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NAFTA Keep on Truckin': Paving the Way for Long-Haul Trucking Operations between Mexico and the United States

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I. INTRODUCTION

One of history's classic policy battles has been relentlessly fought between those who pay reverence to free trade[1] and those who hold protectionism[2] paramount. In 1994, after the North American Free Trade Agreement (NAFTA) entered into force,[3] protectionists sought to block terms of NAFTA[4] designed to facilitate cross-border trucking between Mexico and the United States.[5] The preservation of a U.S. moratorium on Mexico-domiciled trucking companies, fueled by protectionist attitudes under the guise of safety concerns,[6] prevented Mexican trucks from traveling beyond limited border commercial zones[7] in the United States and, subsequently, caused a breach of NAFTA.[8] In response, President George W. Bush[9] signed the Department of Transportation and Related Agencies Appropriation Act of 2002 ("Act of 2002") into law.[10] The Act of 2002

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1. The term "free trade" means "a legal arrangement or national policy under which the exchange of goods and services across international borders is neither restricted nor subsidized by techniques of government intervention such as import tariffs, import quotas, export subsidies, [and] discriminatory regulations." Paul M. Johnson, *Glossary of Political Economy Terms* (2000), *at* http://www.auburn.edu/~johnspm/gloss/free_trade.html (last visited Mar. 8, 2003) (copy on file with *The Transnational Lawyer*).

2. The term "protectionism" means "political-economic doctrines . . . advocating that government impose political barriers to international trade in order to 'protect' a domestic firm." *Id.*

3. *See* North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3311 (2000) (noting that NAFTA was entered into on December 17, 1992).

4. *See* North American Free Trade Agreement, 107 Stat. 2057 (1993), http://www.nafta-secalena.org/english/index.html (last visited Mar. 8, 2003) (copy on file with *The Transnational Lawyer*) (establishing rules under Chapter 12 of the Agreement to govern Cross-Border Trade in Services).

5. *See* Jason C. Messenger, Comment, *Opening the U.S.-Mexico Border: Problems and Concerns for the Bush Administration, the Country, and the Legal System to Consider*, 9 TULSA J. COMP. & INT'L L. 607, 609-10 (2002) (discussing the pressure from labor unions and the Democratic Party that persuaded the Clinton Administration to delay Mexican trucks access beyond the border commercial zones).

6. *See* Hale E. Sheppard, *The NAFTA Trucking Dispute: Pretexts for Noncompliance and Policy Justifications for U.S. Facilitation of Cross-Border Services*, 11 MINN. J. GLOBAL TRADE 235, 248 (2002) (explaining that the strongest campaigns to prolong the moratorium came from public interest groups and organized labor groups who argued that the U.S. obligations under NAFTA would jeopardize the safety of the American public). It has been suggested that many of the groups in opposition to cross-border trucking had ulterior motives such as job protectionism. *Id.* at 252-56.

7. *See* 49 C.F.R. § 372.241 (2003) (delineating a commercial zone as a municipality and a surrounding area that is determined by the municipality's population). When a municipality has a population of one million or more, the municipality and a 20-mile area around the municipality are exempt from the moratorium. *Id.* § 372.241(c)(7).

8. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (last visited Mar. 8, 2003) (copy of file with *The Transnational Lawyer*) (discussing whether the maintenance of the moratorium is justified under either Article 1202 or Article 1203 of NAFTA).

9. George W. Bush is the 43rd President of the United States. Mention of Bush, the Bush Administration, or the President in this Comment is in reference to George W. Bush unless otherwise distinguished.

10. *See* Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (addressing cross-border trucking at § 350).

contained measures designed to ensure safety on U.S. roads and honor NAFTA.[11] Subsequently, the Federal Motor Carrier Safety Administration ("FMCSA"),[12] an agency within the U.S. Department of Transportation,[13] implemented a border operational plan and promulgated rules required by the Act of 2002.[14] Finally, in November of 2002, President Bush lifted the moratorium and authorized the FMCSA to begin processing applications for Mexican long-haul trucking operations.[15] Despite this apparent resolution to the NAFTA cross-border trucking dispute, a recent decision by the Ninth Circuit Court of Appeals prevents the FMCSA from using the promulgated rules required by the Act of 2002 to process Mexican applications.[16] As a result, Mexican trucking companies are still prohibited from receiving FMCSA authority to operate beyond the border commercial zones and the United States continues to breach its NAFTA obligations.[17]

This Comment focuses on the border operational plan and safety regulations for cross-border trucking between Mexico and the United States established by the Act of 2002. It analyzes their capacity to satisfy four competing interests: the free trade vision of NAFTA; the safety of U.S. roads; the commercial wants of Mexican trucking firms; and the desires of protectionists. Part II provides the

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11. Richard Simon, *The World & Nation Deal Struck on Mexico Truckers' Access to U.S. NAFTA: Accord by Lawmakers, White House Resolves Politically Sensitive Provision of 1993 Treaty*, L.A. TIMES, Nov. 29, 2001, at A26.

12. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified as amended at 49 U.S.C. § 101 (2000)) (establishing the FMCSA); *see also* Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., *About Us*, *at* http://www.fmcsa.dot.gov/aboutus/aboutus.html (last visited Oct. 27, 2002) (copy on file with *The Transnational Lawyer*) (explaining that the FMCSA was established in accordance with the Motor Carrier Safety Improvement Act of 1999 to enforce motor carrier safety regulations). All commercial motor carriers that wish to operate in the United States must be granted operational authority by the FMCSA. *Id.* The FMCSA also assists in the development of compatible motor safety requirements and procedures for cross-border trucking operations pursuant to NAFTA. *Id.*

13. *See* R. Dale Grinder, U.S. Dep't of Transp., *The United States Department of Transportation: A Brief History*, *at* http://isweb.tasc.dot.gov/Historian/history.htm (last visited Mar. 7, 2003) (copy on file with *The Transnational Lawyer*) (explaining that the Department of Transportation is the primary agency within the federal government charged with shaping and administering polices to ensure safe and efficient transportation systems). The Department of Transportation is a cabinet level executive department of the United States government with fourteen individual operating administrations including the FMCSA. *Id.*

14. *See* Dave Longo, U.S. Dep't of Transp., *North American Free Trade Agreement - U.S. Department of Transportation Regulations*, *at* http://www.fmcsa.dot.gov/rulesregs/Mexican/NAFTA_Fact_Sheet.htm (last visited Oct. 2, 2002) (copy on file with *The Transnational Lawyer*) (announcing the regulations issued to govern Mexico-domiciled motor carriers applying to operate beyond the U.S.-Mexico border commercial zones).

15. *See* Memorandum from George W. Bush, President of the United States, to the Secretary of Transportation (Nov. 27, 2002), *at* http://www.whitehouse.gov/news/releases/2002/11/print/20021127-6.html [hereinafter Bush Memorandum] (copy on file with *The Transnational Lawyer*) (authorizing qualified motor carriers domiciled in Mexico to obtain authority to provide cross-border trucking services in the United States beyond the commercial zones).

16. *See* Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1032 (9th Cir. 2003) (remanding the matter to the Department of Transportation so that it may prepare a full Environmental Impact Statement and Clean Air Act conformity determination for all three regulations).

17. *See infra* notes 272-90 and accompanying text (discussing the effect of the 9th Circuit decision on the cross-border provisions of the Federal Motor Carrier Safety Regulations).

background that shaped the cross-border trucking dispute, the implementation of the border operational plan, and the regulatory scheme for Mexico-domiciled motor carriers operating in the United States beyond the border commercial zones.[18] Part III analyzes the post-moratorium disputes among the major competing interests.[19] These interests include complying with NAFTA, ensuring safety on U.S. roads, placing a heavy burden on Mexican trucking firms, and the continued efforts by protectionists to block Mexican long-haul trucking. Finally, Part IV concludes that the border operational plan and related regulations will not fully resolve the NAFTA cross-border trucking dispute because even if Mexican trucking firms can afford compliance, the protectionists will not be satisfied until the cost of compliance discourages Mexican trucks from making the long-haul into the United States.

II. THE LONG-HAUL TO REACH THE UNITED STATES

A roadmap of the past twenty years of U.S. policy toward Mexican trucking is necessary to understand the current struggle in resolving the post-moratorium dispute. It includes a discussion on the background that shaped the cross-border trucking dispute and an explanation of the FMCSA's border operational plan. More important, it provides an outline of the FMCSA's regulatory scheme for Mexico-domiciled motor carriers that wish to operate in the United States beyond the designated commercial zones.

A. *Background*

Prior to 1982, U.S. transportation policy permitted Mexican trucks to operate in the United States.[20] That policy was changed by the enactment of the Bus Regulatory Reform Act of 1982 ("BRRA").[21] The BRRA imposed a moratorium on the application process for Mexico-domiciled motor carriers[22] that sought permission to operate in the United States.[23] Mexican trucks could not operate in

18. *See infra* notes 20-168 and accompanying text (describing the reasons that led the United States to lift its moratorium for Mexico-domiciled trucks in order to implement the Federal Motor Carrier Safety Regulations).

19. *See infra* notes 168-290 and accompanying text (setting for the competing concerns that affected the post-moratorium policy established by the Act of 2002).

20. *See NAFTA: Arbitration Panel Decision and Safety Issues with Regard to Opening the U.S./Mexican Border to Motor Carriers: Hearing Before the House Subcomm. on Highways and Transit*, 107th Cong. (2001) [hereinafter *NAFTA Hearing*] (explaining that the United States did not distinguish between U.S. and foreign motor carriers when granting operational authority).

