

## Articles

# Trucking Laws in Mexico and Changes After the NAFTA: A Paradigm for the FTAA?

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### I. INTRODUCTION

The thirty-four democracies of the Western Hemisphere are in the

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process of negotiating a Free Trade Area of the Americas (“FTAA”).<sup>1</sup> To date, it has been a long and arduous road with many stumbling blocks.<sup>2</sup> The official process began in 1994 during the Summit of the Americas where the heads of state and government made the following declaration in Miami, Florida:

We, therefore, resolve to begin immediately to construct the “Free Trade Area of the Americas” (FTAA), in which barriers to trade and investment will be progressively eliminated. We further resolve to conclude the negotiation of the “Free Trade Area of the Americas” no later than 2005, and agree that concrete progress toward the attainment of this objective will be made by the end of this century. We recognize the progress that already has been realized through the unilateral undertakings of each of our nations and the subregional trade arrangements in our Hemisphere. We will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together.<sup>3</sup>

Past experience with the North American Free Trade Agreement (“NAFTA”) and other trading blocs like the European Union (“EU”) have led us to believe that, despite the ardent statements of commitment by the key players at the 1994 Summit, the road towards further liberalization, harmonization, and deregulation of competition within the thirty-four member countries of FTAA will require a long and strenuous uphill struggle. This is particularly true when certain industries are the focus of negotiations. One such industry is transportation, with trucking often being a particularly difficult impasse.

It is the process of economic integration that brings to light the importance of the variances between national legal traditions, rules of law, protected industries with their sector-specific laws and regulations, and business customs. A country’s regulatory regime and accompanying practices tend to develop and generally rest on two principal factors: history and the accompanying traditions, such as culture. Nations often learn lessons from their history and they generally understand those lessons through the prism of their culture. This leaves them with a diverse range of relations with their neighbors, both near and distant. This is especially

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1. See FREE TRADE AREA OF THE AMERICAS, *Links to FTAA Countries*, available at [http://www.alca-ftaa.org/busfac/clist\\_e.asp](http://www.alca-ftaa.org/busfac/clist_e.asp) (last visited Aug. 24, 2004). Cuba is the only country in the hemisphere not participating.

2. Adrian Sainz, *State Department: Chavez, Castro Won't Derail FTAA Plans*, ASSOCIATED PRESS WORLDSTREAM, Jan. 30, 2004. (“Chavez, a friend of Castro, has expressed his opposition to many aspects of the FTAA and has been accused by U.S. officials of stoking anti-American sentiment in Latin America.”).

3. SUMMIT OF THE AMERICAS INFORMATION NETWORK, *First Summit of the Americas, Declaration of Principles* (Dec. 9-11, 1994), available at <http://www.summit-americas.org/miamidec.htm> (last visited Aug. 24, 2004).

true for laws governing foreign investment where the variety of national views are often developed and biased due to historic experiences with one's neighbors. The nations of the Americas seem particularly sensitive to this phenomenon.<sup>4</sup> Moreover, this seems particularly true with respect to their transportation industry's foreign investment, domestic regulations, and logistical structural setup. These differences become even more glaring in the face of cross-border negotiations as in the NAFTA, for example.

This paper will use the NAFTA as an example to understand the challenges facing FTAA as it provides a fertile ground for examples of the dilemmas related to embedded beliefs and fears of foreign investment and regional integration. It thus serves as a valuable primer for the negotiators of FTAA. More specifically, the first section of this paper will present three case studies that exemplify the historical and cultural impact on the Mexican transportation industry's policy on foreign investment, domestic regulations and logistical structural setup that were brought to light during the NAFTA negotiations. Furthermore, we will discuss the reasons for restrictions on foreign investments in trucking, changes in the investment code, new foreign investment law, federal highway permits, and critical questions related to vehicle importation, operational leasing, and renting versus owning. Case #1 addresses the arguments in favor of used vehicle importation, Case #2 discusses rental or leasing versus owning, and Case #3 attempts to explain the restrictions of the trucking industry on Mexican foreign investments.

The second section of the paper will discuss the Mexican trucking industry and its interaction with the NAFTA lawmakers. The lessons from the NAFTA case examples and a deeper investigation of the Mexican trucking industry's negotiations within the NAFTA provide a useful perspective and serve as a guideline by which U.S. carriers could navigate and influence the negotiations of the thirty-four member FTAA. As such, the last section of the paper will attempt to draw some lessons from the NAFTA and apply the lessons to the current FTAA negotiations.

## II. MEXICO, THE NAFTA, AND THE TRANSPORTATION INDUSTRY

Prior to the NAFTA agreement, the transportation laws in Mexico, Canada, and the United States were at considerable variance with one another. Laws in Mexico were especially restrictive when it came to for-

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4. See generally F.V. GARCÍA-AMADOR, *The Code of the Andean Pact in THE ANDEAN LEGAL ORDER: A NEW COMMUNITY LAW 239* (1978); *The Mexican Foreign Investment Code of 1972 in MEXICAN CONSTITUTIONAL PROVISIONS, LAWS, AND OTHER DOCUMENTS RELATING TO FOREIGN TRADE AND INVESTMENT 57* (Michael W. Gordon & Alejandro Ogarrio eds., 4th ed. 1981).

eign carriers or foreign investors in local carriers.<sup>5</sup> Neither was allowed, as will be seen later in this paper. Under FTAA, this problem is multifold as each of the remaining thirty-one countries of the American hemisphere has its own laws and customs in the area of trucking and related logistics operations.<sup>6</sup> The problem is compounded by the fact that there are currently twelve sub-regional sectoral agreements covering aspects of transportation among and between the signatory countries of such sectoral agreements.<sup>7</sup>

Moreover, during the NAFTA discussions, the American and Canadian negotiators could not understand, were confused, bemused, and often annoyed by Mexico's attitude regarding its transportation and oil industries.<sup>8</sup> The Mexicans did not want any foreign investment or real involvement in either industry.<sup>9</sup> The Mexican transportation regime was

5. The term "carrier," as used in this paper, refers to over-the-road carriers or trucking companies. Unless otherwise noted, "transportation" means land transportation.

6. "Logistics" means services that deal with the organization, management of transportation, warehousing, and movement of goods, including the concept of carriage (some call this "supply chain management"). Logistics comes into play anytime a good, or the components or raw material of a manufactured good, is touched, moved, or stored at anytime in the "supply chain." This includes from the time it comes out of the ground, to manufacturing from components, its finished product, and distribution and delivery to the ultimate customer.

7. "Sub-Regional Sectoral Agreements" is a term used by the FTAA Trade Negotiations Committee to describe the various international agreements currently existing in the hemisphere.

8. Telephone Interview with Nancy McCrae, Chief U.S. Negotiator on the NAFTA transportation matters, U.S. Dep't of Transportation, Office of International Transportation (Jan. 2001).

9. See generally JAIME SUCHLICKI, MEXICO: FROM MONTEZUMA TO THE FALL OF THE PRI 709-19 (2nd ed. 2001). In Mexico's case, the restrictive mentality against foreign investment in these particular sectors was due to the lessons of history, which have become a backcloth not only for Mexico's international relations, especially with the United States, but for the Mexicans' day-to-day understanding of who they are. Mexicans traditionally have been very wary of foreigners and foreign intervention. Seven U.S. states are made up of former Mexican territory. In 1846, the U.S. annexed Texas. The Mexican-American War of 1846-1848 killed 50,000 Mexicans and took half of Mexico's territory. Mexican historians reckon uninvited, direct U.S. intervention into Mexican territory has occurred in excess of 200 times. As stated by Porfirio Diaz, "Poor Mexico, so far from God and so close to the United States." The U.S. is a colossus and every Mexican is aware of it. In the early 1860's, the Mexican conservative party and the church were at odds with the liberal party so the conservatives invited the French under Napoleon III to send in any army and an emperor, Maximilian. The French, under Maximilian, controlled Mexico for six to seven years. This culminated in a civil war that the liberals won. Maximilian was executed and the French were kicked out. Then in 1877, one of the leading generals in the war against the French, Porfirio Diaz, became President/Dictator of Mexico. He ruled for over thirty years until the revolution of 1910. During that period, or "Porfirato," as the Mexicans call it, in order to encourage development, Porfirio Diaz invited foreign oil companies, foreign mining interests and foreign transportation and communications companies to dig for oil, conduct mining operations, build railroads and telegraph and the like. The British and the American oil companies exploited the country tremendously. Foreigners controlled most mines. The foreign railroads basically controlled communications and transportation in the country and the government bu-

highly controlled, monopolistic, expensive, and unresponsive to the fluctuating requirements of domestic and foreign shippers alike.<sup>10</sup> Its anti-foreign based rules and highly restrictive domestic regulations severely constrained growth and competitiveness of the industry<sup>11</sup> and made it inefficient when compared to the systems in the United States and Canada.<sup>12</sup> Prior to the negotiation of NAFTA, operational truck leasing was not permitted in Mexico; foreigners could not take part in transportation activities. Foreigners could not own a single share of stock in a Mexican carrier, and U.S.-based and Canadian-based carriers could not enter Mexico to deliver goods.<sup>13</sup> Some of those restrictions have been lifted completely, others have been lifted partially, and others remain. Even so, if those who were interested in taking part in these activities had not been diligent and pro-active during the time of the NAFTA's negotiation and thereafter, it is unlikely that any of these restrictions would have been changed in any way.<sup>14</sup> Even though the NAFTA brought about sweeping changes to the legal landscape, in the case of transportation, over-the-road trucking, truck leasing and rental, those changes did not come about easily, even after the NAFTA was signed.<sup>15</sup>

Similar diligence and pro-activity will be required in connection with

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reocrats and those who were close to the bureaucrats made a great deal of money off of all this. Foreigners owned or controlled 25% of Mexico's territory. The lower classes, the vast majority, were exploited and treated badly. It was often difficult to conduct the war, that is, the revolution, and control the country because of foreign control of the railroads, telegraph, telephone, and vast areas of oil fields. Part of the reason behind the revolution of 1910 and the subsequent constitution of 1917 was to change all this and to get rid of foreign economic domination especially of means of communication and transportation, and natural resources. For this reason, foreign investment has been prohibited in the areas of transportation and communications ever since the revolution. It is a very emotional thing to many Mexicans. *Id.*

10. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001).

11. *Id.*

12. Ken A. Eriksen and Ken L. Casavant, *Trucking in North America Under an Emerging NAFTA: A Country Profile and Potential Prospects for Pacific Northwest Agribusiness Managers*, AGRIBUSINESS MGMT. (1995), available at [www.agribusiness-mgmt.wsu.edu/ExtensionNewsletters/1995/TruckingNo-Amer.pdf](http://www.agribusiness-mgmt.wsu.edu/ExtensionNewsletters/1995/TruckingNo-Amer.pdf).

13. See TRUCKINFO.NET, *Trucking in Mexican Commerce*, available at <http://www.truckinfo.net/-trucking/mexican.htm>.

14. Prior to the writer Perry's involvement and lobbying with the U.S. NAFTA negotiators, no such changes were contemplated. It is for this reason that they asked him for suggestions and briefings in these matters.

15. North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, art. 102(a), 107 Stat. 2057, 32 I.L.M. 605 [hereinafter *NAFTA*] (calling for certain openings in cross border transportation and ability of carriers and others to rent and lease vehicles), available at [http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?articleid=80](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=80) (last visited Aug. 24, 2004). See also *NAFTA*, annex 300-A (promoting foreign investment in certain types of trucking companies), available at [http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?articleid=227](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=227) (last visited Aug. 24, 2004).

the FTAA if U.S. and Canadian-based carriers and logistics companies wish to operate freely throughout the American hemisphere. More specifically, the key issue facing U.S. carriers is whether they wish to undertake the cost, time, and political capital to push for a competition policy that allows them full access in the area of carriage and logistics within the new FTAA construct.

