICE, 13 (2014) available at <http://fas.org/sgp/crs/row/R41349.pdf>.

¹⁴ Small Arms Survey, *Definitions of Small Arms and Light Weapons*, SMALL ARMS SURVEY, available at <http://www.smallarmssurvey.org/weapons-and-markets/definitions.html>.

¹⁵ Sarah Parker & Marcus Wilson, *A Diplomat's Guide to the UN Small Arms Process 2014*. SMALL ARMS SURVEY, 14, 24 (2014) available at <http://www.smallarmssurvey.org/fileadmin/docs/Q-Handbooks/HB-02-Diplo-Guide/SAS-HB02-Diplomats-Guide-UN-Small-Arms-Process.pdf>.

¹⁶ Small Arms Survey, *Light Weapons 2014*, SMALL ARMS SURVEY, available at <http://www.smallarmssurvey.org/weapons-and-markets/products/light-weapons.html>.

¹⁷ *Id.*

| <i>Small Arms</i> | <i>Light Weapons</i> |
|--------------------|---|
| Sub-Machine Guns | Portable anti-tank guns |
| Assault Rifles | Recoilless rifles |
| Light Machine Guns | Portable anti-tank missile launchers and rocket systems |
| | Mortars of calibers less than 75 mm |

SOURCE: Small Arms Survey, Definition of Small Arms and Light Weapons.

Amongst arms classified in the small arms and light weapons category are the assault rifles. This term is used to refer to automatic and semiautomatic rifles. In the United States the inclusion of semiautomatic rifles as assault weapons in the Crime Bill of 1994,¹⁸ formalized a categorization of assault weapons that many organizations still oppose.

Legislative attempts to reinstate the 2004 Federal Assault Weapons Ban continue to classify semiautomatics as assault weapons. In opposition, many organizations —including the Shooting Sports Foundation¹⁹ and the National Rifles Association (“NRA”)— argue that the assault weapon classification should not apply to semiautomatics but only to automatic firearms.

Although Mexican criminal cartels employ both small arms and light weapons, their frequency of use varies widely. The 2013 Small Arms Survey²⁰ suggests that about 80 percent of the illicit firearms recovered in Mexico between 2009 and 2013 were small arms; while the remaining 20 percent were mostly hand grenades and grenade launchers (classified as light weapons).

According to reports from Goodman and Marizco,²¹ AR-15 and AK-47 rifles are the most common firearm smuggled into Mexico, followed by pistols, shotguns and revolvers, in that order. In sum, U.S.-Mexico arms traffickers favor semiautomatic rifles and pistols.

The Violence Policy Center, a Washington, D.C.-based NGO, reports that firearms used in Mexico include: Colt AR-15 (0.223-caliber assault rifle); AK-47 and its variants (7.62-caliber assault rifle); FN 5.57-caliber pistol, better known in Mexico as the “*Mata Policías*” (Kill Police); and the Barrett 50-caliber rifle. According to the Mexican Federal Police, 4,300 AK-47s, AR-

¹⁸ A subsection of the Violent Crime Control and Law Enforcement Act of 1994 - also called the “Crime Bill.” The U.S. law banned the manufacture and transfer of certain newly-manufactured semi-automatic firearms and ammunition feeding devices (magazines).

¹⁹ An illustration of the distinction between these types of firearms is available at: <http://www.nssf.org/factsheets/semi-auto.cfm>.

²⁰ See Matt Schroeder, Captured and Counted Illicit Weapons in Mexico and the Philippines, SMALL ARMS SURVEY 1-2 (2013), available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/sp/Small-Arms-Survey-2013-Chapter-12-summary-SP.pdf>.

²¹ Goodman & Marizco, *supra* note 3, at 187.

15s and 9mm pistols were confiscated between 2007 and 2012,²² comprising over 25 percent of total firearms recovered by this agency.

Firearms recovered through the controversial program “Fast and Furious,”²³ which involved over 2,000 weapons, including AR-15 and AK-47 rifles. An investigative report by the Department of Justice’s Office of the Inspector General found that law enforcement officials created a significant danger to public safety under this operation by allowing weapons to go to the streets and cross the border for the sake of constructing their investigation.²⁴ The public safety threat became real when U.S. Customs and Border Protection Agent Brian Terry was shot and killed with a firearm linked to the Fast and Furious Operation.²⁵

It is worth mentioning that semiautomatic weapons are not the only problem faced by Mexican authorities. Mexico’s army regularly confiscates high-caliber 0.50 rifles capable of shooting down helicopters. Hand grenades also pose a significant risk. According to EGAP *Gobierno y Política Pública*, 19 out of 32 Mexican states reported at least one grenade attack in 2010.²⁶

Aside from small arms and light weapons, conventional weapons also include armored combat vehicles, combat helicopters, combat aircraft, warships, small arms and light weapons, landmines, cluster munitions, ammunition and artillery.²⁷ Though regularly used by military forces, they have been rarely used by criminal groups. The overriding concern for these weapons is adequate protection and proper handling by government agencies. Unconventional weapons, which include weapons of mass destruction, are currently a minor concern as no cases have yet been reported of the production or trafficking of these weapons.

