NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision

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On June 7, 2004, the United States Supreme Court, in a unanimous decision, decided *Department of Transportation v. Public Citizen*.[1] The case concerned questions over whether the Department of Transportation ("DOT") erred in not conducting an environmental impact statement with regard to new regulations allowing Mexican trucks to cross beyond the current commercial zone border areas.[2] These environmental regulations were drawn up, in part to fulfill the U.S.'s obligation under North American Free Trade Act ("NAFTA"), an obligation that the NAFTA arbitration panel found the United States had violated in 2001.[3]

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1. 124 S. Ct. 2204 (2004).

2. *Id.*

3. *See* North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, art. 2001, 107 Stat. 2057, 32 I.L.M. 605 [hereinafter NAFTA]. The United States' blanket refusal to all any

Under the NAFTA, both sides were supposed to begin allowing cross-border trucking in December 1995 in the border states, and then by January 2000, open up cross-border trucking to the greater U.S. and Mexican states.[4] That did not happen on either side. But it was the Mexican government that filed for a NAFTA arbitration panel.[5] The issue of whether to allow Mexican trucks into the United States is not new; we've been debating and barring entry beyond the commercial zone for over twenty years.[6] But the reasons for the restriction have changed over the years. This article explores the strange road of trucks, in its many incarnations. This includes the pre-NAFTA history of trucks, the 2001 NAFTA arbitration decision, the congressional debate in the aftermath of the decision, and the 2003 Ninth Circuit case and its current incarnation as a Supreme Court decision, all of which are asking the question of whether and under what circumstances to allow Mexican cross-border trucking.

The story of cross-border trucks is a story that for years to come will be utilized in classrooms teaching international trade law and the NAFTA. When on February 6, 2001, a binational NAFTA arbitration panel delivered its decision, it marked the third country-to-country dispute, commonly referred to as a Chapter 20 case.[7] Brought by Mexico against the United States, the case involved two areas of violation: not allowing cross-border trucks to be processed for application of operating authority into the United States and denying Mexicans the ability to invest in cross-border trucking in the United States in any substantial manner.[8] The panel found that the United States had violated the agreement on both counts, but added a caveat regarding safety.[9]

Cross-border trucking issues become illustrative of several elements including politics, the process of international and domestic law, and the problem of sorting out rhetoric from fact.[10] At once, the details may seem overwhelming, the law straightforward, the certainty of safety impossible, and the politics insurmountable. But the cross-border trucking case shows the process of our current legal system today, from treaty-making to arbi-

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Mexican-owned carriers to enter the U.S. was found to be a violation of the NAFTA agreement. *See In re* Cross-Border Trucking Services (United States v. Mexico), No. USA-MEX-98-2008-01 (NAFTA Arbitral Panel, Feb. 6, 2001) [hereinafter NAFTA Panel Decision], *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub98010e.pdf.

4. Peter J. Cazamias, *The U.S.-Mexican Trucking Dispute, A Product of a Politicized Trade Agreement*, 33 TEX. INT'L L.J. 349, 349 (1998).

5. *See* NAFTA Panel Decision, *supra* note 3, at 1.

6. Memorandum of the President, Determination Under the Bus Regulatory Reform Act of 1982, 47 Fed. Reg. 41,721 (Sept. 22, 1982) [hereinafter Presidential Memorandum].

7. *See infra* Part I.

8. NAFTA Panel Decision, *supra* note 3, at 1.

9. *Id.* at 90-91.

10. *See infra* Part II.

tration panels, to congressional politics and budgeting, to executive orders, to the circuit courts, all the way up to the Supreme Court. We see the involvement of presidents, U.S. and Mexican, the Congress, special interest groups, such as trucking unions and trade experts, and now environmentalists. It gives us a sense of what impact one seemingly small element—trucks—has on our culture, laws, politics, and trade. That is the way trade works—tomatoes, corn, brooms suddenly take on a much bigger role than one would imagine.[11]

Cross-border trucking can be seen as very simple and straightforward or intensely complex and convoluted, filled with special interests, legitimate concerns, and rhetorical protectionist maneuvering on safety and the environment, and politics on a national and international scale. In regards to the organization of this paper, I have come to believe that we must first see the simple and then figure out how to deal with the complex issues that fall from the simple decisions. Part I looks at the basic issues of the NAFTA arbitration – what the questions of law were and what was argued by Mexico and the U.S. in the Chapter 20 case. Parts II, III, and IV look at the complex questions, relationships, and outcomes; this includes the pre-Panel and pre-NAFTA history of trucks, the U.S.'s response to the Panel decision in the form of congressional and executive debate on safety and infrastructure, as well as the recent environmental case concerned with the border impact of additional Mexican trucks now at the Supreme Court. Parts V and VI end with potential future roadblocks, and some questions, some answered, some posed for others to answer, on this simple and very complex topic of trucks and the border.

A final prefatory remark before beginning. I personally played a small and tedious role in this cross-border dispute. I was hired to help with the panel opinion, assisting the arbitrators to do all of the least glamorous work needed to prepare a final document of that size, including cite-checking, spell-checking, and other kinds of checking-related duties.[12] It actually was very exciting – to feel part of an international issue, however slight, to be contributing to peaceful workings out of differences between one country and another. This may seem idealistic, even naive. But at the time, I really believed that the dispute settlement process was something to be taken seriously, that the opinion would be read carefully, with an eye towards detail, and that the rulings on the law would make a

11. *See* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1057-82 (1999) (describing cases filed under the NAFTA and World Trade Organization ("WTO") dispute settlement processes, including cases involving tomatoes, high fructose corn syrup, and brooms.)

12. Other assistants included Martin Lau, Jorgé Ogarrio, Nancy Oretskin, Erica Rocush, and Elizabeth Townsend; *see* NAFTA Panel Decision, *supra* note 3, at n.24.

difference. It's not that I still do not hope for all of that, or that I would not work as hard given the same opportunity. But it no longer appears as simple as looking at the arguments in light of the law to determine what should happen.

I: Simple and Straightforward—NAFTA Violation

The NAFTA is pretty straightforward with regard to cross-border trucking. In Chapter 12, the U.S., Canada, and Mexico set out the parameters of cross-border services, including trucking, and in Annex I, the three countries agreed to phase-out times for restrictions and phase-in for free trade, i.e. allowing cross-border trucking.[13] When the first deadline passed and the U.S. refused to process pending applications from Mexican carriers, Mexico initiated a Chapter 20 case against the U.S. This section will first briefly explain the NAFTA, its arbitration process, and then look specifically at the issues and decisions of the Panel.

A. The North American Free Trade Agreement

The U.S., Canada, and Mexico entered into the NAFTA, which was signed by President Bush on December 17, 1992 and came into force on January 1, 1994, signaled a new era between the U.S. and Mexico.[14] The U.S. had already entered a similar agreement with Canada in 1988.[15] NAFTA was more ambitious, but nevertheless an extension of this endeavor. The objectives of the agreement, as outlined in Article 102(1), include eliminating barriers to trade through national treatment most-favored-nation treatment and transparency.[16] One area specifically targeted was the cross-border movement of goods and services between the U.S., Mexico, and Canada.[17]

Through the NAFTA, the U.S. and Mexico sought to patch up relations that had traditionally been protectionist at best.[18] The fact that Mexico was now reaching out to form an U.S.-Mexico, and eventually

13. NAFTA, *supra* note 3, at ch. 12, annex I.

14. Judith H. Bello & Alan F. Holmer, *The North American Free Trade Agreement: Its Major Provisions, Economic Benefits, and Overarching Implications*, *in* The North American Free Trade Agreement, A New Frontier in International Trade and Investment in the Americas 1, 1, 4 (Judith H. Bello et al. eds., 1994). The NAFTA Implementation Act of 1993 was passed by the House and Senate and then signed into law by President Clinton in 1993. *Id.* at 1.

15. United States - Canada Free-Trade Agreement, Jan. 2, 1988, 102 Stat. 1851, 27 I.L.M. 28. *See generally* U.S.-Canada Free Trade Agreement: The Complete Resource Guide (Bureau of Nat'l Affairs ed. 1988).

16. NAFTA, *supra* note 3, art. 102(1).

17. *Id.* at art. 102(1)(a).

18. Ralph H. Folsom, NAFTA and Free Trade In the Americas In a Nutshell 5 (2d ed. 1999).

Canadian, free trade agreement marked a remarkable change[19] since it was Mexico that historically had a phobia against foreigners in key areas.[20] Whole new infrastructures and legislation had to be passed in Mexico in order to meet NAFTA obligations, including privatization of key industries and banking.[21]

While the NAFTA is primarily an economic document, with the goal of the elimination of economic borders between the United States, Canada, and Mexico,[22] it is also an incredibly expansive agreement. As David Gantz noted,

> The NAFTA applies not only to trade in goods, specifically including automobiles, textiles, energy, and basic petrochemicals, but to customs procedures, agriculture, sanitary and phytosanitary measures, and safeguards and technical barriers to trade. The NAFTA contains special provisions on safeguards, government procurement, cross border trade, telecommunications and financial services. Foreign investment is protected, as are intellectual property rights; furthermore, there is limited coverage for competition policy and business travel.[23]

That said, the political, cultural, and social impact of these economic changes are always present.[24] The NAFTA sought to "lead to a more efficient use of North American resources—capital, land, labor, and technology—while heightening competitive market forces."[25] With over 80% of goods being transferred between Mexico and the U.S. by truck, part of making more efficient use of resources meant revising the existing trucking system where a trailer is currently transferred in the commercial zone, on the U.S. side, from a Mexican carrier to a U.S. carrier.[26] By opening

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19. *Id.* at 75.

20. Ewell E. Murphy, Jr. *Seeing NAFTA Through Three Lenses*, 23 CAN.-U.S. L.J. 73, 74 (1997).

21. *Id.* at 75-76.

22. FOLSOM, *supra* note 18, at 1.

23. Gantz, *supra* note 11, at 1033.

24. *See generally* Cazamias, *supra* note 4.

25. Dean C. Alexander, *The North American Free Trade Agreement: An Overview*, 11 INT'L TAX & BUS. LAW. 48, 48 (1993).

26. William J. Canary, Remarks at the U.S. Department of Transportation NAFTA Conference in San Antonio, Texas (May 31, 2002). As of 2001,

> [n]early $250 billion in trade moves across the border annually, a 191% increase in the decade following the signing of the North American Free Trade Agreement (NAFTA) .... By 2000, trucks were responsible for transporting an estimated 75% of the goods moved between the two nations. Five million trucks cross the U.S.-Mexican border each year.

Paul Stephen Dempsey, *Free Trade But Not Free Transport? The Mexican Stand-Off*, 30 DENV. J. OF INT'L L. & POL'Y 91, 91 (2001). *See also Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001; Alexandra Walker, *No Easy Solutions To Mexican Truck Safety Issues*, STATES NEWS SERV., Feb. 22, 2001; Eunice Moscoso, *The Wheels of Progress; U.S. Roadways Soon Will Be Open to Trucks*, AUSTIN AM. - STATESMAN, Mar. 25, 2001, at A1.

the border and granting reciprocal cross-border truck access, greater efficiency, and increased trade would occur when this transfer of the trailers would become unnecessary.[27]

B. The NAFTA Arbitration Process

> Probably the most contentious issues, from the U.S. standpoint, were related to dispute settlement. . . .
>
> Hermann von Berurab[28]

The NAFTA has built in dispute resolution mechanisms to resolve conflicts or competing interpretations. Six distinct dispute mechanisms exist within NAFTA, each one relying on a different ad hoc arbitration system.[29] Each government nominates potential arbitrators and panelists are theoretically chosen from these lists.[30] No permanent court, file clerks, or judges exist.[31] Each case brings a new set of arbitrators, specifically chosen for that case.[32] What is permanent, however, is the secretariat.[33] The NAFTA designates that each country will have a secretariat in their capital.[34] The secretariat under NAFTA has very limited functions, dealing only with the practicalities of setting up and running the ad hoc arbitration panels, tending to budgeting, and overseeing the procedural and logistical tasks for each of the arbitration mechanisms.[35] The dispute

27. Canary, *supra* note 26. At its tenth anniversary in 2003, officials reported that over $1.7 billion in NAFTA trade daily, a number that had doubled from $306 to $621 billion between the three countries. Office of the United States Trade Representative, *NAFTA at 10: A Success Story* (Dec. 1, 2003) *available at* www.ustr.gov (last visited Mar. 24, 2004). Another estimate indicated that 85% of the trade between Mexico and U.S. was conducted by land transportation. Cazamias, *supra* note 4, at 349 (citing Legislation to Approve the National Highway System and Ancillary Issues Relating to Highway and Transit Programs; 1995: Hearings Before the Subcomm. on Surface Transp. of the Comm. on Transp. and Infrastructure, 104th Cong. 914 (1995) (statement of Frederico Peña, Secretary of Transportation)).

28. Hermann von Berurab, Negotiating NAFTA: A Mexican Envoy's Account 67 (1997).

29. NAFTA, *supra* note 3, at chs. 11, 19, 20. For a discussion of these mechanisms see Patricia Isela Hansen, *Judicalization and Globalization in the North American Free Trade Agreement*, 38 Tex. Int'l L.J. 489, 489-90 (2003).

30. NAFTA, *supra* note 3, at art. 2009. To date, no pre-approved panelists have been chosen as arbitrators. *See* Hansen, *supra* note 29, at 491. In January 2002, the United States Trade Representative ("USTR") put out a call for applications for panelists for Chapter 20 cases. *See* North American Free Trade Agreement; Invitation for Applications for Inclusion on the Chapter Twenty Roster, 67 Fed. Reg. 3929-3930 (Jan. 28, 2002) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=20-02_register&docid=02-2032-filed (last visited Mar. 26, 2004).

31. *See* NAFTA, *supra* note 3, at art. 2011.

32. *Id.*

33. *Id.* at art. 2002.

34. NAFTA, *supra* note 3, at art. 2002(1).

35. *Id.* at art. 2002.

settlement process was constructed this way because of sovereignty issues.[36]

In all but Chapter 20 cases, private, non-governmental parties may file a case directly.[37] Chapter 20 cases are reserved for country-to-country disputes.[38] Chapter 20 is the mechanism to deal with interpretation of NAFTA between governments, interpreting NAFTA in light of terms of the NAFTA and international law.[39] So far, there have only been three Chapter 20 decisions.[40] The cross-border trucking case followed the procedures set by Chapter 20,[41] beginning with an effort for the parties to consult with each other, followed by conciliation before the Free Trade Commission, which consists of cabinet-level trade representatives from each of the three NAFTA countries.[42] If a satisfactory solution is not reached, an arbitration panel is set up.[43] Five arbitrators are chosen, two from each of the disputing countries, chosen by the opposite country, with the chair being independent.[44]

Mexico first contacted the United States Trade Representative in December 1995,[45] just after the announcement that despite the agreement to open, the border would remain closed to cross-border trucking beyond the commercial zone, and while the U.S. was accepting cross-border trucking applications for operating authority, the U.S. would *not* be processing them.[46] Talks between the U.S. and Mexico began in April 1996, with the U.S. expressing safety concerns.[47] Four months and *two years* later, in July 1998, Mexico formally requested a meeting of the Free

36. *See* Peter Behr, *What's at Stake as Vote Nears on NAFTA*, WASH. POST, Nov. 15, 1993, at A8.

37. *See* Francoy Raynauld, *Trade Dispute Settlement Procedures in the NAFTA*, at 9-11 (2004), *at* http://pdic.tamu.edu/flags/raynauld1.pdf.

38. *See id.*

39. *See id.*

40. *See In re* Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, No. CDA-95-2008-01 (NAFTA Arbitral Panel, Dec. 2, 1996); *In re* U.S. Safeguard Action Taken on Broom Corn Brooms From Mexico, No. USA-97-2008-01 (NAFTA Arbitral Panel, Jan. 30, 1998); *In re* Cross-Border Trucking Services (United States v. Mexico), No. USA-MEX-98-2008-01 (NAFTA Arbitral Panel, Feb. 6, 2001).

41. NAFTA Panel Decision, *supra* note 3, at 6.

42. Gantz, *supra* note 11, at 1030. The most recent commission meeting took place in October 2003 in Montreal. Press Release, Office of the United States Representative, NAFTA Commission Announces New Transparency Measures (Oct. 7, 2004), *available at* www.ustr.gov (last visited Mar. 24, 2004).

43. NAFTA, *supra* note 3, at art. 2008(1).

44. *Id.* at art. 2011. In the three Chapter 20 cases, of the fifteen arbitrators, ten have been law professors. Gantz, *supra* note 11, at 1041. Additionally, all three chairs have been citizens outside the NAFTA countries – from Britain and Australia.

45. NAFTA Panel Decision, *supra* note 3, at 6.

46. *See* Remarks by Pena, *infra* note 173.

47. Gantz, *supra* note 11, at 1065.

Trade Commission ("FTC").[48] In August 1998, the Commission convened to discuss the same dispute.[49] On August 19, 1998, the FTC, along with the parties failed to come to an agreement.[50] A month later on September 22, 1998, Mexico requested the formation of the arbitral panel.[51] The panel consisted of the British chair, J. Martin Hunter, Americans David A. Gantz, and C. Michael Hathaway, chosen by the Mexicans, and Mexicans Luis Miguel Diaz and Alejandro Ogarrio, chosen by the Americans.[52]

Once the arbitration panel was formed, the complaining party, Mexico, transmitted an initial submission, followed by an initial counter-submission from the opposing party, the United States.[53] This took place in the early part of 2000.[54] Then, a second round of submissions from each party took place in April 2000, followed by a hearing in May 2000.[55] Upon written notice, third parties can attend the hearings, make written and oral submissions to the panel, and receive written submissions of the disputing parties.[56] In the cross-border trucking case, Canada submitted its comments in February 2000, before the second round of written submissions.[57]

In terms of the process specified in Chapter 20, experts can be included, as long as the disputing Parties agree.[58] Scientific review boards may be established either by the Panel or at the request of a Party.[59] In the cross-border trucking case, the United States requested a scientific review, but the Panel rejected the request because they felt that the facts were clear that the U.S. and Mexico had different regulatory standards and that a scientific panel would not further aid the Panel in making their decision.[60]

After the Panel deliberates, an initial report is submitted to the parties for their comments, and then a final report is given to the parties, supposedly thirty days after the initial report.[61] What is most peculiar about the process is that, after all of this, the decision is not binding.[62]

48. NAFTA Panel Decision, *supra* note 3, at 6.
49. *Id.*
50. *Id.*
51. *Id.*
52. NAFTA Panel Decision, *supra* note 3, at 7.
53. *Id.*
54. *Id.*
55. *Id.* at 7-8.
56. NAFTA, *supra* note 3, at art. 2013.
57. NAFTA Panel Decision, *supra* note 3, at 7.
58. NAFTA, *supra* note 3, at art. 2014.
59. *Id.* at art. 2015.
60. NAFTA Panel Decision, *supra* note 3, at 53-54.
61. NAFTA, *supra* note 3, at arts. 2016, 2017.
62. *Id.* at art. 2018.