#### A. CASE STUDY #1: ARGUMENTS IN FAVOR OF USED VEHICLE IMPORTATION

The problem of convincing the Mexican government to allow the importation of foreign used vehicles serves as an excellent illustration of the necessity to understand the commercial, historic, and cultural influence on the negotiating process that comes to the forefront during the creation of trade blocs such as the NAFTA.

There were many arguments made by U.S. carriers and leasing companies to the Mexican government, in favor of allowing the importation of used vehicles. For example, Ryder Truck Rental, Inc. ("RTR"), a wholly owned subsidiary and the rental and leasing company of Ryder System, Inc.,<sup>16</sup> had for some time attempted to import used vehicles into Mexico. A few years prior to Ryder's expansion into other countries in the world, RTR owned approximately 160,000 vehicles in those days, spread among the United States, Canada, the United Kingdom and Germany.<sup>17</sup> Because of vehicle fleet rotation, RTR sold about 20% of those vehicles each year.<sup>18</sup> Under the programmed maintenance system, all vehicles were well maintained throughout their lives. RTR could not afford to have a vehicle break down, since the lease guaranteed a vehicle for constant use, absent vehicle abuse on the part of the lessee. A broken down vehicle would require RTR to replace it for the customer with another vehicle, an expensive proposition for the company.<sup>19</sup>

With over 50 years experience in dealing with vehicles,<sup>20</sup> the company had a reliable store of in-house actuarial data at its disposal. RTR

16. RYDER SYSTEM, INC., *About Us*, at [http://www.ryder.com/about\\_us.shtml](http://www.ryder.com/about_us.shtml) (last visited Aug. 24, 2004). Ryder is a Fortune 500 leading logistics and supply chain management provider in the United States and provides a variety of contract carriage and logistics services to its customers in the United States and abroad. *Id.*

17. *Id.*

18. Interview with Glen Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

19. RYDER SYSTEM, INC., *Vehicle Leasing*, at [http://www.ryder.com/vehicle\\_leasing\\_i\\_b.shtml](http://www.ryder.com/vehicle_leasing_i_b.shtml) (last visited Aug. 24, 2004).

20. RYDER SYSTEM, INC., *About Us*, at [http://www.ryder.com/about\\_us\\_h.shtml](http://www.ryder.com/about_us_h.shtml) (last visited Aug. 24, 2004). With a \$35 Model A Ford truck, Jim Ryder, the company's founder, began the business hauling concrete in 1933. In 1938, the full service leasing business began when a Miami beverage distributor leased five trucks from Jim Ryder's fledgling business. *Id.*

knew, given the application of the vehicle, what it was carrying and the road conditions, how long any particular part, including tires, would last.<sup>21</sup> The lease contract usually required the vehicle to be fueled at RTR locations. Each time it was fueled, it was inspected, and minor maintenance was performed.<sup>22</sup> Additionally, each vehicle was required to be brought in periodically for programmed maintenance to be performed.<sup>23</sup> Parts were replaced, based on their use and RTR's knowledge of their useful life, before they failed.<sup>24</sup> The result was that the vehicles were always in "like new condition," and when sold, demanded a premium in the used vehicle market place.

The basic argument of RTR to the Secretariat of Communication and Transportation ("SCT") was as follows: by the late 1980s and beginning of the 1990s, the Mexican economy had seen rapid growth, and trade between Mexico and the United States had experienced a constant volume surpassing double digit percentage increases per year for about five years in a row.<sup>25</sup> Mexico's gross internal product per capita was \$1,846 in 1987, \$3,612 in 1991, and \$4,108 in 1992.<sup>26</sup> Trade and commerce were concomitantly expected to continue to increase, especially if a Free Trade Agreement were entered into. Studies carried out in the United States and the European community indicated a strong connection between efficient transportation networks and an increase in economic growth.<sup>27</sup>

Essentially, there were at least two transportation related matters hampering such economic growth, but both were soluble if Ryder could be allowed to import used vehicles into Mexico. First, the truck and trailer manufacturing capacity in Mexico was not sufficient to keep up with the then current demand.<sup>28</sup> This level of manufacture certainly

21. Interview with Glen Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

22. RYDER SYSTEM, INC., *Vehicle Maintenance*, at [http://www.ryder.com/vehicle\\_maintenance\\_pm\\_f.shtml](http://www.ryder.com/vehicle_maintenance_pm_f.shtml) (last visited Aug. 24, 2004).

23. *Id.*

24. *Id.*

25. U.S. CENSUS BUREAU, FOREIGN TRADE STATISTICS, available at <http://www.census.gov/foreign-trade/balance/c2010.html> (last visited Aug. 24, 2004) (The export/import trade in goods and services between the United States and Mexico were (in millions): \$29,693.4 for 1986; \$34,853.1 for 1987; \$43,888.3 for 1988; \$52,144.1 for 1989; \$58,435.8 for 1990 and \$64,406.8 for 1991).

26. Scotia Inverlat, *Análisis Económico, GUÍA ECONÓMICA*, May 23, 2003 (using statistics from the month of January).

27. DAVID ALAN ASCHAUER, AMERICAN PUBLIC TRANSIT ASS'N, *TRANSPORTATION SPENDING AND ECONOMIC GROWTH* (1991) (analytical report explaining why one way to generate higher productivity growth is through increased funding for transportation in general, and for public transit in particular).

See also Saurav Dev Bhatta & Matthew P. Drennan, *The Economic Benefits of Public Investment in Transportation: A Review of Recent Literature*, J. OF PLAN. EDUC. & RES. 288 (2003).

28. Interview with Licenciado Oscar Moreno Martinez, Director de Asuntos Internacion-

would not keep up with increased commerce.<sup>29</sup> Second, the ability to purchase used vehicles involved a lower sales price point, thus affording vehicle purchasers the economic access to more vehicles at lower cost. RTR tried to make the case to the Mexican government, that making affordable quality used vehicles available for purchase in the Mexican market, in turn making it increasingly likely for the appearance of more vehicles available for the transportation of goods in the burgeoning economic scheme of Mexico, for example, providing shippers more opportunity to ship their goods.<sup>30</sup>

Used vehicles were usually available at 1/3 to 1/5 the price of new vehicles and, if those vehicles were well maintained throughout their life, they were nearly like new.<sup>31</sup> Under Mexican law before the NAFTA, finance leases only allowed for the leasing of new vehicles, which also kept prices high, no cheaper than outright purchases.<sup>32</sup> Finance leasing under the old Mexican law was actually considerably more expensive than purchasing a truck would have been. Operational leasing was strictly prohibited; in fact, the concept was largely unknown.

By 1991, certain officials in the SCT and others suggested to Ryder officials that a method of getting a “foot-in-the-door” would be through the importation of used refrigerated vehicles, since they were not manufactured in Mexico and there was a real need for them.<sup>33</sup> As an example, we were told that fish brought from the Pacific to Mexico City were usually brought on ice, rather than in refrigerated vehicles.<sup>34</sup> There were some refrigerated vehicles in Mexico, but they were not manufactured as such; rather they had aftermarket refrigeration units, mostly imported, and attached to conventional vehicles without proper insulation.

Although all sort of strategic approaches were tried, in the end, the exclusionary rules based on the old attitudes of distrust were too firmly

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ales de CANACAR [Director of International Affairs of CANACAR], Director de Asuntos Jurídicos [Director of Legal Affairs] during the time of the NAFTA negotiations and shortly thereafter, in Mexico City, Mex. (Feb. 20, 2001).

29. *Id.*

30. Throughout the 1980's and the early 1990's one of the authors, Frederick V. Perry, made such arguments while taking part in numerous meetings with the Foreign Investment Commission and the Office of Highway Transportation of the SCT.

31. From 1989 to 1994, one of the authors, Frederick V. Perry, helped establish used vehicle sales distributors throughout Latin America and Eastern Europe. These used vehicles were sold for such prices.

32. Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004). Licenciado Sesma is a well-known transportation lawyer in Mexico, and a member of the Transportation Lawyer Association.

33. Interview with Licenciado Carlos Hefti, Director of the Foreign Investment Commission of Mexico, in Mexico City, Mex. (June 1991).

34. Interview with Licenciado Carlos Hefti, Director of the Foreign Investment Commission of Mexico, in Mexico City, Mex. (May 1991).



embedded to convince them to change the structure. The 21st century has now begun, and the importation of used vehicles is still prohibited in Mexico.

It was clear that either the Mexican government wanted to protect its automotive manufacturing industry, or did not have the political will not to. It appeared to many, as has been seen, that the industry was not going to be able to produce enough trucks and trailers any time soon to keep up with the demand brought about by increased commerce. Indeed, there were not enough trucks in the early 1990s.<sup>35</sup> The time that the government did allow the importation of used trucks, it proved to be a fiasco. In the late 1980's, in the face of automotive industry objections, the government allowed the importation of a very large number of used Japanese trucks.<sup>36</sup> Those vehicles proved to be mostly junk and turned out to be a costly mistake, both politically and economically.<sup>37</sup> To this must be added the matter of a lack of understanding as late as the early 1990s in many parts of the world of the concept of service. In many countries it is easy to sell something you can touch and feel, like a truck or a hammer or a basketball. By looking at the item and testing or hefting it, the potential buyer can evaluate its worth. Service however is a promise, not something that can be looked at and touched and evaluated by sensory means. When told that used vehicles had received excellent maintenance service throughout their life, and that used vehicles were like new, it is not unlikely that the Mexican government officials were very skeptical of such claims. Such a concept ran counter to all their prior experience.

#### B. CASE STUDY #2: RENTAL AND LEASING VERSUS OWNING

The issues surrounding operational leasing and finance leasing in Mexico serve as a case-in-point for the importance of integrating the impact of history and cultural influence in negotiating process of cross-border harmonization of standards.

During the early 1980s, U.S. carriers began attempting to obtain authority to rent and lease vehicles in Mexico.<sup>38</sup> As already mentioned, finance leasing had existed for some time in Mexico.<sup>39</sup> It was simply

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35. Frank Renaud, *Trading with Mexico: The Automobile and Auto Parts Industries* (June 1994), available at [www.bccresearch.com/advmat/GB170A.html](http://www.bccresearch.com/advmat/GB170A.html).

36. Interview with Alejandro Peniche, Director of Highway Transportation (SCT) in Mexico City, Mex. (June 1991).

37. *Id.*

38. The writer, Frederick V. Perry, worked with the SCT intensely during this period attempting to obtain such permission. Mexican attorney Licenciado Carlos Sesma who represented several foreign carriers in Mexico told Perry that a number of such carriers had been turned down for permission.

39. See generally *Law for the Promotion of Mexican Investment and Regulation of Foreign*

considered another financing instrument, culminating generally in purchase, and was regulated by the banking laws. Foreigners, however, were not permitted to engage in finance leasing. Foreigners were kept out of anything smacking of banking or financial exercises.<sup>40</sup> As a result, financing laws, foreign investment laws, and transportation laws kept foreigners out of the trucking industry altogether.