Light weapons, on the other hand, are a major concern, as they have been used frequently by Mexican cartels. Hand grenades used in Michoacán against the civil population in a 2008 Independence Day celebration illustrate why

²² This information was obtained through a request made to the *Instituto Federal de Acceso a la Información (IFAI)*.

²³ Fast and Furious was a failed gun investigation carried out by the ATF involving many firearms permitted to cross into Mexico in order to allegedly investigate how firearms flow into the hands of criminal groups.

²⁴ *ATF’s Fast and Furious Scandal*, LOS ANGELES TIMES, (Los Angeles) June 20, 2012, available at <http://www.latimes.com/news/nationworld/nation/atf-fast-furious-sg,0,3828090.story/gallery#axzz2rCHjZ9xm>.

²⁵ Oversight and Review Division, *A Review of ATF’s Operation Fast and Furious and Related Matters*, OFFICE OF THE INSPECTOR GENERAL 289-295 (2012), available at <http://s3.documentcloud.org/documents/435443/fast-and-furious-oig-report.pdf>.

²⁶ TECNOLÓGICO DE MONTERREY, INFORME DE AVANCES SOBRE EL PRONUNCIAMIENTO Y LAS PROPUESTAS DEL TECNOLÓGICO DE MONTERREY PARA MEJORAR LA SEGURIDAD EN MÉXICO (2012).

²⁷ International Peace Bureau, *Weapons and their Impacts on Communities: Conventional Weapons* (Oct, 2, 2014) available at <http://www.ipb.org/web/index.php?mostra=content&menu=Weapons%20and%20their%20impacts%20on%20communities&submenu=Conventional%20Weapons>.

these weapons pose a major risk. This said, small arms such as semiautomatic AR-15s, AK-47 rifles and 9mm pistols pose the biggest challenge to Mexican authorities. As explained below, the presence of these weapons increased significantly in Mexico after the repeal of the Federal Assault Weapons Ban.

The fact that semiautomatic Small Arms are the most commonly smuggled and used weapon in Mexico should be enough evidence to develop a more comprehensive study of this category and how it shapes the illicit trafficking of firearms that is taking place across the border.

III. FIREARM REGULATIONS: SMALL ARMS

This section will first address international regulations regarding small arms and analyze their implications for Mexico. We also examine current U.S. and Mexican regulations for semiautomatic firearms, with special emphasis on Texas, as this is the U.S. jurisdiction from which most illegal firearms originate.²⁸

1. *Firearms and International Regulations*

The UN adopted the Arms Trade Treaty (ATT) as a landmark agreement to regulate international trade in conventional arms. As of October 2014, it has been signed by 121 countries and ratified by 53. It is scheduled to come into force on December 24, 2014.²⁹

The treaty's objective is to establish strict international norms to better regulate the trade of conventional arms. With this objective, it intends "to reduce the illegal flow of conventional weapons in order to contribute to peace, reduce human suffering and promote international cooperation."

The ATT is meant to serve as a multilateral agreement to regulate exports, imports, transit, transshipment and brokering of weapons at an international level. It establishes common standards for the authorization of international conventional weapons transfers between nations.³⁰ One example is its prohibition of weapons shipments that will knowingly be used to commit genocide, crimes against humanity, breaches of the 1949 Geneva Convention, attacks against civilians, or any other war crime pursuant to international agreements to which it is a signatory.³¹

The ATT also requires arms shippers to keep records of exports and imports for a minimum of ten years, as well transportation of weapons within

²⁸ Goodman & Marizco, *supra* note 3, at 187.

²⁹ U.N. Arms Trade Treaty, Article 22.

³⁰ U.N. Arms Trade Treaty, Article 1.

³¹ U.N. Arms Trade Treaty, Article 6.

each market.³² Despite these requirements, parties are not obliged to keep records of weapons produced within their own territory, including the manufacture of tanks, helicopters, light weapons, small arms and other conventional categories.

The ATT defines brokering—a key component of the weapons trade—as “the action of acting as an agent for others in negotiations, sales, purchases or contract in return for a commission.” It stipulates that “each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2. Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.” Given the significant role played by brokers, and the relative freedom for each individual state to regulate them, the ATT leaves room for the creation of tremendous loopholes, making the regulation of both legal and illegal arms brokering virtually impossible.