After the final report, the disputing parties are to agree upon the resolution of the dispute.[63] If the parties cannot agree, the winning party may impose trade sanctions thirty days after the final report.[64] So far, three years after the decision, Mexico has not imposed trade sanctions on the United States although the threat has arisen on occasion.[65]

C. The Chapter 20 Panel Decision

The Chapter 20 Panel decision can be seen as relatively straightforward, especially compared to the details in the debate afterwards. Those less familiar with the NAFTA might find it somewhat daunting, so we will proceed slowly. The case itself asked the question of whether the U.S. could exclude all Mexican trucks, even though it had been agreed upon in the NAFTA to open the U.S.-Mexican border in both directions to cross-border trucking, first among the border states, then the rest.[66] The case also asked whether the U.S. could bar Mexicans from investing in commercial transportation in the U.S.[67] The more technical language of the arguments surrounding Articles 1202, 1203, 1102, and 1103, as well as Annex I will be discussed below. The U.S. had violated its NAFTA obligations, said the Mexican government.[68] The only way to justify the delaying of the border opening, namely in Article 2101, chapter Nine, or if a different interpretation was determined by the Panel of the more technical language in Article 1202 (national treatment for cross-border services), Article 1203 (most favored nation treatment for cross-border services), Article 1102 (national treatment for investment), or Article 1103 (most favored nation treatment for investment).[69] This section will first look at the conclusion of the panel and then look at the arguments and issues put forth.

1. The Conclusions of the Panel Decision

The Panel unanimously concluded that the U.S. had violated its NAFTA obligations, that "in like circumstances" language did not give the U.S. reason to refuse to process Mexican cross-border trucking applications or allow investment in U.S. trucks,[70] and the differences in the two regulatory systems were no justification for keeping out Mexican

63. *Id.* This can include suspension of benefits. *Id.* at art. 2019.

64. *Id.* at art. 2019.

65. *See* Charles E. Wilson, *NAFTA Delays, Competition Issues Dominate Canacar Transport Meeting*, Refrigerated Transport, Aug 1, 2002, *at* http://refrigeratedtrans.com/ar/transportation_nafta_del-ays_competition_2/.

66. NAFTA Panel Decision, *supra* note 3, at 1.

67. *Id.*

68. *Id.*

69. *Id.*

70. NAFTA Panel Decision, *supra* note 3, at 90.

trucks.[71] The Panel therefore found that the U.S. was in breach of its Annex I obligations to allow Mexican cross-border trucks beyond the commercial zone and into the border states as of 1995, and then the rest of the United States for international cargo purposes beginning in 2000.[72] What should be read carefully is paragraph 298, which reads in its entirety:

> It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the Panel imposing a limitation on the application of safety standards properly established and applied pursuant to the applicable obligations of the Parties under NAFTA. Furthermore, since the issue before the Panel concerns the so-called "blanket" ban, the Panel expresses neither approval nor disapproval of past determinations by appropriate regulatory authorities relating to the safety of any individual truck operators, drivers or vehicles, as to which the Panel did not receive any submissions or evidence.[73]

The "level of protection" under "legitimate regulatory objectives" in the form of safety on U.S. highways and infrastructure at the border would come to dominate the discussion in Congress over 2001 and part of 2002. It would also touch upon the current Supreme Court case, which looks at the relationship of NAFTA to regulatory requirements of the Clean Air Act and National Environmental Policy Act ("NEPA") in relation to regulations promulgated by the Department of Transportation.[74] We will return to these topics further below, as part of the more complex and convoluted world of trucks. For now, what we should take away is that the U.S. was in violation of NAFTA, but the Panel was not imposing restrictions on legitimate regulatory schemes for safety, as long as those regulations did not violate NAFTA, as the "blanket" refusal had. The Panel ended with a set of recommendations which suggested that the U.S. comply with its NAFTA obligations; but to do so, they could ensure safety by implementing *different* standards for Mexican cross-border firms and trucks in order to make sure they comply with U.S. safety regulatory regimes.[75] This is significant in that it gives the U.S. extra "teeth" in order to demand more of the Mexican cross-border trucks in order to make sure they are meeting U.S. standards. So while the Panel decision could be seen as a victory for Mexico, in that the Panel agreed that the

71. *Id.*
72. *Id.*
73. *Id.* at 90-91.
74. Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204, 2209 (2004).
75. NAFTA Panel Decision, *supra* note 3, at 91.

U.S. had violated its NAFTA commitments, it could also be seen as a victory for the U.S., where the U.S. was given direction on how to implement further safety mechanisms in the face of differing regulatory practices between the two countries. How exactly the Panel reached this decision is the subject of the next sections.

a. Basic Argument of the Parties

Mexico's basic argument was that a blanket refusal of all applications was in violation of NAFTA. They merely wanted the opportunity for their carriers to be evaluated on a case-by-case basis on whether they met the U.S. standards for operation.[76] The United States responded that Mexico's regulatory system was far inferior, and that the language of NAFTA, particularly "in like circumstances," meant that the U.S. could keep out Mexican trucks because of safety concerns until Mexico's regulatory system met the same standards as the U.S. and Canadian trucks and regulatory trucking system.[77] Rather than spend a great deal of time on each of their arguments and supporting materials, let us turn to the details of Panel decision and look at the parties positions on the issues along the way.

b. Language and Interpretation

The Panel decision focused a great deal on interpretation of language and, in particular, the term "in like circumstances" found in Chapter Twelve of the NAFTA. The Panel prefaced its analysis with a discussion of the interpretation of the language in the NAFTA.[78] Relying on international law and the preamble of the NAFTA, the Panel asserted that the language of the agreement should be interpreted in accordance with the ordinary meaning of the words in combination with meanings that furthered the goals of the agreement, that is, the liberalization of trade.[79]

c. Annex I Obligations

Annex I is the schedule by which the NAFTA parties phase-out more protectionist arenas under certain, specific phase-out time periods in an effort to further liberalize trade.[80] Mexico contended that the U.S. did not meet its obligations to allow cross-border trucking, as described in the phase-out section of Annex I.[81] The United States, in response, inter-

76. *Id.* at 1-2.
77. *Id.* at 2-3.
78. NAFTA Panel Decision, *supra* note 3, at 55-60.
79. *Id.* at 56.
80. NAFTA, *supra* note 3, at annex I.
81. NAFTA Panel Decision, *supra* note 3, at 60.

preted the language of Annex I to be more of a suggestion that did not actually obligate the U.S. in any way.[82]

The Panel first looked to the language of a Note attached to the Annex that the drafters included for help with interpretation.[83] The Panel concluded that nothing in the Annex itself, the Note, or the NAFTA left the language ambiguous or conditional, as the United States had argued, and in fact, the phase-out schedules in Annex I were unconditional.[84] The United States had not made their case that the Annex I language made processing cross-border trucking cases merely an option.

d. Chapter Twelve - Services

The Panel next turned to Chapter Twelve of the NAFTA, the services section under which cross-border trucking resides. It was the heart of the argument for both Mexico and the United States. Mexico contended that the United States had violated its 1202, national treatment, and 1203, most-favored-nation, duties under the NAFTA.[85] The United States contended that the language of "in like circumstances" allowed the U.S. to deny access to Mexican cross-border trucking because the regulatory systems of the two countries were not in "in like circumstances."[86] Canada weighed in, siding with Mexico, and "insisting that the major issue in interpreting Article 1202 is a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically."[87] Canada also believed the "blanket" refusal to process Mexican cross-border trucking applications "would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances."[88] The following section will delve into understanding just what all of this means and how the Panel decided that the U.S.'s interpretation was not justification for denying Mexican cross-border trucking applications on a "blanket" basis. For this is the issue of the case: whether the U.S.'s denial of Mexican cross-border carriers "*as a group* is consistent with the applicable NAFTA obligations of the United States."[89] The Panel found the U.S. denial of border crossing not to be consistent with NAFTA obligations.[90]

82. *Id.* at 61.
83. *Id.*
84. *Id.* at 66-67.
85. NAFTA Panel Decision, *supra* note 3, at 69.
86. *Id.*
87. *Id.* at 70.
88. *Id.*
89. NAFTA Panel Decision, *supra* note 3, at 71.
90. *Id.* at 72-74.

The two basic issues were first whether the United States was providing national treatment as required by Article 1202 to the Mexican cross-border truckers.[91] This trade concept means that the United States is supposed to treat foreign companies equal to national trucking companies.[92] The other issue is most-favored nation treatment, found in Article 1203, which means the United States must treat Canada and Mexico the same, not preferencing one over the other.[93] The phrase in question is "in like circumstances" found in both 1202 and 1203. Article 1202 provides in pertinent part: "each Party [shall] accord to service providers of another Party treatment that is no less favorable than it accords, in like circumstances, to its own service providers."[94] Similarly, Article 1203 states "[e]ach party shall accord to service providers of another Party treatment no less favorable than it accords, *in like circumstances*, to service providers of any other Party or of a non-Party."[95]

It was the Panel's job to interpret the language of "in like circumstances" by looking to NAFTA and other related case law and related treaty and international law. While it applied to both national treatment and most favored nation treatment, the Panel focused its discussion on the former. Since they found the U.S. had violated the national treatment "in like circumstances" language, they did not find it necessary to delve into the most favored nation treatment.[96]

In analyzing "like circumstances" under national treatment, the Panel took a number of steps. First, they looked at the Free Trade Agreement ("FTA") between the U.S. and Canada, a precursor to NAFTA, and a treaty that used much of the same language.[97] That, along with language in the General Agreement on Tariffs and Trade ("GATT"), helped the Panel determine that treatment does not necessarily have to be identical.[98] The Panel then had to determine what was meant by "service provider."[99] The Panel found that while the United States was allowing some Mexican trucks not subject to the moratorium to continue to operate, they were providing less favorable treatment to those applying for operating authority under NAFTA.[100] The Panel concluded that by continuing the moratorium passed the Annex I deadline of December 17, 1995, the United States was committing a *de jure* violation of the national treat-

91. *Id.* at 71-72.
92. NAFTA, *supra* note 3, at art. 1202.
93. NAFTA Panel Decision, *supra* note 3, at 72.
94. *Id.*
95. NAFTA, *supra* note 3, at art. 1202 (emphasis added).
96. NAFTA Panel Decision, *supra* note 3, at 76.
97. *Id.* at 73.
98. *Id.* at 74.
99. NAFTA Panel Decision, *supra* note 3, at 76.
100. *Id.* at 75-76.

ment requirement, because Mexican cross-border carriers applying for operating authority were subject to less than favorable treatment to domestic carriers.[101] The Panel dismissed the idea that the two regulatory systems had to be identical in order to qualify for national treatment or most-favored-nation.[102]

e. Article 2101

One argument that the U.S. put forth was that they could exclude Mexican cross-border trucks from the United States because of safety concerns, relying on Article 2101 of the NAFTA.[103] Article 2101(2) gives a Party the flexibility of requiring additional measures *necessary* in order for the compliance of regulations of laws in the Party's country.[104] The language the Panel had to define was the term "necessary."[105] The Panel looked to GATT language and cases for advice.[106] The Panel noted that the "necessary" language had previously been interpreted strictly and that the U.S. itself has supported in the past a strict interpretation.[107] The Panel concluded

> The Panel is generally in agreement with Mexico that, consistent with the GATT/WTO history and the text of Article 2101, in order for the U.S. moratorium on processing of Mexican applications for operating authority to be NAFTA-legal, any moratorium must secure compliance with some other law or regulation that does not discriminate; be necessary to secure compliance; and must not be arbitrary or unjustifiable discrimination or a disguised restriction on trade.[108]

The United States did not meet the *necessary* requirement.[109] The Panel continued

> the United States has failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements than the moratorium. In fact, the application and use of exceptions would appear to demonstrate the existence of less-restrictive alternatives.[110]

f. Chapter Nine

The Panel then turned to Chapter Nine of the NAFTA. The United

101. *Id.* at 76-77.
102. *Id.*
103. *Id.* at 69.
104. NAFTA, *supra* note 3, at art. 2101(2).
105. NAFTA Panel Decision, *supra* note 3, at 78.
106. *Id.*
107. *Id.*
108. *Id.* at 80.
109. *Id.*
110. NAFTA Panel Decision, *supra* note 3, at 80.

States had not argued the moratorium as a Chapter Nine exception, but both Canada and Mexico had made arguments that Chapter Nine did not apply.[111] Chapter Nine pertains to "legitimate objectives of safety or the protection of human life or health" and in part relates specifically to the Land Transportation Standards Committee.[112] The Panel explained,

> Thus under Article 904, the United States has the right to set a level of protection relating to safety concerns, through the adoption of standards-related measures, notwithstanding any other provision of *this Chapter*, and provided only that this is done consistently with Article 907.2, which establishes a permissive (i.e. not mandatory) assessment of risk, and encourages Parties to avoid arbitrary or unjustifiable distinctions between similar goods or services, in the level of protection a Party considers.[113]

The United States, however, would have still had to meet the national treatment and most-favored-nation requirements.[114]

g. Investment

While investment was also part of this case, the focus has been primarily on the application process. The original moratorium keeping Mexican trucks out of the U.S. since the 1980s applied to investment in U.S. trucking companies by Mexican nationals.[115] These restrictions were supposed to have been phased out as well.[116] Mexico contended that the U.S. was violating the national treatment, most favored nation treatment, and standard of treatment clauses of the NAFTA.[117] The United States' response was weak. The U.S. said there was no evidence that there was any interest in Mexican nationals investing in the U.S. trucking industry, that it had been the U.S. that had been interested in this aspect during the negotiations, and, that if anything, Mexican investors had more worries over U.S. investors in Mexico.[118] The panel found in favor of Mexico.[119]

II: The Convoluted World Surrounding Trucks

Safety is one of many factors that make trucks more complex, both in determining what is safe or *necessary* to make the opening of the border safe as well as sifting rhetoric from reality. This section looks at the truck debate from myriad angles.

111. *Id.* at 81.
112. *Id.*
113. *Id.*
114. NAFTA Panel Decision, *supra* note 3, at 81.
115. *Id.* at 83.
116. *Id.*
117. *Id.* at 85.
118. NAFTA Panel Decision, *supra* note 3, at 85.
119. *Id.* at 90.

A. Before NAFTA

Cross-border trucking as an issue was a point of contention between the United States and Mexico long before NAFTA.[120] In many ways, the cross-border trucking issue illustrates the difficulty and long-standing tensions between the two countries, and how NAFTA seeks to eliminate these problems. Historically, Mexico and the United States have been "confrontational and protectionist" when it comes to trade.[121] The cross-border trucking issue illustrates this history. In this author's opinion, the dispute started as a protectionist stance on the part of Mexico, which has now escalated to a still protectionist stance on the part of the U.S., backed by the Teamsters and combined with real and political concerns over first safety and supposed now concerns over the environment. In many ways, this evolution demonstrates that new mechanisms are necessary to achieve old results in the face of the NAFTA. Yet, at the same time, the pressures of the NAFTA continue to attempt to erode old antagonisms for the economic benefit of both countries. The pre-history before the Chapter 20 Cross-border case will give some sense of this in the example of trucks.

The United States, while in high profile over their unwillingness to let in Mexican trucks, was not alone. Mexico refused to allow U.S. trucks into Mexico.[122] And it was Mexico that first put that prohibition in place long before NAFTA. Before 1980, the United States, through the Interstate Commerce Commission allowed carriers to cross the border, without distinguishing between U.S., Canadian, or Mexican applicants.[123] This was not an open border policy. Rather, carriers had to economically justify each route of service before being approved, an actually rather restrictive mechanism causing a carrier great time and expense.[124] Then, in 1980, the United States passed the Motor Carrier Act, which deregulated the trucking industry.[125] Trucking changed dramatically, opening U.S. trucks to competition from both Mexico and Canada.[126] Mexico, however, did not reciprocate; its border remained closed to U.S. trucking companies.[127]

Two years after the Motor Carrier Act, the Bus Regulatory Reform

120. *See* Folsom, *supra* note 18, at 4-7.

121. *Id.* at 5.

122. Dempsey, *supra* note 26, at 93.

123. *See* Kenneth R. Hoffman, *United State Operations of Mexican Motor Carriers*, 6 Newsl. of the Int'l L. Sec., State of Tex. 61 (Apr. 1990) (on file with author) [hereinafter *Operations of Mexican Motor Carriers*].

124. *Id.* at 61.

125. 49 U.S.C. § 10101 (Supp. 1989).

126. *See Operations of Mexican Motor Carriers*, *supra* note 123, at 61.

127. *Id.* at 61.

Act of 1982, ended the one way flow by preventing carriers from coming into the United States if the originating country did not allow U.S. trucks reciprocal access.[128] The moratorium was supposed to be part of effort to negotiate with Mexico "a fair and equitable resolution."[129] Over twenty years later, the standoff remained steadfast and unchanged, although the rhetoric now concerns safety, illegal immigration, the environment, illegal drugs, insurance liability issues, and focuses solely on the U.S. disallowing Mexican trucks across the border. Interestingly, however, Presidential Reagan's Memorandum from September 20, 1982 clearly sets out that the differences were one of market access.[130] The rhetoric and concerns of safety would not be utilized until over a decade later.[131] The original moratorium also applied to Canada, but Canada allowed U.S. trucks into Canada, and so the moratorium was lifted.[132] The moratorium continued against Mexico until very recently when President George W. Bush ended the moratorium on November 27, 2002.[133]

The rhetoric, however, focuses on the U.S.'s violation of the NAFTA and not of Mexico's. President Fox even went so far as to say that if Mexican trucks were not allowed into the U.S. then Mexico would not allow U.S. trucks to cross the border.[134] So, in many ways, the Panel opinion of February 6, 2001, tells only part of the story.[135] For we must remember that just as Mexican trucking companies were supposed to have access to the four border states of Arizona, California, New Mexico, and Texas in the United States after December 18, 1995,[136] so too were the United States trucking companies supposed to have access to the six northern Mexican border states of Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas,[137] and by January 1, 2000, both Mexican and U.S. trucks were supposed to be able to carry international cargo

128. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261 § 6(g), 96 Stat. 1103.

