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## Free Trade but Not Free Transport - The Mexican Stand-off

### Keywords

International Trade, Transportation Law, States, Economic Policy, War

# FREE TRADE BUT NOT FREE TRANSPORT? THE MEXICAN STAND-OFF†

PAUL STEPHEN DEMPSEY\*

With ninety-five million inhabitants, Mexico became the United States' second largest trading partner, following only Canada.<sup>1</sup> Nearly \$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).<sup>2</sup> In NAFTA's first decade, truck traffic across the U.S.-Mexico border increased approximately 400%.<sup>3</sup> By 2000, trucks were responsible for transporting an estimated 75% of the goods moved between the two nations.<sup>4</sup> Five million trucks cross the U.S.-Mexican border each year.<sup>5</sup>

A number of legal and regulatory barriers limit operations by Mexican bus and trucking companies within the United States. With the exception of cross-border transportation of passengers in charter and tour bus service, operations have historically been limited to the commercial zones (defined as a zones extending from three to twenty miles of a community's limits, depending upon population) of U.S.

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1. See Eunice Moscoso, *The Wheels of Progress: U.S. Roadways Soon Will Be Open to Trucks*, AUSTIN AM. – STATESMAN, Mar. 25, 2001, at A1.

2. See *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001. See generally 19 USC § 3301 *et. seq.* (North American Free Trade Agreement effective January 1, 1994).

3. See Alexandra Walker, *No Easy Solutions To Mexican Truck Safety Issue*, STATES NEWS SERV., Feb. 22, 2001.

4. See Moscoso, *supra* note 1, at A1.

5. See *NAFTA Trucking Deadline Passes Over U.S. Inspection Concerns*, J. COM., Mar. 8, 2001, at WP.

border communities.<sup>6</sup> In the commercial zone, Mexican carriers would deliver trailers to U.S.-based long-haul trucks, which slowed the movement of goods and increased transportation costs. These limitations applied to Mexican common carriers, private carriers and to carriers of both regulated and exempt commodities. Prior to NAFTA, U.S. carriers were completely banned from operating in Mexico, even though Mexican carriers were able to operate within U.S. commercial zones.

As of September 1994, the Interstate Commerce Commission (ICC) issued licenses to 4,666 Mexican motor carriers to operate within the commercial zones along the U.S.-Mexico border. In fiscal year 1993, for example, the ICC obtained twenty-eight injunctions against Mexican carriers performing unauthorized bus or trucking operations in the U.S. The Department of Transportation (DOT) investigates Mexican carriers suspected of operating within the U.S. without the required license and those licensed Mexican carriers that are suspected of operating outside of the commercial zones.<sup>7</sup> The DOT also investigates those carriers that concealed their Mexican ownership or control when they applied for and received a license authorizing them to operate in interstate commerce in the U.S.

Under NAFTA's terms, which became effective in January 1994, most restrictions against Mexican carriers operating in the U.S. were to have been phased out in the 1990s.<sup>8</sup> More specifically, NAFTA laid out a framework under which, beginning December 18, 1995, Mexican trucking companies were to have been allowed to obtain licenses to perform cross-border operations into the four U.S. states bordering Mexico (i.e., California, Arizona, New Mexico and Texas), and U.S. carriers were to have been allowed entry into the six northern border states of Mexico.<sup>9</sup> On January 1, 2000, NAFTA provided cross-border access for Mexican carriers that engage in foreign commerce only, throughout the United States. Reciprocal rights were to be granted to U.S. carriers throughout Mexico.<sup>10</sup> A similar phased-in schedule will eventually allow full access by Mexican passenger carriers to the U.S.

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6. See Leo Abruzzese, *ICC Seeks to Expand Commercial Zones*, J. COM., Jan. 5, 1988, at 2B.

7. See generally *Statement of U.S. Transportation Secretary Supporting the Motor Carrier Safety Improvement Bill*, M2 PRESSWIRE, Nov. 22, 1999 (describing improvements to DOT operations).