The critical question here, in our view, was what were the benefits of leasing or renting versus owning outright. RTR attempted to negotiate both with SCT and Secretariat of Commerce and Industrial Development ("SECOFI"). The arguments made to SECOFI were economic and financial (much as the arguments in favor of used vehicles were), but they were also operational in nature. As stated previously, operators of vehicles had to purchase vehicles outright or finance-lease them. No effective competition or alternative methods of obtaining vehicles were available, which might have fostered efficiency and lowered costs of obtaining vehicles and concomitantly lowering the cost of the transportation of goods. The type of leases that many U.S. and Canadian lessors provided for customers, as does RTR, is known as a full-service lease, which included fuel, licensing services, vehicle insurance, fuel tax services, and full programmed maintenance.<sup>41</sup> Vehicles were even painted with the colors and logo of the customer. When a private carrier purchases vehicles, it is tying up capital in an asset that is not related to its core business. Further, it lowers the private carrier's, often a manufacturer's, borrowing power for loans for capital to invest in its core business.<sup>42</sup> By engaging in operational leases, the manufacturer - in this case, the private carrier - has use of the capital that it would have invested in vehicles, and can use it in furtherance of its core business. In essence, the manufacturer outsourced a non-core business, truck ownership and maintenance, and focused efforts and money on making money in what it does best.

Around the globe the carriage of goods is usually broken down into two broad categories: private carriage and common carriage.<sup>43</sup> In many countries this is subdivided further into common carriage, contract car-

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*Investment in MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS*, ch. 1, arts. 4-5 (1973) [hereinafter *Old Foreign Investment Law*].

40. *Old Foreign Investment Law*, *supra* note 39, at art. 6.

41. MACK TRUCKING COMPANY, *Full Service Lease*, at <http://www.mackleasingsystem.com/default.aspx?pageid=581> (last visited Sept. 2, 2004).

42. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder System, Inc. (June 10, 2004) (This was a typical sales pitch, but nonetheless true, used by Ryder salesmen during this period.)

43. MARITIME CONTRACT LAW, *Carriage of Goods*, available at [http://www.tamug.tamu.edu/mart/c\\_goods.htm](http://www.tamug.tamu.edu/mart/c_goods.htm) (last visited Sept. 2, 2004).

riage, and private carriage.<sup>44</sup> A manufacturer who carries its own goods to market on its own vehicles is referred to as engaged in private carriage.<sup>45</sup> The private carrier hires and manages its own drivers, maintains, or contracts for the maintenance of, its own vehicles, and does its own routing, scheduling and dispatching of vehicles.<sup>46</sup>

The definition of common carriage varies from place to place around the world, but it is generally considered a public service or at times, a public utility.<sup>47</sup> It is often highly regulated, with routes and tariffs, or charges, with liability limits for loss or damage to cargo often fixed by statute.<sup>48</sup> The license to perform common carriage services is often considered something of a concession given by the government for public convenience and necessity. Anyone can ostensibly have his or her goods carried by a common carrier without discrimination. However, in many countries becoming a common carrier and obtaining the concession is often difficult. The reason for this is that many countries consider common carriage to be a public service, a utility almost, and permits or concessions are often only granted, as mentioned above, for the public convenience and necessity.<sup>49</sup>

In a contract carriage situation, depending on the country, many of the things fixed by statute are now governed by the contract. Shippers for specialized types of transportation, frequently recurring transportation, as well as for transportation connected with complex logistics services usually use contract carriage.<sup>50</sup>

Except for the fact that the Mexican transportation law before the NAFTA was very clear on the matter, no cogent policy reason was ever articulated as to why the law could not be changed. The law said that, in order to get a concession as a common carrier or a permit as a private carrier, the carrier had to own the vehicle completely and exclusively.<sup>51</sup>

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44. See U.S. DEPARTMENT OF TRANSPORTATION, CARGO LIABILITY STUDY 6-7 (1998) [hereinafter CARGO LIABILITY STUDY].

45. See 49 U.S.C. § 13102(13) (2002).

46. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

47. See CARGO LIABILITY STUDY, *supra* note 44, at 4.

48. See *Ley de Caminos, Puentes y Autotransporte Federal* [Law of Roads, Bridges, and Federal Transportation], (Dec. 22, 1993) (Mex.) [hereinafter *New Transportation Law*].

49. See AAA Cooper Transp., Dothan, Alabama, ICC Certificate of Public Convenience & Necessity, MC-55889-Sub 78 (May 1983), available at <http://www.aaacooper.com/company/Certificate%20of%20Authority.pdf>, from 1983.

50. One of the writers, Frederick V. Perry, was the lawyer in charge of legal services for Ryder System's logistics division, was on the Board of Directors for the logistics division for seven years, and was the lawyer in charge of providing legal services to Ryder System's International Division for six years, providing logistics services in many countries of the world, all of which were the subject of specific contracts.

51. *Ley de Vías Generales de Comunicación y Transporte* [Law of General Means of Com-

In fact, transportation law did not even really allow for finance leases. The way the carriers (as a practical matter, almost exclusively private carriers) and the government got around the law respecting ownership in the case of finance leases was via the creation of a legal fiction. The contract of finance lease provided for an option to purchase for a predetermined price at the end of the term.<sup>52</sup> The lessee would, at the time of signing the lease, simply exercise the purchase option, that is, issue a letter saying it was going to pay the predetermined sum at the end of the lease.<sup>53</sup> The lessor then issued a second letter acknowledging the exercise of the option.<sup>54</sup> Armed with the finance lease contract, and those two letters, the finance lessee would have sufficient proof of "ownership" for the government to issue the permit or concession.<sup>55</sup>

The culture did not allow for changes in thinking or for changes in the rules. Getting anyone in the Mexican government to agree to allow truck rental, that is, short-term hire, or leasing, in the form of operational leasing was going nowhere. Hence we began to investigate the real reasons for such resistance. We used the national truck rental and leasing policy as a case study to illustrate the complex blend of variables that has led the Mexicans to have such an approach to their trucking industry.

Of all the arguments given by Mexican government officials in connection with transportation matters, the reason for resistance to rental and leasing, seemed the most difficult to understand. The Director of Highway Transportation tried to clarify the reason to RTR - and presumably other leasing companies if they tried to make similar arguments - by repeatedly stating that one of the primary objectives of the SCT is to ensure that goods are moved to market.<sup>56</sup> For the SCT, the needs of the shipper and in the end, the economy as a whole were paramount.

In a typical transportation scenario, when goods are moved, there are two parties involved in the transportation operation. There is the shipper (the owner of the goods and the party that contracts with the transporter), and there is the transporter (the carrier, or the trucking company). To introduce a third party, such as an operational leasing company, is only to introduce a third party to the equation unrelated to the contract of carriage, which yields an unpredictable degree of vagary.

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munication], art. 153, published in *Diario Oficial de la Nación*, (Feb. 19, 1940) [hereinafter *General Communications Law*].

52. Discussion with Logistics and Transportation Manager for Carnation de Mexico (Spring 1982); Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).

53. *Id.*

54. *Id.*

55. *Id.*

56. Interview with Alejandro Peniche, Director of Highway Transportation, SCT, in Mexico City, Mex. (June 1991).

What if there is a dispute between the lessor (the owner of the vehicle) and the lessee (the carrier) in the event of default on rent payments? According to the Director of Highway Transportation, the lessor could take possession of the vehicle and the goods would not move, thereby inflicting harm to the shipper, the consignee, and to the economy in general.

It was pointed out to officials that operational leases provided no more vagaries and dangers to the market in such a scenario than did finance leases. It did no good. It was difficult to characterize the position taken by the SCT as a logical one, since if a finance lessee were to default on its rental payments, the finance lessor would certainly repossess the vehicle and the goods would not move. The Director of Highway Transportation did not buy this argument, or did not wish to believe or accept it. "When a carrier owns its own vehicle, no one can take it away," he simply said.<sup>57</sup>

C. CASE STUDY #3:  
TRUCKING INDUSTRY:  
RESTRICTIONS ON MEXICAN FOREIGN INVESTMENT

This case study explores the significance of the historic and cultural bases for the restrictions on Mexican foreign investment in trucking. Mexican trucking companies have historically been and still to this day are very much afraid of competition from U.S. truckers.

When investigating the Mexican trucking industry and engaging with a wide variety of Mexican trucking companies and their owners and with the Cámara Nacional De Autotransporte De Carga ("CANACAR"), or the national chamber of freight carriers, we found a variety of differences between the industry and its U.S. counterpart.<sup>58</sup> To begin with, in Mexico the industry was highly politicized, that is politically well connected, and generally protected.<sup>59</sup> Tariffs were fixed by regulation, but truckers generally charged what they wished since they controlled the routes,<sup>60</sup> which

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57. Interview with Alejandro Peniche, Director of Highway Transportation, SCT, in Mexico City, Mex. (June 1991).

58. CANACAR is a very powerful trade association and chamber of commerce for the Mexican trucking industry. See U.S. Commercial Services, Business Service Provider Directory, available at [http://www.buyusa.gov/mexico/en/business\\_service\\_providers.html?bsp\\_cat=7800000](http://www.buyusa.gov/mexico/en/business_service_providers.html?bsp_cat=7800000) (last visited Aug. 31, 2004).

59. BUSINESS MEXICO, *Trucking Update*, Aug. 2001, available at <http://www.amcham.com.mx/-hotissues/agosto/hotissues0801-2.html> (last visited Aug. 29, 2004). See generally ISABEL STUDER, ITAM CURSO DEL TRATADO DE LIBRE COMERCIO DE AMERICA DEL NORTE [NAFTA AND THE TRUCKING INDUSTRY] § 3.2 (1999) (describing the economic impact of the NAFTA on the trucking industry), available at <http://wehner.tamu.edu/mgmt.www/FAFTA/spring99/Groups99/ITAM/transpo-2.htm> (last visited Aug. 29, 2004).

60. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos,

they had been given in their concessions. If a shipper did not pay what they charged, the goods did not move.<sup>61</sup> There was, in effect, no competition on rates. Except for a few progressive carriers in northern Mexico, there generally was no such thing as programmed maintenance, rather merely breakdown maintenance. No one knew when a vehicle would break down, perhaps many miles from maintenance stations. Because there was no programmed maintenance, fleets had to be larger, so that there were extra vehicles to pull into operation in the event of breakdowns.<sup>62</sup> This was more expensive to fleet owners. Additionally, the vehicles were on average fifteen years old, versus an average of five years in the U.S.<sup>63</sup> The running costs of older vehicles are usually higher than that of newer vehicles because they are not as efficient; they use more fuel and require more maintenance.<sup>64</sup>

All in all, the carriers and CANACAR did not want any foreign investment in Mexican trucking.<sup>65</sup> They lobbied heavily with the SCT before, during, and after the NAFTA to keep foreign truckers and foreign investment in trucking out of Mexico.<sup>66</sup> For example, Ryder executives had for years tried every argument they could manufacture to allow Ryder to invest in a Mexican trucking company, or to start up such a company. The old attitudes, however, proved to be too strongly embedded. Without significant changes in the attitude of the government and the way they viewed the world, the rules were not going to change; the laws

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de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001).

61. Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).

62. *Id.*

63. STUDER, *supra* note 59, § 3.2. See also *Mexico Says Reserves Right to Sanction U.S. Trucks*, REUTERS (June 13, 2002), available at <http://www.planetark.com/dailynewsstory.cfm/newsid/16414/-newsDate/13-Jun-2002/story.html> (last visited Aug. 29, 2004).

64. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

65. BILL HAY INTERNATIONAL, MEXLINX 1 (Fall 2000), available at <http://www.billhayintl.com/mexlinx.htm> (last visited Aug. 29, 2004).