21. *See* Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 6(g), 96 Stat. 1102 (1982) (amending 49 U.S.C. § 10922 by adding subsections 1 and 2).

22. *See* 49 C.F.R. § 368.2 (2003) (defining a Mexico-domiciled motor carrier as a motor carrier of property whose principle place of business is located in Mexico).

23. *See* Sheppard, *supra* note 6, at 237-38 (explaining that the Bus Regulatory Reform Act placed a two year moratorium on the issuance of new operating permits for foreign domiciled motor carriers, but authorized the President to lift the moratorium if in the national interest). The moratorium on Canadian trucks was immediately lifted after reaching an agreement on reciprocal truck access. *Id.*

the United States without first obtaining federal permission.[24] Mexico's refusal to give U.S. trucks reciprocal access to the Mexican domestic trucking market was the motivation for implementing the moratorium.[25] The BRRA made some exceptions to the moratorium, giving Mexican trucks limited access to U.S-Mexico border municipalities in California, Arizona, New Mexico, and Texas.[26] Nevertheless, the prohibition on processing applications for operating authority throughout the United States remained.[27]

More than a decade after the enactment of the BRRA, the United States, Mexico, and Canada established a free trade area under a trilateral agreement called NAFTA.[28] The purpose of NAFTA was to eliminate barriers to trade and facilitate the cross-border movement of goods and services.[29] Thus, U.S. policy toward Mexican trucking had to be consistent with the principles of NAFTA.[30] In accordance with "Annex 1" of NAFTA,[31] the U.S. moratorium on Mexican motor carriers had to be incrementally lifted to give Mexican trucks access to U.S. border states by 1997 and complete access to the United States by the year 2000.[32]

During the Clinton Administration, strong political pressure slowed the progress toward lifting the moratorium.[33] Opposition[34] to U.S. obligations under

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24. *Id.*

25. *See* Stephen T. Weisweaver, Comment, *International Trade Partners, Politics, and Promises: An Analysis of the North American Free Trade Agreement's Arbitral Panel Decision Concerning the United States-Mexico Trucking Dispute*, 32 N.M. L. REV. 471, 472-73 (2002) (discussing the United States' motivations for imposing the moratorium). The Motor Carrier Act of 1980 essentially eliminated regulatory barriers that distinguished Mexican motor carriers from U.S. domestic motor carriers. *Id.*

26. *See* 49 C.F.R. § 368.1 (2003) (setting forth rules for issuance of Certification of Registration to those Mexican motor carriers that wish to operate exclusively in the border commercial zones); *see also* Revisions of Regulations and Application Form for Mexico-Domiciled Motor Carriers to Operate in U.S. Municipalities and Commercial Zones of the U.S.-Mexico Border, 67 Fed. Reg. 12,652 (Mar. 19, 2002) (to be codified at 49 C.F.R. pt. 368) (explaining the revisions to part 368). Although these revisions may have a significant impact on trucking in the border commercial zones, discussion of them is outside the focus of this Comment.

27. *See Trucking Safety: Hearing Before the House Subcomm. on Highways and Transit*, 107th Cong. (2001) (explaining that the FMCSA issues and enforces regulations governing the operation and maintenance of motor carriers in interstate transportation).

28. North American Free Trade Agreement § 101, 107 Stat. 2057 (1993).

29. *Id.* § 102(a).

30. *Id.* § 105.

31. *See id.* at Annex 1 (establishing a schedule for phasing out reservations on existing measures). Specifically, the moratorium on cross-border trucking to California, Arizona, New Mexico, and Texas was scheduled for elimination three years after the date NAFTA entered into force. *Id.* Full access to the United States was scheduled to take effect six years after the date of entry into force of NAFTA. *Id.*

32. *See* Sheppard, *supra* note 6, at 237 (explaining that the annex is a reservation that preserved the moratorium after NAFTA went into force to allow time to adjust to the new requirements).

33. *See* Messenger, *supra* note 5, at 609-10 (explaining that the Clinton Administration delayed implementation of NAFTA's trucking provisions because of safety concerns and inadequate harmonization between U.S. and Mexican trucking standards); *see also* Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1481 (D.C. Cir. 1994) (challenging a regulation by the Federal Highway Administration to implement U.S. recognition of Mexican commercial driver's licenses).

34. *See* Sheppard, *supra* note 6, at 248-52 (discussing the arguments forwarded by Public Citizens, International Brotherhood of Teamsters, and the American Federation of Labor-Congress of Industrial Organizations).

NAFTA rested on the belief that trucks governed by lower regulatory standards in Mexico would rumble into the United States and create safety hazards on U.S. highways.[35] Opponents cited the major areas where Mexican regulations would negatively impact U.S. highway safety, including the absence of hours-of-service regulations,[36] less stringent weight restrictions on trailer cargo,[37] and fewer safety standards for trucks.[38] In addition, a General Accounting Office[39] report published in 2001 claimed that the Department of Transportation had not developed an adequate operational plan to ensure that Mexican trucks crossing the border would meet U.S. safety standards.[40] The safety issue effectively prevented Mexican trucks from gaining access beyond the border commercial zones because the consequences for violating NAFTA obligations dimmed in comparison to the imagery of Mexican trucks killing Americans on U.S. roads.[41]

Despite the trucking dispute, trade between Mexico and the United States exploded during the first ten years of NAFTA.[42] U.S. exports to Mexico increased by ninety-three percent and U.S. imports from Mexico rose by 190%.[43] This represented more than just an increase in the quantity of goods traded,[44] it also represented a growing number of new industries willing to participate in the integrated market

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35. *See id.* at 246-47 (referring to a 1996 GAO report). The report found that half of all Mexican trucks attempting to cross the border did not meet U.S. standards. *Id.* at 247. The report also found that trucking regulations in Mexico placed no limits on hours-of-service for drivers and permitted trailers to carry 20% more than would be allowed by U.S. weight restrictions. *Id.*

36. *See* Fed. Motor Carrier Safety Admin., U.S. Dep't of Transp., *Proposed Hours-of-Service, at* http://www.fmcsa.dot.gov/hos/hos.html (last visited Feb. 11, 2003) (copy on file with *The Transnational Lawyer*) (explaining that hours-of-service regulations were established to reduce the potential safety hazards equated with fatigued drivers). There is evidence that many crashes occur as a result of driver fatigue caused by work conditions. *Id.*

37. *See* TRANSPORTATION RESEARCH BOARD REPORT 267, REGULATIONS OF WEIGHTS, LENGTH AND WIDTH OF COMMERCIAL MOTOR VEHICLES 13 (2002) (indicating that federal size and weight restrictions influence highway construction and maintenance costs and highway accident losses).

38. Sheppard, *supra* note 6, at 248-52.

39. *See* U.S. Gen. Acct. Off., *Homepage, at* http://www.gao.gov/main.html (last visited Mar. 8, 2003) (copy on file with *The Transnational Lawyer*) (explaining that the General Accounting Office is the audit, evaluation, and investigative arm of Congress). The General Accounting Office's activities are designed to ensure the executive branch's accountability to Congress. *Id.*

40. U.S. GEN. ACCT. OFF., GAO Report No. 02-238, NORTH AMERICAN FREE TRADE AGREEMENT: COORDINATED OPERATIONAL PLAN NEEDED TO ENSURE MEXICAN TRUCKS COMPLIANCE WITH U.S. STANDARDS 12 (2001) [hereinafter GAO Report No. 02-238].

41. *See* Sheppard, *supra* note 6, at 250-52 (referencing a Teamsters spokesperson who suggested that the United States ignore the NAFTA panel's mandate regardless of the economic consequences because human life is priceless).

42. *See* Daniel T. Griswold, *NAFTA at 10: An Economic and Foreign Policy Success*, CENTER FOR TRADE POL'Y STUD. (Dec. 2002), *at* http://www.freetrade.org (copy on file with *The Transnational Lawyer*) (referring to trade between Mexico and the United States which has increased from $81 billion to $232 billion since 1993).

43. *See* RUSSELL HILLBERRY & CHRISTINE MCDANIEL, U.S. INT'L TRADE COMM'N, PUB. NO. 3527, INTERNATIONAL ECONOMIC REVIEW 2-3 (May-June 2002) (comparing U.S. trade with that of the NAFTA partners, which has increased by 78% to a 43% trade increase with the rest of the world).

44. *See id.* at 2 (employing a methodology that analyzes trade growth by three factors: changes in quantity traded; changes in price; and variety of the goods).

between NAFTA partners.[45] NAFTA was also a foreign policy success because Mexico turned toward a more stable economic system.[46] Furthermore, NAFTA's success during this period did not come at the expense of the U.S. domestic economy.[47]

Notwithstanding the trade growth among NAFTA partners, the cross-border trucking dispute weakened the full potential of NAFTA.[48] The moratorium on cross-border truck traffic continued to make the movement of goods between Mexico and the United States more difficult because it prevented Mexican trucks from obtaining authority to travel beyond designated commercial zones along the U.S.-Mexico border.[49] The commercial zone exception[50] allowed Mexican trucks to operate up to twenty miles[51] beyond the U.S.-Mexico border without a grant of FMCSA authority, which was otherwise prohibited by the moratorium.[52] Without FMCSA authority goods must be trucked across the border exclusively by a drayage system.[53] The drayage system's three-step process requires three trucks, three drivers, and two transfer stations to move goods across the border.[54] First, a Mexican long-haul truck transports the goods from the interior of Mexico to a Mexican transfer yard near the border.[55] Next, the goods are transferred to a Mexican drayage truck and transported across the border to a transfer yard in the United States.[56] Finally, a U.S. long-haul truck takes the cargo to its U.S. destination.[57] In addition to the extra time and

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45. *See id.* at 4 (suggesting that an increase in the variety of goods traded between partners shows an expanding international trade market).