8. See *NAFTA Will Be Slow to Change the Rules for Transportation Operations and Ownership*, INFO. ACCESS CO., Jan. 1994, at 26. See also Robert Collier, *Mexico's Trucks On Horizon; Long-Distance Haulers are Headed into U.S Once Bush Opens Borders*, S.F. CHRON., Mar. 4, 2001, at A1.

9. See *Pena Announces Delay in NAFTA Crossings*, HAZMAT TRANSP. NEWS, Jan. 1996. See also Collier, *supra* note 8, at A1.

10. See Collier, *supra* note 8, at A1.

market.<sup>11</sup>

NAFTA also contemplated lifting foreign ownership restrictions.<sup>12</sup> NAFTA provided that on December 18, 1995, Mexican investors were to be permitted to invest in 100% of a Mexican carrier providing international service, while U.S. investors were allowed to invest up to 49% in U.S. carriers providing international service.<sup>13</sup> On January 1, 2001, that percentage increased to 51%; complete ownership is to be permitted in 2004.<sup>14</sup>

The U.S. dutifully implemented those NAFTA provisions allowing Canadian carriers, vehicles and drivers to operate in the U.S.<sup>15</sup> The ease of implementation stemmed primarily from the similarity in U.S. and Canadian truck inspection programs.<sup>16</sup> However, implementation of NAFTA provisions relating to Mexican carriers were not as easy. On December 17, 1995, only one day before the U.S.-Mexican border was scheduled to open, then-U.S. President Bill Clinton issued a safety proclamation for unilaterally closing the border to Mexican trucks beyond the commercial zones, thereby failing to implement NAFTA.<sup>17</sup> The Mexican government responded by placing a similar restriction on U.S. vehicles.<sup>18</sup>

Ostensibly, President Clinton's moratorium was based on safety considerations.<sup>19</sup> He insisted that Mexican trucks would not be allowed beyond the commercial zone until the U.S. was satisfied with Mexican carriers' compliance with U.S. transportation safety laws.<sup>20</sup> Some contend, however, that President Clinton's moratorium was imposed under pressure from the 1.4 million-member International Brotherhood of Teamsters and the insurance industry.<sup>21</sup> Mexican drivers earn only about one-third of the salary of U.S. drivers, and typically drive their vehicles up to twenty hours per day.<sup>22</sup> Consequently, many anticipate that after NAFTA is fully implemented, the trucks hauling most of the

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11. See Phyllis F. Scheinberg, *Commercial Passenger Vehicles – Safety Inspection of Commercial Buses and Vans Entering the United States from Mexico*, 1997 GAO REP. 97-194.

12. See *NAFTA Will Be Slow to Change the Rules for Transportation Operations and Ownership*, *supra* note 8, at 26.

13. *Id.*

14. *Id.*

15. See *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001.

16. *Id.*

17. See *NAFTA Panel Decision Creates Uproar*, LOGISTICS MGMT., Mar. 2001, at 19.

18. See Collier, *supra* note 8, at A1.

19. See *NAFTA Panel Decision Creates Uproar*, *supra* note 17, at 19.

20. See *id.*

21. See Collier, *supra* note 8, at A1.

22. *Id.*

two nations' trade will be driven by Mexican drivers.<sup>23</sup>

President Clinton's suspension of implementation of NAFTA led the Mexican government to file a formal complaint in 1998 requesting arbitration under NAFTA's dispute resolution provisions.<sup>24</sup> The Mexican government alleged in their complaint that the U.S. was engaging in protectionism.<sup>25</sup> The U.S. counterclaimed, accusing Mexico of improper retaliation by sealing off its borders to U.S. carriers.<sup>26</sup> The arbitral process is to take six years to run its course.