66. See *U.S. - Mexico Disputes Over Truck Access & Fructose Duties Come Under Increased Scrutiny During October*, SOURCEMEX – ECON. NEWS & ANALYSIS ON MEXICO (Oct. 27, 1999), available at <http://ssdc.ucsd.edu/news/smex/h99/smex.19991027.html> (last visited Aug. 29, 2004). The bitter disputes between the U.S. and Mexico regarding access of Mexican trucks to U.S. roads and Mexican tariffs on high-fructose corn syrup gained increased attention during October because of actions taken either in the U.S. Congress or the World Trade Organization (“WTO”). The longstanding disagreement about U.S. restrictions for Mexican trucks on U.S. roads came to a boil on Oct. 18, 1999 when the U.S. House of Representatives voted to require the U.S. Transportation Department to impose stiff fines on Mexican shipping companies that violate truck-transportation restrictions. Under provisions negotiated in the NAFTA, Mexican trucks would have gained free access to U.S. roads by 1995. But access was delayed twice because of safety concerns related to the wide difference in each country’s requirements regarding weight, size, and insurance coverage for trucks. *Id.*

were not going to change. The attitude of restriction was not going to change.

During the period of the NAFTA negotiations, one of the writers provided suggested language and lobbied hard with the United States negotiators in order to get them to convince the Mexicans to allow United States carriers to carry goods into Mexico. The objective was unrestricted access into, out of, and within Mexico for such carriers.<sup>67</sup> The NAFTA calls for a phased-in ability for U.S.-based carriers to carry goods into and out of Mexico—but not point-to-point domestic carriage within Mexico<sup>68</sup>—and for Mexican carriers to do the same in the United States.<sup>69</sup> Three years after signature of the NAFTA, Mexico was to allow U.S. and Canadian carriers to make cross-border deliveries to, and pick up cargo in, Mexican border states, and the United States was to allow Mexican carriers to perform the same services in U.S. border states. Six years after the NAFTA went into effect, the United States was to provide cross-border access to its entire territory to carriers from Mexico for international carriage.<sup>70</sup> At the same time, Mexico was to provide the same treatment to carriers from Canada and the United States.<sup>71</sup> Seven years after the NAFTA went into effect, Mexico was to allow fifty-one percent Canadian and U.S. investment in Mexican carriers providing exclusively international cargo services.<sup>72</sup>

Ten years after the NAFTA went into effect, Mexico was to permit 100 percent investment in carriers in Mexico which provide international carriage service.<sup>73</sup> No NAFTA country will be required to remove restrictions on truck carriage of domestic cargo for cabotage.<sup>74</sup> Just before Mexican and United States carriers were to commence crossing the border,

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67. Thomas Donahue, President and CEO of American Trucking Associations, worked very strongly lobbying, giving speeches, and conducting conversations with the Mexican head negotiator, Herminio Blanco, trying to attain the same objective. Tom Donahue also attempted to convince the Mexicans to allow foreign investment in Mexican carriers.

68. *NAFTA*, *supra* note 15, at annex I: schedule of Mexico & schedule of United States.

69. *Id.* The NAFTA allows access for U.S. carriers to the six northern Mexican border states during the phase-in period, designed to give U.S. carriers a market opportunity comparable to that which Mexico gains in its access to U.S. border states. Monterrey, Mexico's second largest industrial city is in one of those six states. Virtually all the maquiladora plants and other substantial economic activity exist in those six Mexican states, representing about seventeen percent of Mexico's gross national product. The four U.S. Border States to which the Mexican carriers were to have initial access contribute just over twenty percent of U.S. gross national product, so the two market openings were roughly comparable.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* See also Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004). Mr. Sesma recently obtained authorization for the first international carrier to invest in a Mexican transportation carrier.

74. *NAFTA*, *supra* note 15, at annex 1.

the Clinton Administration announced that Mexican carriers were unsafe and they could not enter into United States territory, despite the language of the NAFTA.<sup>75</sup> The Mexicans followed suit, disallowing United States carriers' access to Mexican territory so long as the United States restrictions were not lifted.<sup>76</sup> Only recently, the United States Supreme Court declared this restriction unlawful, though Mexican and United States carriers have not commenced cross-border carriage as contemplated by the NAFTA.<sup>77</sup> It is expected that they will roll across the border by the end of 2004.<sup>78</sup>

### III. CHANGES IN THE FOREIGN INVESTMENT CODE

With the NAFTA, many changes occurred. In order to implement the myriad changes contemplated by the NAFTA for the transportation industry, the foreign investment code and the law of transportation and communications had to be overhauled.

Over the last few decades before the implementation of the NAFTA, Mexico had been on a roller coaster ride from the peak of economic prosperity to the valley of financial chaos and back again.<sup>79</sup> But many believed that Mexico continued to be an attractive market for foreign direct investment. The NAFTA made it more attractive and friendlier than in the past.

After a suggestion to then U.S. President George Bush by then Mexican President Carlos Salinas de Gortari, both leaders agreed to move forward on a bilateral trade agreement between the two countries.<sup>80</sup> Not to be left out, a short while later, Canada asked to join the talks, and the NAFTA commenced its birthing process.<sup>81</sup> After protracted negotiations and intense arguments both for and against the NAFTA, Brian Mulroney,

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75. See Magdolna Kornis, *Mexican Trucks Gain Access to U.S. Highways*, INT'L ECON. REV. 1, 2 (2002).

76. Interview with Licenciada Adriana Ibarra Fernandez, Director Legal Consulting and Negotiation on State to State Controversies, Secretari de Economía, in Mexico City, Mex. (Feb. 20, 2001).

77. Paul Blustein, *High Court Opens U.S. Roads to Mexican Trucks*, WASH. POST, June 8, 2004, at E1, available at <http://www.washingtonpost.com/wp-dyn/articles/A23391-2004Jun7html> (last visited Aug. 29, 2004).

78. *Id.*

79. See Larry Rothers, *Nomination Welcomed in Mexico; Business Groups Welcome Mexico's Candidate*, N.Y. TIMES, Oct. 12, 1987, at D1. Inflation in Mexico was as high as 135% in 1987, but with President Carlos Salinas de Gortari's austerity and free enterprise economic planning, inflation was brought down to less than 10% in 1994. *Id.* See also *Mexico: Can it Cope?* BUS. WEEK, Jan. 16, 1995, at 42, available at <http://www.businessweek.com> (last visited Aug. 29, 2004).

80. Clyde H. Farnsworth, *Bush Will Act Faster On Mexico Trade Pact*, N.Y. TIMES, Sept. 14, 1990, at A1.

81. *Id.*



Prime Minister of Canada, and Presidents George Bush and Carlos Salinas de Gotari signed the accord on December 17, 1992.<sup>82</sup>

From 1982 to 1988, under former President of Mexico Miguel de la Madrid, foreign investors were given more latitude and lighter restrictions, sometimes on an ad-hoc basis and sometimes across the board, than was prescribed by the Foreign Investment Law then in effect, although neither the laws nor the regulations officially changed.<sup>83</sup> The old attitudes of mistrust started to erode ever so slightly at the top.<sup>84</sup> After Carlos Salinas became President, the “lightening up” on foreign investors continued, but neither the Foreign Investment Law nor its implementing regulations changed until the NAFTA was signed and approved.<sup>85</sup>

During its negotiation and then with the approval of the NAFTA, the attitudes and the legislation began to change quickly in Mexico. In December of 1993, the *New Foreign Investment Law* was enacted.<sup>86</sup> In the same month, the new Law on Roads, Bridges and Highway Transportation (*New Transportation Law*) was enacted.<sup>87</sup> In August of 1994, the Mexican government enacted a new Patent and Trademark Law.<sup>88</sup> All three of these laws are important to foreign investors and all three will have major impact on the way in which many foreign investors will conduct their business in Mexico. The first two laws have had a major impact on the over-the-road transportation industry in Mexico.

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82. Keith Bradsher, *Bush, Salinas and Mulroney to Sign Trade Pact Dec. 17*, N.Y. TIMES, Dec. 4, 1992, at D1.

83. One of the writers, Frederick V. Perry, worked continuously during the 1980's and early 1990's attempting to conduct a variety of foreign investment operations in Mexico. The Foreign Investment Law promulgated in 1972 did not change until the NAFTA required the changes.

84. One of the authors, Frederick V. Perry, obtained permission to change and broaden the corporate purpose of an old Mexican company that had been incorporated by a U.S. owner prior to the 1972 Foreign Investment Code's restrictions requiring majority Mexican ownership in 1987. He was told at the time by the Commission on Foreign Investment that the enforcement of the rule had been lightened. In discussions with then Director of Foreign Investment, Carlos Hefti, in February of 1991, this author was told that the Salinas Administration was continuing and even expanding the easing up on foreign investment restrictions started by the de la Madrid Administration.

85. See generally Editorial, *After the NAFTA Victory*, N.Y. TIMES, Nov. 19, 1993, at A32. Under U.S. law, as a commercial agreement and not a treaty, the NAFTA required no Senate ratification and no formal approval by Congress. However, the United States Congress did have to approve the implementing legislation and did so on November 17, 1993. Under Mexican law, the agreement is a treaty and required congressional approval, before and in addition to the passage of implementing legislation. In Mexico, the NAFTA is called the Treaty of Free Trade (Tratado de Libre Comercio).

86. Foreign Investment Law, art. 4 (Dec. 28, 1993) (Mex.), reprinted in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT LAWS OF THE WORLD – MEXICO, 27 (1997) [hereinafter *New Foreign Investment Law*].

87. *New Transportation Law*, supra note 48.

88. Industrial Property Law (Aug. 2, 1994) (Mex.), available at <http://www.mexico-trade.com/ip.html> (last visited Aug. 29, 2004).

## IV. THE NEW FOREIGN INVESTMENT LAW

In order to appreciate the revolutionary impact of the *New Foreign Investment Law*, it is useful first to consider some aspects of the old foreign investment law. The old law was called *The Law for the Promotion of Mexican Investment and Regulation of Foreign Investment (Old Foreign Investment Law)*.<sup>89</sup> Note the use of "regulate" rather than words such as "encourage" or "promote." The national cultural attitude was so wary of foreign intervention it was only natural that such restrictive laws would be implemented and perpetuated.

The *Old Foreign Investment Law* was enacted under President Luís Echeverría, a president considered by many to have a socialist bent because of the intervention in the Mexican Economy during his presidency.<sup>90</sup> The law was enacted at a time when restrictive foreign investment laws were implemented in many third world countries; at a time when the writings of dependency theorists were read by most and believed by many; at a time when most third world countries feared investment from and dependency upon industrialized countries.<sup>91</sup> The lawmakers continued to believe in the old ways of protectionism and exclusion, mistrust of foreigners and things foreign.<sup>92</sup> They collectively created the institutions that kept the foreigners out.

In his speech to the Mexican Congress when introducing the bill on the New Foreign Investment Law, President Carlos Salinas told those present that the world in which the *Old Foreign Investment Law* was enacted had changed.<sup>93</sup> He went on to explain that because foreign investment acts as a catalyst for intra-national development, a growing number of countries had established diverse strategies to attract the flow of inter-

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89. See generally *Old Foreign Investment Law*, *supra* note 39.

90. See generally COLUMBIA ENCYCLOPEDIA, *Echeverria Alvarez, Luis* (6th ed. 2001), available at <http://www.bartleby.com/65/ec/EcheverrA.html> (last visited Aug. 29, 2004). See also WORLDBOOK, *Developments in the Mid-to-Late 1900's*, available at <http://www2.worldbook.com/wc/features/cinco-/html/develop.htm> (last visited Aug. 29, 2004). Luis Echeverria Alvarez was President of Mexico from 1970-1976. In 1971, he nationalized the copper industry and caused the national government to invest heavily in industry. *Id.*

91. See generally ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA; HISTORICAL STUDIES OF CHILE AND BRAZIL* (1969); ANDRE GUNDER FRANK, *DEPENDENT ACCUMULATION AND UNDERDEVELOPMENT* (1979); RAUL PREBISCH, *THE ECONOMIC DEVELOPMENT OF LATIN AMERICA AND ITS PRINCIPLE PROBLEMS* (1950).