46. *See* Griswold, *supra* note 42, *at* http://www.freetrade.org (explaining that since the signing of NAFTA, Mexico has made economic and political reforms that have been instrumental in avoiding the economic disasters common in the 1980s). Mexico now has one of the most stable and dynamic economies in Latin America. *Id.*

47. *See id.* (explaining that while some U.S. industries have moved to Mexico, other U.S. industries have expanded and created better paying job in the United States).

48. *See NAFTA Hearing*, *supra* note 20 (estimating that trucks move 80% of freight between Mexico and the United States); *see also* Jeffery Atik, *National Treatment in the NAFTA Trucking Case*, 42 S. TEX. L. REV. 1249 (2001) (stating that cross-border trucking is an essential service for establishing a North American free trade market and that the major border crossings are chokeholds on NAFTA potential).

49. *See* Atik, *supra* note 48, at 1249 (explaining that a large percentage of trade between Mexico and the United States is transported by truck).

50. *See* 49 U.S.C. § 13506(b)(1) (2000) (exempting from the FMCSA's jurisdiction, unless otherwise necessary, transportation provided entirely in a municipality, in contiguous municipalities, or in a zone adjacent to and commercially a part of the municipality or municipalities).

51. *See* 49 C.F.R. § 372.241 (2003) (defining commercial zones as an area exempt from all provisions of 49 U.S.C. subtit. IV, pt. B). A commercial zone is a municipality and a surrounding area that is determined by the municipality's population. *Id.* When the base municipality has a population of one million or more, the municipality and a 20-mile area surrounding municipality are exempt. *Id.* § 372.241(c)(7).

52. *See* 49 U.S.C. § 13506(b)(1) (2000). *But see* 49 C.F.R. § 368.1 (2003) (requiring Mexico-domiciled motor carriers to apply to the FMCSA and receive a Certificate of Registration before providing interstate transportation in the border commercial zones).

53. *See* Sheppard, *supra* note 6, at 258 (using the term drayage to describe a truck that operates exclusively in the commercial border zone and is used only to transfer goods across the border).

54. *See id.* (describing the three step process).

55. *Id.* Long-haul trucks are used to transport goods over long distances while drayage trucks are used to shuttle goods over short distances. *Id.*

56. *Id.*

57. *Id.*

expense associated with the drayage system, a substantial number of safety violations can be linked to the older drayage trucks used in the process.[58] Under the drayage system, thirty-seven percent of Mexican trucks fail state inspections[59] at the U.S.-Mexico border crossings and are put out-of-service as a result.[60]

The continued delay to lift the moratorium caused the United States to miss the deadlines set by NAFTA to provide unfettered cross-border trucking service.[61] Frustrated by the United States' delay to lift the moratorium and expand access to U.S. roads, the Mexican government requested a NAFTA arbitration panel to resolve the dispute.[62] The NAFTA arbitration panel released its final report in February of 2001, finding that the United States was not in compliance with its NAFTA obligations.[63] The report held that the U.S. moratorium against the issuance of new motor carrier operating permits to Mexican motor carriers constituted a breach of its NAFTA obligations.[64] The report made it clear that the United States was treaty-bound to accord Mexico-domiciled motor carriers access to the U.S. markets for cross-border trucking services.[65] Annex 1[66] of NAFTA expressly fixed a schedule for phasing out the moratorium[67] without regard to the disparity between Mexican and U.S. trucking standards.[68] When the phase-out period expired, the United States was obligated to give Mexico domiciled trucking firms an opportunity to operate in the United States consistent

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58. *See id.* (explaining that simple economics dictate that Mexican motor carriers are not going to dedicate their best trucks, most experienced drivers, and maintenance resources to travel only a few miles).

59. *See* Messenger, *supra* note 5, at 621 (comparing the Mexican failure rate to a U.S. national average failure rate of 24%).

60. *See id.* (explaining that there is a significant disparity in failure rates between the four border states). California has a 27% failure rate compared to 40% in Arizona, 34% in New Mexico, and 41% in Texas. *Id.*

61. *See* North American Free Trade Agreement Annex 1, 107 Stat. 2057 (1993).

62. *See* Sheppard, *supra* note 6, at 238 (discussing Mexico's use of NAFTA Article 2008 to solicit the formation of an arbitration panel in order to resolve the dispute).

63. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 295 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (determining unanimously that the United States' blanket refusal to review Mexican applications for operating authority was, and remains, a breach of the U.S. obligations under Annex 1).

64. *See id.* at para. 300 (explaining that the review of the Mexican carrier applications had to be done on a case-by-case basis).

65. *See* Atik, *supra* note 48, at 1252-53 (discussing the NAFTA arbitration panel decision that found the phase-out commitments under Annex 1 to be unconditional). The United States was not given an extension of the timetable to continue effort to create parity between the Mexican regulatory regime and the U.S. regime. *Id.*

66. *See* North American Free Trade Agreement Annex 1.

67. *See* C. O'Neal Taylor, *Mexican Trucking Case and NAFTA: Introduction, Commentary and Afterward*, 42 S. TEX. L. REV. 1239, 1241 (2001) (explaining that Annex 1 of NAFTA is an obligation to phase out reservations to provisions on trade in services and investments). The United States' obligations under Annex 1 provided express terms for Mexican operating authority in cross-border trucking service throughout the United States six years from the date NAFTA entered into force. *Id.* at 1242. The phase out deadline was January 1, 2000. *Id.*

68. *See* Atik, *supra* note 48, at 1250 (noting that the degree of disparity could be a debated issue for applying national treatment because the standard of " in like circumstance" for service providers is not clearly defined). However, the fact that there has been significant litigation over the same language in the trade of goods regime, under GATT, could be used by analogy to interpret the standard of in like circumstance in trade of services regime. *Id.*

with its NAFTA obligations.[69] However, the NAFTA arbitration panel's report also stated that the United States could impose different regulations on Mexican carriers as long as they were applied in good faith to address legitimate safety concerns and in full compliance with all relevant NAFTA provisions.[70]

The required response to the NAFTA arbitration panel's final report was continued negotiation between the parties.[71] Within thirty days of the final report, Mexico and the United States should have reached a resolution that included removal of the moratorium.[72] Because the parties did not achieve this goal, Mexico was authorized to suspend benefits of equivalent effect against the United States.[73] Suspension of benefits was not limited to the same sector, *i.e.*, U.S. truck access to Mexico, if such action would not be effective.[74] However, any suspension of benefits would have had to sting in order to stimulate an effective resolution.[75] Suspension of truck access to Mexico would have been ineffective as there were no U.S. cross-border trucking operations into Mexico, and suspension of other NAFTA benefits might have hurt Mexico more than the United States.[76] The more biting incentive for the United States to resolve the dispute was the danger of wrecking its international reputation.[77]

Within three months of the NAFTA arbitration panel's final report, the Bush administration and the Department of Transportation drafted regulations designed to comply with NAFTA.[78] The responsive action postponed Mexican sanctions.[79] However, the regulations came under immediate attack from Congress[80] and non-governmental organizations.[81] It was argued that the Department of Transportation's regulations did not sufficiently address the safety issues posed by Mexican motor

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69. *See* Taylor, *supra* note 67, at 1243 (indicating that the NAFTA arbitration panel's decision was not concerned with the motivation for extending the moratorium).

70. *In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 301 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/ enforcement/trucking.pdf

71. *See* Weisweaver, *supra* note 25, at 483 (explaining that the Chapter 20 dispute resolution process, which occurred in this case, eventually comes back to party negotiation).

72. *See* North American Free Trade Agreement § 2018(2), 107 Stat. 2057 (1993) (setting forth that whenever possible a resolution shall include removal of the measure not conforming with the agreement).

73. *See id.* § 2019(1) (setting forth that the parties have 30 days from receipt of the final report to agree on a resolution pursuant to the panel recommendations).

74. *See id.* § 2019(2) (setting forth the considerations for the suspension of benefits).

75. *See* Weisweaver, *supra* note 25, at 485 (explaining that effective resolution depends on the bargaining power between the parties).

76. *See id.* (explaining that Mexico gains economically from NAFTA trade benefits).

77. *Id.*

78. *See* Sheppard, *supra* note 6, at 240-41 (referring to May 2001 proposed regulations to be added to the Code of Federal Regulations at title 49, part 365).

79. *See id.* (mentioning that Mexico would not impose sanctions as long as conciliatory efforts continued).

80. *See id.* at 241 (discussing the Sabo Amendment proposed in the House of Representatives to block all funding necessary to process applications by Mexican carriers).