While the arbitration panel was being formed, Congress passed the Motor Carrier Safety Improvement Act of 1999.<sup>27</sup> This Act created the Federal Motor Carrier Safety Administration within the DOT and increased the penalties for Mexican carriers operating outside the commercial zones.<sup>28</sup> Under the Act, foreign domiciled carriers must carry a copy of its registration, and if a vehicle operates beyond the scope of its registration, it may be placed out-of-service.<sup>29</sup> The carrier is liable for a civil penalty and, depending upon whether the violation was intentional, the carrier may be suspended from operating anywhere in the U.S. for a period of time.<sup>30</sup>

On February 6, 2001, the five-member arbitration panel unanimously concluded that the U.S. decision to block Mexican trucks from entering the U.S. breached NAFTA, as did its refusal to allow Mexican companies to invest in U.S. international cargo companies.<sup>31</sup> With the threat of possible sanctions for non-compliance, the panel gave the U.S. thirty days to conclude a plan identifying a timetable and action steps that the U.S. will undertake in accordance with the arbitration panel's conclusions.<sup>32</sup> If negotiations to implement NAFTA are unsuccessful, Mexico has the right to levy compensatory duties equal to the economic damage it incurred as a result of the closed border since 1995.<sup>33</sup> Some estimate this potential damage amount to be

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23. See Collier, *supra* note 8, at A1.

24. See Kevin G. Hall, *Mexico Turning to Arbitration to Open Border*, J. COM., Aug. 5, 1998, at A1 (announcing its decision to exercise its Chapter 20 options under NAFTA).

25. See Collier, *supra* note 8, at A1.

26. See Debra Rose, *U.S.-Mexican Trucking: Standoff at the Border Continues*, BORDERLINES, June 2000, at 15.

27. See William Buxton, *Read: This Act Could Change Your Business*, TRANS. & DISTRIBUTION, Mar. 2000, at 11.

28. See generally Lisa H. Harrington, *Trucking Wins A Big One*, TRANS. & DISTRIBUTION, Jan. 2000, at 69.

29. See *Statement of U.S. Transportation Secretary Supporting the Motor Carrier Safety Improvement Bill*, M2 PRESSWIRE, Nov. 22, 1999.

30. See Buxton, *supra* note 27, at 11.

31. See Daniel McCosh, *DOT, Mexico Talk Trucks*, J. COM., Mar. 22, 2001, at WP.

32. See Alexandra Walker, *No Easy Solutions To Mexican Truck Safety Issues*, STATES NEWS SERV., Feb. 22, 2001.

33. See McCosh, *supra* note 31, at WP.

around \$200 billion.<sup>34</sup>

President George W. Bush promised to implement the arbitration decision expeditiously. As Governor of Texas, Mr. Bush signed a letter with the governors of Arizona, California, and New Mexico insisting that, "This transborder trucking delay robs the entire U.S.-Mexico border region of the full economic benefits that NAFTA promises."<sup>35</sup>

As noted above, Mexican truck drivers typically drive twenty hours per day in Mexico.<sup>36</sup> When they crossed the U.S. border, the Mexican drivers would be subjected to the ten-hour safety requirements with which the U.S. drivers must comply.<sup>37</sup> However, the Mexican drivers would not be subject to U.S. labor laws, such as minimum wage requirements.<sup>38</sup> Concerns remain about U.S. capabilities to police Mexican vehicles in order to assure that they meet U.S. safety standards. The primary reason for this concern is the fact that border crossings are notoriously understaffed.<sup>39</sup> The DOT Inspector General found that while the number of federal border inspectors increased to from forty persons to sixty persons in 2000, and from a mere seven persons in 1995, an additional 126 inspectors are needed.<sup>40</sup> For example, California gave full safety inspections to only 2% of the 920,000 short-haul trucks that entered the U.S. from Mexico in 2000.<sup>41</sup> In 1999, the Texas Department of Public Safety "inspected only about 1% of the 2.9 million trucks that crossed the U.S.-Texas border. . ."; half of these Mexican trucks were turned away for safety and other violations.<sup>42</sup>

Though the DOT inspected fewer than 1% of Mexican trucks in 2000, it estimates that 35% of Mexican trucks were put out of service due to significant safety violations, compared to a U.S. national average of 25% for 1999 and 34% for 2000.<sup>43</sup> These statistics have improved however. More than 40% of Mexican trucks that were inspected were taken out of service in 1997-98, compared with 25% for U.S. trucks and

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34. See McCosh, *supra* note 31, at WP.