92. See WORLDBOOK, *Developments in the Mid-to-Late 1900's*, available at <http://www2.worldbook.com/-wc/features/cinco/html/develop.htm> (last visited Aug. 29, 2004). See generally Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera, Diario Oficial 7 de Marzo de 1973 [Law to Promote Foreign Investment and to Regulate Foreign Investment, Official Gazette, Mar. 7, 1973].

93. President Carlos Salinas, address to Mexican Congress, Doc. 011/LV/93 P.O. (Año III), at VIII, Presidencia de la República.

national capital.<sup>94</sup> In that same speech Salinas said that according to the International Monetary Fund in 1991, Mexico was in eighth place in the world as a receiver of direct foreign investment. Among developing countries, Mexico received more direct foreign investment than any other.<sup>95</sup> Further, he said, at that time, Mexico was the second-highest receiving country of U.S. foreign investment.<sup>96</sup> Foreign investment, according to President Salinas was important, essential in fact, for Mexico's continued growth.<sup>97</sup> Accordingly, his objective behind the New Foreign Investment Law was to create a new normative framework which would promote the competitiveness of Mexico in the world economy, provide legal certainty to foreign investors and establish clear, easily understood rules that would channel international capital into productive activities.<sup>98</sup> In one speech, Carlos Salinas became the single most important agent for change in the rules and for change in the institutions.<sup>99</sup>

Mexico's *Old Foreign Investment Law* was notoriously restrictive, generally restricting foreign investors—in the industries in which they could invest at all—to no more than 49% equity ownership, often much less.<sup>100</sup>

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94. *Id.* at VII.

95. *Id.* at V.

96. *Id.*

97. Mensaje del Presidente Carlos 'Salinas de Gortari a la Nacion, con motivo del Tratado de Libre Comercio [Message of President Carlos Salinas de Gortari to the Nation, Because of the Free Trade Agreement], Los Pinos, (Aug. 12, 1992).

98. *Id.*

99. President Carlos Salinas, address to Mexican Congress, Doc. 011/LV/93 P.O. (Año III), at V.

100. See *Old Foreign Investment Law*, *supra* note 39, at art. 5. However, the *New Foreign Investment Law* provides for the concept of "neutral investment." A neutral investment is an investment in Mexican companies or in authorized trusts that is not computed in order to determine the percentage of foreign investment in the equity of the Mexican companies. In the past, the concept of neutral investment was authorized only for those companies, which were traded on the stock exchange. Now, however, there is no such limitation. Neutral investments may be made in any companies. Neutral investment is one in which the investment is in stock that has no voting rights or has limited corporate rights. However, such investment may only be made by foreigners after obtaining prior authorization from the SECOFI and, when applicable, from the National Securities Commission. Under the concept of neutral investment, the foreign investor may not be permitted, under any circumstances, to obtain any type of control over the companies in which investments are made. This is passive or portfolio type, indirect investment. See *New Foreign Investment Law*, *supra* note 86, at art. 18. The *New Foreign Investment Law* sets forth very clearly what the functions of the Foreign Investment Commission shall be. The Foreign Investment Commission is given the charge of "designing mechanisms to promote investment in Mexico." See *New Foreign Investment Law*, *supra* note 86, at art. 26. Here again, Mexicans are directed to encourage and to welcome foreigners. The new attitude espoused by the government and the lawmakers is that foreigners are okay. The new attitude is: "Welcome them; help them." Like the old law, the new law sets forth in fair detail what the Foreign Investment Commission shall do, what it is made up of, and also talks about the National Foreign Investment Registry. In the transitory section of the law, several items of interest are covered.

As a general rule, the *New Foreign Investment Law* establishes the principle that a foreign investor may participate, up to any percentage he or she may wish, in the equity of Mexican companies, acquire fixed assets, start up new economic activity, manufacture new product lines, open and operate business and grow or relocate already existing businesses.<sup>101</sup> There are, of course, some exceptions to this broad freedom.

The *New Foreign Investment Law* defines "foreign investment" as the participation of foreign investors, in whatever percentage, in the equity stock of Mexican companies; that investment carried out by Mexican companies with majority foreign ownership; and the participation of foreign investors in the activities and acts contemplated by the law.<sup>102</sup>

As the *Old Foreign Investment Law* reserved certain activities exclusively to Mexicans,<sup>103</sup> so does the *New Foreign Investment Law*.<sup>104</sup> The new law reserves such activity to Mexicans or to companies which have clauses in their by laws that exclude any foreign equity participation in such companies, what is known as a foreign ownership exclusion clause.<sup>105</sup> Among those activities still reserved to Mexicans are national overland transportation of passengers, tourism and cargo, excluding message and package delivery service.<sup>106</sup>

The new law goes on to provide that a foreign investor may not participate in the aforementioned activities or companies dedicated to such activities either directly or through trust arrangements, agreements, corporate by-laws or other agreements, pyramid schemes or other schemes which give such foreign investor control or any form of participation, except as set forth in Title 5 of the *New Foreign Investment Law*.<sup>107</sup>

There is a sea change in attitude reflected in the *New Foreign Investment Law* respecting over-the-road transportation of goods and tourists. The *Old Foreign Investment Law* stated that only Mexicans - and Mexican companies with foreign ownership exclusions clause could transport any-

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First, the *New Foreign Investment Law* abrogates the *Old Foreign Investment Law*, and it abrogates the Presidential Decree establishing the requirement that a buyer obtain permission prior to acquiring assets from a foreigner and prior to the formation or modification of Mexican companies that have foreign partners, which was published in the Official Gazette on July 7, 1944. See *New Foreign Investment Law*, *supra* note 86, at transitory provisions, two I-II.

101. *New Foreign Investment Law*, *supra* note 86, at art. 4.

102. *Id.* at art. 2-II. See also *Old Foreign Investment Law*, *supra* note 39, at art. 2. The *Old Foreign Investment Law* defined "Foreign Investor" as (1) foreign persons or companies, (2) Mexican companies in which a majority of capital is owned by foreigners, (3) Mexican companies which are managed by foreigners who may or may not own a majority of the stock, and (4) foreign entities without legal personality, such as partnerships. *Id.*

103. See *Old Foreign Investment Law*, *supra* note 39, at arts. 4-5.

104. *New Foreign Investment Law*, *supra* note 86, at art. 7-8.

105. *Id.* at art. 6.

106. *Id.*

107. *Id.*

thing, people or cargo - there was no distinction on federal highways.<sup>108</sup>

As a practical matter, this meant that virtually no goods or passengers could be carried intrastate, into Mexico from abroad or in most areas within the various Mexican states, inasmuch as virtually all such transportation would entail traversing a federal highway. The *New Foreign Investment Law* breaks down the transportation into that of cargo, passengers and tourism<sup>109</sup> and further divides it into national and international traffic.<sup>110</sup> The overland transportation of cargo, passengers and tourism of national traffic, within Mexico is reserved to Mexicans and Mexican companies with a foreign ownership exclusion clause.<sup>111</sup>

The *New Foreign Investment Law* provides similar restrictions for the international overland transportation of passengers, tourism and cargo between points within Mexico; however, as already mentioned, foreign investment is allowed gradually to take over such enterprises: up to 49% foreign ownership beginning December 18, 1995; up to 51% foreign ownership beginning January 1, 2001; and up to 100% foreign ownership commencing January 1, 2004.<sup>112</sup>

This means that foreigners can buy international carriers, but not domestic carriers. Goods, which come from abroad, however they arrive, whether by road, rail, sea or air are international commerce and can be carried to their destination by such a Mexican international carrier. So, if goods are flown in to Mexico City from Korea, for example, a Mexican international carrier with foreign ownership can transport them to their final destination and distribute them within Mexico.<sup>113</sup>

## V. TRANSPORTATION LAW

One of the big changes in the new Transportation Law that will have a substantial impact on both sides of the border has to do with truck rental and leasing and the way the implementing regulations were drafted to interpret broadly the *New Transportation Law*.

### A. TRANSPORTATION LAW BEFORE THE NAFTA

Prior to the NAFTA, the *Law of General Means of Communication*

108. *Old Foreign Investment Law*, *supra* note 39, at art. 4.

109. *New Foreign Investment Law*, *supra* note 86, at art. 6.

110. *See id.*

111. *Id.*

112. *Id.* at transition provisions, six.

113. Telephone Interview with Nancy McCrae, Chief U.S. Negotiator on the NAFTA transportation matters, U.S. Dep't of Transportation, Office of International Transportation (Jan. 2001). Ms. McCrae explained that point-to-point international carriage was agreed upon by the parties to the NAFTA despite the fact that it is not explicitly stated in either the NAFTA or the New Foreign Investment Law.

of Mexico regulated concessions and permits for common and private carriage.<sup>114</sup> A common carrier, as we use the term in the United States, is a carrier that provides transportation service to the general public.<sup>115</sup> Under the *Old Transportation Law*, common carriers were given what is called in Mexican law a concession (and then a special federal license plate for each vehicle), and private carriers were given a permit for each vehicle.<sup>116</sup> In order to obtain either the concession and plates or the permit, the carrier had to prove that it owned the vehicles.<sup>117</sup> Eventually, as described above, through the use of a finance lease, because for tax and accounting purposes the vehicle is on the accounting books as an asset of the lessee, the SCT allowed concessions and permits to be issued to finance lessees of vehicles, treating both common and private carriers alike in this regard.<sup>118</sup>

The old law did not allow vehicles obtained under an operational lease, like those leases used by many companies in the United States and elsewhere, to be issued permits for transportation activities on the federal highways, since an operational lessee did not own the vehicle. In fact, there was no such thing as a standard operational lease of a vehicle in Mexico. Under a standard operational lease, the vehicle reverts to the lessor at the end of the payment term.<sup>119</sup> During the entire term of the lease, the vehicle is the property of the lessor and remains on its books

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114. *General Communications Law*, *supra* note 51.

115. See CARGO LIABILITY STUDY, *supra* note 44, at 4 (discussing the development of common carriage in the middle ages and the notion that all customers should be treated the same way in order to avoid discrimination). See also *Niagra v. Cordes*, 62 U.S. 7, 22-23 (1858) (“At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods entrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.”); *Hughes Aircraft, Co. v. N. Am. Van Lines, Inc.*, 970 F.2d 609, 613 (9th Cir. 1992) (discussing that a carrier may limit its liability for damages to cargo under 49 U.S.C. § 10730(a)). See generally Countryman & McDaniel, *Index of Claims Procedures For Motor Truck Cargo For U.S. Purposes* (discussing the removal of the term “common carrier” in relation to liability after the ICC Termination Act of 1995), available at [http://www.cargolaw.com/guides\\_motor\\_truck.html](http://www.cargolaw.com/guides_motor_truck.html) (last visited Aug. 26, 2004).

116. *General Communications Law*, *supra* note 51, at art. 152.