81. *See id.* at 249-50 (discussing the organized labor groups' use of safety issues to oppose the presence of Mexican trucks on U.S. highways).

carriers.[82] In response, Congress introduced several proposals in order to force a more restrictive regulatory scheme,[83] but it was questionable whether these proposals would be NAFTA compliant.[84] Congress focused on the language used in the NAFTA arbitration panel's final report which suggested that Mexican motor carriers did not necessarily have to be treated exactly the same as U.S. domestic motor carriers.[85] The Bush administration was committed to enacting regulations that would not violate NAFTA and promised to veto any legislation that did not meet that goal.[86] In December of 2001, a compromise was reached and the President signed the Act of 2002.[87] Section 350 of this legislation was crafted to address safety concerns while also complying with NAFTA commitments.[88]

B. *Implementation of the Cross-Border Trucking Operational Plan*

One important step toward resolving the NAFTA trucking dispute was the implementation of an effective border operational plan. The Act of 2002 imposed requirements that the FMCSA had to implement before funding could be expended to issue permits to Mexican trucking firms.[89] The FMCSA was required to have a certified[90] system of safety procedures in place before provisional operating authority could be granted to Mexican motor carriers.[91] The Act of 2002 required the FMCSA to issue rules governing the application process and safety monitoring system for Mexico-domiciled motor carriers.[92] The Act of 2002

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82. See *id.* at 243 (explaining that the proposed regulations permitted Mexican trucks to operate in the United States for up to eighteen months without review).

83. *See id.* (discussing the proposed Sabo Amendment introduced in the House and the Murray Amendment introduced in the Senate).

84. *See id.* at 242 (referring to Congressmen Sabo's declaration that his proposed amendment was probably not NAFTA compliant because it maintained a total prohibition on Mexican carriers).

85. *See id.* at 244 (citing Senator Murray's belief that her proposed amendment was NAFTA compliant).

86. Press Release, White House, Fact Sheet on Trucking (July 25, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/print/20010905-8.html (copy on file with *The Transnational Lawyer*).

87. Press Release, White House, President Signs Transportation Appropriation Act (Dec. 18, 2001), *at* http://www.whitehouse.gov/news/releases/2001/12/20011218-4.html (copy on file with *The Transnational Lawyer*).

88. *See* Jeffery Price, *Update: Department of Transportation and Related Agencies Appropriation Act of 2002*, 11 MINN. J. GLOBAL TRADE 277 (2002) (indicating that the Act of 2002 appeared to be a definitive step toward NAFTA compliance).

89. *See* Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(a), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (prohibiting the use of funding for processing applications by a Mexican motor carrier until the conditions of the Act of 2002 were implemented by the FMCSA).

90. *See id.* § 350(c)(2) (requiring the Secretary of Transportation to certify in writing that the opening of the border does not pose an unacceptable safety risk to the American public).

91. *See id.* § 350(c)(1)(A)-(H) (setting forth the conditions that the FMCSA must meet to satisfy the operational plan mandated by the Act of 2002).

92. *See id.* § 350(a)(1)-(2); *see also infra* notes 127-67 and accompanying text (discussing the Federal Motor Carrier Safety Regulations for Mexico-domiciled carriers).

also required commercial border crossings to have the necessary personnel[93] and infrastructure[94] to ensure that opening the border would not pose unacceptable safety risks to the American public.[95] This included rules to initially certify and maintain certification of safety auditors, safety investigators, and safety inspectors.[96] It also required installation of state of the art weigh-in-motion scales[97] at the busiest commercial crossings[98] and a system to electronically verify the status and validity of Mexican driver's licenses and operating permits.[99] Each of these requirements had to be verified by the Department of Transportation's Inspector General ("IG")[100] and certified in writing by the Secretary of Transportation.[101]

1. The Inspector General Review

While the FMCSA executed the requirements mandated by the Act of 2002, the IG reviewed their progress.[102] The purpose of the IG review was to audit and verify that basic safeguards would be in place before the border opened to new long-haul motor carriers and then report the findings to the Secretary of

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93. *See Implementation of Commercial Motor Carrier Safety Requirements at the U.S.-Mexico Border: Hearing Before the Senate Subcomm. on Transportation, Comm. on Appropriations and the Senate Subcomm. on Surface Transportation and Merchant Marine, Comm. on Commerce, Science, and Transportation*, 107th Cong. (2002) (statement of Norman Mineta, Secretary, Dep't of Transp.) [hereinafter Mineta Statement] (explaining that the border-crossing regulations are enforced by three distinct groups of inspectors). Safety auditors conduct required safety audits before Mexican motor carriers can be issued eighteen-month provisional authority to operate beyond the commercial zone. *Id.* Safety inspectors conduct roadside inspections of vehicles and drivers as they cross the border. *Id.* Safety investigators conduct compliance reviews during the eighteen-month provisional period to evaluate the Mexican carrier's operational history. *Id.*

94. *See* Department of Transportation and Related Agencies Appropriation Act of 2002 § 350(c)(1)(F) (explaining that the border crossings must have adequate capacity to conduct a sufficient number of meaningful vehicle safety inspections and accommodate out-of-service vehicles).

95. *See id.* § 350(c)(2) (providing that the Secretary of Transportation should base his decision to certify the opening of the border on the Inspector General's findings).

96. *See* Certification of Safety Audits, Safety Investigators, and Safety Inspectors; Final Rule, 67 Fed. Reg. 12,775, 12,777 (Mar. 19, 2002) (to be codified at 49 C.F.R. § 385, subpt. C) (explaining that training standards were unchanged by the Act of 2002 and do not present a new burden on the FMCSA). Personnel are trained in accordance with standards provided for in the Motor Carrier Safety Improvement Act of 1999. *Id.*

97. *See Why WIM?*, WEIGH IN MOTION, *at* http://www.weighinmotion.com/whyWim.htm (last visited Feb. 4, 2003) (copy on file with *The Transnational Lawyer*) (explaining that Weigh-In-Motion is a scales system that allows enforcement officials to accurately inspect every truck's weight as it passes at speeds up to 55 mph).

98. Department of Transportation and Related Agencies Appropriation Act of 2002 § 350(a)(7).

99. *See id.* § 350(c)(1)(E)-(H) (requiring an information infrastructure to ensure effective monitoring of the application process and enforcement of regulations by U.S. law enforcement). The information infrastructure requirements include a telecommunication system to access information from the Mexican government and a comprehensive database to electronically verify the status and validity of licenses, vehicle registration, operating authority, and insurance information. *Id.*

100. *See id.* § 350(c)(1) (calling for a comprehensive review of the border operations within 180 days of enactment).

101. *Id.* § 350(c)(2).

102. Memorandum from Kenneth M. Mead, Inspector General, to the Secretary of Transportation (June 25, 2002) [hereinafter Mead Memorandum].

Transportation, as required by the Act of 2002.[103] The IG report grouped the requirements mandated by the Act of 2002 into three major categories: the hiring and training of FMCSA personnel, the adequacy of border inspection facilities, and development of the information safety monitoring system.[104] The IG concluded that the FMCSA had substantially completed the requirements of the Act of 2002.[105] A majority of the incomplete portions were scheduled for completion within sixty days of the IG review.[106] The IG report recommended that the Secretary of Transportation direct the FMCSA to provide weekly updates on its progress toward completing the actions required by the Act of 2002.[107]

At the time of the IG report, the FMCSA planned to have 198 of the 214 new border inspectors assigned by July 31, 2002.[108] The IG found that the FMCSA had hired 138 of the 144 safety inspectors and trained all but thirty.[109] The FMCSA had also hired ninety-one auditors to process the pre-authorization applications of which fifty were trained.[110] Hiring of compliance review investigators was planned, although it was not required until January of 2003.[111] The IG review also verified that personnel had not been transferred from other parts of the United States.[112] These findings confirmed that the FMCSA had substantially complied with the hiring and training requirements mandated by the Act of 2002.

The IG review found that significant improvements had been made to border crossing inspection facilities.[113] It verified that twenty-three of the twenty-five commercial border crossings were sufficiently equipped for inspectors to enforce the requirements of the Act of 2002.[114] The FMCSA initiated plans for improvements at the two other crossings and anticipated compliance within sixty days of the report.[115] The IG review also verified that weigh-in-motion scales

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103. *Implementation of Commercial Motor Carrier Safety Requirements at the U.S.-Mexico Border: Hearing Before Senate Subcomm. on Transportation, Comm. on Appropriations and the Senate Subcomm. on Surface Transportation and Merchant Marine, Comm. on Commerce, Science, and Transportation*, 107th Cong. (2002) (statement of Kenneth Mead, Inspector General, Dep't of Transp.) [hereinafter Mead Statement].

104. *Id.* at 2.

105. *See* Mead Memorandum, *supra* note 102, at 4 (stating that the Secretary of Transportation conceded that some work still needs to be done but expects compliance).

106. Mead Statement, *supra* note 103, at 3.

107. Mead Memorandum, *supra* note 102, at 16.

108. Mead Statement, *supra* note 103, at 4.

109. *See id.* (estimating that all inspectors should be hired and trained by July 31, 2002).

110. *Id.* Although the FMCSA goal was only to hire 67 auditors, additional auditors were hired to ensure adequate personnel. *Id.*

111. *See id.* (adding that any immediate need for a compliance review could be handled by existing personnel).

112. *See id.* (explaining that transfer of personnel was prohibited by § 350(c)(1)(C) of the Act of 2002); *see also* Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(c)(1)(C), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (stating that transferring personnel would undermine the level of inspector coverage and safety in other regions of the country).

113. Mead Memorandum, *supra* note 102, at 4.

114. *Id.*

115. *Id.*

were in place at six of the highest volume border crossings and that a plan was in place to install the remaining four by December 2002.[116] Portable or static scales suitable for enforcement were located at all twenty-five commercial border crossings.[117] These findings confirmed that the FMCSA had substantially complied with the infrastructure requirements mandated by the Act of 2002.