35. Steven Greenhouse, *Bush to Open Country to Mexican Truckers*, N.Y. TIMES, Feb. 7, 2001, at A12.

36. See Collier, *supra* note 8, at A1.

37. *Id.*

38. *Id.*

39. See Moscoso, *supra* note 1, at A1.

40. See generally *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001.

41. See Collier, *supra* note 8, at A1.

42. Charlene Oldham, *U.S. Aid Sought for Truck Inspections*, DALLAS MORNING NEWS, Mar. 6, 2001, at 1D.

43. *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001; See also *Unions Aim to Block Trucks*, USA TODAY, Mar. 13, 2001, at 11A.

17% for Canadian trucks.<sup>44</sup> In 1995, on the other hand, 54% of Mexican trucks were pulled out of service.<sup>45</sup>

According to Texas legislator Ciro Rodriguez:

Mexican trucks are held to less stringent safety standards than U.S. trucks. Unlike American drivers, Mexican drivers do not have to meet minimal medical qualifications, submit to drug testing, or maintain logbooks which monitor the length of time they spend behind the wheel. Additionally, Mexican trucks are older, heavier, and more likely to transport unmarked toxic or hazardous materials. Overall, Mexican trucks are reported to have three times as many safety deficiencies than U.S. trucks and without a standard regulatory apparatus in place, Mexico has been unable to improve the safety of its trucks or enforce a border safety inspection program of its own.<sup>46</sup>

By 2001, some 184 Mexican trucking companies applied to transport goods in the United States.<sup>47</sup> Applications from 190,000 trucks were waiting to be processed.<sup>48</sup> But several safety issues required resolution: (1) road sign standardization; (2) drug and alcohol testing procedures; (3) medical examinations; (4) safety inspection and inspector training standards; and (5) completion of a database of Mexican trucking companies.<sup>49</sup>

The following table summarizes the differences in the regulatory regimes at the time of the arbitration decision:

TRUCK & DRIVER SAFETY REQUIREMENTS <sup>50</sup>		
SAFETY STANDARDS	UNITED STATES	MEXICO
Hours of Service	10 hours consecutive driving; 15 hours consecutive duty; up to 8 hours consecutive rest; maximum 70 hours driving in 8-days	No
Licensure	2 to 6 years	10 years

44. Brendan M. Case, *Mexican Truckers Challenge Image*, DALLAS MORNING NEWS, Mar. 7, 2001, at 1D.

45. Brenda Rodriguez, *Mexican Trucks Have Bumpy Ride in Senate*, DALLAS MORNING NEWS, Aug. 3, 2001.

46. Ciro Rodriguez, *Safety on the NAFTA Superhighway*, CONGRESSIONAL PRESS RELEASES, Feb. 17, 2001.

47. See *Mexico's Truckers Detoured By Legal, Safety Barriers*, *supra* note 43.

48. Diane Lindquist, *Driving Controversy: NAFTA and Mexico's Trucks*, COPLEYS NEWS SERV., Feb. 12, 2001.

49. *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001.

50. Collier, *supra* note 8, at A1.



Age of Driver	21 years minimum interstate	18 years old
Skills Test	Yes, for all drivers	Yes, for new drivers
Medical Card	Yes	No – medical qualifications on license
Automatic Medical Disqualification	Yes	No
National Monitoring System	Yes, to detect violations	Information system in infancy
Drug Testing	Testing and documentation	Documentation lax
Logbooks	Standardized logbooks with date graphs required	Standardized logbooks in different format, unenforced
Gross Vehicle Weight Limits	80,000 lbs	135,360 lbs
Roadside Inspections	Yes	Discontinued; new program to be phased in over two years
Out-of-Service Rules	Yes	New program to be phased in over two years
Hazmat Regulation	Strict standards, training, licensure and inspections	Covers fewer chemicals and substances, and has fewer licensure requirements
Vehicle Standards	Standards for antilock brakes, underride guards, night visibility of vehicle	Voluntary inspections
Safety Rating System	Yes	No