117. *Id.*

118. *Principios de Contabilidad Aceptados*, de la Comisión de Principios de Contabilidad del Instituto Mexicano de Contadores Públicos, Boletín D-5, Párrafo 33; Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

119. *Principios de Contabilidad Aceptados*, de la Comisión de Principios de Contabilidad del Instituto Mexicano de Contadores Públicos, Boletín D-5, Párrafos 29, 32 and 54 and Párrafo 33(a). One of the writers, Frederick V. Perry, was engaged in providing legal services, including contract drafting, review and negotiation to Ryder Truck Rental, Inc. for nearly twenty years throughout the United States and Canada and many parts of the world. All operational leases that he dealt with had such provisions.

for tax and accounting purposes.<sup>120</sup> Under an operating lease, the lessor gets the tax and accounting benefit of the depreciation rather than the lessee.<sup>121</sup> For the lessee, it is an expense item for accounting and tax purposes, rather than a capital investment.<sup>122</sup> For a variety of reasons, in the United States, common carriers do not typically obtain their vehicles under operational leases; they buy them outright or sometimes finance lease them. This appears also to be true in many other countries where Ryder has done business. RTR and presumably other vehicle leasing companies in the U.S. and elsewhere lease to private carriers, such as companies that transport and distribute their own goods. They typically do not lease to common carriers.<sup>123</sup> This has changed in Mexico after entry into effect of the NAFTA and the new leasing regulations, and such change has increased competition in the industry.<sup>124</sup>

## B. TRANSPORTATION LAW AFTER THE NAFTA

Annex VI of the NAFTA states that “[a]n enterprise authorized in Mexico to provide bus or truck transportation services may use equipment of its own, leased vehicles with an option to purchase (finance leasing), leased vehicles (operation leasing), or short term rental vehicles.”<sup>125</sup> The next line reads “(f)ederal measures will be established in relation to leasing and rental operations.”<sup>126</sup> It should be noted that the language in the NAFTA is: “an enterprise authorized in Mexico to provide bus or truck transportation services.” This wording raises a question: what is an enterprise authorized to provide these services? Is it a common carrier, or is it both a common and a private carrier?

The *New Transportation Law*, promulgated in December of 1993,<sup>127</sup> after the NAFTA, does not clearly articulate the idea that both common and private carriers can lease vehicles under an operational lease. However, the law does not prohibit private carriers from leasing vehicles. In fact, the law is encouragingly silent on the matter of vehicle ownership for

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120. See, e.g., UNION LEASING, *Leasing v. Ownership* (“One of the basic fundamental differences between leasing and ownership is the potential financial accounting treatment. Depending on how it’s structured, most leases may qualify as an operating lease in accordance with FASB 13. This allows the lessee to expense the lease payment up to the amount utilized for business purposes.”), available at [http://www.unionleasing.com/web/why\\_lease/LeasingvsOwnership.asp](http://www.unionleasing.com/web/why_lease/LeasingvsOwnership.asp). See also *Ley de Impuestos Sobre la Renta*, art. 32, sec. XIII; art. 42, sec. II & III.

121. *Id.*

122. *Id.*

123. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

124. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

125. *NAFTA*, *supra* note 15, at annex VI.

126. *Id.*

127. *New Transportation Law*, *supra* note 48.

private carriers. Under the old law common carriers were given concessions and private carriers were given permits.<sup>128</sup> Under the new law, both are given permits.<sup>129</sup>

In an unrelated meeting with one of the premier transportation lawyers in Mexico,<sup>130</sup> who had been consulted by the SCT on the matter, one of the authors<sup>131</sup> was allowed to view the draft regulations, which were to give effect in Mexico to the leasing provisions of Annex VI of the NAFTA and the recently passed transportation law implementing the NAFTA. It was immediately apparent that there was a problem. Those draft regulations,<sup>132</sup> which were put together in June of 1994, by a working group consisting of people from the SCT and SECOFI,<sup>133</sup> were very clear in that they did not allow used vehicles to be leased to carriers and, although common carriers were mentioned, the draft regulations did not provide that private carriers could be lessees.<sup>134</sup> In fact, the SCT did not contemplate that private carriers would lease vehicles; the drafters assumed that they would continue to own their own vehicles as before.<sup>135</sup>

128. *General Communications*, *supra* note 51.

129. *New Transportation Law*, *supra* note 48.

130. Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese (June 1994).

131. Frederick V. Perry

132. *Anteproyecto, Reglamento Para el Arrendamiento de Vehículos de Autotransporte Federal* [Preliminary Draft of Regulation for Leasing Vehicles for Federal Transportation] (June 3, 1994) [hereinafter *Preliminary Draft of Regulation*].

133. The primary members of that group were Director de Normatividad de Autotransporte [Director of Federal Highway Regulation], of the SCT; Licenciada Evelyn Rodriguez, Director of Economic Studies of SECOFI and personal Advisor to the Secretary; and Licenciada Luz Elena Barrios, Director General of Legislative Affairs of SECOFI.

134. *Preliminary Draft of Regulation*, *supra* note 132.

135. Interview with Alejandro Peniche, Director of Land Transportation of the SCT, and with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation of the SCT], in Mexico City, Mex. (Aug. 1994). The parties stated that neither the *New Transportation Law* nor the draft regulations contemplated that a private carrier would lease or would be allowed to lease its vehicles under an operational lease, and that the term "autotransporte federal", really contemplated and referred to common carriers only. The *New Transportation Law* in its definition section did not even define private carriage and when it defined "*Servicio de Autotransporte de Carga*" [Service of Truck Transportation of Cargo] it stated that such service was for service to third parties. *See New Transportation Law*, *supra* note 48, at art. 2-VIII. The people at the SCT said that a fair number of people were opposed to allowing private carriers to lease vehicles, some because they interpreted the law narrowly. However, upon meeting with personnel of the Secretariat of Commerce and Industrial Development (the secretariat which masterminded, negotiated and was charged with implementing the NAFTA [SECOFI]), one of the authors got them to agree that private carriers were supposed to be allowed to lease vehicles under an operational lease. The working group that was charged with creating the leasing regulations was made up of people from both secretariats. In the end, one of the author's view and that of the convinced SECOFI prevailed and the regulations not only allowed private carriers to lease vehicles, but also allowed used vehicles to be leased.



It was also clear that CANACAR did not wish private carriers to have the ability to lease vehicles. CANACAR did not want to encourage or help the private carriers in any way, since they, in effect, compete with common carriage. One of the authors<sup>136</sup> was in close contact with the CANACAR and knew their views. They had a strong influence on the SCT, and the SCT opposed inclusion of that capability in the leasing regulations.<sup>137</sup> As mentioned above, leasing companies, such as Ryder Truck Rental and others lease more to private than common carriers. The draft regulations in Mexico provided that a leasing company could get permission to lease a particular vehicle only in the year of the vehicle's manufacture, that is, new vehicles, not used ones.<sup>138</sup> This meant that the old exclusionary attitudes were still alive and well despite the NAFTA. So only new fleets could be purchased and leased back. This restriction would substantially impair a vehicle leasing company's ability to do business, since many leasing companies in other countries purchase a fleet from a carrier, private or common—more frequently a private carrier—and then lease those vehicles back to the carrier. As mentioned, this takes those assets off the carrier's accounting books, thereby freeing up capital for other uses. One of the authors<sup>139</sup> had spent the better part of the previous year and a half lobbying with the U.S. negotiators of the NAFTA, the U.S. government, the Mexican government and CANACAR to get the language of Annex VI accepted, and in fact, drafted that language. Now it seemed that all those efforts were going to be for nothing unless the author could get the SCT and SECOFI to agree upon and change the draft regulations.<sup>140</sup>

As stated above, well-maintained used vehicles are often the subject of lease contracts in other countries, especially the U.S., UK, and Canada. If normal truck leasing and rental, as it is known in the United States, Canada and many other parts of the world were to take place in Mexico, one of the authors<sup>141</sup> involved had to work quickly before those new regulations were signed by President Salinas. Everything had to be rewritten and revamped. In order to do that, it was necessary to convince a number

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136. Frederick V. Perry

137. Interview with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation of the SCT] (Summer 1994) (stating that it became clear that the SCT, while they did not openly oppose the concept of leasing to private carriers, they did not support it and did not wish to support it).

138. *Preliminary Draft of Regulation, supra* note 32.

139. Frederick V. Perry

140. The Draft Regulations had been drafted by a joint committee made up of personnel from both the SCT and SECOFI. Neither Secretariat trusted the other to get it quite right. SECOFI was in overall charge of the NAFTA, and wanted to ensure that international treaty obligations were respected. The SCT was the institution charged with the regulation of transportation.

141. Frederick V. Perry

of high placed government officials in both the SCT and SECOFI about the benefits of one of the author's proposed leasing regulations. One of the authors was involved in redrafted, in Spanish, the draft regulations, providing for the lease of used vehicles and permitting private carriers to lease vehicles. The employees at the SCT told one of the authors that a fair number of people were opposed to allowing private carriers to lease vehicles. According to them, this opposition was coming from the SCT or their constituencies. In part, this was based on a narrow reading of the new transportation law. To overcome this approach, one of the authors had to then explain fully the regime of operational leasing to a variety of government officials at both the SCT and SECOFI, since a working group from both was charged with drafting the new leasing regulations. He also had to show to them the language of the NAFTA that their country had just agreed to and emphasize its clear meaning. This author shuttled back and forth between the two secretariats for a few weeks, causing meetings to occur between them to consider the proposals. In the end, the teams from both SECOFI and the SCT were convinced that they should adopt the author's version of the regulations, but it took finally a meeting directly with Jaime Serra Puche, the Secretary of Commerce, in order to finally get the regulations approved at the Secretary level.<sup>142</sup>

### C. FEDERAL HIGHWAY PERMITS

The current system of permitting vehicles is an anachronism, based on the system inherited from the old ways. There are different requirements and permits for common carriers and private carriers. A common carrier, once it complies with all the requirements, is given a concession (now a permit), federal license plates and a circulation card (or traffic card).<sup>143</sup> The circulation card states what kind of cargo the vehicle can carry, and the federal license plate is a license plate issued only to a common carrier in order to provide carriage services to third parties throughout the United States of Mexico.<sup>144</sup> A leased vehicle, just like an owned vehicle, must have such a permit to engage in the carriage of freight on the highways. Neither the law nor the regulations mention how permits are to be issued for leased vehicles. One would think, or at least the authors thought, that the permit would be issued to the carrier, not for the vehicle itself. Unfortunately, the permits of carriage are still issued for each particular vehicle, in the name of the owner. Even leased vehicles, then, are permitted as if they were common carriage vehicles, in the name of the owner/lessor, who cannot, under the law, be a carrier of freight—

142. Interview with Dr. Jaime Serra Puche, Secretary of Commerce (Oct. 11, 1994).

143. Interview with Licenciado Mancilla Olivares, Director General of Transportation Department of the Federal District of Mexico, in Mex. (Sept. 6, 1994).

144. *New Transportation Law*, *supra* note 48, at art. 43.

either common or private.<sup>145</sup> This is a major bone of contention since the CANACAR fears that the foreign owned leasing companies will secretly engage in carriage. This is - along with their general dislike of private carriage - one of the primary reasons that CANACAR has been hostile to the foreign leasing companies. A permit is issued for a vehicle to be leased based on the contract of lease.<sup>146</sup> So a permit is only valid for the life of the lease agreement. This same procedure is in place for short-term rental, which makes for a very unwieldy process of rental, since it can take up to a week or more to get the permit.<sup>147</sup>

The regime for private carriers is somewhat different. Private carriers are licensed, that is, they are given license plates in the state in which they are domiciled.<sup>148</sup> So, if the owner of a vehicle is headquartered in Monterrey, the State of Nuevo Leon, the state in which Monterrey is located, will license it. The SCT then issues a federal permit and a circulation card (or traffic card) to a private carrier (once it has its state license plates).<sup>149</sup> With this permit the private carrier can travel throughout Mexico, and on the federal highways, carrying its own goods but not the goods of third parties.