The IG also tested the capability of the information safety monitoring system.[118] It determined that Mexico's database accurately provided the necessary information to verify the status of Mexican driver's licenses and vehicle license plates.[119] In addition, the IG tested the U.S. database used to verify operational authority and valid insurance.[120] Of the twenty-five border crossings, six could not access the Mexican and U.S. databases.[121] All mobile enforcement units had access to the Mexican database and were expected to have access to the U.S. database within thirty days of the report.[122] These findings confirmed that the FMCSA had substantially complied with the information system requirements mandated by the Act of 2002.

2. *Lifting the Moratorium*

Satisfied with the IG report findings on the FMCSA's implementation of the requirements mandated by the Act of 2002, the Secretary of Transportation certified in writing that the opening of the border did not pose unacceptable safety risks.[123] Subsequently, the President lifted the twenty year-old moratorium that prevented the FMCSA from processing Mexican motor carrier applications for operating authority.[124] The Secretary of Transportation ordered the FMCSA to start processing Mexican applications under the appropriate procedures mandated by the Act of 2002 and promulgated in the Code of Federal Regulations.[125] These actions ended the moratorium and replaced it with a process designed to review

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116. *See id.* (meeting the requirement to have five weigh-in-motion scales in place before processing applications).

117. *Id.*

118. Mead Statement, *supra* note 103.

119. *Id.*

120. *Id.*

121. *See id.* (indicating that the issue would be addressed within 60 days of the report). At one of the border crossings, the inspector did not have a password to access the database. *Id.* At three border crossings, telecommunication links had not yet been installed. *Id.* At the remaining two, inspectors were not yet assigned. *Id.*

122. *Id.*

123. *See* Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(c)(2), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (requiring that the Secretary of Transportation to certify the opening of the border in a manner addressing the Inspector General's findings).

124. Bush Memorandum, *supra* note 15, *at* http://www.whitehouse.gov/news/releases/2002/11/print/20021127-6.html.

125. Press Release, U.S. Dep't of Transp., U.S. Transportation Department Implements NAFTA Provisions for Mexican Trucks, Buses (Nov. 27, 2002), *at* http://www.dot.gov/affairs/dot10702.htm (copy on file with *The Transnational Lawyer*).

Mexican motor carrier applications on a case-by-case basis in accordance with the NAFTA arbitration panel's recommendations.[126]

C. Federal Motor Carrier Safety Regulations for Mexico-Domiciled Carriers

An important component of the post-moratorium operational plan is a regulatory scheme that governs Mexico-domiciled motor carriers operating beyond the U.S.-Mexico border commercial zones.[127] Mexican motor carriers are required to meet the same regulatory standards as U.S. domiciled motor carriers.[128] However, the Act of 2002 required the FMCSA to make additional regulations only applicable to Mexican motor carriers before granting permanent operating authority[129] in order to ensure compliance with the Federal Motor Carrier Safety Regulations.[130] To achieve this mandate, the FMCSA promulgated special entry regulations to govern the application process and the preliminary operational authority for Mexican carriers.[131] The regulatory scheme requires Mexican carriers to submit to two stages of review in order to achieve permanent operating authority beyond the designated commercial zones along the U.S.-Mexico border.[132] Initially, Mexican carriers must pass a pre-authorization safety audit.[133] Next, during an eighteen-month period of provisional operating authority[134] in the United States, Mexican carriers are subject to an oversight program to monitor compliance with the applicable Federal Motor Carrier Safety Regulations.[135] After completing two steps of review, permanent operating authority is granted with an extended thirty-six-month inspection component.[136] The

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126. *See generally infra* notes 127-67 and accompanying text (discussing the regulatory scheme that governs Mexico-domiciled motor carriers operating in the United States beyond the border commercial zones).

127. Department of Transportation and Related Agencies Appropriation Act of 2002 §§ 350(a)(1)-(2).

128. *See* 49 C.F.R. § 390.3 (2003) (setting forth that the rules in this chapter are applicable to all employers, employees, and commercial motor vehicles transporting property or passengers in interstate commerce).

129. *See* Department of Transportation and Related Agencies Appropriation Act of 2002 §§ 350(a)(1)(A), (2) (requiring a safety examination that must be verified by the FMCSA before operational authority is granted, and a compliance review must be completed within eighteen months of granting conditional authority).

130. *See* 49 C.F.R. § 385.3 (2003) (indicating that the Federal Motor Carrier Safety Regulations are contained in 49 C.F.R. pts. 350-99).

131. Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border, 67 Fed. Reg. 12,702 (Mar. 19, 2002) (to be codified at 49 C.F.R. pt. 365); *see also* Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, 67 Fed. Reg. 12,758 (Mar. 19, 2002) (to be codified at 49 C.F.R. pt. 385).

132. *See* 49 C.F.R. § 365 (2003) (adding subpart E to part 365 in order to provide special rules governing the application process of Mexico-domiciled motor carriers); *see also* 49 C.F.R. § 385 (2003) (adding subpart B to part 385 in order to establish a safety monitoring system governing Mexico-domiciled carriers).

133. *See infra* notes 138-47 and accompanying text (outlining the components of a pre-authorization safety audit).

134. *See infra* notes 148-49 and accompanying text (explaining provisional operating authority).

135. *See infra* notes 150-57 and accompanying text (discussing the safety monitoring program for Mexico-domiciled motor vehicles).

136. *See infra* notes 158-65 and accompanying text (discounting the 36-month inspection component of permanent operating authority).

Act of 2002 requires compliance with these rules before the FMCSA is authorized to spend funds on the application process.[137]

1. Pre-Authorization Safety Audit

Before Mexican carriers are granted provisional operating authority to provide trucking services between Mexico and the United States, they must undergo a pre-authorization safety audit designed to guarantee compliance with the Federal Motor Carrier Safety Regulations.[138] Fifty percent of all the safety audits must be conducted at the Mexico-domiciled carrier's principal place of business, and the on-site inspections must cover at least fifty percent of the estimated cross-border trucking traffic.[139] In addition, all Mexican motor carriers must demonstrate the required safety management controls to successfully complete the audit.[140] A motor carrier will not be granted provisional authority if the FMCSA fails to verify the following safety management controls: an appropriate drug and alcohol testing program,[141] a system of compliance to enforce hours-of-service rules,[142] proof of financial responsibility,[143] records of periodic vehicle inspections and maintenance,[144] and the qualifications of each driver expected to operate under the provisional authority.[145] A Mexican motor carrier's application can be denied if the FMCSA finds inadequate safety management controls in at least three separate factors.[146] Once the carrier has established the basic safety management controls, the FMCSA must grant preliminary authority to operate in the United States.[147]

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137. Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(a), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902).

138. *See* 49 C.F.R. § 365.507(c) (2003) (providing a safety audit during the application process to be used as a tool to determine whether provisional operating authority should be granted).

139. 49 C.F.R. § 365 subpt. E app. A.I(b) (2003).

140. *See* 49 C.F.R. § 365.507(c) (2003) (assessing the adequacy of the carrier's basic safety management controls in accordance with the criteria in Appendix A to subpt. E of part 365).

141. *See* 49 C.F.R. § 365 subpt. E app. A.III(a)(1) (2003) (verifying that the Mexican carrier's drug and alcohol program is consistent with the Federal Motor Carrier Safety Regulations standards and procedures set forth in title 49, part 40 of the Code of Federal Regulations).

142. *See* 49 C.F.R. § 365 subpt. E app. A.III(a)(2) (2003) (specifying that hours-of-service rules are limits on the duration of time and conditions under which drivers may operate their commercial vehicles in accordance with title 49, part 395 of the Code of Federal Regulations).

143. 49 C.F.R. § 365 subpt. E app. A.III(a)(3) (2003).

144. 49 C.F.R. § 365 subpt. E app. A.III(a)(4) (2003).

145. *See* 49 C.F.R. § 365 subpt. E app. A.III(a)(5) (2003) (verifying that drivers Mexican motor carriers intend to assign to operate in the United States have qualifications consistent with the Federal Motor Carrier Safety Regulations standards and procedures as set forth in title 49, parts 383 and 391 of the Code of Federal Regulations).

146. 49 C.F.R. § 365 subpt. E app. A.III(b) (2003); *see also* 49 C.F.R. § 365 subpt. E app. A.IV(f) (2003) (combining Federal Motor Carrier Safety Regulations with similar characteristics into six areas to evaluate the adequacy of the carrier's safety management controls).

147. *See* 49 C.F.R § 365.507(d)-(e) (2003) (assigning a distinctive "USDOT" number that identifies the motor carrier as authorized to operate in the United States).

2. *Provisional Operating Authority*

During the eighteen-month provisional[148] operating period, Mexican carriers are governed by a safety monitoring system to ensure compliance with the applicable Federal Motor Carrier Safety Regulations.[149] The safety monitoring system includes frequent roadside inspections[150] and a compliance review.[151] A compliance review must be conducted by the FMCSA, and a safety rating[152] must be assigned to the Mexican motor carrier in the eighteen-month provisional period or the carrier will remain in the safety monitoring system.[153] If the Mexican carrier is given a satisfactory safety rating,[154] the provisional designation is removed at the end of the eighteen-month provisional period,[155] provided the motor carrier's safety record is still in good standing.[156] If the carrier receives an unsatisfactory rating, the provisional operating authority will be revoked and suspended if no action is taken to remedy the inadequate safety management controls.[157]

In addition to the safety monitoring system requirements, Mexican carriers are required to have Commercial Vehicle Safety Alliance[158] inspections on each vehicle[159] every ninety days during the eighteen-month provisional period[160] and for three consecutive years after receiving permanent operating authority.[161] The

148. *See* 49 C.F.R. § 385.101 (2003) (explaining that operating authority is provisional because it will be revoked if the Mexican carrier is not assigned a satisfactory safety rating during the safety monitoring period).