It is fairly clear that the ATT alone will not have a major impact on arms smuggling into Mexico. The reality is that it fails to address in-country production (*i.e.*, goods sold legally in the producer’s country but not in others) which seriously undermines its purpose.

In order to address gray markets that thrive on their shared border, Mexico and the U.S. have signed several agreements, most in relation to drugs and narcotics.³³ However, no bilateral treaty or agreement existed intended to reduce arms smuggling.³⁴ Agreements such as the Merida Initiative were enacted to dismantle criminal cartels, relegating arms smuggling to a minor role within a much broader strategy. For this reason, current agreements can be improved by exploring alternative ways to achieve bilateral cooperation to address firearm trafficking.

2. Regulations in Mexico

One major difference between gun laws in Mexico and the U.S. is the relative autonomy of each state. Mexican gun laws are enacted at a federal level; individual states within the federation have very little control. On the other hand, U.S. federal law has limited reach; under the U.S. Constitution, primary jurisdiction for firearms control belongs to the states.

Comparatively speaking, the Mexican Constitution and the Federal Firearms and Explosives Law (*Ley Federal de Armas de Fuego y Explosivos*, “LAFE”) are much more restrictive than U.S. law. Pursuant to the LAFE, all Mexican nationals who purchase a legal firearm must register it first in the Federal Firearm Registry (*Registro Federal de Armas*), which serves as a national firearm

³² U.N. Arms Trade Treaty, Article 12.

³³ United States Department of State. *Treaties in Force: A List of Treaties And Other International Agreements of the United States in Force on January 1, 2014* 189-198 (2014) available at <http://www.state.gov/documents/organization/218912.pdf>.

³⁴ *Id.*

database. The Federal Firearm Registry is managed by the National Defense Ministry (*Secretaría de Defensa Nacional*, “SEDENA”) and shared with federal and local police institutions for intelligence gathering and other law enforcement activities.³⁵

In Mexico, states and municipalities do not enact arms control laws; they are mostly involved in the implementation of programs designed to reduce illegal possession. In addition to the difference of how gun laws are made, Mexico and the United States also differ on how they regulate gun ownership. In Mexico, the type of firearms allowed to be owned by citizens is much more limited. Several types of small arms are reserved exclusively for military use.³⁶

The Mexican executive branch has the exclusive faculty to authorize the establishment of firearm factories and business. SEDENA is responsible for the monitoring and management of activities and industrial operation that involve firearms, ammunitions, explosives and chemical substances.³⁷

LAFE also regulates the transport and carry of firearms. The law defines “transport” as firearms use by law enforcement personnel such as police officers or private security agents. “Carry” refers to use by private owners who must register their weapons with the SEDENA and show the following: 1) they make a legitimate living; 2) they do not have a criminal record; 3) they do not consume drugs or have a record of drug consumption; 4) they demonstrate mental and physical capacity to handle firearms; 5) they have served in the military; and 6) they demonstrate a legitimate need based on job or special living circumstances.³⁸

LAFE also regulates the weapons trade, including sanctions for noncompliance. Pursuant to Article 84, any individual who attempts to introduce into Mexican territory firearms, ammunitions or explosives reserved exclusively for military use face between 5 to 30 years in prison. Public officials found

³⁵ Ley Federal de Armas de Fuego y Explosivos [L.F.A.FE.] [Federal Law of Firearms and Explosives] as amended, Article 2 and 7, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

³⁶ Ley Federal de Armas de Fuego y Explosivos [L.F.A.FE.] [Federal Law of Firearms and Explosives] as amended, Article 11, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

Including: Revolvers .357 caliber Magnum and any above .38 Special. 9 mm caliber pistols Parabellum, Luger and similar, 38 Super and Commando and all higher caliber pistols. .223, 7 mm, 7.62 mm caliber rifles, muskets and carbines; and all models of .30 caliber carbines. Pistols, carbines and guns with a burst system; sub-machineguns and machineguns of all calibers. Shotguns with a canon inferior to 635 mm; shotguns with caliber 12 (0.729 or 18.5 mm) Ammunition for all the above firearms All categories of conventional and light weapons and their ammunition.