129. Presidential Memorandum, *supra* note 6.

130. *Id.*

131. *See* NAFTA Panel Decision, *supra* note 3, at 10.

> The purpose of the moratorium was to encourage Mexico and Canada to lift their restrictions on market access for U.S. firms. Therefore, the U.S. Congress imposed a two-year initial moratorium on foreign carriers, which could be removed or modified by the President if such action was in accord with the national interest, if the foreign country began providing reciprocal access.

Id.

132. Presidential Memorandum, *supra* note 6.

133. Steven Greenhouse, *Mexican Trucks Allowed to Haul All Over U.S.*, NY TIMES, Nov. 28, 2002, *available at* http://www.nytimes.com/2002/11/28/politics/28TRUC.html (last visited Aug. 24, 2004).

134. *See Fox Calls on U.S. to Implement Truck Decision, Cut AG Subsidies*, INSIDE U.S. TRADE, Sept. 14, 2001.

135. *See generally* NAFTA Panel Decision, *supra* note 3.

136. NAFTA, *supra* note 3, at annex I-United States, I-U-21.

137. *Id.* at annex I-Mexico, I-M-69.

from any point in the United States to any point in Mexico.[138] The U.S. did not bring this up as a defense in the case, but instead turned to issues of safety and different regulatory systems as the reason for keeping out Mexican trucks.[139] The U.S. did, however, try to consolidate the case against Mexico's not opening the border to U.S. trucks with the Mexican case.[140] Mexico initially declined.[141] In December 1999, three months into the arbitration case, the U.S. requested a meeting with Mexico; in January 2000, they failed to come to agreement on combining the two cases into a single panel.[142] The next month, the U.S. requested a formal meeting of the Federal Trade Commission, again, to see if the two issues could be consolidated into one issue.[143] The U.S., however, had never requested a panel on this issue, and neither side pursued it further with the Panel.[144] Nor, did either side bring up the related cross-border bus access, which is also an issue between the two sides.[145]

B. The Commercial Zone—A Workable, Practical Solution

While the moratorium continued, both sides worked out practical solutions. U.S. trucks are *de facto* allowed into Mexico in the border area without legal permits,[146] and the Mexican trucks are legally allowed to operate in the U.S. commercial border zone.[147] Interestingly, in 1994, Mexico signed an agreement with Canada, allowing Canadian trucks to obtain a permit into a 20 kilometre border area in Mexico for the purpose of loading and unloading goods, or inter-changing trailers.[148] While a similar agreement between the U.S. and Mexico was also negotiated, the agreement was never signed.[149] On the U.S. side, in 1985, the Interstate Commerce Commission began allowing Mexican trucks in limited areas at the border known as the commercial zone.[150] The size of commercial

138. Kenneth R. Hoffman, *Truck Transportation Service Between the United States and Mexico under NAFTA, presented to The United States-Mexico Chamber of Commerce Southwest Chapter,* NAFTA Survival Guide For Transp. & Customs Issues, Dec. 11-12, 1995. [hereinafter *Truck Transportation*].

139. *See* NAFTA Panel Decision, *supra* note 3, at 69.

140. *Id.* at 6-7.

141. *Id.* at 7.

142. NAFTA Panel Decision, *supra* note 3, at 6-7.

143. *Id.* at 7.

144. *Id.*

145. *Id.*

146. *Truck Transportation*, *supra* note 138, at 1 (For U.S. trucks operating in Mexico, the distance they travel is usually less than 20-25 kilometres. Mexican law, however, does allow the maquilladoras to operate their own trucking operations by non-Mexicans.).

147. *See* Motor Carrier Safety Act of 1984, Pub. L. No. 98-554, § 226, 98 Stat. 2848.

148. *Truck Transportation*, *supra* note 138, at 2.

149. *Id.*

150. Motor Carrier Safety Act of 1984, § 226.

zone depends upon the size of municipality, with larger towns having larger commercial zones.[151] Most of the commercial zones have a radius of two to twenty miles, although some have been expanded beyond their previous regulatory boundaries by Congress.[152] The commercial zone continues today.

Most of these Mexican trucks haul only short-distances within the border zone and tend to be older trucks not suitable for use for long-haul services.[153] These trucks had to comply with safety regulations and go through an application process, although on-site compliance review requirements do not apply to the carriers based in Mexico.[154] As of 1999, "8,400 Mexican firms had authority to operate in the commercial zones."[155]

Short-haul drayage trucks were not the only exception to the moratorium. Mexican trucks traveling to Canada by way of the United States were also exempted, because the U.S. Department of Transportation does not have jurisdiction over these trucks, and it was this department who regulated the moratorium.[156] In 1999, there was only one Mexican trucking firm operating within this category.[157] Additionally, five Mexican carriers who had already acquired operating authority prior to the 1982 moratorium were allowed to continue crossing the border,[158] and roughly 160 carriers U.S.-owned Mexican-domiciled trucks were exempt from the restrictions of the moratorium.[159] From 1982 to 1999 a fourth exception existed: Mexican trucks leased to U.S. companies were exempt from the Moratorium.[160] But this exception ended with the Motor Carrier Safety Improvement Act of 1999.[161] Finally, "Mexican owned and domiciled motor carriers that transport passengers in international charter or tour bus operations are also subject to an exception that began in

151. 49 C.F.R. § 372.241 (2004).

152. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 4031, 112 Stat. 107 (1998); 49 C.F.R. § 372.237 (2004).

153. NAFTA Panel Decision, *supra* note 3, at 12 ("Mexico submitted that the comparatively poorer condition of the Mexican drayage trucks cannot be taken as an indicator for the condition of Mexican long-haul trucks.").

154. *Id.*

155. *Id.*

156. NAFTA Panel Decision, *supra* note 3, at 12 (citing 49 U.S.C. § 13501 (2004)).

157. *Id.* at 13.

158. *Id.*

159. NAFTA Panel Decision, *supra* note 3, at 3.

160. *Id.*

161. *Id.* at 13-14 ("[I]t was realized that 'this provision could be used to, in essence, sell U.S. carrier's operating authority to a Mexican carrier for operations beyond the commercial zone.' Section 219 of the Motor Carrier Safety Improvement Act of 1999 ended the leasing exception.").

1994."[162]

C. NAFTA Anticipated Changes

In anticipation of the NAFTA passage in the Senate in 1993, the Washington Post reported basic elements of the agreement, including elements regarding trucks: "After a phase-in period, U.S. and Mexican truckers could travel freely in each other's countries; there are no such restrictions on U.S. and Canadian truckers. Mexican trucks would have to comply with U.S. safety rules and vice versa."[163] Interestingly, this would be the exact same conclusion a panel would find when faced with the cross-border trucking issue seven years later.[164] A simple statement reported in the Washington Post or a binational arbitration Panel - the result remains the same. The issues in the case were always clear cut.

What made it less clear was how to implement proper safety requirements. It was recognized from the beginning that Mexico, the U.S., and Canada had different safety standards, and probably more important, Mexico had less effective enforcement mechanisms.[165] Mexico would argue that they wanted to be allowed to meet U.S. standards, but the U.S. would question how to ensure that Mexican trucks were complying with U.S. safety standards.[166] NAFTA negotiators were aware of the differences between the U.S. and Mexican safety systems.[167] The NAFTA drafters included under Article 913(5)(a)(i) the creation of a Land Transportation Standards Subcommittee, which was charged with implementing a program to make trucking standards compatible between U.S., Canada, and Mexico.[168] Their efforts focused on non-medical standards, medical standards, vehicle standards, and road sign standards; these were

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162. *Id.* at 11.

163. Behr, *supra* note 36, at A8.

164. NAFTA Panel Decision, *supra* note 3, at 91.

165. *Id.* at 37.

166. *See id.* at 37-39.

167. *Id.* at 37-38.

168. *Id.* at 15.

> Under Annex 913.5.a-1, different deadlines, all based on *the date of entry into force* of NAFTA, were assigned for different tasks: (1) no later than a year-and-a-half for "non-medical standards-related measures respecting drivers, including measures relating to the age of and language used by the drivers;" (2) no later than two-and-one-half years for medical standards-related measures for drivers; (3) no later than three years for "standards-related measures respecting vehicles, including measures relating to weights and dimensions, tires, brakes, parts, and accessories, securement of cargo, maintenance and repair, inspections, and emissions and environmental pollution levels;" (4) no later than three years for standards-related measures respecting each Party's supervision of motor carriers' safety compliance, and (5) no later than three years for standards-related measures respecting road signs.

Id.

to go into effect at different times.[169] But, the deadlines for making the standards compatible was set after the deadline for allowing cross-border trucking services in the border states, so that access was not conditioned on the standards already being compatible.[170] In their first two years—1993-1995, the Land Transportation Standards Subcommittee accomplished a number of tasks, including an agreement between the U.S., Canada, and Mexico on performing uniform truck inspections, standards for commercial drivers' licenses,[171] and the forming of a new tri-national Border Clearance Planning and Deployment Committee to look at ways to expedite traffic and improve procedures at the border.[172]

As part of this effort, officials from the U.S. border states and Mexican border states met, along with the Commercial Vehicle Safety Alliance and the International Association of Police Chiefs ("IAPC").[173] There, the IAPC developed a "10-point strategy for conducting motor carrier safety and weight enforcement along the border."[174] Centers like the National Law Center for Inter-American Free Trade Center gathered to discuss creating standards among bills of lading, a uniform liability system, and other customary law elements of trucking to make cross-border trucking a smother transition.[175] All of this happened in anticipation of the border opening to cross-border traffic in the border states. U.S. Secretary of Transportation Secretary Peña met with Mexican Minister of Transportation and Communication Emilio Gamboa at a North American Transportation Summit on April 29, 1994, resulting in the Memorandum of Understanding ("MOU") regarding coordination, cooperation, and a plan for preparedness on the state, federal, and international levels for both sides, and agreed, *inter alia*, on standardization regarding hazardous materials and access for U.S. truckers to northern Mexican border terminals and facilities.[176]

But even before the implementation of the NAFTA, an U.S.-Mexico Border Transportation Working Group was formed, which among other things looked at ways to standardize vehicles' safety, weight, size, and deal with the logistics of the trucks themselves.[177] One of their accom-

169. NAFTA Panel Decision, *supra* note 3, at 15.

170. *See id.*

171. *Id.* at 16.

172. Secretary of Transportation Federico Peña, Remarks prepared for Delivery at the NAFTA Border Opening (Dec. 18, 1995) [hereinafter Remarks by Peña] (on file with author).

173. NAFTA Panel Decision, *supra* note 3, at 15.

174. Remarks by Peña, *supra* note 172, at 2.

175. Michael B. Berzon, *Breaking the Impasse on North American B/L (Bill of Lading)*, AM. SHIPPER, Sept. 1, 1996, at 20.

176. *See NAFTA Transportation Summit Yields Accords*, MEX. BUS. MONTHLY, June 1, 1994, at 19.

177. Letter from Nancy K McRae, U.S. Department of Transportation, Chief, Maritime and

plishments appeared to have been to allow the maquiladora companies "to obtain permits for private carriage to transport their inputs and final products."[178] Uniform guidelines for roadside inspection and commercial driver's license were agreed upon, as well as "common standards on such criteria as knowledge and skills testing, disqualification, and physical requirements for drivers."[179]

As part of this new effort, the border states began building new infrastructure to accommodate the anticipated influx of traffic.[180] For example, California had already "invested $30 million to construct two facilities for inspecting and weighing trucks from Mexico,"[181] and Texas hired over 100 new "motor carrier enforcement officials" to conduct anticipated inspections at the border.[182] The U.S. provided training to Mexican officials on roadside inspections and hazardous material inspections, and a campaign was begun to make Mexican companies aware of the U.S. safety requirements.[183] In addition, the DOT gave the border states $2 million in 1994 and 1995 for inspections, with an additional $1 million promised for 1997.[184] Mexico had also pledge money from its World Bank loans to improve border infrastructure.[185]

In the Fall of 1995, every sign led to the belief that the first phase of the border opening to cross-border trucks would be in place by the deadline of December, 18, 1995. On September 5, 1995, U.S. Secretary of Transportation Peña issued a press release which proposed measures for a safe and smooth NAFTA transition, including comprehensive safety compliance and enforcement strategies for the border states and a broad educational campaign for the three NAFTA countries.[186] Proposed regu-

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Service Division and Head of Delegation, to all interested parties (Feb. 20, 1990) (including conclusions from fourth meeting of the border transportation work group) (on file with author).

178. *Id.*

179. NAFTA Panel Decision, *supra* note 3, at 16.

180. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, COMMERCIAL TRUCKING; SAFETY AND INFRASTRUCTURE ISSUES UNDER THE NAFTA 5 (1996).

181. *Id.*

182. Remarks by Peña, *supra* note 172, at 2. *See also* Cazamias, *supra* note 4, at 352 (citing Helene Cooper, *Shift Into Reverse: Ban on Mexican Trucks in U.S. Interior Shows Rise of Protectionism*, WALL ST. J., Feb. 5, 1996, at A9).

183. NAFTA Panel Decision, *supra* note 3, at 16.

184. Cazamias, *supra* note 4, at 352 (citing David Barnes, *Safety Sieve?*, TRAFFIC WORLD, Aug. 19, 1996, at 13).

185. Cazamias, *supra* note 4, at 352.

186. NAFTA Panel Decision, *supra* note 3, at 16:

The press release stated, *inter alia*, that

> - a team of state officials from the four U.S. border states and federal agencies was to be established with responsibilities for issues relating to the implementation of NAFTA's transportation provisions. The team was to meet through December 17, 1995, and beyond to 'ensure that operations will be as safe and efficient as possible.'
> - a joint federal-state comprehensive safety compliance and enforcement strategy appli-

lations were published on October 18, 1995 and December 18, 1995 in the Federal Register to implement the cross-border trucking provisions of NAFTA.[187] The procedures for obtaining authority to provide service between Mexico and the border states were to be identical to those in place for applicants from the United States and Canada, except that the application form for Mexican carriers was designated OP-1MX.[188]

On December 4, 1995, Secretary Peña stated in a joint Mexico-U.S. press conference that both countries were ready for the opening of the borders on December 18, 1995.[189] It was between December 4, 1995 and December 18, 1995 however that the story took a highly political turn and at the center of this turn was the Teamsters.

D. The Teamster's Response

On December 12, 1995, thirty-two coalitions sent a letter to President Clinton urging him to delay implementation of the NAFTA opening of the border to Mexican trucks.[190] Printed on the International Brotherhood of Teamsters letterhead, the letter contended that the differences between U.S. and Mexican commercial trucks and truck drivers pose a serious highway safety threat to U.S. citizens.[191] Among their concerns were that Mexican trucks were older, heavier, poorly maintained, and that "Mexican drivers were not required to receive special training in the transport of hazardous material."[192] They also stated that Mexican drivers had no limits on the number of hours they could work, leading to increased accidents on U.S. highways, and that the safety records of Mexican drivers were "not computerized and available to U.S. law enforcement officials."[193] The letter was signed an interesting mix of groups including the United Methodist Board of Church and Society and, strangely, the American Society for Prevention for Cruelty.[194] However, most of the signees were other union organizations, including International President of United Food and Commercial Workers, Texas AFL-

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cable to border states was to be implemented, designed to address problems that may arise as a result of increased number of trucks engaged in cross-border operations;
- a broad educational campaign was to be launched with the objective of disseminating information on motor carrier operating requirements in the United States, Mexico and Canada.

Id.

187. *Id.*

188. *Id.* at 16-17.

189. *Id.* at 17.

190. *Id.* at 18.

191. Letter from International Brotherhood of Teamsters to Bill Clinton, President of the United States, Dec. 12, 1995 (on file with author).

192. *Id.*

193. *Id.*

194. *Id.*

CIO, and the International Brotherhood of Electrical Workers.[195] An additional category of organizations with titles such as "Advocates for Highway Safety," and "Parents Against Tired Truckers" also signed.[196] A similar letter, with much of the same wording, was sent by Congress to the White House as well.[197] The letter was effective, but it was not the Teamsters' only effort. On December 15, 1995 – three days before the NAFTA deadline of December 18, 1995, the Teamsters filed a legal challenge against the Interstate Commerce Commission; their attempt to stop the border from opening would fail.[198] But, their supposed safety concerns would prevail.

Secretary Peña issued a second press release three days later and two weeks after his previously positive announcement – on the day the first installment of the border was to be opened for applications for operating authority to Mexican trucks –.[199] It was an odd press release. It feels as if it was written with the excitement of the border opening talking about all the programs that have been put in place and the accomplishments for opening the border. Then, an odd paragraph is stuck in. First, Secretary Peña reminisced about his own experiences as a product of the border and then turns to safety: "So, I know we've had safety problems in the past. I've seen trucks with inadequate brakes and worn ties that shouldn't be anywhere near a highway."[200] After three pages of comments on the myriad efforts regarding safety, Peña announced that applications for foreign motor carriers would be accepted, but *not finalized for approval.*[201] The border would remain closed and the moratorium would continue to be in effect.[202]

The next day Mexico started the process to bring a NAFTA case against the United States.[203] The rhetoric had changed. The U.S., once

195. *Id.*

196. *Id.*

197. Letter from the House of Representatives to Bill Clinton, President of the United States, Dec. 14, 1995 (on file with author).

198. NAFTA Panel Decision, *supra* note 3, at 18 ("The case was briefed and argued by the parties in 1996 and then held in abeyance by the court pending a decision by the United States to implement NAFTA's cross-border trucking service provisions.").