149. 49 C.F.R. § 385.103(a) (2003).

150. 49 C.F.R. § 385.103(b) (2003).

151. *See* 49 C.F.R. § 385.3 (2003) (defining a compliance review as an on-site examination of motor carrier operations to determine whether the motor carrier meets the safety fitness standards); *see also* 49 C.F.R. § 385.103(e) (2003) (establishing that a compliance review on the Mexico-domiciled carrier is required within 18 months of issuing provisional operating authority).

152. *See* 49 C.F.R. § 385.109(a) (2003) (specifying that the criteria used to rate Mexico-domiciled carriers are found in Appendix B to part 385); *see also* 49 C.F.R. § 385 app. B (2003) (using data from compliance reviews and roadside inspections to rate a motor carrier). There are three safety ratings: satisfactory, conditional or unsatisfactory. *Id.*

153. 49 C.F.R. § 385.117(c) (2003).

154. 49 C.F.R. § 385.109(b) (2003).

155. *See id.* (indicating that a satisfactory compliance review does not terminate the 18-month provisional status of the carrier or the safety monitoring program).

156. 49 C.F.R. § 385.117(b) (2003).

157. 49 C.F.R. § 385.109(c) (2003).

158. *See* Commercial Vehicle Safety Alliance, *About Us*, *at* http://www.cvsa.org/aboutus/cvsa_aboutus.htm (last visited Oct. 27, 2002) (copy on file with *The Transnational Lawyer*) (explaining that Commercial Vehicle Safety Alliance ("CVSA") is a non-profit organization comprised of government agencies and private industry in the United States, Canada, and Mexico). The CVSA is dedicated to achieving uniformity and reciprocity of commercial vehicle inspections throughout North America. *Id.*

159. *See* 49 C.F.R. § 385.103(c) (2003) (mandating that every Mexican commercial motor vehicle operating in the United States must have a current CVSA decal attesting to a satisfactory inspection by a CVSA inspector).

160. *Id.*

161. 49 C.F.R. § 365.511 (2003).

regulation requires a "level 1"[162] inspection,[163] which includes a complete safety check of the vehicle, an examination of the driver's records, and an alcohol and drug test of the driver.[164] The carrier is also required to display a current inspection decal attesting to the successful completion of the inspection.[165]

The post-moratorium regulatory scheme authorizes the FMCSA to process applications for Mexico-domiciled motor carriers on a case-by-case basis, provided the cross-border provisions of the Federal Motor Carrier Safety Regulations are applied.[166] However, the cross-border provisions of the Federal Motor Carrier Safety Regulations may conflict with other interests.[167] These conflicts are the keystone of the post-moratorium dispute.

III. THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION'S ABILITY TO SATISFY ALL INTERESTS

Complying with NAFTA, ensuring safety on U.S. roads, placing a heavy burden on Mexican trucking firms, and the continued efforts by protectionists to block Mexican long-haul trucking are the four major conflicting interests that affect the Act of 2002's post-moratorium policy. The U.S. cross-border trucking policy must comply with NAFTA obligations while ensuring safety on U.S. roads. Moreover, the policy must be flexible enough to allow Mexican trucking firms a fair chance to compete in the integrated NAFTA market, but strict enough to withstand the fact that protectionists are likely to capitalize on defects in the policy. Ultimately, it is unlikely that all the competing interests can be completely satisfied.

A. NAFTA Compliance

Compliance with NAFTA is one of the competing interests affecting the post-moratorium policy requirements established by the Act of 2002 for cross-border trucking. The NAFTA arbitration panel's final report made it clear that lifting the moratorium was essential for achieving NAFTA compliance.[168]

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162. *See* Commercial Vehicle Safety Alliance, *Inspections: Inspections Levels*, *at* http://www.cvsa.org/inspections/inspection_levels.htm (last visited Oct. 27, 2002) (copy on file with *The Transnational Lawyer*) (explaining that there are seven levels of inspection and level I is the most comprehensive).

163. 49 C.F.R. § 365.507(e)(3) (2003).

164. Commercial Vehicle Safety Alliance, *supra* note 162, http://www.cvsa.org/inspections/inspection_levels.htm.

165. 49 C.F.R. § 365.511 (2003).

166. Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902).

167. *See infra* notes 168-290 and accompanying text (discussing the potential conflict with NAFTA rules and the U.S. environmental laws).

168. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para 295 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (stating that the refusal to process Mexican applications for operating authority to provide cross-border trucking services was a breach of the United States' obligations under NAFTA).

Certification of the FMCSA border operational plan[169] and promulgation of cross-border provisions of the Federal Motor Carrier Safety Regulations[170] were the first steps in lifting the moratorium.[171] These actions substantially cured the NAFTA violation.[172] As a result, Mexico-domiciled motor carriers wishing to establish long-haul service to the United States are individually scrutinized under the FMCSA regulatory scheme[173] rather than denied as a group simply because they are domiciled in Mexico.[174] Nevertheless, the United States may still be in violation of its NAFTA obligations if the cross-border provisions of the Federal Motor Carrier Safety Regulations do not conform to all relevant NAFTA provisions.[175] Whether the cross-border trucking regulations promulgated by the FMCSA are NAFTA compliant is an open question[176] that could ultimately turn on the interpretation of NAFTA rules for "Cross-border Trade in Services."[177]

1. National Treatment and Most-Favored-Nation Treatment: NAFTA Articles 1202 & 1203

One issue that must be addressed is whether the cross-border provisions of the Federal Motor Carrier Safety Regulations comply with NAFTA. Notwithstanding the dissolution of the blanket moratorium, the cross-border provisions of the Federal Motor Carrier Safety Regulations placed on Mexico-domiciled trucking firms are not placed on U.S. trucking firms or Canadian

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169. *See infra* notes 223-46 and accompanying text (discussing the Act of 2002 requirement for certification of the border operations before applications for Mexican carriers can be processed).

170. *See infra* notes 247-71 and accompanying text (explaining the FMCSA's regulatory scheme for Mexico-domiciled carriers).

171. *See* Department of Transportation and Related Agencies Appropriation Act of 2002 § 350(a) (mandating that funding could not be used to process applications for Mexico-domiciled carriers until the requirements of the Act of 2002 were implemented).

172. *See* Price, *supra* note 88, at 282 (speculating that a failure to certify FMCSA border operations would have constituted a continued breach of NAFTA obligations). Denial of operating authority based on border conditions would have been a blanket ban of all Mexican carriers rather than a process based on their individual qualifications. *Id.* The United States will continue to be in violation of its NAFTA obligation until Mexican applications for operational authority are processed on a case-by-case basis. *Id.*

173. *See* Bush Memorandum, *supra* note 15, *at* http://www.whitehouse.gov/news/releases/2002/1/print/20021127-6.html (modifying the moratorium to be consistent with U.S. obligations under NAFTA).

174. *See* Taylor, *supra* note 67, at 1246 (pointing out that the moratorium denied new operating permits to all Mexican trucking firms that sought operating authority beyond the designated commercial zones). Operating permits for U.S. trucking firms are individually scrutinized. *Id.*

175. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 301 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (finding that if the United States imposes requirements on Mexican carriers that differ from those imposed on U.S. carriers, then the requirements must be made in good faith with respect to a legitimate safety concern and conform with all relevant NAFTA provisions).

176. *See* Atik, *supra* note 48, at 1250 (explaining that trade in services jurisprudence is relatively unexplored).

177. *See* North American Free Trade Agreement § 1201, 107 Stat. 2057 (1993), http://www.nafta-sec-alena.org/english/index.html (setting forth that Chapter 12 rules apply to measures relating to cross-border trade in services including transportation systems).

trucking firms operating under FMCSA authority.[178] The NAFTA rules for cross-border trade in services bar disparity in treatment among the treaty parties under national treatment[179] or most-favored-nation treatment,[180] codified respectively in NAFTA Articles 1202[181] and 1203.[182] However, national treatment and most-favored-nation treatment obligations are only triggered by the "in like circumstances" language found in Articles 1202 and 1203.[183] If the commercial trucking industries in Mexico and the United States are in like circumstances, then the "no less favorable" language in Articles 1202 and 1203 is triggered.[184]

First, it is necessary to decide whether Mexican and U.S. trucking services are in like circumstances. In light of the differences[185] between the regulatory regimes for commercial vehicles in Mexico and the United States, it is unclear whether trucking services on both sides of the border are in fact in like circumstances.[186] It is relatively easy to decide if goods being produced by two different countries are alike and, therefore, should be treated the same under the terms of a multilateral trade agreement. It is more tenuous to conclude that service industries such as the trucking industries in Mexico and the United States are alike and should be treated equally. A truck is a truck under the goods analysis, but there is more to trucking operations than just the truck. There is also a human element that must be considered under the service analysis that is not necessary to the goods analysis. Simply because two trucks, one Mexican and

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178. *See* 49 C.F.R. § 365 (2003) (establishing the Mexican carrier application process for carriers seeking to operate beyond the commercial zone); *see also* 49 C.F.R. § 385 (2003) (establishing a safety monitoring system and compliance initiative for Mexico-domiciled carriers operating in the United States).