³⁷ Ley Federal de Armas de Fuego y Explosivos [L.F.A.FE.] [Federal Law of Firearms and Explosives] as amended, Article 37, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

³⁸ Ley Federal de Armas de Fuego y Explosivos [L.F.A.FE.] [Federal Law of Firearms and Explosives] as amended, Article 26, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

guilty of this violation receive the same sentence and are dismissed from their duties.³⁹ If the violator is a foreign resident, the jail sentence may be commuted to an administrative fine if it's a first offenders; or 3 to 10 years in prison for second offenders.⁴⁰

There have been several cases involving arms trafficking by US Citizens. In 2011, The DEA and the ATF with cooperation from local authorities of New Mexico arrested a firearm smuggling ring in involving the Police Chief, Mayor and Village Trustee of Columbus, New Mexico. They were indicted in a federal firearms trafficking case for smuggling around 200 firearms, mostly AK-47, into Mexico between January 2010 and March 2011.⁴¹

Mexican authorities have also arrested US citizens that have attempted to traffic firearms in the border. One case is that of Marine Sergeant Tahmooressi, who crossed the border into Tijuana with high-caliber weapons and ammunitions. The case gained international attention since he allegedly entered Mexico without realizing it. Tahmooressi is currently awaiting trial under arms trafficking charges.⁴²

3. *Regulations in the United States and Texas*

In the U.S., firearm regulations are driven by the Second Amendment of the Bill of Rights. This amendment literally states: "A well-regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed."

The interpretation of the Second Amendment has been subject to debate by diverse parties and coalitions. For some, it creates an individual constitutional right for citizens of the United States. This individual right approach is based on the second part of the Amendment that reads "the right of the people to keep and bear Arms."⁴³ Under this approach, the Amendment implies that prohibition and restrictive regulation of firearms is unconstitutional.

Others have a different interpretation based on the first part of the Amendment. "A well regulated Militia" is then interpreted not as an individual but as a collective right. Under this approach the Second Amendment refers to

³⁹ Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Article 84, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

⁴⁰ *Id.*

⁴¹ Diana Apocada, *Police Chief, Mayor and Village Trustee of Columbus New Mexico Indicted in Federal Firearms Trafficking Case*, DRUG ENFORCEMENT ADMINISTRATION, (Sept. 11, 2014), available at <http://www.justice.gov/dea/divisions/elp/2011/elp031011.html>.

⁴² Sandra Dibble, *U.S. House Hearing Scheduled for Tahmooressi*, UT SAN DIEGO (Sept. 3, 2014), available at <http://www.utsandiego.com/news/2014/sep/12/marine-andrew-tahmooressi-house-representatives>.

⁴³ Legal Information Institute, *Second Amendment*, CORNELL UNIVERSITY LAW SCHOOL, (Sept. 3, 2014), available at http://www.law.cornell.edu/wex/second_amendment.

“the collective right of each state, and not an individual right to bear arms for citizens.” In other words, the forces and authorities designated by each individual state, such as the police, are the only individuals protected by this amendment.⁴⁴

Most organizations, however, do not share the collective right interpretation, in particular the National Rifle Association (NRA), which has considerable influence in promoting its own interpretation. Its arguments entail a vision of the Bill of Rights as a set of individual rights, including freedom of religion and speech.

The widely divergent views about the 2nd Amendment held by different groups from the public and private sector in the U.S., creates a scenario in which institutions, political parties, associations and individuals actively promote their own positions creating a vigorous ongoing debate about firearms regulation.

Until 2008, District of Columbia law banned handgun possession, making it a crime to carry an unregistered firearm and prohibiting the registration of handguns. Also, it required that all legally-owned firearms be kept unloaded, disassembled or bound by a trigger lock or similar device.⁴⁵ In 2008 the case *District of Columbia et al vs. Heller*⁴⁶ set a revision to the DC gun law as it held that this proposed legislation violated U.S. citizens’ rights under the Second Amendment.

Supreme Court Justice Antonin Scalia, who formed part of the majority in *Heller vs. DC*, referred to the Second Amendment as a Law with limits.⁴⁷ Given the opinion of Supreme Court Justice Antonin Scalia, and the ongoing arguments presented by gun control advocates, regulations to firearms can still be legislated.

The Gun Control Act of 1968 regulates federal laws regarding the manufacture, purchase, sales and possession of firearms in the U.S. In terms of manufacturing, any person may produce firearms as long as they possess a proper license under the provision of this Act. The ATF is responsible for granting licenses to individuals who meet these requirements.

In 1994, the U.S. passed the Violent Crime and Law Enforcement Act in response to several violent incidents involving firearms, including the 101 California Street shooting in 1994.⁴⁸ With exceptions, the Act prohibits indi-

⁴⁴ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989).

⁴⁵ Legal Information Institute, *District Of Columbia V. Heller (No. 07-290)*, CORNELL UNIVERSITY LAW SCHOOL, (Sept. 3, 2014), <http://www.law.cornell.edu/supct/html/07-290.ZS.html>.

⁴⁶ *District of Columbia et al. v. Heller* 128 S. Ct. 2783 (2008).