199. *Id.*

200. Remarks by Peña, *supra* note 172, at 2.

201. *Id.*

202. *Id.* The same press release also stated that Mexican individuals would be allowed to invest in U.S. carriers engaged in international commerce. However, the DOT maintained a complete ban on Mexican nationals owning or controlling U.S. cargo and passenger motor carrier service providers because each application requires that the applicant certify that it is not a Mexican national and that the carriers are not owned or controlled by Mexican nationals. Therefore, any application indicating Mexican ownership would not be approved, banning Mexican investment in the U.S. carriers. *See* NAFTA Panel Decision, *supra* note 3, at 18-19.

203. *See* NAFTA Panel Decision, *supra* note 3, at 6.

wanting Mexico to open its border to U.S. trucks, now forbid entry of Mexican trucks because of safety. Mexico, who had for more than twenty years had refused entry of U.S. trucks, argued that the U.S. violated the NAFTA national treatment and most-favored nation treatment obligations by refusing to let all Mexican trucks into the U.S.[204] The rhetoric continues to this day along those lines with the Republicans adopting the Mexican's view of the U.S. need to meet the NAFTA requirements and the Democrats focused on safety and infrastructure concerns.[205] The Teamsters and other groups continued to play an active role. So, in many ways, the Panel opinion of February 6, 2001 tells only part of the story. Many see the cross-border trucking case as illustrative of the power of the Teamsters and its 1.4 million members.[206] Teamsters' concerns are obvious from their posters: they are concerned about losing jobs to lower-wage Mexican workers.[207] But they have also very effectively used safety to keep the border closed. Other citizen and environmental groups have joined in, including Public Citizen and Citizens for Reliable and Safe Highways ("C.R.A.S.H.").[208]

In Mexico's argument before the NAFTA Panel, they cited political interest from groups like the Teamsters as influencing and motivating U.S. actions to keep from processing operating applications.[209] The United States responded that while political interests might influence their actions, they were not determinative.[210] The Panel "decline[d] to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking and investment. . ." noting that they would only look at what was consistent or inconsistent with the NAFTA.[211] This is what, in great part, makes the Panel decision and the law so much cleaner and simple than the post-Panel decision environment because it confines itself to the law itself, rather than the subjective intentions of the Parties

204. *Id.* at 26.

205. *See* Carrie Anne Arnett, *The Mexican Trucking Dispute: A Bottleneck to Free Trade. A Tough (Road) Test on the NAFTA Dispute Settlement Mechanism*, 25 HOUS. J. INT'L L. 561, 600-06 (2003).

206. Paul J. Nyden, *Teamsters' Hoffa Visits New Union Hall*, CHARLESTON GAZETTE & DAILY MAIL, May 9, 2004, at P1A. But what is curious about the Teamsters is that while they have 1.3 million members, "[n]ationally, just 65,000 of the nation's 3 million long-haul freight drivers are Teamsters." Bonnie Pfister, *It's Hard to Find a Teamster Among South Texas Long-Haul Truck Drivers,* SAN ANTONIO EXPRESS-NEWS, May 5, 2004, at 1E.

207. Mary Jordan, *Mexican Truckers Protest Red Light at U.S. Border*, WASH. POST, July 14, 2001, at A14.

208. More information about Public Citizen can be found *at* http://www.publiccitizen.org and C.R.A.S.H. *at* http://www.trucksafety.org (last visited Mar. 26, 2004).

209. NAFTA Panel Decision, *supra* note 3, at 20.

210. *Id.* at 3.

211. *Id.* at 55.

and special interests.[212]

III. After the Decision – The Department of Transportation's Regulations and the Congressional Debates Surrounding Safety

The Panel decision ended with a section entitled "Recommendations."[213] It is useful to look at these before turning to the debate and final legislation and regulations regarding cross-border trucking. First, the Panel wrote that the U.S. *should* become compliant with the NAFTA.[214] The Panel then gives an interesting roadmap for the U.S.:

> The Panel notes that compliance by the United States with its NAFTA obligations would not necessarily require providing favorable consideration to all or any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S. trucking regulations when operating in the United States. Nor does it require that all Mexican-domiciled firms currently providing trucking services in the United States be allowed to continue to do so, if and when they fail to comply with U.S. safety regulations. The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis. U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican.[215]

The U.S. is not required to allow Mexican trucks across the border merely because of its NAFTA obligations.[216] The Mexican trucks must meet the same U.S. standards and may be denied access, as long as it is on a case by case basis, rather than the "blanket" refusal.[217] Mexican trucks at all times must comply with U.S. safety standards, and to ensure this is the case, the U.S. may treat Mexican trucks *differently* from U.S. or Canadian trucks.[218] This is a pretty big win for the United States, but it is also what the Mexican trucking firms had wanted in the first place, to be allowed to operate within the U.S. according to U.S. standards. It would also give Congress and the Department of Transportation room to determine additional safety measures to better ensure that the Mexican firms comply with U.S. highway and truck regulations.

Finally, the Panel ends by stating that the U.S. may implement *different* standards for Mexican trucks to ensure safety without violating the

212. *Id.*
213. NAFTA Panel Decision, *supra* note 3, at 91.
214. *Id.*
215. *Id.*
216. *Id.*
217. *See id.*
218. *See* NAFTA Panel Decision, *supra* note 3, at 91.

NAFTA.[219] Once again, it is worth looking at the language of the decision.

> Similarly, it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement *different procedures* with respect to such service providers. Thus, to the extent that the inspection and licensing requirement for Mexican trucks and drivers wishing to operate in the United States may not be "like" those in place in the United States, *different methods of ensuring compliance with the U.S. regulatory regime may be justifiable.* However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those imposed on U.S. or Canadian carriers, then any such decision must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform to all relevant NAFTA provisions.[220]

Again, the Panel clearly signaled to the U.S. the parameters of their future actions. What is odd about the debate that followed the Panel decision, however, is how rarely the language of the Panel decision was used, and how often, perhaps for rhetorical affect, interested parties claimed that Mexican carriers would not have to meet the same U.S. standards, posing a serious safety risk.

A. Reactions to the Panel Decision

The decision was released on Feb. 6, 2001.[221] The reaction to the decision was relatively quiet in that the regulations had been so uncertain for such a long time, and also because George W. Bush, a pro-NAFTA Republican from Texas, was pro-opening the border and now in office. Bush reversed the Clinton policy proclaiming that the border should be open by January 2002.[222] On June 5th, 2001 without much fan fare, Bush lifted the moratorium investment, now allowing Mexican nationals to invest in trucking and busing firms in the U.S.[223] The U.S. had now met part of its obligation under the Panel's decision. The real focus of the controversy, however, was not resolved as easily.

The story after the Panel decision begins with the Department of Transportation's attempt to restructure the rules that would govern the requirements for obtaining permanent operating authority for Mexican carriers.[224] The political reaction to the suggested rules was tremendous,

219. *Id.*
220. *Id.* (emphasis added).
221. *Id.* at 1.
222. *See* Arnett, *supra* note 205, at 600.
223. *Id.*
224. *See* FMCSA Proposed Rules, *infra* note 242.

particularly from the Democrats in Congress and the Teamsters.[225] There followed debate in both the House and the Senate for the remaining part of the year of what would guarantee that U.S. highways would be safe from the onslaught of Mexican trucks.[226] What is interesting about the debate is that the concerns centered on the level of preparedness of the U.S. border, rather than the requirements of the Mexican trucks, although that does play some legitimate part and much great rhetorical role. The DOT rules only address the requirements for obtaining authority. The Senate version and final congressional compromised version of the cross-trucking provision to the Transportation bill address these other concerns[227] – concerns the U.S. should have and had been addressing as part of their NAFTA obligations long before the deadlines for opening the border.

B. Safety Concerns and the Congressional Debate

During the NAFTA arbitration, the United States had argued for a Scientific Review Board to determine the state of Mexico's trucking system, and what would be necessary to make sure everything would be safe in the United States once the border was open.[228] The request was rejected by the Panel, stating the differences between the two systems was not in debate, and a factual search was unnecessary.[229] What is interesting for our purposes is to look at the questions that the United States put forth to be answered. They asked four questions, which were later expanded to seven.[230] The broader questions focused on: (1) the differences between the two regulatory systems; (2) the role of safety enforcement in the two systems; (3) the role of border inspectors to ensure compliance and safety; and (4) the significance of out-of-service rates for Mexican domiciled trucking firms.[231] The specific questions are more interesting:

> [1] the differences between U.S. and Canadian government oversight of

225. *See Resolution Seeks to Delay Border-Opening to Mexican Trucks*, Inside U.S. Trade, May 25, 2001 [hereinafter *Resolution Seeks Delay*]; *House Panel Defeats Efforts to Delay Access for Mexican Trucks*, Inside U.S. Trade, June 22, 2001 [hereinafter *House Panel Defeats Effort*]; *Bush Promises to Fight House Language Blocking Mexican Trucks*, Inside U.S. Trade, June 29, 2001 [hereinafter *Bush Promise*].

226. *See Resolution Seeks Delay, supra* note 225; *House Panel Defeats Efforts, supra* note 225; *Senate Passes Bill Restricting Access for NAFTA Trucks*, Inside U.S. Trade, Aug. 3, 2001 [hereinafter *Senate Passes Restricting Bill*]

227. *See Congress Strikes a Deal on NAFTA Trucks Supported by White House*, Inside U.S. Trade, Nov. 30, 2001.

228. NAFTA Panel Decision, *supra* note 3, at 50. A scientific review board can be proposed by either party but it is up to the Panel's discretion on whether the panel of experts is convened. *See* NAFTA, *supra* note 3, at art. 2015.

229. *Id.* at 53.

230. *Id.* at 50-51.

231. NAFTA Panel Decision, *supra* note 3, at 50.

truck safety on the one hand, and the Mexican government oversight of truck safety, on the other;[232]

This is the difference between the regulatory systems again, which the Panel later ruled was not a justification for not processing applications.[233]

[2] the importance of Mexican government oversight of truck safety in promoting safety for carriers operating both within Mexico and within the United States[234]

This is an interesting question as it implies that an argument could be made that the difference between the two regulatory systems leads to potential safety problems within the United States. How one would determine that, as opposed to carriers meeting U.S. requirements is unclear.

[3] in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced through *border inspections*;[235]

[4] in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced *through operating-authority application procedures for Mexican carriers*;[236]

These two are very interesting questions as well, for this is the system that is currently being enacted, border inspections combined with operating-authority application procedures. It was in these two areas that Congress would concentrate effort and attention in the post-Panel debates.

[5] the significance of available data on out-of-service rates for Mexican motor carriers . . . [and] . . . whether it is significant to classify carriers as short-haul versus long-haul carriers;[237]

This focuses on the question of the older short-haul trucks currently in use around the commercial zone for transporting trailers short distances and long waits to the U.S. carriers, and how allowing cross-border trucking would alter the state of the trucks. Mexico contended that newer trucks would be in use for longer-hauls, and therefore, the out-of-service rates for the short-haul trucks were irrelevant.

[6] the role of intergovernmental cooperative programs, such as complete, real-time, interoperable databases, in effectively enforcing safety regulations with respect to trucks, drivers and carriers;[238]

This is one of the more fascinating and frustrating areas. Before the denial of operating-authority and denying the opening of the border, Sec-

232. *Id.* at 51.
233. *Id.* at 90-91.
234. *Id.* at 51.
235. NAFTA Panel Decision, *supra* note 3, at 51 (emphasis added).
236. *Id.* (emphasis added).
237. *Id.* at 51.
238. *Id.*

retary of Transportation Peña, at a press conference, seemed to indicate that programs put in place to ready the border as part of NAFTA were moving along terrifically.[239] This issue of just what the intergovernmental groups have done to get ready for the border is a little reported on phenomenon. I have been surprised at how little investigation or attention has been paid by the press or interest groups. Again, I thought that during a post-Panel debate there would be more focus on the preparedness done in the past. Instead, it got very little play.

> [7] whether U.S. governmental safety regulations can be practicably or effectively enforced with respect to drivers, carriers, and trucks not subject to comprehensive, integrated safety oversight systems under their domestic laws.[240]

This is the big question, whether the system will work once it is in place. One might assume that people would fixate on this question, but again, no. One might also assume that a comparison of the effectiveness of the oversight system on domestic trucks might be useful as a comparison of what is necessary for foreign trucks, but again, nothing of the sort dominated the discourse. Instead, the discussion was much less technical and sophisticated. The United States in its petition for the scientific review board explained, "[s]uch issues involve technical and complex questions concerning the real-life operation of trucking firms and the effectiveness of various types of governmental safety regulation. . ."[241] While the Panel environment was not necessarily the right place for these questions, these questions are important but still unanswered in the post-Panel era.

C. The Department of Transportation's Federal Motor Carrier Safety Administration's Response

On May 3, 2001, the Department of Transportation's Federal Motor Carrier Safety Administration ("FMCSA") issued proposed rules with request for comments that would govern Mexican trucks coming over the border.[242] In the proposal, Mexican carriers would have to file a new or

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239. *Id.* at 17.

240. NAFTA Panel Decision, *supra* note 3, at 51.

241. *Id.* at 50.

242. Application by Certain Mexican Motor Carriers to Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border, Fed. Reg. 22,371 (May 3, 2001) [hereinafter FMCSA Proposed Rules].

> The FMCSA regulates commercial motor vehicle (CMV) safety in the United States under a comprehensive system of regulations designed to ensure that drivers are medically qualified; meet applicable licensing standards; can read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals in the English language, respond to official inquires and make entries

updated application form with additional information.[243] The motor carrier would be required to complete Form MSC-150 every six months in order for the FMCSA to monitor the carriers for safety and compliance.[244] Permanent operating authority would be conditional upon a safety audit within eighteen months of receiving its conditional operating authority.[245] What would be struck, however, was the domicile requirement, found illegal under the NAFTA by the panel.[246] A waiver of the new filing fee would be given to those who had filed previously under the old system and to those already operating in the commercial zone who wanted to continue only operating in the commercial zone.[247] As of January 1, 2001, according to the FMCSA, approximately 10,000 Mexican carriers had operating authority in the commercial zone: "[s]eventy-five (75) percent of Mexican carriers had three or fewer trucks, and the 95th percentile carrier had only 15 trucks."[248] The FMCSA predicted that about half of these would expand their services and their routes outside of the commercial zone, with the other half not having the "financial and administrative wherewithal" to being able to expand.[249]

First and foremost, the rules explained, "Mexican carriers would be

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on reports and records; and do not operate vehicles while impaired by drugs, alcohol or excessive fatigue.

Id. at 22,372.

243. *Id.* at 22,374.

244. *Id.* ("[W]e estimate that it would take 4 hours to complete each form after compiling the necessary information.").

245. *Id. See also* JOSEPH A. CRISTOFF, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT – COORDINATED OPERATIONAL PLAN NEEDED TO ENSURE MEXICAN TRUCKS' COMPLIANCE WITH U.S. STANDARDS, 02-238, Dec. 21, 2001. [hereinafter GAO REPORT].

246. FMCSA Proposed Rules, *supra* note 242, at 22,372.

247. *Id.* at 22,374.

The FMCSA estimates that 11,787 Mexican carriers are currently operating in the United States and are categorized as follows: Mexican carriers operating pursuant to OP-2 Certificates of Registration; Mexican carriers that previously filed an OP-1(MX) application; and Mexican carriers assigned DOT numbers and no operating authority or operating without appropriate authorization. The Agency estimates that half of the Mexican carriers (approximately 5,894 carriers) known to be now operating in the U.S. will switch to OP-1(MX) authority, while the other half will continue operating pursuant to OP-2 authority. Based upon the high estimate scenario, the FMCSA anticipates 3,200 first-time applicants for either OP-2 or OP-1(MX) authority in the first year that this proposal becomes a final rule, and 2,500 applicants annually in subsequent years. The agency estimates that twenty-five percent of the first year new applicants (800) would file a Form OP-1(MX); and twenty-five percent of the subsequent-year new applicants (625 annually) would file a Form OP-1(MX). *Id.* at 22,374-75. The FMCSA's proposal consisted of three basic rules to establish a "two-tiered application process," one within the commercial zone and one beyond. GAO REPORT, *supra* note 245.

248. FMCSA Proposed Rules, *supra* note 242, at 22,375. ("For Mexican carriers with any trucks, the mean number of trucks was 5.1. That mean was pulled up by a small number of large carriers.")

249. *Id.* at 22,375.

subject to the same safety regulations as domestic carriers when operating in the U.S"[250] This was what the Mexicans had wanted and were asking for from the Panel, that they be given the opportunity to meet the same safety requirements as those of U.S. carriers. Moreover, the FMCSA proposed additional rules, an action condoned by the Panel if done properly. The application would be required to make a specific certification of compliance[251] as well as "verification from the Mexican government that the applicant is a registered Mexican carrier authorized to conduct motor carrier operations up to the United States-Mexico border. . ."[252] All drivers would also be required to have a valid Mexican driver license.[253] The FMSCA proposed holding workshops and providing written material "to help the Mexican applicants understand the various requirements and the proper way to complete the applications."[254]

250. *See id.* at 22,372.

251. *Id.*

> The FMCSA proposes to add a new section that would require the applicant to certify that it has a system in place to ensure compliance with applicable requirements covering driver qualifications, hours of service, drug and alcohol testing, vehicle condition, accident monitoring, and hazardous materials transportation. In addition, the FMCSA proposes that the applicant provide narrative responses describing how it will monitor hours of service, how it will maintain an accident register and what is its monitoring program. This section would also require that the applicant provide information including the names of individuals in charge of the applicant's safety program. The applicant must provide: specific locations where the applicant maintains current FMCSRs, the names of the individuals in charge of drug and alcohol testing (if applicable). The FMCSA would require only those safety certifications that apply to the applicant. For example, due to the weight of the vehicles they operate, certain applicants would not be subject to the drug and alcohol testing and CDL requirements in 49 CFR parts 382 and 383, respectively, and would not be required to certify compliance with those regulations. The certification information would enable FMCSA to evaluate, upon initial application, the safety compliance program of the applicant. The FMCSA would reject an applicant that cannot offer a specific, unambiguous plan to ensure compliance.
>
> The FMCSA proposes to add more extensive and specific certifications regarding compliance, including compliance with Department of Labor regulations. Other parts of this certification would require the applicant to affirm its willingness and ability to provide the proposed service and to comply with all pertinent statutory and regulatory requirements. It would remind the applicant of statutory and regulatory responsibilities, which if neglected or violated, might subject the applicant to disciplinary or corrective action by the FMCSA. Another certification, derived from the existing Form OP-2 application, would highlight the need to comply with applicable provisions of the U.S. Internal Revenue Code relating to payment of the Heavy Vehicle Use Tax. An additional certification would ensure that the applicant understands that the agents for service of process designated on the Form BOC-3 would also be deemed the applicant's representative in the United States for service of judicial process and notices under 49 U.S.C. 13304 and administrative notices under 49 U.S.C. 13303. Finally, the applicant would affirm that it is not currently disqualified from operating a commercial motor vehicle in the United States under the provisions of MCSIA.