There is a two-step process for a private carrier to be able to carry goods interstate, and on the federal highways using leased vehicles. The first step is that, even if the SCT regulations were to allow for permitting the leased vehicles of private carriers, the leasing company or owner of the vehicles must ensure that the states will license a vehicle which is on an operating lease and not owned outright by the private carrier.<sup>150</sup> As an example, representatives of the Federal District<sup>151</sup> (Mexico City) and the states of Nuevo Leon<sup>152</sup> and Jalisco<sup>153</sup> (Guadalajara is the capital of Ja-

145. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services, SCT], and with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

146. *Reglamento de Autotransporte Federal y Sericios Auxiliares* [Federal Transportation Regulations], arts. 8 & 9; *New Transportation Law*, supra note 48, at arts. 42 & 43.

147. Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

148. Federal Transportation Regulations, supra note 146, at ch. 6, art. 10.

149. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001). Interview with Licenciado Mancilla Olivares, Director General of Transportation Department of the Federal District of Mexico, in Mex. (Sept. 6, 1994).

150. Interview with Licenciado Victor Manuel Martinez, Under Secretary of Transportation of the State of Nuevo Leon (Nov. 1994).

151. See *Reglamento de Transito del Distrito Federal* [Traffic Regulation of the Federal District of Mexico] (Oct. 1994) (explaining that a state would license a vehicle for a private carrier). This information was confirmed by the Director of Traffic Regulation of Mexico.

152. Interview with Licenciado Victor Manuel Martinez, Under Secretary of Transportation

lisco) told me that they would license vehicles for private carriers obtained on an operational lease.

However, because the regimes in the various states provide for only two types of license plates for trucking, one plate for common carriers and another for private carriers, many states will likely say that since the service of leasing trucks is for third parties, that the service is public and akin to that of a common carrier—despite the fact that the lessor would not be providing carriage—and they would thus be forced to issue the leasing company a common carrier license plate. Because federal law prohibits a foreigner or a foreign owned company from being a carrier, there was some fear that the state would see this as an obstacle. In practice, it appears not to be a problem.

Ninety percent of the trucks in Mexico in the early nineties belong to private carriers, leaving only ten percent in the hands of common carriers.<sup>154</sup> To disallow operational leasing by private carriers would mark a drastic change in the equal treatment previously afforded to common and private carriers in the area of vehicle ownership. As mentioned above, the new regulations as adopted allowed for used vehicles to be the subject of operating lease contracts, and allowed for private carriers to lease vehicles. Unfortunately, at the time of all that work, one of the authors did not know that the SCT was not going to issue permits, that is, blanket permits, to the carrier—private or common—using the leased or rented vehicle. Had this author known how the SCT was going to interpret the regulations, he would have attempted to provide for the matter in the regulations also. Unfortunately, the old rules—customs really, since there are no official regulations on this—are still in place in this regard. The old ways die hard. Hopefully one day soon this will change also. There are forces at work lobbying for such a change.<sup>155</sup>

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of the State of Nuevo Leon (Nov. 1994). See also *Ley de Comunicaciones y Transportes para el Estado de Nuevo Leon* [Law of Communication and Transportation for the State of Nuevo Leon] (Oct. 25, 2000).

153. See *Ley y Reglamento del Servicio de Tránsito del Estado de Jalisco* [Law and Regulation for Transportation Service for the State of Jalisco]. Interview with Doctor Héctor Luna de la Vega, Director General of Land Transportation of the State of Jalisco (Nov. 1994) (confirming this information).

154. In August of 1994, one of the authors, Frederick V. Perry, had several conversations with Alejandro Peniche, Director of Land Transportation of the SCT and the Mexican negotiator of transportation issues in the NAFTA negotiations, and with officials of the SCT who reported to Mr. Peniche. They told this author that neither the *New Transportation Law* nor the draft regulations contemplated that a private carrier would lease or would be allowed to lease its vehicles under an operational lease, and that the term “autotransporte federal,” was really contemplated and referred to common carriers only. They agreed that, as drafted, the regulations would effectively preclude roughly 90% of vehicle owners from leasing vehicles.

155. Interview with Doctor Héctor Luna de la Vega, Director General of Land Transportation of the State of Jalisco (Nov. 1994); Interview with Licenciado Carlos Sesma Mauleón, part-

## VI. THE MEXICAN TRUCKING INDUSTRY AND THE NAFTA: TRUCKING INTERESTS' OPPOSITION TO THE NAFTA AND TO LAW CHANGES

As mentioned above, one of the authors<sup>156</sup> was involved, for well over a decade, in transportation related issues in Mexico. In trying to get leasing approved, in addition to working directly with the government, the author's attempted to enlist the aid of potential customers of leased vehicles and with the powerful CANACAR, the trade association of truckers in Mexico. Many large manufacturing concerns in Mexico were customers of the author's then employer, Ryder, in the United States and elsewhere. They wanted to use Ryder leased trucks for their private fleets. While such customers were supportive of Ryder's efforts, and while they understood the seemingly illogical position of the government regarding operational leasing versus finance leasing, they could do little to influence political change. CANACAR however was another matter. The association was politically very powerful and was generally considered by the SCT to be its most important constituency when it came to matters of over-the-road freight carriage.<sup>157</sup> Before and during the NAFTA negotiations, Francisco Dávila, owner of trucking companies himself,<sup>158</sup> was the president of CANACAR. He was and is widely known in trucking circles in the U.S., Canada, and Mexico. One of the writers shared the podium with him several times in all three countries, giving speeches on transportation-related topics. Sometime after the NAFTA's ratification, Mr. Dávila stepped down from his post as president of CANACAR. He became a member of the Mexican Senate, Mexico's upper house of the federal legislature,<sup>159</sup> and became chairman of the transportation committee.<sup>160</sup>

When the NAFTA was being negotiated, CANACAR was opposed

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ner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001). Licenciado Carlos Sesma Mauleon has repeatedly told me that he is constantly discussing such changes with officials at the SCT.

156. Frederick V. Perry

157. Interview with Francisco Dávila, President of CANACAR (1990); Interview with Jorge Teres, Economist with CANACAR (Feb. 20, 2001); Interview with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation], of the SCT (June 1994).

158. Membership required the person or organization to be a trucker.

159. Roger King, *No Resolution for NAFTA Trucking; In Mexico, Clinton Says Nothing About Access*, TRANSPORTTOPICS, May 12, 1997, available at <http://www.ttnews.com/members/printEdition/week-ly.archive/05.12.97.tw5.html> (last visited Nov. 5, 2004).

160. Reauthorization of ISTE: NAFTA, Border Infrastructure and Motor Carrier Safety, Laredo and Pharr, TX, Hearing Before the House Subcomm. on Surface Transportation of the Committee on Transportation and Infrastructure, 104th Congress (1996). Submission for the record from Thomas J. Donahue, President and CEO of American Trucking Association, Inc. included a letter from Francisco J. Dávila Rodriguez, Senador de la República de Mexico [Senator

to two matters: they did not want any foreign investment in Mexican trucking companies, and they did not want foreign trucking companies crossing the border into Mexico<sup>161</sup> to deliver or pick up goods.<sup>162</sup> They did not appear to actively oppose the idea of leasing.<sup>163</sup> They did not actively support it either. Now, CANACAR appears to support leasing, but they are still suspicious of foreign leasing companies, fearing that they will engage in carriage.<sup>164</sup> Of course a change in the way permits are awarded to leased vehicles would change all this.

The roles of certain actors and the relative power of those actors were changing as a result of the NAFTA. Once the NAFTA was negotiated, and the implementing legislation was promulgated; CANACAR, seeing their power eroding, commenced a vigorous campaign to keep trucking companies from the United States from crossing the border into Mexico, despite the language agreed upon in the NAFTA.<sup>165</sup> One of the authors was working very closely with the SCT in those days; first to lobby for and help draft the leasing regulations, and then to implement those regulations, which, as it turned out, proved even more complex than merely drafting regulations. Because of such close involvement, the author saw first-hand what was happening. Leaders of CANACAR really were afraid of leasing, or at least the possibilities under leasing, despite what everyone said. They were afraid that foreign leasing companies would make inroads into transportation, and they were afraid that they would not be able effectively to compete against U.S. leasing companies, who would, CANACAR believed, surreptitiously become carriers in some fashion. The New Director of Highway Transportation of the SCT, and his subordinate, the Director of Transportation Regulation, were

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of the Republic of Mexico] (July 5, 1996), available at [http://commdocs.house.gov/committees/Trans/hpw10480.000/hpw10480\\_0.HTM#0](http://commdocs.house.gov/committees/Trans/hpw10480.000/hpw10480_0.HTM#0) (last visited Nov. 5, 2004).

161. *Endosan a La Nueva Administración el Cumplir con Cambios en el Ramo de Autotransporte* [The New Administration Endorses Compliance with Changes in the Area of Transportation], *EL FINANCIERO*, (Sept. 6, 1994).

162. See INTERNATIONAL INSIGHTS, *THE INTERNATIONAL FORUM OF THE AMERICAN TRUCKING ASSOCIATIONS* (1994). This was the subject of many public discussions between Francisco Dávila, president of CANACAR, and Tom Donohue, president and CEO of the American Trucking Associations, its U.S. Counterpart, at a number of cross-border trucking meetings that the author attended in the years 1991-1993. Mr. Dávila was also the first Chairman of the North American Transportation Alliance, which was an organization designed to "pursue common research and policy goals continent-wide" in the area of over-the-road trucking.

163. Interview with Alejandro Peniche, Mexican negotiator of transportation issues in the NAFTA negotiations, and former Federal Director of Highway Transportation (Feb. 2, 2001).

164. Interview with Licenciado Oscar Moreno Martínez, Director de Asuntos Internacionales de CANACAR [Director of International Affairs of CANACAR], Director de Asuntos Jurídicos [Director of Legal Affairs] during the time of the NAFTA negotiations and shortly thereafter, in Mexico City, Mex. (Feb. 20, 2001).

165. *Renuncian Transportistas al TLC*, *EL FINANCIERO*, June 13, 1995.

under constant pressure from CANACAR.<sup>166</sup> But their response to CANACAR was always the same: “We have signed a treaty that allows U.S. truckers to cross the border, and we will live up to that obligation.”<sup>167</sup> When their lobbying efforts failed with the government, CANACAR took to the press, issuing statements to the press regarding the unfair competition the entry of U.S. truckers would create, and pillorying those few U.S.-based leasing companies with the temerity to enter Mexico, hoping to elicit the aid of public opinion in their quest.<sup>168</sup>

It is interesting to note that a few years before, CANACAR might have had the power to pull this off, or indeed they may have been able to keep leasing, in particular, and transportation, in general, out of the NAFTA. However, during the late ‘80s and early ‘90s, CANACAR was supplanted as the most powerful agent in the institution of over-the-road freight transportation.<sup>169</sup> Several things had happened to bring this about.

#### A. CANACAR’S LOSS OF POWER

In Mexico, as in most Latin American countries, membership in a chamber of commerce, often one specializing in one’s particular industry, has been mandatory.<sup>170</sup> Membership in CANACAR was no exception. The association is a cross between a chamber of commerce and a trade association. Since all the industry players were members, the voice of its lobby was loud and powerful. Just about the time of the NAFTA, this law changed, and trucking companies no longer were required to be members of CANACAR.<sup>171</sup> As a result, other competing trucking trade associations sprung up and private carriers started their own trade association. Additionally, trucking in Mexico had been controlled by a very few powerful companies and families in the past. Because of the natural march of economic and commercial progress, more and more smaller and medium-sized trucking companies were being created.<sup>172</sup> Finally, deregulation had a great leveling effect on both competition and freight rates. Users of

166. Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex.