⁴⁷ Thomas M. DeFrank, *Supreme Court Justice Antonin Scalia said that the right to bear arms is not unlimited, and noted that future limitations will have to be decided in future cases*. NY DAILY NEWS, (Sept. 3, 2014), available at <http://www.nydailynews.com/news/politics/supreme-court-justice-antonin-scalia-bear-arms-unlimited-noted-future-limitations-decided-future-cases-article-1.1124408>.

⁴⁸ It consists of 33 chapters; title 11 - which regulates Assault Weapons - is a modification of title 18, section 922 of the U.S. code.

viduals from manufacturing, transferring or possessing semiautomatic assault weapons.

Before 1993, it was legal to transfer or possess assault weapons.⁴⁹ The Act brought with it a Federal Assault Weapon Ban. It was only effective for 10 years, which meant that in 2004, restrictions on their manufacture, transfer and possession ended. Although several attempts⁵⁰ were made to retain the ban during George W. Bush's administration (2000-2008), they were largely unsuccessful.⁵¹ As of 2004, it became legal to manufacture high-power assault weapons such as the AR-15 rifle and 9mm pistols with higher magazine capacity.

The term "assault weapon" is interpreted in widely-divergent ways, depending on one's views regarding firearm possession. For some politicians such as Jerry Patterson of Texas, semiautomatic firearms should not be considered assault weapons.⁵²

Dube, Dube and Garcia-Ponce⁵³ show that the repeal of the Assault Weapons Ban in 2004 was followed by an increase in executions and violence in Mexican municipalities along the border with California. On the other side of the border, California has one of the most restrictive regulations of the country. This is also true when compared to other border states. Texas, Arizona and New Mexico are considered amongst the most lax states in terms of gun regulations.

California passed a gun control bill to ban assault weapons in September 2013. Thus, making it illegal to sell or purchase firearms defined as "assault weapons." This bill was drafted as a response to the tragic events such as Sandy Hook, the Sikh Temple in Wisconsin and the movie theater killing in Colorado. Prior to this bill, California already banned rifles with large-capac-

⁴⁹ 1) Colt AR-15 prototype, 2) Poly Technologies Avtomat Kalashnikovs (all models), 3) Action Arms Israeli Military Industries UZI and Galil, 4) Beretta Ar70 (Sc-70), 5) Fabrique National Fn/Fal, FN/Lar and FNC, 6) Grenade launchers, 7) SWD M-10, M-11, M-11/9, and M-12, 8) Steyr AUG, 9) INTRATEC TEC-9, TEC-DC9 and TEC-22, 10) Revolving Cylinder shotguns such as the Street Sweeper and Striker 12.

Pistols with two of the following features are also banned: 1) An ammunition magazine that attaches to the pistol outside of the pistol grip, 2) A threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer, 3) A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the non-trigger hand without being burned.

⁵⁰ The most recent attempt to pass this bill occurred when Senator Diane Feinstein from California submitted it for a vote in 2013. The Senate voted it down by a 60-40 margin.

⁵¹ There was a dismissal of the ban by house majority leader Tom Delay. Juan A. Lozano, *Tom DeLay Sentenced to 3 Years In Prison*. HUFFINGTON POST, October 1, 2011, available at http://www.huffingtonpost.com/2011/01/10/tom-delay-sentenced-to-th_n_806951.html.

⁵² Interview with former State Senator Jerry Patterson of Texas in Austin, in Austin Texas (Sept. 25, 2013).

⁵³ Arindrajit Dube, Oeindrila Dube and Omar Garcia Ponce, *Cross-Border Spillover: US Gun Laws and Violence in Mexico*, 107 AMERICAN POLITICAL SCIENCE ASSOCIATION 3, 397-417 (2013).

ity magazines which cannot be removed. However, the new bill added semi-automatic weapons with removable large-capacity magazines to the ban.

The ATF is responsible for granting Federal Firearm Licenses (FFL) that allow private owners or companies to import, produce or sell firearms pursuant to the 1968 Firearms Act.⁵⁴ The ATF also grants licenses to pawnbrokers,⁵⁵ who accept firearms in exchange for money in the same way that they take other goods such as televisions and furniture.

In 1989, former President George H. W. Bush issued an executive order to halt the importation of nearly all semiautomatic rifles.⁵⁶ The executive order followed a mass shooting in California in which five children were killed and 29 others were wounded. Although this ban affected weapons such as the AK-47, it did not restrict the manufacture of assault weapons in the U.S. or any previously acquired.⁵⁷ Not much later, President William Clinton issued an executive order to update and tighten the ban with additional enforcement. This law, however, was not enforced during George W. Bush administration (2000-2008).⁵⁸

In spite of efforts to increase the ban's enforcement, assault weapons are still frequently imported as a result of legal loopholes that can classify them as sporting rifles. As Boggs and Rand argue,⁵⁹ firearms brokers have succeeded in using this classification to import assault rifles as sporting weapons. During April 2014, House Democrats urged President Obama to use his executive power to push for further enforcement of the ban.⁶⁰