Id. at 22,372-73.

252. *Id.* at 22,372. "This requirement would ensure that FMCSA's database contains current and consistent information about Mexican registrants and thus enhance the effectiveness of FMCSA's safety oversight" *Id.* at 22,373.

253. *Id.* at 22,372.

254. *Id.* at 22,373.

The FMSCA ends with the caveat that these new requirements should not "distract from or detrimentally affect, the efforts underway between the Governments of Mexico and the United States to establish compatible regulations and to ensure that a comprehensive safety oversight program is put in place in Mexico."[255] In its report, the FMCSA reported that the DOT had "consulted extensively with Mexican transportation officials," who agreed to "utilize the Commercial Vehicle Safety Alliance (CVSA) out-of-service (OOS) criteria."[256] However, the FMSCA believed that a safety oversight program was needed in order for the standards to be effective and ensure compliance.[257] While the DOT and Mexican transportation officials worked together, "Mexico has not yet completed implementation of a comprehensive safety inspection program."[258] What is not made clear by the DOT's mention of this is that this cooperation cannot be a requirement or an impediment for opening the border. The DOT's language reflects this, but subtly.

Two weeks later, on May 18, 2001, the DOT's Inspector General issued a report that said "25 of the 27 border-crossings lack[ed] sufficient resources and real estate to effectively perform their duties."[259] Infrastructure problems on the U.S. side had long been known, but again, were not reason for violating the U.S.'s obligations under the NAFTA. Now, infrastructure problems would soon become the focus of the debate, something that had not been much mentioned in the opinions by the Parties of the NAFTA case. It was also very different from the rhetoric stressed in 1995, in anticipation of the border opening. The Bush administration had asked for budget increases for additional Federal inspectors and staffing personnel, but that was only just the beginning of the political debate.[260] The House and Senate would concentrate much of their energy on the safety concerns on the U.S. side of the border.

D. The House and Senate Debates

When President Bush announced that he would have the border

255. FMCSA Proposed Rules, *supra* note 242, at 22,373.

256. *Id.* at 22,372.

257. *Id.*

258. *Id.*

259. *DOT Inspector General Outlines Hurdles to NAFTA Truck Panel*, Inside U.S. Trade, May 18, 2001 [hereinafter *DOT Outlines Hurdles*].

> According to the report, the temporary facilities, which generally consist of a small portable building placed on a U.S. Customs port of entry lot and equipped with a single portable computer, are often without a dedicated phone line needed to access necessary databases, and only have enough space to inspect one or two trucks at a time. The facilities also lack space to park trucks that are put out of service, often having enough for only one or two trucks or require trucks to share the space used for inspections.

Id.

260. *Id.*

opened by early 2002, he "asked Congress for money to build and staff new inspection stations."[261] Congress did not comply.[262] The House and the Senate took different approaches to stop the opening of the border. The House refused to provide funding for processing applications from Mexican firms – in direct violation of NAFTA.[263] The Senate focused its campaign on truck safety and infrastructure issues.[264]

The House's ultimate response was to deny any funds for assisting in processing the application fees, an action in direct violation of the NAFTA, as the United States government is required to provide funds to implement requirements of the NAFTA.[265] Before this tactic, however, a number of different alternatives were proposed. On May 24, 2002 Representative James Oberstar (D-MN) introduced a resolution to delay the granting of operating authority to Mexican trucks due to safety concerns.[266] This was supported by thirty-one House members, including Minority Leader Rep. Dick Gephardt (D-MO), Rep. John Dingell (D-MI) and "22 of the 34 Democratic Members of the Transportation Committee."[267] This original resolution included twenty specific conditions the U.S. would have to meet before allowing Mexican trucks to cross the U.S. border past the commercial zone.[268] These conditions included permanent inspection facilities, permanent weigh stations, the Mexican government having in place a system safety rating process, "a domestic roadside protection program, credible drug and alcohol testing, hours of service regulations, and accessible safety databases," and that necessary steps were taken to certify that Mexican carriers complied with U.S. safety and environmental laws.[269] Note that most of these were included in the DOT's original regulations or were already in place. Oberstar's resolution would not pass.[270] Also, one wonders if requiring Mexico to adjust its regulatory regime once again violated the NAFTA.

Another proposal required the U.S. to perform safety audits on Mexican firms in Mexico.[271] Proposed by Rep. Martin Olav Sabo (D-NM), Sabo's Amendment was fully supported, not surprisingly by labor

261. *Transportation Spending Highlights: Where the Money Goes*, CQ WKLY., Sept. 8, 2001, at 2073 [hereinafter *Spending Highlights*].

262. *See id.*

263. *Id.*

264. *Id.*

265. *See Bush Promise, supra* note 225.

266. *Resolution Seeks Delay, supra* note 225.

267. *Id.*

268. *See id.*

269. *Id.*

270. *See Impasse Reached on Trucks as Senate Compromise Effort Falls Flat*, INSIDE U.S. TRADE, Nov. 23, 2001.

271. *See Bush Promise, supra* note 225.

and the Teamsters.[272] The DOT found this proposal "highly problematic" because "pre-conditioning grants of operating authority on a safety audit would provide no meaningful indicator of how a firm is likely to conduct itself in the United States."[273] Moreover, this would probably be in violation of the NAFTA, as the Administration noted, because of potential sovereignty issues.[274] A year later, however, this would be part of the DOT's new rules for operating authority.[275]

Finally, on June 26, 2001, the House voted, 283 to 143,[276] in favor of H.R. 152[277] to prevent the administration from "using any funds in fiscal year 2002 to process applications from Mexican firms for operating au-

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272. *See House Panel Defeats Effort, supra* note 225. "The AFL-CIO also wrote to members of the House committee urging them to support the Sabo amendment. "This approach makes good sense, is consistent with the intent of NAFTA and a recent ruling by an international NAFTA arbitration panel, and protects American highway users from the consequences of allowing uninspected motor carriers to cross our borders without assurances that they meet all U.S. safety requirements." according to the June 19, 2001 AFL-CIO letter.

273. *Bush Promise, supra* note 225 (citing Transportation Secretary Norman Mineta, letter to Rep. Sabo, June 12, 2001). *See also House Panel Defeats Effort, supra* note 225.

274. *House Panel Defeats Effort, supra* note 225.

275. *See DOT to Unveil Rules Setting Safety Procedures for Mexican Trucks*, INSIDE U.S. TRADE, Mar. 1, 2002 [hereinafter *DOT to Unveil Rules*].

276. *Bush Promise, supra* note 225.

277. *See* H. Res. 152, 107th Cong. (2001).

> [This resolution] [c]alls on the President to continue to delay granting Mexico-domiciled motor carriers authority to operate in the United States beyond the commercial zone until: (1) The President and Secretary of Transportation certify to Congress, among other specified things, that such carriers (buses and trucks) will comply with U.S. motor carrier safety, driver safety, vehicle safety, and environmental laws and regulations, that the United States is able to enforce such laws and regulations at the U.S.-Mexico border and in each State, and that granting such operating authority will not endanger the health, safety, and welfare of U.S. citizens; and (2) the Administrator of the Environmental Protection Agency (EPA) certifies to Congress that all necessary steps have been taken to ensure that the manufacturer, owner, and operator of Mexico-domiciled trucks operating outside a commercial zone comply with any Clean Air Act notice, certification, disclosure requirements, or environmental standards to the same extent that such requirements or standards apply to any heavy-duty truck or heavy-duty engine regulated by the EPA.

H. Res. 152, 107th Cong, Bill Summary & Status (Oct. 22, 2001).

This is what the Mexicans wanted in the NAFTA case – to have the opportunity to meet the U.S. standards and operate in the U.S. – the U.S. was preventing them with a blanket denial of processing their applications for operating authority. *See* NAFTA Panel Decision, *supra* note 3, at 90.

> [The second part of the resolution] [c]alls on the Governments of Mexico and the United States to: (1) agree to uniform application of U.S. and Mexico-domiciled motor carriers and drivers of the highest standards regarding safety, environmental protection, and driver competency, licensing, and hours of service; (2) improve truck and bus inspection and enforcement programs and their coverage; and (3) consider truck and bus safety to be of paramount importance to the relationship between the United States and Mexico.

Id.

thority"[278] by cutting $88 million out of the transportation budget for applications and safety.[279] "The House denied the money and voted to flatly ban all Mexican trucks beyond the border zone."[280] This was in direct violation of the NAFTA, both because it keeps in place a blanket ban and also because it denies the money to implement the NAFTA. Representative Sabo (D-NM), chief sponsor of the bill admitted as much,

> but said he had been blocked by the Republican-led Rules Committee from offering a more moderate amendment that would have delayed Administration action until it had completed safety audits of Mexican firm, which he claimed would not violate the NAFTA. This left him with no choice but to offer the straightforward language barring access for Mexican trucks in U.S. territory beyond the border's commercial zones. . .[281]

The next day in response, Mexican Secretary of Economy said that "if the U.S. could not comply with the panel's ruling, Mexico would be prepared to suspend trade benefits, possibly including benefits relating to the services sector and industrial and agricultural products" in retaliation of up to $1 billion.[282] This is perfectly legal within the Dispute Settlement Mechanism of the NAFTA, which allows for retaliation action within thirty days of the Panel decision.[283] However, Mexico had incentive to wait – at this point the threat was still a means of pressure. According to *Inside U.S. Trade*, Mexico had agreed with Bush's time line of opening the border on January 1, 2002 and was willing to work with the U.S., rather than retaliate immediately.[284]

On June 11, 2001 Senate Democrats wrote to Bush to say they would oppose granting Mexican trucks authority to operate in the U.S. "unless it could be shown that the trucks do not pose a threat to U.S. Safety."[285] In the Senate, the controversy has been focused on the Murray-Shelby proposed language tacked onto the Transportation Bill.[286] President Bush

278. *Bereuter Says White House Neglect Led to House Truck Vote*, INSIDE U.S. TRADE, July 13, 2001. *See also Bill Restricting Access, supra* note 226.

279. *Bush Promise*, *supra* note 225.

280. *Spending Highlights*, *supra* note 261, at 2073.

281. *Bush Promise*, *supra* note 225. The final transportation spending bill, with Sabo's amendment, "passed the House on a vote of 426 to 1." *Id.*

282. *Id.*

283. "Normally this should be in the same economic sector and can be challenged by panel review only if 'manifestly excessive.'" FOLSOM, *supra* note 18, at 203-04.

284. *Bush Promise*, *supra* note 225.

285. *Senate Leaders Oppose Bush Plan to Implement NAFTA Truck Panel*, INSIDE U.S. TRADE, June 15, 2001. ("The letter is signed by Majority Leader Tom Daschle (SD), committee Chairmen Max Baucus (MT), Tom Harkin (IA), Joe Lieberman (CT), Ted Kennedy (MA), Jeff Bingaman (NM), and John Kerry (MA), and fellow Senate Democrats Ron Wyden (OR), Evan Bayh (IN) and Dick Durbin (IL).")

286. Department of Transportation and Related Agencies Appropriations Act, 2002, S. 1178 107th Cong. (2002). It is important to note that the Transportation bill is far more expansive than

"threatened to veto the transportation bill if it is passed with the Murray language intact."[287] The Murray Provisions, sponsored by Patricia Murray of Washington and Richard Shelby of Alabama, set out twenty-two safety measures, including requiring:

> the Transportation Dept. to conduct an *on-site audit* of Mexican trucking firms' home offices before they are approved to operate in the U.S, require *adequate facilities* including weigh stations and out-of-service spaces to be in place at border crossings prior to allowing any Mexican trucks to operate throughout U.S. territory, additional inspection requirements, and require drivers' license checks of all trucks crossing the border.[288]

Notice that these measures, unlike the FMCSA's proposed rules, focus substantially on the U.S.'s infrastructure, rather than solely application requirements for the Mexican carriers. In many ways, the FMCSA's rules could be seen as insufficient because the concerns of the Senate were different from the task of the FMCSA. The Murray/Shelby provision also would "appropriate $103 million for a border truck safety program aimed at evaluating the safety of Mexican trucks."[289] Regarding the carriers themselves, the provision "would not give Mexican trucking firms access to the entire U.S. until they have undergone a thorough safety review that would take place in Mexico. Once the firms were granted access, they would subject to a second review within 18 months"[290] – similar to the FMSCA's proposed rules. The provisions "prohibit Mexican trucks from crossing borders when they are unmanned, and mandate the installation of scales and weigh-in-motion machines at the border" and "require an electronic check of the driver's information each time a Mexican truck enters the U.S."[291]

In the midst of the debate were McCain and Gramm, who wanted to add language "aimed at ensuring that the bill would not violate U.S. NAFTA obligations, [but] . . . Democratic leaders in the Senate repeatedly maneuvered to limit debate on the issue."[292] "McCain and Gramm argued that strict requirements for ensuring the safety of Mexican trucks . . . would violate NAFTA because the requirements could take as

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just truck-related issues, and includes the budget for the FAA, Federal Highway Administration, the Federal railroad Administration, the Coast Guard, the National Highway Traffic Safety Administration, the Secretary of Transportation, and the Federal transit Administration. *Spending Highlights*, *supra* note 261, at 2073.

287. *Senators Continue to Dispute NAFTA Trucking Language in Spending Bill*, Inside U.S. Trade, July 27, 2001 [hereinafter *Senators Dispute Language*].

288. *Bill Restricting Access, supra* note 226.

289. *Senators Dispute Language*, *supra* note 287.

290. *Id.*

291. *Id.*

292. *Senators Dispute Language, supra* note 287.

long as two years to implement."[293] Gramm and McCain's additional language was defeated.[294]

The Bush Administration saw the Murray Provisions' requirements as in defiance of the NAFTA Panel, because it would maintain a blanket ban on access to Mexican trucks while it took the estimated two years to "put in place the safety system required by the Murray language, which would mean further delay before the U.S. adheres to its NAFTA obligations."[295] The Department of Transportation also responded to the Murray language and actually named the political power behind the language.[296] At a July 31, 2001 press conference, Trade Ambassador Zoellick "attacked arguments from Teamsters . . . calling them 'disingenuous.' 'It's important . . . that we who promote free trade be ardent in dealing with the concerns that they raise – for example, safety – but also be ardent in pointing out when the arguments are fraudulent and misleading."[297]

> [Zoellick denied a] claim propounded by Teamsters that only 1 percent of Mexican trucks now operating in border zones are subject to U.S. inspectors. The claim of 1 percent is based on counting every time a truck crosses the border, which also counts multiple crossings by the same truck, he noted. In fact, he claimed, only about 63,000 Mexican trucks are operating in the border zones, about 43,000 of which have been inspected, an inspection rate of 73 percent.[298]

On August 1, 2001 by a voice vote, the Senate passed a transportation spending bill that, *inter alia*, restricts access for NAFTA trucks that the Bush administration opposes.[299] The House and Senate bills now went to conference. The passage of the bill is seen as a victory, in part, for the Teamsters.[300]

E. Interested Parties

A week after the Panel decision, the AFL-CIO Executive Council

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293. *Id.*
294. *Id.*
295. *Bill Restricting Access*, *supra* note 226.
296. *Id.*
297. *Id.*
298. *Id.* The Teamsters retorted.

> A Teamsters source defended the numbers, noting that the DOT Inspector General had found that of 4.5 million border crossings in 2000, only 46,000 inspections were performed. . . .
> "If Mr. Zoellick did the math then he would find that 20,000 carriers that crossed the border 72 times [on average] in one year never got inspected," the source said. "That's totally unacceptable."

Id.
299. *Bill Restricting Access, supra* note 226.
300. *Id.*

adopted a resolution that "urged [President Bush to] put off complying with an order to open the American border to Mexican trucks until safety measures are in place."[301] On their own website, the Teamsters told its members that "Teamsters government affairs specialists were on Capitol Hill on February 27th to brief House staffers about the danger posed to American lives by unsafe Mexican trucks."[302] The site explained that "[a] panel of NAFTA bureaucrats has decreed that the U.S. must open its southern border to these impending disasters or pay a heavy price in trade sanctions."[303] Jimmy Hoffa, president of the Teamsters, also urged President Bush to go slow.[304] But the Teamsters were more involved than merely rhetoric, as Ambassador Zoellick's comments indicated.

Not surprisingly, the House's Sabo amendment was lobbied and greatly supported by the Teamsters.[305] Jimmy Hoffa also liked the DOT Inspector Report of May 18, 2001, which focused on the U.S.'s lack of infrastructure and staffing needs to process the Mexican trucks, which he saw as the U.S.'s "inability to keep unsafe trucks off of our highways."[306] Hoffa remarked, "I will urge the president to keep the border closed until an adequately designed and funded inspection program is put into place. We cannot allow for there to be two standards: none for Mexican trucks, and comprehensive standards for American drivers."[307]

In March, more than 1000 Teamsters held a rally in Dallas, Texas,[308] and 200 rallied in El Paso, Texas.[309] In El Paso, Teamsters Freight Director and International Vice-President Phil Young said "We are here today to support public safety over corporate profit. Unsafe equipment and drivers with no basic worker protections are a recipe for disaster on our highways."[310] In the summer of 2001, the Teamsters had an eleven truck convoy cross the country to increase awareness about unsafe Mexican trucks.[311] The Teamsters also actively supported the Murray-Shelby

301. Peter Szekely, *AFL-CIO Urges Delay in Mexican Truck Entry to U.S.*, TEAMSTERS ONLINE, Feb. 16, 2001, *at* http://teamsters.org/01news/hn_010216_1.htm (last visited Sept. 9, 2004).