167. Interview with Licenciado Zinzer, Director of Highway Transportation, in Mexico City, Mex. (Apr. 1995).

168. *Renuncian Transportistas al TLC*, EL FINANCIERO, June 13, 1995.

169. See generally CANACAR, available at [www.canacar.com.mx](http://www.canacar.com.mx).

170. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).

171. See AMERICAN CHAMBER OF COMMERCE IN MEXICO, *How to Set Up a Business in Mexico*, available at [http://www.mexconnect.com/mex\\_/businesssetup.htm](http://www.mexconnect.com/mex_/businesssetup.htm) (last visited Nov. 5, 2004). New associations that truckers may now join instead of CANACAR are Asociación Sindical de Transportistas, Sindicato Unico de Trabajadores De Autotransportes, Asociación de Industriales del Transporte Y Comercio Internacional, Asociación General de Autotransportes y Automovilísticos and the Cámara Nacional de Autotransportes de Carga.

172. Interview with Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico

cargo transportation services could now shop around for rates and service.<sup>173</sup> Neither tariffs nor routes were fixed as they had been before.<sup>174</sup> In short, the power that CANACAR had enjoyed in years past had diminished by the time the NAFTA was negotiated.

### B. LEASING AND RENTAL PROBLEMS

What then of vehicle leasing and rental? Once President Salinas signed the new leasing regulations, leasing companies were jumping at the chance to get started in Mexico, especially U.S. companies. However, leasing regulations were only the first step in the business process. Leasing and renting were foreign concepts to Mexicans, and no one knew really how to do it.

The truly unfortunate event in vehicle leasing, unfortunate for the leasing companies, for customers, and, as it turned out, for the SCT itself, were Article 57 and Article 59.<sup>175</sup> While it is not totally clear from the Articles' language, these articles, taken in their totality, appear to state that leasing companies are the ones who must obtain license plates and circulation card.<sup>176</sup> That is the way the SCT has interpreted the Articles' intent, which has given rise to two problems. First, the registration process is so cumbersome and time consuming requiring new registration for each lessee that, as a practical matter the maintenance of a fleet of short term rental vehicles is not a valid business proposition for a renting company. Further, quick response to the needs of a company that needed a rental vehicle on short notice was not possible because new permits and circulation cards would have to be requested for each short term user.

### C. CANACAR OPPOSITION TO LEASING AND RENTAL

The second problem, as already mentioned, which has made the leasing business difficult for the SCT, leasing companies and lessees is the fact that leasing companies get the license plates of Autotransporte Federal de Carga, or common carriages in their own name, but for each and every vehicle. Many of these companies, and all of the initial ones li-

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City, Mex. (Feb. 20, 2001). In 1988, tariffs were deregulated, ostensibly allowing for competition in rates, but routes were still controlled by concessions. *Id.*

173. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).

174. *Id.*

175. Reglamento de Autotransporte Federal Y Servicios Auxiliares [Regulation of Federal Transportation and Ancillary Services], at arts. 57, 59 [hereinafter *Regulation of Federal Transportation*], available at <http://www.sct.gob.mx/marco/reglamentosdelsector/atfsaux/titulo6.html> (last visited Nov. 5, 2004).

176. The *Tarjeta de circulacion* [traffic card] is a document that must always be carried in the cab of the vehicle. It authorizes the carriage of the particular type of goods, which may be a general cargo permit.



censed as lessees, were foreign corporations.<sup>177</sup> Remember that Mexican laws specifically prohibit leasing companies from providing the service of transportation of passengers, tourism or cargo.<sup>178</sup> CANACAR had always been fearful that foreign companies would do just that and constantly accused them of doing so.<sup>179</sup> During 1997 and 1998, one of the authors attended several meetings with leasing company representatives and the New Director of Highway Transportation of the SCT regarding some of the practical procedural problems of such things as the carriage of hazardous materials, and how to change the procedures so as to allow for short term rental fleets. At one of those meetings, CANACAR representatives threatened to block all roads to Mexico City, if the SCT did not listen and react to their concerns about leasing companies providing freight common or contract carriage services.<sup>180</sup> From 1995 to 1998, CANACAR leaders convinced the SCT to conduct what amounted to inspection raids on foreign companies, to insure that all leasing documentation and operations were in order, and to determine what leased vehicles were really doing.<sup>181</sup> They were constantly accusing the foreign leasing companies of being surreptitiously involved in providing actual transportation services. This was very disruptive for the leasing companies and for their customers. In reality, no foreign leasing companies were actually found to be violating this law

CANACAR now seems to be in favor of leasing but only if the regulations and registration procedures ensure that leased vehicles are licensed only in the names of licensed transportation companies.<sup>182</sup> CANACAR is no longer powerful enough to impose the changes they wish, but they continue to influence and, are constantly suggesting changes to the laws and regulations to the SCT.<sup>183</sup>

The fact is that the NAFTA and the changes it has brought about have increased the efficiency and the economy of over-the-road transportation in Mexico and lowered the costs to shippers.<sup>184</sup> Even greater effi-

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177. Interview with Licenciado Zinzer, Director of Highway Transportation, in Mexico City, Mex. (Apr. 1995).

178. *Regulation of Federal Transportation*, *supra* note 175, at art. 61-III.

179. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001).

180. Interview with Ing. Aaron Dychter, Director of Federal Highway Transportation, SCT (April 1995) (This meeting was also attended by representatives of all licensed leasing companies in Mexico.).

181. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 5, 1998).

182. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001); Interview with Licenciado Oscar Moreno Martinez, Director of Legal Affairs of CANACAR (Feb. 2001).

183. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001).

184. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

ciencies could be obtained if the permits for leased vehicles were issued to the actual user, or, if long term permits were issued for leased or rental vehicles in the name of the leasing company, allowing the leasing company to place either on rent or on lease such vehicles with validly existing carriers. The old cultural attitudes are hard to root out; they are still an entrenched paradigm. The foreigners are feared, and are still not fully trusted to respect the rule of law.

## VII. LESSONS FOR FTAA

The FTAA of thirty-four countries has had nine meetings of the Ministers of Trade, with the final stages of the FTAA negotiations to be under the co-chairmanship of Brazil and the U.S.<sup>185</sup> It was agreed that last two plenary meetings of the Trade Ministers be held in November 2003 in Miami, U.S., and the other to be held in the later half of 2004 in Brazil.<sup>186</sup> At the eighth meeting in Miami on November 20, 2003, the Ministers restated their commitment to the Free Trade Area of the Americas and set forth a vision of the FTAA as follows: "We, the Ministers, reaffirm our commitment to the successful conclusion of the FTAA negotiations by January 2005, with the ultimate goal of achieving an area of free trade and regional integration."<sup>187</sup>

Just as in Mexico, each of the thirty-four countries in the Western Hemisphere has its own history and its own manner of interpreting that history. They all have had good, bad, or indifferent relations with their neighbors, both near and distant. Many of their views on foreign investment and transportation, both foreign and domestic, will often be based upon or colored by their history and by the experience of those relations with their neighbors. Accordingly, one may find areas of the transportation law or regulations within a particular country that provides obstacles for the way in which one would wish to do business in that country as a foreign investor. The FTAA is currently in the process of being negotiated. Examples of areas of possible concern for logistics companies or carriers wishing to engage in cross-border operations are that in Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, there is a restriction on foreign investment in international carriers, allowing only minority equity participation on the part of foreigners.<sup>188</sup> Standards in the varying countries vary, so that vehicle and trailer sizes, which are allowed on the

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185. FREE TRADE AREA OF THE AMERICAS, *Antecedents of the FTAA Process*, available at [http://www.alca-ftaa.org/View\\_e.asp](http://www.alca-ftaa.org/View_e.asp) (last visited Nov. 5, 2004).

186. *Id.*

187. *Id.*

188. See Acuerdo Sobre Transporte Internacional Terrestre, entre Argentina, Brazil, Bolivia, Chile, Paraguay y Uruguay [Agreement on International Land Transportation among Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay], at art. 22 (Jan. 1, 1990).

highways can vary from country to country.<sup>189</sup> Certain Andean Pact countries do not permit the importation of used vehicles.<sup>190</sup> It is very likely that similar and a variety of other restrictions, political, legal or customary exist in the other nations of the hemisphere.

Now is the time to attempt to get any such obstacles removed or smoothed over. If transportation services company or a logistics company that, once the FTAA enters into effect, will wish to conduct new business operations within, between or among any of the signatory countries, now is the time to investigate the current transportation and transportation related legal regime in the target country or countries. The proposed operations to be carried out in the target country or countries must be clearly defined. Then the transportation regime of the target countries must be examined in detail to see if such operations are allowed. If such operations are not allowed, the necessary changes must be identified. But in order to change things, it is uniquely helpful first to understand the history behind the obstacle. It is important to understand the objective of the obstacle. Knowing these things can help in formulating arguments for changing the regime. It is also important fully to understand exactly how things need to be changed. This of course will entail consulting with local counsel who fully understand the transportation laws in the jurisdiction in question.

Once this is accomplished, U.S. carriers will have to work through the negotiators who are working on the transportation or service-related issues. Making them your ally is a key factor in getting anything accomplished. Working through the United States Ambassador in the target country can also be helpful, as the ambassador can often get investors in to see the right people in the country in order to conduct appropriate and effective lobbying efforts. Approaching the ministry in the target country, which is charged with regulating transportation can be helpful in both understanding fully the issues and perhaps in lobbying for certain changes, especially if that ministry is working closely with that country's FTAA negotiators.

The lesson that we learned from the NAFTA experience is that if a

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189. See FREE TRADE AREA OF THE AMERICAS, *Inventory of National Practices on Standards, Technical Regulations and Conformity Assessment in the Western Hemisphere*, available at [http://www.ftaa-alca.org/Wgroups/WGSTBT/Npract/english/TBT\\_TOC.asp](http://www.ftaa-alca.org/Wgroups/WGSTBT/Npract/english/TBT_TOC.asp) (last visited Nov. 5, 2004).

190. One of the authors was involved in the importation of used vehicles into Venezuela in 1990 and was successful in importing between 75-100 used vehicles. The Venezuelan Customs officials stopped the first shipment at the port, believing them to be new - they had received good programmed maintenance throughout their life, and were over five year old. The cars were then permitted entry. After nearly 100 vehicles were imported, the government adhered once again to the restrictions of the Andean Pact on the importation of vehicles, and no more used vehicles were permitted to enter Venezuela.

logistics or transportation company wants to do business in and throughout the FTAA that company should, in our view:

- Define clearly what it wants to do;
- Investigate the laws and regulations and business practices in the countries in which it wishes to conduct that activity;
- If there are restrictions, find out why they exist and what the objectives of those restrictions are;
- Prepare position papers for the U.S. negotiators explaining the state of the law in the target country, the reasons behind the law—historical, commercial or otherwise—and try to explain counter arguments the negotiators will encounter and try to come up with good reasons why your position makes sense. The position paper should also outline the regime in the U.S. that the U.S. carrier would like to emulate and the benefits of such a regime, along with statistical evidence of such benefits; and
- Lobby as much as possible and monitor the situation closely. If U.S. carriers have contacts in the foreign country, through either a law firm or even the U.S. embassy, they should also lobby with the negotiators on the other side, as Ryder did with the NAFTA.