179. *See* WORLD TRADE ORGANIZATION, TRADING INTO THE FUTURE 21 (2d ed. 2001) (explaining that national treatment means equal treatment for foreigners and one's own nationals). Once foreign firms have been allowed to enter the host country market and provide services therein, there should be no discrimination between the foreign and domestic companies. *Id.* at 23.

180. *See id.* at 21 (explaining that most-favored-nation means treating one's trading partners equally). Put another way, favor one means favor all. *Id.*

181. *See* North American Free Trade Agreement § 1202(1), http://www.nafta-secalena.org/english/index.html (stating that "[e]ach party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.").

182. *See id.* § 1203 (stating that, "[e]ach party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to service providers of any other Party or of a non-Party.").

183. *See* Taylor, *supra* note 67, at 1244 (explaining that an analysis of trade in services obligations under NAFTA Articles 1202 and 1203 requires a finding of like circumstances between foreign and domestic service providers before a determination of less favorable treatment can be established).

184. North American Free Trade Agreement §§ 1202, 1203, http://www.nafta-secalena.org/english/index.html.

185. *See* Atik, *supra* note 48, at 1254 (suggesting that there is ambiguity about whether the NAFTA arbitration panel believed U.S. and Mexican trucking firms were not in like circumstances, given the disparity between regulatory regimes in the two countries). Mexico argued that its less restrictive regulatory regime did not affect the ability of Mexican trucking firms to meet U.S. standards. *Id.* The United States believed that the disparity in standards justified differential treatment. *Id.*

186. *See id.* at 1250 (noting that the NAFTA arbitration panel reasoned that too broad of an interpretation of like circumstances is dangerous because it could render Article 1202 meaningless). In contrast, interpreting like circumstance too narrowly is unacceptable because it would eliminate most service providers from national treatment protection. *Id.*

one U.S., are the same make, model, and year does not mean that the drivers will be trained the same, the trucks will be maintained the same, and the companies will be managed the same. Consequently, factors that influence the human elements of services, like the difference in regulatory regimes, become important for in like circumstances analysis. Despite the blurred issue of how to determine when service providers are in like circumstances, the NAFTA arbitration panel concluded that Articles 1202 and 1203 should apply to the moratorium.[187] One can conclude by inference from the NAFTA arbitration panel's final report that the Federal Motor Carrier Safety Regulations must also comply with Articles 1202 and 1203 to survive challenge.

It is also necessary to determine if the cross-border provisions of the Federal Motor Carrier Safety Regulations applied to Mexican motor carriers are less favorable than the safety regulations applied to U.S. and Canadian motor carriers. Under the regulatory scheme promulgated by the FMCSA, there is a distinct application process for a Mexican motor carrier[188] that requires it to undergo a pre-authorization safety audit process before operating authority may be granted.[189] The pre-authorization safety audit is completely absent from the general application process applicable to U.S. and Canadian motor carriers.[190] The FMCSA is required to verify information in the Mexican application before operational authority is granted, while the information in the general application is independently adequate to approve operational authority for U.S. and Canadian motor carriers.[191] When a Mexican motor carrier applies for operating authority it is presumed that the information provided in the application is insufficient, and the FMSCA must take additional steps to verify that the carrier will comply with the FMCSA's operational safety policy before authority is granted.[192] The difference in treatment at this stage is not likely to trigger national treatment analysis because the differential treatment occurs prior to a Mexican motor carrier's entry into the U.S. market.[193] However, the most-favored-nation treatment analysis is

187. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 295 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (finding that an exception to these NAFTA obligations is not authorized by the in like circumstance language of Articles 1202 and 1203).

188. *See* 49 C.F.R. § 365.105 (2003) (providing a distinct form "OP-1 (MX)" for Mexico-domiciled motor carriers).

189. *See supra* notes 138-47 and accompanying text (discussing the pre-authorization safety audit).

190. *Compare* 49 C.F.R. § 365 subpt. A (2003) (setting forth the general provisions on the application process for operating authority), *with* 49 C.F.R. § 365 subpt. E (2003) (setting forth special rules for the application process of Mexico-domiciled carriers).

191. *Compare* 49 C.F.R. § 365.109(a) (2003) (requiring that the FMCSA review the applications for correctness, completeness, and adequacy of the evidence and accepting applications that are in substantial compliance), *with* 49 C.F.R. § 365.507(b)-(c) (2003) (requiring the FMCSA to verify the validity of the information by checking Mexican and U.S. databases and conduct a pre-authorization safety audit before approving an application).

192. *See* 49 C.F.R. § 365.507(b)-(c) (mandating that the FMCSA verify the information in the application before approval).

193. *See* WORLD TRADE ORGANIZATION, *supra* note 179, at 21 (explaining that national treatment only applies once a service provider has entered the market).

triggered by the fact that the same general application procedures applied to U.S. domestic trucking firms also govern the application process for Canadian trucking firms.[194] Therefore, Mexico can demand most-favored-nation treatment based on the treatment extended to Canadian trucking firms at entry into the U.S. market.

If operating authority is granted, Mexico-domiciled motor carriers are scrutinized differently than "new entrant" U.S. and Canadian domiciled carriers.[195] During the first eighteen months of operations, Mexican trucking companies are governed by a safety monitoring system.[196] A less rigorous safety assurance program is required for U.S. and Canadian domestic motor carriers.[197] Mexican trucks are subject to frequent roadside monitoring and must undergo Commercial Vehicle Safety Alliance inspections every ninety days in addition to successfully completing a compliance review before permanent authority will be granted.[198] At this stage, the Mexican motor carrier will have entered the U.S. market and triggered national treatment protection in addition to most-favored-nation treatment.[199] Therefore, Mexican trucks must be treated no less favorable than the U.S. and Canadian trucking firms operating in the U.S. market.

However, application of the no less favorable language found in Articles 1202 and 1203 also turns on how it is interpreted. The NAFTA arbitration panel stated that a limited degree of differential treatment might be justifiable if it is for legitimate regulatory reasons and it is equivalent to treatment accorded to domestic service providers.[200] Therefore, differential treatment under national treatment and most-favored-nation treatment analysis is not automatically less favorable for two reasons.

First, it must be determined whether or not the regulatory scheme is designed to address a legitimate issue such as transportation safety.[201] The fear is that Mexican motor carriers will not comply with the Federal Motor Carrier Safety

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194. *See* Taylor, *supra* note 67, at 1247 (discussing the NAFTA arbitration panel's analysis that most-favored-nation treatment would be the same as national treatment because the FMCSA treats Canadian motor carriers exactly the same as U.S motor carriers).

195. *See* 49 C.F.R. § 385.3 (2003) (defining "new entrant" as a motor carrier not domiciled in Mexico).

196. *See* 49 C.F.R. § 385 subpt. B (2003) (establishing provisions for the safety monitoring of Mexico-domiciled carriers).

197. *See* 49 C.F.R. § 385 subpt. A (2003) (setting forth the safety assurance program for "new entrant" motor carriers); *see also* 49 C.F.R. § 385.307 (2003) (subjecting new entrant motor carriers to eighteen months of safety monitoring procedures, including close monitoring of roadside performance and a safety audit).

198. *See supra* notes 148-65 and accompanying text (discussing provisional operating authority).

199. *See* Taylor, *supra* note 67, at 1244 (explaining that Canadian motor carriers are treated the same as U.S. motor carriers). In this case, the analysis is the same for national treatment or most-favored-nation because under either provision the Mexican motor carrier can demand no less favorable treatment. *Id.*

200. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 258 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (stating that language in Articles 1202 and 1203 should not be interpreted to permit significant barriers to NAFTA trade).

201. *See* Atik, *supra* note 48, at 1250 (indicating that the design and efficiency of the regulatory scheme is relevant when testing it against national treatment obligations).

Regulations unless there are additional provisions to ensure compliance.[202] The counterargument is that the fear was never a legitimate concern, but rather a tactic to protect other U.S. interests such as American jobs.[203] The NAFTA arbitration panel declined to examine the U.S. motivation for maintaining the moratorium and instead confined its analysis to whether or not the action was compliant with NAFTA.[204] Without objective evidence to dispel the potential safety issues that Mexican trucks present, it is possible that a future inquiry about the legitimacy of the FMCSA's regulatory scheme would be similarly confined despite signs of protectionist influence in crafting the cross-border provisions of the Federal Motor Carrier Safety Regulations. On the other hand, the NAFTA arbitration panel may have confined its inquiry to compliance with NAFTA because the moratorium was such a substantial restriction on trade that it was unnecessary to look at the U.S. motivation before deciding that it could not be legitimate.[205] The extent to which the cross-border provisions of the Federal Motor Carrier Safety Regulations will restrict trade is not as clear as it was in the case of the moratorium. That fact may trigger a deeper inquiry to determine the legitimacy of the FMCSA's regulatory scheme.