302. *Congress Hears Teamsters on Dangerous NAFTA Trucks*, TEAMSTERS ONLINE, Mar. 1, 2001, *at* http://www.teamster.org/01news/hn%5F010301%5F2.htm, (last visited Sept. 9, 2004).

303. *Id.*

304. Letter from Jimmy Hoffa, President, Teamsters, to President Bush (June 5, 2001) [hereinafter Hoffa Letter], *available at* http://www.teamster.org/01news/hn%5F010605%5F5.htm (last visited Sept. 3, 2004).

305. *See* Hoffa Letter, *supra* note 304.

306. *DOT Outlines Hurdles, supra* note 259.

307. *Id.*

308. *Teamsters Rally To Keep Border Closed, Hoffa Says Unsafe Mexican Trucks Should Be Kept Off U.S. Highways*, TEAMSTERS ONLINE, Mar. 5, 2001, *at* http://www.teamster.org/01news/hn%5F01030-5%5F1.htm (last visited Sept. 3, 2004).

309. *Id.*

310. *Id.*

311. *Teamsters Convoy Highlights Dangers of Unsafe Mexican Trucks*, TEAMSTERS ONLINE,

amendment.[312] The substance of their support, comes from the study done on the Murray-Shelby amendment conducted by the Dewey Ballentine law firm for the Transportation Trades Department of the AFL-CIO.[313]

Some of the other activities the Teamsters spearheaded included asking the DOT to extend its review process an additional sixty-days, asking the DOT to put off implementing regulations, to add a "proficiency exam" for applicants to the requirements "to demonstrate they were familiar with U.S. motor carrier safety laws and regulations," to require "more detailed records than the DOT had proposed and urging the DOT "perform a safety review prior to granting even conditional authority to Mexican carriers, which would go beyond the application process in the proposed rules."[314] *Inside U.S. Trade* noted that the Teamsters did not specify what the safety review should include.[315] They also wanted the DOT to "conduct an environmental assessment of the proposed rules" and require the Mexican carriers "certify they will comply with U.S. environmental and labor standards, as a condition of their receiving operating authority."[316]

Even as recently as January 10, 2002, after a compromise between the House and Senate had been worked out, the Teamsters continue to focus on publicizing safety concerns.[317] A GAO report, requested by House Democrats (no doubt influenced in part by lobbying on the part of the Teamsters), issued a report that "Mexican truck safety isn't up to U.S. standards."[318] Hoffa concluded that "the Teamsters are proud to have fought for a DOT appropriation bill that keeps the border closed until safety can be assured."[319] A reasonable assumption might be that the emphasis should be on the word *closed* rather than the phrase *safety*.

The Teamsters were not the only ones critical of the DOT proposed regulations. The American Insurance Association thought the application process was less rigorous than for U.S. carriers, "which are required to submit detailed data on drivers, licenses, safety and loss records, and ve-

June 22, 2001, *at* http://www.teamster.org/01convention/01conventionnews/cnews%5F010621%5F1.htm (last visited Sept. 3, 2004).

312. Press Release, Teamsters Online, Murray-Shelby Amendment on Mexican Trucks is NAFTA-Compliant (Nov. 27, 2001), *at* http://www.teamster.org/01newsb/nr%5F011127%5F1.htm (last visited Sept. 3, 2004).

313. *Id.*

314. *Labor, Other Critics Urge Postponing Access for Mexican Trucks*, INSIDE U.S. TRADE, July 6, 2001.

315. *Id.*

316. *Id.*

317. Press Release, Teamsters Online, GAO Report Says Mexican Truck Safety Still Lags (Jan. 10, 2002), *at* http://www.teamster.org/02news/nr_020110_3.htm (last visited Aug. 28, 2004).

318. *Id.*

319. *Id.*

hicles."[320] Public Citizen, a Ralph Nader group, supported the Murray-Shelby agreement and applauded the attempts to keep McCain-Gramm's addition from passing.[321] Public Citizen is very specific in their concerns:

> Public Citizen analyses have found that Mexico's truck inspection system is riddled with holes that allow vehicles with major safety defects to stay on the road. . . .Public Citizen supports legislation to require on-site inspections of Mexico-domiciled carriers; add inspection facilities, equipment and inspectors to the border crossings; and ensure that Mexican truckers comply with all U.S. safety requirements, including rules governing how long truckers may drive without rest.[322]

The rhetoric is interesting:

> "I cannot be more clear: We are not calling for Mexico-domiciled carriers to be held to higher standards; we are calling for strong inspections to ensure that the trucks are safe enough to travel on U.S. roads. Murray/Shelby assures that Mexico-domiciled trucks do in fact meet U.S. standards."[323]

This is not far off from the panel opinion, but there is still a strong notion of keeping Mexican trucks out. In fact, they use the Panel opinion for support.[324] Interestingly, Public Citizen uses the closing of the Canadian border in 1982 as proof that the U.S. will stop foreign traffic for

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320. *Labor, Other Critics Urge Postponing Access for Mexican Trucks*, INSIDE U.S. TRADE, July 6, 2001.

321. Press Release, Joan Claybrook, President, Public Citizen, Senate Vote Places Safety Above Free Trade at All Costs (July 26, 2001), *at* http://www.citizen.org/pressroom/print_release.cfm?ID=681 (last visited Aug. 28, 2004).

322. *Mexico-Domiciled Trucks and NAFTA*, PUB. CITIZEN AUTO SAFETY (Public Citizen, Wash., D.C.), June 7, 2004, *at* http://www.citizen.org/autosafety/Truck_Safety/mex_trucks/ (last visited Aug. 24, 2004).

323. Press Release, Joan Claybrook, President, Public Citizen, In Mexican Truck Debate, Safety is the Only Issue (Aug. 1, 2001) [hereinafter Mexican Truck Debate], *at* http://www.citizen.org/pre-ssroom/print_release.cfm?ID=680 (last visited Aug. 24, 2004). *See also In Mexican Truck Debate, Safety Is the Only Issue, Murray/Shelby Would Ensure Mexico-Domiciled Trucks Meet U.S. Standards*, MEXICAN TRUCK FACT SHEET (Public Citizen, Wash., D.C.), Aug. 1, 2001 [hereinafter MEXICAN TRUCK FACT SHEET], *at* https://www.citizen.org/autosafety/Truck_Safety/mex_trucks/articles.cfm-?ID=5219 (last visited Aug. 28, 2004).

> Under NAFTA, Mexican trucks must meet U.S. safety standards. But because Mexico has no mandatory standards in a variety of safety categories, it is essential that carriers be inspected by the United States. We are not calling for Mexican carriers to be held to higher standards; we are calling for strong inspection standards to ensure that the trucks are safe enough to travel on U.S. roads.

See MEXICAN TRUCK FACT SHEET.

> The site also notes
>
> Provisions of the transportation appropriations bill (H. 2299) authored by Murray and Shelby have been endorsed by Advocates for Highway and Auto Safety, Citizens for Reliable & Safe Highways (CRASH), the Consumer Federation of America, Parents Against Tired Truckers (PATT), Public Citizen and the Trauma Foundation.

Id.

324. Mexican Truck Debate, *supra* note 323.

safety concerns.[325] Unfortunately, they got it wrong.

F. Mexico's Response

In response to the Murray Provisions, Mexico "warned that it may bring punitive tariffs on U.S. products, including high-fructose corn syrup."[326] More specifically, on July 24, 2001 the Mexican Secretary of Economy, Luis Ernesto Derbez Bautista, sent a letter to U.S. Senators.[327] The Secretary was particularly concerned about the Murray amendment, because it may be a violation of the NAFTA.[328] "In this light, we hope the legislative language will allow the prompt and non-discriminatory opening of the border for international trucking."[329] From a legal standpoint, the Secretary pointed out that "Mexico expects non-discriminatory treatment from the U.S. as stipulated under the NAFTA," saying that "[t]he integrity of the Agreement is at stake as is the commitment of the U.S. to live up to its international obligations under the NAFTA."[330] "I would like to reiterate that Mexico has never sought reduced safety and security standards. Each and every truck company from Mexico ought to be given the opportunity to show it complies fully with U.S. standards at the state and federal levels."[331] This was the Mexican's argument in the NAFTA case, and the Panel agreed.[332]

The Secretary then brought up an economic argument for allowing Mexican trucks to cross beyond the commercial zone, stating that as the U.S.'s second largest trading partner, where 75% of the goods move by truck, "[c]ompliance with the panel ruling means that products will flow far more smoothly and far less expensively between our nations. Doing this will enable us to take advantage of the only permanent comparative advantage we have: hat is our geographic proximity."[333]

At a July 31, 2001 press conference, Mexican Secretary of Economy Luis Ernesto Derbez acknowledged that the U.S. President and Trade Representative were trying to comply with NAFTA, even if the Congress was not.[334]

> There is a very clear position from the Administration of President Bush and

325. *Id.*
326. *Bill Restricting Access, supra* note 226.
327. *Mexican Letter on Cross-Border Trucking,* Inside U.S. Trade, Aug. 3, 2001 (text of Letter from Luis Ernesto Derbez Bautista, Mexican Secretary of the Economy, to Trent Lott, Senate Minority Leader (July 24, 2001)).
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *See* NAFTA Panel Decision, *supra* note 3, at 90-91.
333. *Id.*
334. *Bill Restricting Access, supra* note 226.

Ambassador [Robert] Zoellick where they are doing all the actions required to see that the treaty will be fulfilled exactly as it has been worked," [Derbez] said. "We are satisfied, and therefore, there is no action contemplated at this point.[335]

Nevertheless, Mexico continued to exert pressure on the issue. President Fox in a speech at the Institute for International Economics on September 7, 2001 "renewed his call for the United States to comply with its commitments under the North American Free Trade Agreement and allow Mexican trucks access to the U.S. market."[336]

G. Trucks in Post-September 11, 2001 Atmosphere

On September 7, 2001, Mexico's President Fox reiterated the importance of U.S. complying with the NAFTA obligations with regard to processing Mexican trucks.[337] President Bush promised to veto the bill "if it includes language identical to either the House or Senate versions," and the two versions from the House and Senate were set to go to conference.[338] In the aftermath of the World Trade Center, September 11, 2001 terrorist attacks, the discourse on trucks altered, at least for a time. In testimony at the Senate Commerce, Science, and Transportation committee, Keith Gleason, Director of Tran Haul Division, noted that border security "calls for greater inspection presence."[339] Concerns over border infrastructure have gotten a boost from the September 11th activities, as greater technology and improvements is needed as security concerns heightened. On March 22, 2002, Bush announced a twenty-two point "smart border" plan to prevent terrorism but promote the free flow of goods and "low-risk, pre-approved border crossers."[340] A similar type of agreement had already been signed with Canada in December, 2001.[341] The plan calls for more infrastructure and technology along the border, totaling $50 million, already allotted by Congress as part of its $40 billion in emergency spending.[342] The call for additional infrastructure is not new. Local economies in particular have been concerned for a long time now, even if the Congress and the DOT have been slower to share the

335. *Id.*

336. *Fox Calls on U.S., supra* note 134.

337. *Id.*

338. *Bill Restricting Access, supra* note 226. *See also* William B. Cassidy, *Tale of Two Borders; Accord Tightens Security, and Shipper Patience, at U.S.-Canadian Line; Mexican Trucks Coming*, Traffic World, Dec. 10, 2001, at 6.

339. *Bill Restricting Access, supra* note 226.

340. *Bush Announces US-Mexico Border Security Plan, Leaves for Latin America*, The Bull. Frontrunner, Mar. 22, 2002.

341. *Id.*

342. *Id.*

same concern.[343]

After months of negotiations, on November 30, 2001, the House[344] and on December 4, 2001, the Senate approved a compromise agreement to allow Mexican-domiciled trucks to obtain conditional and permanent operating authority.[345] "But DOT must put a safety inspection regime in place before granting authority to any Mexican truckers."[346] The compromise keeps "many of the safety requirements included in the Senate bill but softens their implementation."[347] The compromise includes:

- The hiring of new, additional inspectors, on the U.S. side. On the U.S. side at the ten busiest crossing, facilities will include scales and weigh-in-motion systems.
- Fully trained DOT auditors.
- A FMCSA policy in place to ensure that Mexican carriers comply with hours-of-service regulations before Mexican-domiciled trucks begin operation.
- Mexican carriers must pass safety exams before being issued conditional operating authority, with a "full, compliance review before granting . . . permanent authority."
- DOT will conduct on-site inspections in at least half of Mexican-domiciled carriers that will be traveling beyond the commercial zone.
- Mexican trucks granted authority would display "a Commercial Vehicle Safety Alliance decal verifying satisfactory completion of a safety inspection," and vehicles "must be inspected every 90 days for three years."
- No inspection of trucks operating solely within the commercial zone.
- Mexican trucks with three or fewer trucks will not need on-site inspections in order to obtain an interim or permanent operating authority.
- Electronic verification of drivers' licenses for half of the drivers crossing the border.[348]

Additional requirements are included for drivers carrying hazardous materials,[349] which includes 100% inspection.[350] The FMCSA is also required to "issue interim final regulations that establish requirements to ensure that carriers are knowledgeable about federal safety standards; to improve training and certification of motor carrier auditors; and to determine the appropriate number of motor-carrier inspectors for the Mexican border."[351] "Finally, the secretary of Transportation must certify that the

343. *Id.*

344. Gary Martin, *House Vote Clears Road for Mexican Trucks in U.S.*, THE SEATTLE POST-INTELLIGENCE, Dec. 1, 2001, at A5. The House vote was 371-11 in favor of the bill. *Id.*

345. Cassidy, *supra* note 338, at 6.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. Dennis Kelly, *Senate Passes Bill Allowing Mexican Trucks Full Access to U.S. Roads*, BESTWIRE, Dec. 6, 2001.

351. Cassidy, *supra* note 338, at 6.

opening of the border does not pose an unacceptable safety risk to the public."[352]

Public Citizen supported the compromise but warned that the FMCSA often "ignored congressional mandates" and feared that "loopholes . . . may be exploited."[353] Jimmy Hoffa claimed victory.[354] So did both sides of the Senate, with McCain stating, "[t]his agreement represents a victory for everything we have fought for these last five months."[355] Remember, he had opposed the original Murray-Shelby version.[356] Groups like the Free Trade Alliance San Antonio, who seek to promote trade and commerce in San Antonio with the influx of additional Mexican trucks were also ecstatic.[357] Executive Director of the Alliance, Blake Hastings, said, "We'd rather have cross-border trucking begin with some warts than not at all."[358] President Bush said the compromise was "an important victory for safety and free trade."[359]

What seems to have changed, to a great extent, are the requirements for the U.S. side, elements that should have been in place already with the awareness that the opening of the border was part of the NAFTA treaty. These include facilities improvements, that is, making the facilities *permanent*, adding weight stations, and increasing staffing requirements. Many of the requirements for the Mexican trucks were already in place when they originally applied, that they must conform to the requirements of U.S. law, or were in place with the DOT's 2001 rules. The big change is the addition of the onsite audit requirement, originally proposed in the House by Rep. Olav, and then included in the Murray language in the Senate version.[360] That made it through the compromise and is now part of the DOT rules.[361] Whether this is legal under NAFTA, however, seems questionable, particularly with sovereignty issues. Can one government come into inspect businesses in another's territory in order to meet requirements for entry? This seems to be pushing the boundaries a bit.

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352. *Id.*

353. Press Release, Joan Claybrook, President, Public Citizen, Compromise on Mexican Trucks Is a Major Step Forward, but Implementation Must Be Carefully Monitored (Nov. 30, 2001), *at* http://www.citizen.org/pressroom/release.cfm?ID=946 (last visited Sept. 3, 2004).

354. Cassidy, *supra* note 338, at 6.

355. *Id.*

356. Martin, *supra* note 344, at A5.

357. David Hendricks, *S.A. Trade Officials See Big Gains in Border Truck Deal; Alliance Plans to Attract Mexican Firms and Create Kellyhub*, SAN ANTONIO EXPRESS-NEWS, Nov. 30, 2001, at 1E.

358. *Id.*

359. Martin, *supra* note 344, at A5.

360. *House Panel Defeats Effort*, *supra* note 225.

361. *DOT to Unveil Rules*, *supra* note 275.

H. GAO Report – December 2001

In a strange postscript, in December 2001, the GAO issued a report on Mexican truck safety.[362] The GAO report examined three areas:

> (1) the extent to which Mexican-domiciled commercial trucks are likely to travel beyond the U.S. border commercial zones once the border is fully opened, (2) U.S. government agencies' efforts to ensure that Mexican commercial carriers meet U.S. safety and emissions standards, and (3) how Mexican government and private sector efforts contribute to ensuring that Mexican commercial vehicles entering the United States meet U.S. safety and emissions standards.[363]

In many ways, these questions mirror some of the concerns raised by the U.S. in their request for a scientific review board in the NAFTA arbitration process.[364]

The GAO found that "[r]elatively few Mexican carriers are expected to initially operate beyond the commercial zones. . ." because of "specific regulatory and economic factors."[365] Among the factors the GAO included as prohibitive were: "(1) the lack of established business relationships beyond the U.S. commercial zones . . . (2) difficulties obtaining competitively priced insurance, (3) congestion and delays in crossing the U.S.-Mexico border that make long-haul operations less profitable, and (4) high registration fees."[366] Technology and increased efficiency at the border in processing would in the future reduce some of these problems.[367]

With regard to the U.S. ensuring that Mexican-domiciled trucks comply with U.S. safety standards, "[t]he Department of Transportation does not have a fully developed or approved operation plan" in place.[368] This is no surprise since the rules and regulations had not yet been approved. Among the continuing problems that the DOT was aware of a year prior were the need for permanent inspection facilities in all but California, the division of inspection responsibilities between federal and state authorities, how states will ensure Mexican trucks are complying with emission standards *sans* California, the only state that has a program in place, and the need for advanced technology, *inter alia,* to weigh trucks and check Mexican drivers' licenses.[369]

On Mexico's side, Mexico has begun developing "five databases with

362. GAO Report, *supra* note 245.
363. *Id.*
364. *See* NAFTA Panel Decision, *supra* note 3, at 50-51.
365. GAO Report, *supra* note 245.
366. *Id.*
367. *Id.*
368. *Id.*
369. GAO Report, *supra* note 245.

important information on the safety records of its commercial drivers and motor carriers"[370] but is far from being complete. The commercial drivers' license database contained only 1/4 of all commercial drivers so far: "as of October 2001, 70,150, or 23 percent, of an estimated 300,000 federal commercial driver's licenses had been entered into the database."[371] The report continues, "However, Mexican government officials say the database has information on 90 percent of the Mexican commercial drivers now crossing the border."[372] The records are also being updated as drivers renew the licenses, and the database is supposed to be complete by 2003.[373] The first database, the Carrier and Vehicle Authorization Information System was completed in 1998 and the second, the Licensed Federal Information System, was completed in 1999 and went online in January 2000.[374]

Notice that these databases were either completed or in process before the Panel decision was issued. The report said that Mexico is also continuing to participate in "NAFTA-related efforts to make motor carrier safety regulations compatible across the three member nations,"[375] efforts that had also begun before the Panel decision or the case filing. This includes participation in NAFTA's Land Transportation Standards Subcommittee ("LTSS") and specific bilateral treaties with the United States on commercial motor vehicle safety.[376]

As mentioned in the briefs and the panel's decision, the LTSS has accomplished, *inter alia*, "commercial driver's licenses-agreement on a common age (21 years) for operating a vehicle in international commerce; language requirements-agreement on a common language requirement . . .; drivers' logbooks and hours-of-service-agreement on safety performance information. . . ., and driver medical standards-recog-

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. GAO REPORT, *supra* note 245.