With regard to the sale of firearms, the federal government requires all FFLs to run background checks on its customers. This procedure is operated by the Federal Bureau of Investigation (FBI) through the National Instant Criminal Background Check System (NICS). Its main objective is to “de-

⁵⁴ Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Federal Firearms Regulations Reference Guide 46 2005* (2005) available at <http://www.google.com.mx/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.atf.gov%2Ffiles%2Fpublications%2Fdownload%2Fp%2Fatf-p-5300-4.pdf&ei=v5BGVI7IONiTgwSQ-IDYAw&usg=AFQjCNEGI90IMUTTE7IP-W2FWk9IOWndNg&bvm=bv.77880786,d.eXY>.

⁵⁵ *Id.*

⁵⁶ Department of the Treasury, *Study on The Sporting Suitability of Modified Semiautomatic Assault Rifles* (1998) available at <https://www.atf.gov/files/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>.

⁵⁷ Susan Rasky, *Import Ban on Assault Rifles Becomes Permanent*, NEW YORK TIMES, July 8, 1989, available at <http://www.nytimes.com/1989/07/08/us/import-ban-on-assault-rifles-becomes-permanent.html>.

⁵⁸ Clay Boggs and Kristen Rand, *Fully Enforce the Ban on Imported Assault Weapons*, WASHINGTON OFFICE ON LATIN AMERICA W.O.L.A. (2013) available at http://www.wola.org/commentary/fully_enforce_the_ban_on_imported_assault_weapons.

⁵⁹ *Id.*

⁶⁰ Dan Friedman, *House Democrats Push Obama to Restore Import Ban on Military Style Guns*, NEW YORK DAILY NEWS, April 10, 2014, available at <http://www.nydailynews.com/news/politics/house-democrats-push-obama-restore-gun-import-ban-article-1.1751704>.

tect prior criminal records, drug abuse, home violence and other concerns which could endanger society or the individual itself.” Nevertheless, there has been concern about its effectiveness from keeping weapons out of criminals’ hands, as many individuals with a history of dangerous behavior can still pass background checks. One of these cases, is the shooting in Navy Yard in Washington DC during 2013, where Aaron Alexis shot 12 people and injured 3 others with a legally purchased firearm.⁶¹

In April 2013, a bill to place additional restrictions on firearms was introduced by Joe Manchin (D-WV) and Pat Toomey (R-PA).⁶² This legislation required background checks on all sales, including those by private sellers and at gun shows. On April 17, 2013, the amendment garnered 54 votes, falling 4 votes short of the minimum required to move forward.

One major loophole in this system is that private individuals can sell their own firearms to buyers without first running a background check. Firearms may also be sold at gun shows and online, as background checks are not required for these settings either. This is known as the Gun Show Loophole, as opposed to purchases made from FFL dealers. Jonathan Lowy from the Brady Campaign cites this as a major concern, since buyers can acquire firearms “in bulk” and later resell them for a profit.⁶³

Loopholes also exist in other commercial firearm transactions.⁶⁴ Even though FFL dealers are required to run background checks at Gun Shows, they often skip this procedure due to a lack of supervision.

Firearm regulations also prohibit the purchase of firearms on behalf of third parties. This is known colloquially as “Straw Purchasers”, individuals who sell their legal right to purchase a firearm to other individuals, usually brokers. Federal law prohibits straw purchases by sanctioning materially false statements made to FFL’s. Pursuant to this provision, sanctions will be applied to any individual who: “Knowingly makes any false statement or representation with respect to the information required by Federal Firearms Law to be kept in the records of a person licensed under Federal Firearms Law or in applying for any license or exemption or relief from disability under the provisions of Federal Firearms Law.”

These false statements or representations are punishable by a fine of up to \$250,000 and up to 10 years in prison. Any deliberate sale of a firearm by a FFL to a straw purchaser represents a violation of the federal firearms law,

⁶¹ Josh Horwitz, *Expanding Background Checks Necessary, But not Enough.*, HUFFINGTON POST, July 1st, 2014, available at http://www.huffingtonpost.com/josh-horwitz/expanding-background-check_b_4554161.html.

⁶² Manchin-Toomey Amendment.

⁶³ Interview with Jonathan Lowy, Director of Legal Action Project, Brady Center to Prevent Gun Violence, in Washington, D.C. (January, 2013).

⁶⁴ See GOVERNING, GUN SHOW BACKGROUND CHECKS STATE LAWS, (2012) available at <http://www.governing.com/gov-data/safety-justice/gun-show-firearms-background-checks-state-laws-map.html>.

which prohibits gun owners from selling firearms to any individual whom they know or have reason to know is a criminal or other prohibited buyer.

During March 2013, another bill was introduced and sponsored by Patrick Leahy (D-VT) called the S.54 “Stop Illegal Trafficking in Firearms Act of 2013.” This bill amends the federal criminal code to prohibit any individual, other than a licensed firearms importer, manufacturer, collector or licensed dealer, from knowingly purchasing a firearm for any individual who they know or have reasonable cause to believe may not meet the criteria for possessing a firearm.

It also directs the U.S. Sentencing Commission to review and amend its guidelines and policy statements to ensure that individuals convicted of offenses involving straw purchases of firearms and firearms trafficking are subject to increased penalties. If an individual was convicted of affiliation with a gang, cartel, or organized crime, he will be automatically subject to increased penalties.

No clear and effective federal statute makes gun trafficking a federal crime.⁶⁵ However, the U.S. has implemented some efforts to avoid gun trafficking into Mexico. It has created several programs with the objective of detecting possible firearm crossing points into Mexico. Much attention has been paid to southbound checkpoints; they serve as cross-border detention areas where officials implement random inspections to detect unlawful shipments of firearms and cash. Despite these efforts, there has been little gain, as U.S. priorities in the border remain terrorism, migration and drug trafficking.

Among southern U.S. border states, gun laws differ significantly. While some states strictly regulate monthly firearm purchases, others allow unlimited acquisitions. California, for example, permits the purchase of one handgun per month, while Arizona, Texas and New Mexico have no purchase restrictions.

According to the Brady Campaign Index,⁶⁶ California is the border state with the strictest gun laws, while New Mexico and Arizona are the most permissive. Although Texas is a bit more restrictive than its neighbors, it still remains more permissive than states such as California or New York.

Despite the fact that Texas state law requires purchasers to show a valid state ID and pass background checks, it does not require registration or waiting periods. Firearms owners may carry guns in their vehicles and, if they have licenses, carry concealed weapons. They are also entitled to carry firearms (without the need for a license) on their own property. At the same

⁶⁵ LAW CENTER TO PREVENT GUN VIOLENCE, GUN TRAFFICKING & STRAW PURCHASES POLICY SUMMARY, *available at* (2013) <http://smartgunlaws.org/gun-trafficking-straw-purchasing-policy-summary/>.

⁶⁶ BRADY CAMPAIGN, 2011 BRADY CAMPAIGN STATE SCORECARD, (2011) *available at* <http://www.bradycampaign.org/sites/default/files/2011%20Final%20state%20scoresA3-2%20Sheet1.pdf>.

time, landholders are free to restrict firearm use on their own property as they see fit.

Overall, the state of Texas follows federal regulations that permit the production, importation, sales and possession of semiautomatic firearms such as the AR-15, AK-47 and 9mm pistol. It has certain restrictions on where these firearms may be used (e.g., shooting ranges, sporting events, and on private property for self-defense).

4. Implications

Legal asymmetry between Mexico and the U.S. has systematically obstructed efforts to stem the illegal flow of weapons across the border. The nations' gun regulations differ in nearly every respect, from production to possession. For this reason, collaboration aimed at reducing firearms smuggling is a complex and difficult task.

Table 2 summarizes key legal differences for the production, importation, exportation, sales and possession of the firearms mentioned above. It summarizes the differences in Mexican and U.S. law, addressing key components at each level:

TABLE 2. REGULATION OF SEMIAUTOMATIC FIREARMS

| | <i>Production</i> | <i>Import</i> | <i>Export</i> | <i>Sales</i> | <i>Possession</i> |
|--|---|--|--|---|---|
| International (ATT Treaty) ⁶⁷ | Neither prohibited nor regulated by international laws. Subject solely to national legislation. | Importations should be reported and records kept for a minimum of ten years. | Exports should be reported and record kept for a minimum of ten years. Exports prohibited in case of knowledge that firearms will be abused. | No limitation on domestic sales within nations. Brokers must be registered. | No restrictions on national law regarding possession. |
| Mexico ⁶⁸ | Only by SEDENA and used by military or security institutions. | Import prohibition for ordinary citizens or private companies. | There are no exports. | No legal brokers operate in Mexico. Sales are prohibited, except by SEDENA. | Solely by military and police forces. |

⁶⁷ U.N. Arms Trade Treaty.