375. *Id.*

376. *Id. See also* Department of Transportation, Land Transportation Standards Subcommittee (LTSS), *at* http://www.dot.gov/nafta/LTSS.html (last visited Sept. 4, 2004).

> The Land Transportation Standards Subcommittee (LTSS) was established by the North American Free Trade Agreement's (NAFTA) Committee on Standards-Related Measures to examine the land transportation regulatory regimes in the United States, Canada, and Mexico, and to seek to make certain standards more compatible. The Transportation Consultative Group (TCG) was formed by the three countries' departments of transportation to address non-standards-related issues that affect cross-border movements among the countries, but that are not included in the NAFTA's LTSS work program (Annex 913.5.a-1). The LTSS meets annually in plenary session, usually in conjunction with meetings of the several LTSS and TCG working groups.

Id.

nition of several binational agreements. . . ."[377] So far, the NAFTA countries have not been able to reach agreements on "commercial vehicle weight standards, maximum weight limits for truck axles, and dimensions. . ."[378] In terms of the binational agreements, Mexico and the U.S. have agreed to "standards for drug and alcohol tests for drivers and acceptance of commercial driver's licenses issued by the other country."[379]

The GAO concluded that "[i]n the 7 years since NAFTA was implemented, the United States and Mexico have taken a number of steps toward achieving closer economic integration."[380] Mexico still had improvements to make on its regulatory system and completing its databases.[381] "However, Mexico's efforts to increase regulation of its motor carrier industry are relatively new; therefore, it is too early to assess their effectiveness."[382] On the U.S. side, permanent facilities and additional personnel and other infrastructure issues were still not in place.

IV: The Ninth Circuit and Supreme Court Cases as Emblematic of the Complex and the Simple

On November 27, 2002, President Bush modified the moratorium on Mexican cross-border trucking put in place in 1981 by President Reagan.[383] It was predicted that in a matter of week, Mexican cross-border trucks would be crossing beyond the commercial zone.[384] That same day, on November 27, 2002,

> U.S. Transportation Secretary Norman Y. Mineta . . . directed the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) to act on the 130 applications received thus far from Mexico-domiciled truck and bus companies seeking to transport international cargo in cross-border services in the United States or to provide regular route services between Mexico and the United States.[385]

Victory at last. Not quite. A week after Bush removed the twenty-year old moratorium, Public Citizen, the Environmental Law Foundation, the International Brotherhood of Teamsters, the California Federation of Labor AFL-CIO, and the California Trucking Association asked the

377. GAO Report, *supra* note 245.
378. *Id.*
379. *Id.*
380. GAO Report, *supra* note 245.
381. *Id.*
382. *Id.*
383. Steven Greenhouse, *Mexican Trucks Allowed All Over U.S.*, NY Times, Nov. 28, 2002, at A26, *available at* http://www.nytimes.com.
384. *Id.*
385. News Release, Department of Transportation, U.S. Transportation Department Implements NAFTA Provisions for Mexican Trucks, Buses 1 (Nov. 27, 2002) [hereinafter DOT News Release].

Ninth Circuit Court of Appeals for an emergency stay to keep the border closed.[386] This time, instead of citing concerns over Mexican drivers, the focus was on accusing the Department of Transportation of failing to review the impact of the air quality from potential new Mexican trucks.[387] This latest attempt to keep the border closed to Mexican trucks so far has worked. Public Citizen and other groups filed a case directly in the Ninth Circuit Court of Appeals against the Department of Transportation.[388] The case challenged what now was being described as three regulations from the FMCSA, asserting that the "regulations failed to comply with the provisions of the National Environmental Policy Act (NEPA); and (2) that DOT failed to make a 'conformity' determination under the federal Clean Air Act."[389] A three-judge panel on the Ninth Circuit "ruled unanimously in favor of the petitioners on both grounds."[390] Once again, this leads to either a complex situation or very simple.

The complex way to look at it is to take serious the potential problems, just as in safety, and see these as stopping the trucks from coming across the border. This is the approach of the Ninth Circuit. But the other way is very simple. It reads the NAFTA as requiring the U.S. to treat Mexican trucks under the same standards as U.S. trucks. This is what the NAFTA Panel found, and what some predicted the Supreme Court would do.[391] It does not reject the concerns. As with the panel, safety was addressed by the Ninth Circuit in that the U.S. could put in places requirements that would make sure Mexican trucks applying for operating authority met U.S. standards.[392]

Just as in the past, those opposing the opening of the border fear the worst, while those in charge try to explain that the Mexican trucks, under the law, will be held to the same standards as the U.S. trucks.[393] In a CBS article, Al Meyerhoff, an attorney for the groups, believed that Mexican trucks "are not being held to the same standards."[394] What gave him this impression is not included in the article. Secretary Mineta in his comments on the lifting of the moratorium said, "Mexican carriers and drivers must meet the same standards as U.S. operators. I have made a

386. *See Suit To Slam Brakes On Mexican Trucks*, Dec. 3, 2002 [hereinafter *Brakes on Mexican Trucks*], *at* http://www.cbsnews.com/stories/2002/12/03/national/printable531506.shtml (last visited Aug. 31, 2004).

387. *Id.*

388. Public Citizen v. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003).

389. *Ninth Circuit Places Entry of Mexican Trucks on Hold*, 16 CAL. ENVTL. INSIDER 4 (Jan. 31, 2003) [hereinafter *Ninth Circuit Entry on Hold*].

390. *Id.*

391. *See* NAFTA Panel Decision, *supra* note 3, at 90-91.

392. *Ninth Circuit Entry on Hold*, *supra* note 389.

393. *Brakes on Mexican Trucks*, *supra* note 386.

394. *Id.*

lifelong commitment to equality under the law and will not, however, tolerate discriminatory enforcement. In this matter of trucking, as in all the modes of transportation, the pervasive issue is safety."[395]

And what exactly had been done at the border after all the talk about safety? According to Kenneth Mead, Inspector General of the Department of Transportation, he stated upon the lifting of the moratorium:

> The Department has worked diligently and aggressively to fulfill the requirement for establishing a strong safety program before the southern border was opened to long-haul Mexican truck traffic. This objective has been met by having in place a sufficient number of inspectors, adequate facilities and space for inspections, measures to ensure that licenses are valid and that motor carrier firms pass safety and compliance reviews. These actions are testimony that this Secretary and the Department place a high value on safety. As mandated by Congress, we will continue to review and report on the implementation of these requirements.[396]

According to the DOT, Congress' twenty-two point law had been implemented.[397]

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395. DOT News Release, *supra* note 385, at 1.

396. *Id.*

397. *Id.* at 2. This included:

> 144 safety inspectors, 67 auditors, and 41 safety investigators. FMCSA has also constructed and expanded inspection stations along the border; provided additional parking areas for vehicles taken out of service for safety violations; acquired and installed weigh stations; and made other improvements to infrastructure and federal and state facilities.
>
> Mexican drivers will be subject to U.S. drug and alcohol requirements. They also must follow U.S. hours of service rules to ensure that they have sufficient rest to drive safely, and they must maintain logs to prove it to safety inspectors.
>
> To drive in the United States, commercial drivers from Mexico must have a Licencia Federal, the Mexican equivalent of a U.S. commercial driver's license. . . .U.S. and Mexican truck inspectors can access federal and state databases in the United States and Mexico during an inspection to check whether a driver's license is valid.
>
> To receive operating authority, all Mexico-domiciled carriers must undergo a safety audit by the FMCSA. During these audits, inspectors assess a carrier's safety posture and assist applicants with information concerning U.S. safety regulations and help ensure that these carriers have methods in place to comply with the safety regulations. The United States and Mexico will share safety data generated on both sides of the border in such audits by U.S. officials. . . .
>
> To help ensure safety, Mexican carriers granted authority to operate in the United States beyond the border commercial zones also will receive a formal compliance review within the first 18 months of operation. Carriers that receive and maintain satisfactory compliance ratings will be awarded permanent operating authority at the end of the 18-month period of operating under provisional operating authority.
>
> All Mexican trucks and buses operating in the United States will be required to display a valid Commercial Vehicle Safety Alliance (CVSA) inspection decal. These decals, valid for 90 days, indicate a vehicle has passed a safety inspection by a qualified inspector. Likewise, Mexican truck and bus companies will be required to carry U.S. insurance while operating in the United States.

Id. at 2-3.

A. The Ninth Circuit Case

It would be easy to characterize this case as merely the Teamsters' newest attempt to keep out the trucks but we need to look at the relationship of the NAFTA and the environmental regulations in the U.S. The case in many ways reaches the nature of the NAFTA as a treaty and how the treaty relates to environmental rules. "The Court in rendering its decision determined that rules implementing the North American Free Trade Agreement (NAFTA) are subject to invalidation if they fail to comply with the requirements of other federal laws."[398] The three judge panel considering the petition ruled unanimously in favor of the petitioners on both grounds.[399] Justice Thomas would later encapsulate this position in the Supreme Court decision as follows:

> According to the Court of Appeals, FMCSA was required to consider the environmental effects of the entry of Mexican trucks because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the [Environmental Assessment] was prepared and the decision not to prepare an [Environmental Impact Statement] was made." Due to this perceived deficiency, the Court of Appeals remanded the case for preparation of a full [Environmental Impact Statement].[400]

The court-ordered study is expected to take a year and cost $1.8 million.[401] The focus of the study is to determine the effect of Mexican long- and short-haul trucks on U.S. roads.[402] Others believe the study could take up to five years if not fast-tracked.[403] At the time of the stay, the DOT had received 135 applications to operate past the commercial zone, half of which, according to the DOT, were ready for safety audits.[404] In September 2003, The Bush administration appealed to the Supreme Court to stop the study.[405] Speaking for the Bush administration, Solicitor General Theodore Olson pointed to the need to fulfill the NAFTA obligations, a misapplication of the environmental laws by the Ninth Cir-

398. *Ninth Circuit Entry on Hold*, *supra* note 389. ("The DOT was prevented from contending that NAFTA trumped other federal laws, because NAFTA itself contains a provision providing that any provision of the agreement that is inconsistent with federal law will not have any effect.")

399. *Id.*

400. Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204, 2212 (2004) (internal citations omitted).

401. Associated Press, *Truck Conflict Grows/Administration Asks For High Court's Help on Mexican Vehicles,* Hous. Chron., Sept. 11, 2003, at 1 [hereinafter *Truck Conflict*], *available at* 2003 WL 57441988.

402. *Id.*

403. Bonnie Pfister, *It will probably be at least two more years before Mexican. . .*, San Antonio Express-News, May 31, 2003, at 1C, *available at* 2003 WL 20249408.

404. *Brakes on Mexican Trucks*, *supra* note 386.

405. *Truck Conflict*, *supra* note 401.

cuit, and "constrain[ing] the president's discretion to conduct foreign affairs, . . . prevent[ing] the president's action from taking effect and thereby hamper[ing with] commerce."[406]

B. The Supreme Court Case

The Supreme Court reviewed the relationship between presidential foreign affairs actions and domestic environmental protection requirements, specifically under the NEPA[407] and the Clean Air Act.[408] Was the DOT required to comply with the environmental impact statement ("EIS") requirements of NEPA and the Clean Air Act? The Washington Post framed it as follows: "Does the Department of Transportation have to write an environmental impact statement to let Mexican truckers use U.S. roads?"[409]

The oral arguments began with Deputy Solicitor General Edwin Kneedler's remarks. They are worth repeating, as they summarize the progression we have been tracing in this paper:

> Mr. Chief Justice, and may it please the Court:
> In February of 2001, an international arbitration panel, convened under the North American Free Trade Agreement, concluded that the United States' continuation of a blanket ban or a moratorium on the operation of Mexican domiciled commercial carriers beyond the border zone in the United States violated NAFTA.
> Soon thereafter, the President made clear . . . his intention to comply with the arbitration decision by invoking power specifically vested in him by Congress to lift the moratorium in order to comply with an international trade agreement. And the President in fact did lift the moratorium in November of 2002.
> In this case, the Ninth Circuit held that the Federal Motor Carrier Safety Administration, an agency in the Department of Transportation that is limited to a . . . safety mandate, was required to conduct an elaborate and complex environmental analysis of the President's foreign trade and foreign policy decision before it could enter or issue procedural safety regulations that were necessary to implement the President's decision. The Ninth Circuit set aside the procedural regulations on that ground and thereby prevented the agency from granting certification to carriers that under the President's decision were eligible to receive it.
> The Ninth Circuit's decision is incorrect and it has frustrated the President's ability to comply with NAFTA.
> Congress and the President, the two entities whose joint action brought about the lifting of the moratorium, are not subject to either NEPA or the provisions of the Clean Air Act that respondents rely on to require an envi-

406. *Id.*
407. National Environmental Policy Act of 1969, 42 U.S.C. § 4321.
408. Clean Air Act, 42 U.S.C. § 7506.
409. Supreme Court Calendar, Wash. Post, Apr. 21, 2004, at A6.

ronmental analysis. Accordingly, the agency acted entirely reasonably in choosing to take the President's action as a given, including any increased traffic or trade that might occur as a result of the President's decision and to, instead, focus its own environmental analysis on the effects of its own procedural regulations.

FMCA's . . . governing statute requires it to grant registration to any carrier that is willing and able to comply with applicable safety, safety fitness, and financial responsibility requirements. The agency has no authority to deny operating permission to a carrier, foreign or domestic, based on environmental concerns or foreign trade concerns. It has no authority to countermand the President's decision or to refuse to issue the regulations that were necessary to implement the President's decision.[410]

News reports on the oral arguments at the Supreme Court on April 21, 2004 seem to point in the direction of the Court taking a clear, simple path, similar to the Panel's reading of the law in 2001. Chief Justice William Rehnquist is reported to have remarked, "it seems to me a very doubtful proposition that statutory law - in this case, the Environmental Protection Act - would trump the president's constitutional authority to implement treaties ratified by Congress."[411] And Justice Stephen Breyer "noted that, under NAFTA, 'Mexicans and Americans are to be treated alike.' That includes the treaty's trucking provisions."[412] David Hendricks of the *San Antonio Express-News* reported that "Justice Antonin Scalia said such a rule would require 'every agency' to conduct environmental reports on 'every decision,' since nearly all regulations have some impact on the environment."[413] "Most associate justices appeared engaged and asked detailed questions of trucking regulations, although Sandra Day O'Connor, Ruth Bader Ginsburg and Clarence Thomas remained silent."[414]

The *Dallas Morning News* reported the following:

"It seems to me obvious that you don't have to make an environmental impact statement on something you have no power to remedy," said Justice Antonin Scalia.

"Does this agency have the authority to exclude trucks on the basis of environmental (concerns)?" asked Justice Stephen G. Breyer.

Even Justice David H. Souter, who seemed to be searching for a rationale to permit a wider environmental examination, asked [Mr.] Weissglass if he ex-

410. Petitioner's Arguments, at *1-*3, Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204 (2004) (No. 03-358), *available at* 2004 U.S. TRANS LEXIS 39.

411. Editorial, *Open Roads*, COPLEY NEWS SERV., Apr. 30, 2004.

412. *Id.*

413. David Hendricks, *OK for Long-Delayed Cross-Border Trucking Would Help S.A.*, SAN ANTONIO EXPRESS-NEWS, Apr. 28, 2004, at 1E (quoting Mark Helm of the Hearst Washington Bureau).