⁶⁸ Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Law of Firearms and Explosives] as amended, Diario Oficial de la Federal [D.O.] January 23, 2004 (Mex).

| | <i>Production</i> | <i>Import</i> | <i>Export</i> | <i>Sales</i> | <i>Possession</i> |
|--------------------------------|---|--|---|--|--|
| USA Federal Laws ⁶⁹ | Production limited to ATF-licensed companies. | Importation allowed to ATF-licensed individuals and companies. | Exportation allowed provided it is reported to the ATF. | Firearms sales allowed under federal law, but FFL dealers must run background checks. This is not required for online sales and gun shows. | Regulated by each state. |
| Texas Laws ⁷⁰ | Production limited to ATF-licensed companies. | Importation allowed to ATF-licensed individuals and companies. | States cannot export. | No limit on the number of firearm purchased. Must prove residency and pass background check. | No limit on the number owned by a particular individual. |

SOURCE: Authors' elaboration.

In this complex scenario Mexico faces two main challenges. The first challenge is that in order to push the issue of illegal trafficking in the bilateral agenda with the U.S., it must consider the significant role played by American States. Even though the U.S. has federal firearms laws, individual states have primary jurisdiction within their territory over gun laws. This explains the difference between California, which has its own Assault Weapons Ban, and is a relatively small source of firearms trafficked into Mexico; and Texas, where gun regulations are widely opposed, and has become the source of about 50 percent of all illegal firearms confiscated in Mexico and traced back to the U.S.

The second challenge goes beyond regulations, and involves each nation's willingness and ability to cooperate. On the one hand, Mexico has been overly protective of its sovereignty throughout its history as an independent nation... and not without justification. This said, security cooperation has recently become a vital part of the bilateral agenda. As a result, closer cooperation between institutions like SEDENA and its northern counterparts has been characterized by mutual mistrust. On the other hand, the U.S. perspective on firearms is unlikely to change —despite tragedies such as Sandy Hook. U.S. citizens' right to own and carry firearms is as culturally significant as Mexicans' sense of sovereignty.

⁶⁹ Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), *Federal Firearms Regulations Reference Guide 46 2005* (2005) available at [http://www.google.com.mx/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.atf.gov%2Ffiles%2Fpublications%2Fdownload%2Fp%2fatf-p-5300-4.pdf&ei=v5BGVI7lONiTgwSQ-IDYAw&usg=AFQjCNEG190IMUTE71P-W2FWk9lOWndNg&bvm=bv.77880786,d.eXY](http://www.google.com.mx/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.atf.gov%2Ffiles%2Fpublications%2Fdownload%2Fp%2Fatf-p-5300-4.pdf&ei=v5BGVI7lONiTgwSQ-IDYAw&usg=AFQjCNEG190IMUTE71P-W2FWk9lOWndNg&bvm=bv.77880786,d.eXY).

⁷⁰ Gun Laws in Texas , <http://gunlawsintexas.com/> (Last visited Sep. 28, 2014).

IV. CONCLUSIONS

As higher caliber weapons became more available in the United States after the removal of the FAWB, semiautomatic rifles such as the AR-15 and AK-47 became the most popular type of firearm smuggled into Mexico. Unsurprisingly, they are the weapons of choice of criminal organizations.

The asymmetry of Mexican versus U.S. gun laws has encouraged the development of significant gray markets throughout the border region. The U.S.-Mexico border, like many international crossings, has a long and tumultuous history of smuggling, including drugs, money and firearms. Recent U.S. policy shifts, including the removal of the AWB in 2004, have helped increase the smuggling of higher-caliber firearms into Mexico. These weapons are used regularly by criminal cartels to commit homicide, threaten authorities, intimidate civilians and commit high-impact crimes such as robbery, kidnapping and extortion.

Despite efforts to regulate firearms at an international level (*e.g.*, the Arms Trade Treaty), there has been a general lack of consensus among participating nations to ratify and implement meaningful regulations. Moreover, while the proposed treaty addresses important issues, it still leaves out key concerns, including the proliferation of cross-border gray markets. In order to succeed, each nation must be fully committed to monitoring firearms brokers and sales.

While U.S. states have primary jurisdiction within their territory over gun laws, southern border states need to give special consideration to the fact that they directly impact the behavior of firearm trafficking in their border with Mexico. Their interpretation of the 2nd Amendment, and the protection of their right to bear arms, should also consider the gray markets it creates and how they impact violence on the other side of the border. In the battle of freedom vs. responsibility regarding firearm regulations, American states struggle to implement measures to avoid illegal trafficking within the United States and to Mexico.

The diversity of stakeholders and state gun laws throughout the border creates a very complex scenario in which actors have contrasting interests and concerns. In this context, the scope of bi-national cooperation to address the illegal traffic of firearms seems to be too broad to be able to effectively deal with the sharp asymmetries.

Mexico can recur to its current bi-national strategy under Merida Initiative, it can rely on the good intentions of the ATT, or it can turn to its own capacity to stop firearms from crossing the border. Whichever the means, it is important to consider that addressing the traffic of firearms is going to impact Mexican criminal group's access to these weapons.