414. John D. Schultz, *Trucking's Day in Court; Teamsters, Environmentalists, Safety Advocates Make Case to Keep Mexican Carriers Out of U.S.*, TRAFFIC WORLD, Apr. 26, 2004, at 14.

pected the federal safety agency to simply "find a safety hook" to keep out older, more polluting Mexican trucks.
Under questioning by Justices Scalia and Breyer, [Mr.] Weissglass told the court that the safety agency can treat Mexican trucks differently from U.S.-based carriers.
"You're saying they have to look at Mexican trucks," said Justice Breyer. ". . . Why shouldn't they have to look at the whole thing?"[415]

The *LA Times* reported

Under the free-trade treaty, "Mexicans and Americans are to be treated alike," said Justice Stephen G. Breyer. He too wondered how safety regulations in U.S. law gave the appeals court reason to block the flow of Mexican trucks.[416]

And the *San Francisco Chronicle* reported the following:

Justice Antonin Scalia posed the hypothetical case of a "mad millionaire" who applied to the Federal Communications Commission for a license and threatened that if it were denied, he would unleash a flood of trucks that would pour out emissions and greatly increase U.S. air pollution.
Scalia asked whether the FCC—which oversees communications, not the environment—would then have to develop an environmental impact statement before it issued a license, "knowing what the result would be of the mad millionaire's actions."
The plaintiffs' attorney, Jonathan Weissglass of San Francisco, said the question would hinge on whether the added pollution was foreseeable.
Scalia replied that yes, the mad millionaire put this threat in writing and swore to do it. "He really is crazy," Scalia said.
Weissglass replied that in that case, then the FCC would have to demand an environmental impact statement.
Justice Stephen Breyer then took Scalia's hypothetical to a more absurd level, outlining another fictional scenario involving the Postal Service. If the Postal Service were in any way involved in the mad millionaire's application, would that agency be required to do an environmental study, Breyer asked.
"The answer is clearly no," he said.[417]

What is interesting is that Teamsters' President Hoffa was still asserting that Mexican trucks would be held to a different standard. From the steps of the Supreme Court, he is reported to have said, "We have rules in this country and everybody has to abide by those rules, . . . American truckers have to abide by those rules. It's that simple. That's the basic

415. Allen Pusey, *Supreme Court Asked to Delay Mexican Trucking in U.S.*, DALLAS MORNING NEWS, Apr. 22, 2004, at Bus. & Fin. News.

416. David G. Savage, *Bush Wants U.S. Roads Opened to Mexican Trucks, Buses; The High Court is Urged to Lift an Order Keeping the Older, Diesel-Burning Vehicles Near the Border*, L. A. TIMES, Apr. 22, 2004, at A14.

417. Carolyn Lochhead, *High Court Takes Up Allowing Mexican Trucks on U.S. Roads*, SAN FRAN. CHRON., Apr. 22, 2004, at A8.

issue, and I think that was shown here."[418] And Deborah Sivas, Director and Managing Attorney, of the Earthjustice Environmental Law Clinic at Stanford issued the following statement:

> NAFTA requires that nations doing business in the United States obey our environmental protection laws. If the Bush administration wants to allow these polluting diesel trucks free rein on US highways they must first tell us how high an environmental price all Americans, especially those living in border states, will pay. Many communities near the border, including California's Imperial Valley and the Los Angeles basin, are already suffering from terrible air pollution levels and they shouldn't be subjected to the increased asthma and cancer risks posed by diesel pollution. Thousands of dirtier trucks plying our highways each day will undermine the work of local air districts to clean up the air and will place an extra burden on our factories and power plants to compensate. At a minimum, the Bush administration owes Americans a plan to bring Mexican trucks up to code.[419]

C. The Supreme Court Decision

On June 7, 2004, a unanimous Supreme Court issued its decision.[420] Written by Justice Thomas, the Court stated the question and answer:

> In this case, we confront the question whether the National Environmental Policy Act of 1969 (NEPA), and the Clean Air Act (CAA), require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. Because FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement on FMCSA.[421]

The issues were then discussed in detail. Of interest here is the pollution caused by the *additional inspections* of trucks at the border that Public Citizen is concerned about.[422] "Critical to its calculations was its consideration of only those emissions that would occur from the increased roadside inspections of Mexican trucks; like its NEPA analysis, FMCSA's CAA analysis did not consider any emissions attributable to the increased presence of Mexican trucks within the United States."[423] Second, in the oral argument, the focus was on older trucks polluting versus newer trucks, without any mention of the commercial zone and the

418. Schultz, *supra* note 414, at 14.

419. *Earthjustice Expert Available on Mexican Truck Case Before Supreme Court Today: Amicus Brief Author Defended Clean Air Standards,* U.S. Newswire, Apr. 21, 2004.

420. *Public Citizen*, 124 S. Ct. at 2204.

421. *Id.* at 2209.

422. *See id.* at 2217.

423. *Id.*

current system.[424] If trailers are no longer transferred from Mexican carriers using older more polluting trucks, wouldn't this help the environment? This was never part of the discussion.

V: Potential Future Roadblocks

Not all of the possible problems with allowing Mexican carriers across the border have been exhausted. Insurance issues, drug trafficking concerns, labor laws, post-September 11, 2001 security concerns, and the most ironic of all, Mexico's willingness to have U.S. trucks come across the border, are still issues that have yet to be fully politicized and aired for debate. For, in the end, we seem to be headed back to where we began. The U.S. closed its border in the 1980s because Mexico would not allow in U.S. trucks. This issue did not go away, upon the signing of the NAFTA, as one needs only look at the 1995 United Parcel Service ("UPS") controversy:

> In April 1995, the United States sought consultations with Mexico arising out of Mexico's refusal to provide "national treatment" to an American-owned package delivery firm—the United Parcel Service ("UPS"). Mexico refused to allow UPS to utilize the same large trucks as its Mexican competitors. While the dispute apparently was discussed in a meeting of the Free Trade Commission, there has been no formal resolution of the case, even though "informal" discussions were reported to be continuing as late as October 1996. Meanwhile, UPS announced that it planned to abandon its Mexican operations, contending that "[b]urdensome customs procedures and protectionist regulatory practices have made our ground service to Mexico inefficient and costly to operate."[425]

There were also other safety concerns in Mexico as well. "[The Economist] reported that in 1996 there were approximately two attacks daily on heavy trucks in Mexico. There are also many thefts of trucks in Mexico."[426] How much has changed in the last eight years has not been the subject of many journalists or interest groups.

It has also been pointed out that Mexico, like the U.S., has powerful groups that are opposed to the opening of the border. Like the Teamsters, these groups, including Canacar, the largest Mexican trucking industry trade group representing seventy-eight percent of the commercial rigs, have lobbied to keep the border closed and actually *void* this portion

424. Respondent's Argument, at *30-*31, Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204 (2004) (No. 03-358).

425. Gantz, *supra* note 11, at 1064. *See also* Martha Brannigan, *UPS Cancels Land Service to Mexico*, Wall St. J., July 12, 1995, at A2 (discussing UPS' complaints about Mexican government procedures).

426. Isabel Studer, Itam Curso Del Tratado De Libre Comercio De América Del Norte [NAFTA and the Trucking Industry] § 3.2 (1999), *at* http://wehner.tamu.edu/mg-mt.ww/nafta/spring99/Groups99/IT-AM/transpo2.htm.

of the NAFTA.[427] Even before the Panel decision was released, MexLink, a newspaper specializing in trucking and shipping interests, was reporting that Canacar was concerned about U.S. investment in Mexican trucking companies, and Canacar's interest in having the new president-elect, now President Fox, put limitations on foreign investments to a minority position in Mexican trucking companies, this while Mexico was seeking the NAFTA obligations to be opened in investment and increased border activity on the U.S. side.[428]

After the decision, Mexican truckers threatened to strike if President Fox allowed U.S. trucks to operate in Mexico in the manner required by the NAFTA.[429] In fact, the president of Canacar Manuel Gomez asked Fox to put in place a Moratorium against the trucks.[430] Canacar also sponsored a conference, *Mexico Transporta 2002*, where President Fox suggested he might take retaliatory step regarding the safety and insurance requirements now imposed.[431]

Additionally, Mexico currently prohibits foreign labor unions from competing in Mexico.[432] "Mexican workers could possibly gain greater protection if U.S. labor organizations were allowed to operate in Mexico, as U.S. unions are allowed in Canada. This discovery is crucial because it points to politics as overreaching and at times overshadowing the general protection of workers' rights."[433] Again, these are areas the journalists, Teamsters, and other interest groups have not been as vocal.

VI: Conclusion—Questions Left Unanswered

In 2001, an arbitration panel returned a verdict in Mexico's favor;[434] yet, three years later, Mexican trucks are still not allowed past the commercial zone, and legislatively and judicially, no one has even begun to deal with access for U.S. trucks into Mexico. Following the decision, throughout 2001, the U.S. Senate and House debated and implemented additional safety legislation with the DOT releasing new requirements in

427. *See Trucking Talk,* MexLink, Fall 2000, at 1 [hereinafter *Trucking Talk*], *available at* http://www.billhayintl.com/mexlinx.htm (last visited Sept. 5, 2004) (stating that 4000 trucking companies, and 50,000 owner-operators are members of and represented by Canacar). *See also* Chris Kraul, *NAFTA May Deliver Blow to Mexican Truckers,* L.A. Times, Aug. 15, 2001, at A1.

428. *Trucking Talk*, *supra* note 427, at 1.

429. *Mexican Truckers Threaten Strike Over NAFTA Provisions*, EFE, Dec. 12, 2002, *at* http://www.geo-cities.com/ericsquire/articles/ftaa/efe021212.htm (last visited Apr. 2, 2004).

430. *Id.*

431. Wilson, *supra* note 65.

432. Kraul, *supra* note 427, at 1.

433. Michael S. Plotkin, *Workers' Rights: A Winding Road in the Trucking Dispute Between the United States and Mexico*, 2 Rich. J. Global L. & Bus. 221, 231 (2003).

434. *See* NAFTA Panel Decision, *supra* note 3, at 90-91.

2002 for Mexican trucks to meet.[435] But the border would still not open. Then an environmental impact statement has been required by the Ninth Circuit Court of Appeals, which was expected to delay the border opening.[436] The Supreme Court removed the latest roadblock.[437] Will the border open after that? How long will that take? Months? Another year? Two? Five? Not if certain powerful interests, including the Teamsters, Public Citizen, and various environmental groups have their way. One wonders how and why the opening of the border was included in the NAFTA if there is so much opposition. Of course, the easy answer is that it is a step in the process to liberalize trade. But nothing seems as simple as this when it comes to the issue of trucks.

This has also been the story of the third Chapter 20 case filed under the NAFTA, and the framework of relations surrounding the issues of cross-border trucking. In describing the negotiation process from the Mexican side, Hermann von Berurab noted that to gain support for an U.S.-Mexican free trade agreement, he had to take into account the "framework of relations"

> Everything had to be understood within the framework of relations (1) between the [US's] administration and the legislative branches, with Congress granting rights to the executive but at the same time vying to control the process; (2) between the openness of the largest market in the world and its persistent trade deficit, which created great contradictory pressures . . . and (3) between the sectors that were protectionistic by tradition or need and the ones seeking to open foreign markets in a context of globalization that imposed necessary, but at times, unwelcome, transformations.[438]

This agreement in its practical real world, political setting is about relationships. But after all these years of work and research, I am left with many unanswered questions, questions that remind me of the U.S.'s questions posed for a proposed scientific review board during the arbitration process—interesting and even useful if answered but nearly impossible in reality to actually know for sure. And so I leave you with five questions—part musings, part rants.

1. The Chapter 20 case: What was Mexico's purpose in filing the Chapter 20 case? What did they hope to gain? What is considered a victory? What would have happened if the United States had actually opened the border? How would Mexico have reacted? Was this ever a possibility, or did Mexico know that this was merely a rhetorical move on their part, that the politics of the United States would never actually let

435. *See generally* FMCSA Proposed Rules, *supra* note 242.

436. *See Ninth Circuit Entry on Hold*, *supra* note 389, at 4.

437. *See Public Citizen*, 124 S. Ct. at 2209.

438. VON BERURAB, *supra* note 28, at 3-4.

the border be open? Will the U.S. file its own Chapter 20 to have rights to U.S. trucks in Mexico?

2. The FMSCA Rules and Congressional Legislation: While infrastructure and on-sight inspections were included, what changed over all the debate? Why wasn't the infrastructure complete? Did everyone realize that this would, in part, cause a delay? How prepared were the U.S. and Mexico in reality for the initial opening? How much work has been done now, and is it really sufficient?

3. How did the cross-border trucking element get into the NAFTA? If interests can work this hard to keep it out, why was it included in the first place? The Teamsters have been so influential and successful at guiding the rhetoric, politics, and courts in this issue. Where were they at the negotiation of the NAFTA? Did they have a role in these? A number of people have always commented to me that the trucking industry, rather than the Teamsters wanted this provision. Where were these influential voices when the border did not open? It is a strange tale indeed.

4. How much will really change once the border is opened to Mexican-domiciled trucks? Will it change the way the U.S. and Mexican companies currently do business? How much will insurance, immigration, and other yet to be focused upon issue, play a new role? This may be only something we know in time. Some have said that the partnerships that have developed during the commercial zone era will continue, what will change is that the truck will remain with the trailer, but the driver will change at the border, or that the trailer will still be transferred from a Mexican truck to a U.S. truck, because of insurance and other liability issues. Moreover, Mexican trucks will only be allowed to transport from Mexico to a point in the U.S., not from freely from point-to-point within the U.S., and many predict this restriction will keep most Mexican carriers from doing much business in the U.S.

5. The final question, which has yet to be answered is will the border actually open to cross-border trucks beyond the commercial zone? As of May 2005, the border remained in its pre-NAFTA state – which U.S. and Mexican trucks still switching their trailers from one to the other within the commercial zone.

Today, there are the same issues we have seen in the past, with the same players, interests and concerns. In January 2005, the DOT issued another report which the Teamsters have interpreted as concluding that the Mexican government and the country's motor carriers have not met the safety requirements and preconditions outlined in provisions of the NAFTA, and that should not be granted long-haul operating authority within the United States.[439] According to the Christian Science Monitor,

439. *DOT Audit Supports Teamster Position on Cross-Border Trucking Office of Inspector*

"the January DOT report recommend[ed] that the trucks be examined by US inspectors before they leave Mexican soil. Mexico balked at what it said was an infringement on its sovereignty."[440] The question now at issue concerns "Section 350 of the appropriations act of FY 2002, which prohibited the FMCSA from using funds to review or process applications for long haul of Mexican motor carriers until certain conditions and safety requirements were met."[441] The Teamsters are claiming that the recent DOT report confirms that the safety requirements have not been met and therefore the border should not be open. *Logistics Today* explains,

> One hang up is the portion of Section 350 that requires the FMCSA to review 50% of Mexican motor carriers applying for long haul authority on-site and that be at lease [sic] 50% of the estimated truck traffic for the year. Mexico and the U.S. have not agreed on procedures for conducting the reviews. Additionally, the [Office of Inspector General] is concerned that the just as FMCSA must fulfill new requirements for background checks for U.S. drivers applying for hazardous materials endorsements, that these apply to Mexican motor carriers, as well.[442]

As of April 2005, ten months after the Supreme Court decision of June 7, 2004, as of April 2005, the situation diplomatically has not been resolved in any way: "U.S. and Mexican trade officials continue to bargain over truck safety and underwriting data issues. . . ."[443] In a recent Senate Hearing, Senator Murray asks Secretary of Transportation, Norman Mineta, why it has taken so long to reach an agreement with Mexico on cross-border trucking.[444] His answer and her reply:

> MINETA: Mostly because of [Mexico's] own reluctance to do so. We have worked—I've had a number of meetings with Secretary Cerisola, and every time I meet with him, this is a subject that I bring up.
> We have had a memorandum in their office for over probably two years on trying to get this memorandum of agreement completed. And we just haven't been able to bring this to closure. . . .

General Finds Mexican Government and Motor Carriers Do Not Meet NAFTA Requirements, PR NEWSWIRE-U.S., Jan. 26, 2005.

440. Danna Harman, *For Most Mexican Truckers, Access to US a Waiting Game*, CHRISTIAN SCI. MONITOR, Feb. 17, 2005, *available at* http://www.csmonitor.com/2005/0217/p07s02-woam.html (last visited Apr. 28, 2005).

441. *DOT Says Mexican Trucks Shouldn't Run Long Haul in the U.S.*, Logistics Today (2005), *available at* http://www.logisticstoday.com/sNO/6918/LT/displayStory.asp (last visited Apr. 28, 2005).

442. *Id.*

443. Steven Tuckey, *Mexican Trucks Hit Legal Speed Bumps Inland: Marine Insurers Eye Potential, Pitfalls of Cross-Border Transport*, NAT'L UNDERWRITER – PROP. & CASUALTY, Apr. 4, 2005.

444. U.S. Senate Comm. on Appropriations: Subcomm. On Transportation, Treasury, Judiciary, HUD, and Related Agencies Holds A Hearing on Fiscal Year 2006, Transportation Dep't Appropriations, FDCH POLITICAL TRANSCRIPTS, Mar. 15, 2005.

> We've suggested that this be a conversation between the president and President Fox and Prime Minister Martin when they meet. I believe it's sometime. . .
> MURRAY: So you believe that this is reluctance on behalf of Mexico to move forward with cross-border trucking?
> MINETA: I think it is, because they've had tremendous pressure from their own trucking association, Canacar, to move forward on this.
> You gave us the money in 2002 to bring our workforce up to place, and we have them in place. We're utilizing those inspectors that are not on the border at other inspection points.
> But we're ready to move at any time that we get that memorandum of agreement signed, to allow our inspectors to go to their terminals and to their maintenance facilities of their trucking companies.[445]

This feels like the same rhetoric we have seen from the beginning. But will it open the border? Only time will tell. And in the most crazy twist of all, after the U. S. Supreme Court reversed the Ninth Circuit's ruling, finding that processing of Mexican applications could not be held up until one received the results of a Clean Air Act analysis and Environmental Impact Statement, a pilot study to measure emissions from Mexican trucks has begun in Nogales, Arizona. Begun in March 2005,

> The study will take place over the next three weeks at the peak of the produce season and will test 1,200 trucks each day in the first hundred yards of their U.S. journey.
> The hope is to quantify - for the first time - how much pollution is coming from Mexican trucks so U.S. officials have a better idea of what will happen to air quality in border cities and states when the trucks are allowed beyond the 20-mile border zone, as envisioned by the North American Free Trade Agreement, or NAFTA."[446]

Of course, once again, there is a complete disconnect that many of the older trucks causing the pollution would not be crossing the border if Mexican trucks were allowed to go further into the United States and that the pollution would then be cut down. But that is not discussed.

This article shows the complexity of the rather simplistic statement that Mexico cross-border trucking must meet US standards to cross the border. There has been nothing simple about trying to get the border open to cross-border trucking, and as the article points out, this is only one side of the story. How will Mexico behave if and when US trucks want to cross further into Mexico as designed by the NAFTA? Will there be another NAFTA case? What will happen? Another cliffhanger, I suppose.

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445. *Id.*

446. Dina Cappiello, *Pilot Study to Measure Mexican Truck Emissions*, HOUS. CHRON., Mar. 14, 2005.