Second, it must be determined whether or not the cross-border provisions of the Federal Motor Carrier Safety Regulations as applied to Mexican motor carriers are equivalent to the treatment accorded to domestic motor carriers. The regulations are likely to create additional operating costs for Mexican motor carriers not incurred by U.S. and Canadian trucking firms.[206] For example, Mexican motor carriers must extend greater resources than Canadian motor carriers to gain entry into the U.S. market because of the more rigorous application process.[207] Furthermore, Mexican motor carriers may also have additional contractual difficulties during the first eighteen months of operation because of the conditional nature of the provisional operating authority.[208] In spite of these disadvantages, Mexican trucking firms governed by Mexico's less demanding regulatory regime are only being asked to extend the same resources demanded of U.S. and Canadian trucking firms operating in the U.S. market. In this light, differential treatment for Mexican motor carriers actually creates equivalency between competing trucking firms. Therefore, national treatment or

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202. *See In re* Cross-Border Trucking Services at para. 298, *available at* http://www.ustr.gov/enforcement/trucking.pdf (declining to determine if the safety of trucking services is a legitimate regulatory objective).

203. *See* Atik, *supra* note 48, at 1251 (postulating that suspicion of protectionist intent will doom the legitimacy of differential treatment under national treatment analysis).

204. *In re* Cross-Border Trucking Services at para. 214, *available at* http://www.ustr.gov/enforcement/trucking.pdf.

205. *Id.* at para. 269.

206. GAO Report No. 02-238, *supra* note 40, at 7.

207. *See supra* notes 127-67 and accompanying text (discussing the regulatory scheme for Mexican motor carriers).

208. *See* GAO Report No. 02-238, *supra* note 40, at 10 (explaining that the uncertainty about the rules for obtaining operating authority makes it difficult to plan for the future since contracts and distribution ties must be established in advance).

most-favored-nation treatment does not necessarily bar the differential nature of the cross-border provisions of the Federal Motor Carrier Safety Regulations.

2. *General Exceptions Provisions: NAFTA Article 2101*

Even if the cross-border provisions of the Federal Motor Carrier Safety Regulations are more burdensome than national treatment or most-favored-nation treatment allows, they may still be justified under NAFTA's general exceptions provisions.[209] Under Article 2101 of NAFTA,[210] the United States could justify its regulatory scheme as necessary to secure compliance with other non-discriminatory U.S. laws.[211] However, the NAFTA arbitration panel interpreted Article 2101 narrowly.[212] The NAFTA arbitration panel found that for the cross-border provisions of the Federal Motor Carrier Safety Regulations to be NAFTA-legal, they must entail the least degree of inconsistency with other NAFTA provisions.[213] In the NAFTA arbitration panel's decision, the moratorium was not found to be the least trade-restrictive measure available to deal with the safety concerns regarding Mexican trucks.[214] The cross-border provision of the Federal Motor Carrier Safety Regulations, on the other hand, may be within the narrow range of Article 2101 as interpreted by the NAFTA arbitration panel. The reason for the added regulatory layer is to ensure that Mexican trucks comply with all Federal Motor Carrier Safety Regulations. The intent of the pre-authorization safety audit and the safety monitoring system during the first eighteen months is designed to ensure that Mexican carriers have the requisite tools to comply with all Federal Motor Carrier Safety Regulations.[215] For example, one function of a pre-authorization safety audit is to secure compliance with Federal hours-of-service requirements.[216] The safety monitoring system has a similar application. All motor carriers must have a satisfactory safety rating to maintain operating authority.[217] The safety rating is based on data collected from the compliance review.[218] In the case of Mexican long-haul trucks, there is less trucking data generated by Mexico's domestic regulatory regime. Therefore, a greater

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209. *See* Taylor, *supra* note 67, at 1246 (discussing Article 2101 of the NAFTA). Article 2101 allows exceptions to NAFTA obligations when they are necessary to secure compliance with domestic laws. *Id.*

210. *See* North American Free Trade Agreement § 2101(2), 107 Stat. 2057 (1993), http://www.nafta-sec-alena.org/english/index.html (providing general exceptions to Chapter 12 obligations).

211. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 262 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (importing GATT/WTO jurisprudence to the interpret NAFTA).

212. *See id.* at para. 263 (explaining the narrow interpretation under GATT Article XX exceptions).

213. *See id.* at para. 270 (importing language from the *Reformulated Gasoline* case).

214. Taylor, *supra* note 67, at 1246.

215. *See supra* notes 127-67 and accompanying text (explaining the FMCSA's regulatory scheme for Mexico-domiciled motor carriers).

216. *See supra* notes 140-46 and accompanying text (providing examples of Federal standards that apply to all motor carriers operating on U.S. roads).

217. 49 C.F.R. 390.3 (2003).

218. *See* 49 C.F.R. 385.3 (2003) (setting the standards for compliance review of all motor carriers).

frequency of roadside monitoring and Commercial Vehicle Safety Alliance inspections are necessary to generate essential data for the required compliance review and, ultimately, issue a safety rating.

If a strong connection is established between the cross-border provisions of the Federal Motor Carrier Safety Regulations and the need to ensure compliance with other domestic safety regulations, there is still a possibility that a less restrictive method is available to meet these concerns.[219] If the Federal Motor Carrier Safety Regulations without the cross-border provisions tailored for Mexican motor carriers would effectively address the relevant safety concerns, then the added regulatory layers are too restrictive under NAFTA's Article 2101 general exceptions analysis.[220] However, because Mexico does not have equivalent regulatory requirements to the Federal Motor Carrier Safety Regulations from which some initial presumption of compliance might be formed, the added regulatory layers are necessary to guarantee that Mexican trucking companies will operate in compliance with all the relevant Federal Motor Carrier Safety Regulations prior to the first compliance review, which is not required under the FMCSA's regulatory scheme until months after authority is granted.[221]

Concluding that the Federal Motor Carrier Safety Regulations as applied to Mexico are a breach of NAFTA will not be as easy to prove as it was in the case of the prior moratorium. To the extent that Mexico's regulatory standards for the trucking industry may not be like U.S. standards, different methods of ensuring compliance with the U.S. regulatory regime may be justified even under national treatment and most-favored-nation treatment analysis.[222] Therefore, Mexico does not have a clear claim of impermissible discrimination under Chapter 12 of NAFTA. Furthermore, the cross-border provisions of the Federal Motor Carrier Safety Regulations are likely to fall into the narrow category of NAFTA's Article 2101 exceptions. Mexico should focus its efforts toward operating under the current Federal Motor Carrier Safety Regulations, at least until there is objective data to counter the legitimacy of the safety concerns.

B. Ensuring Safety on U.S. Roads

Opening the U.S. border for Mexican long-haul trucks while maintaining transportation safety on U.S roads is a second interest influencing the post-moratorium policy established by the Act of 2002. While the FMCSA's regulatory scheme faces difficulties in complying with NAFTA for being too

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219. *See* Taylor, *supra* note 67, at 1246 (explaining that the NAFTA arbitration panel does not discuss what the least restrictive measure might be). It only found that the moratorium was not the least restrictive measure. *Id.*

220. *Id.*

221. *See supra* notes 78-82 and accompanying text (discussing Congressional objections to rules less restrictive than those ultimately required by the Act of 2002).

222. *See In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 298 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf (leaving open the question whether NAFTA parties may set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives).

restrictive, there is also a potential clash with interest groups who have campaigned for more restrictive regulations to ensure safety.[223] The possibility of a continued dispute over safety concerns will turn on the efficiency of the FMCSA border operational plan and the subsequent safety record of Mexican long-haul trucks operating in the United States under FMCSA authority.

1. Improvements in the Border Operational Plan

The FMCSA border operational plan addressed many of the deficiencies associated with cross-border trucks entering the United States from Mexico.[224] The FMCSA's implementation of the requirements set forth in the Act of 2002 provides a more effective border operational plan designed to deter unsafe trucks from entering the United States.[225] Only Mexican motor carriers able to demonstrate the required safety management controls will be granted permanent authority to operate in the United States.[226] Furthermore, an increase in the inspection facilities and personnel at the U.S.-Mexico border will increase the rate of vehicle safety inspections of Mexican trucks entering the United States.[227] An increased rate of inspection is likely to lead to a decrease in the number of trucks failing inspection because the related out-of-service costs will reduce the incentive to use sub-standard trucks.[228] Finally, FMCSA plans to differentiate between the data collected on Mexican drayage trucks and on long-haul trucks[229] will be an important element for accurately evaluating the safety compliance of Mexican trucks.[230]

Two areas of uncertainty that could cause continued dispute over the border operational plan are the number of Mexican trucks that must be inspected at the

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223. *See* Sheppard, *supra* note 6, at 248-52 (discussing the safety concerns advanced by public interest groups and labor unions).

224. *See id.* at 246-48 (discussing a trilogy of government reports that detail safety concerns regarding cross-border trucking). One report focused on the disparity in trucking regulations between Mexico and the United States. *Id.* at 246-47. A second report focused on the shortage of border inspection facilities and personnel. *Id.* at 247. A third report highlighted Mexican trucks that were violating U.S. law without consequences. *Id.* at 247-48.

225. Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902).

226. *See supra* notes 148-67 and accompanying text (discussing operational authority for Mexico-domiciled motor carriers).

227. *See* Messenger, *supra* note 5, at 621 (stating that approximately one-third of Mexican trucks crossing the border were inspected prior to the Act of 2002 improvements).

228. *See id.* at 621-22 (suggesting that border crossings with a higher frequency of inspections have lower truck failure rates). At California border crossings the Mexican truck failure rate was 27% as compared to 41% at Texas border crossings. *Id.* at 622.

229. *See* GAO Report No. 02-238, *supra* note 40, at 19 (explaining that the FMCSA plans to measure Mexican carrier compliance with U.S. safety standards by using truck out-of-service rates, traffic fatality rates, and accident rates).

230. *See* Sheppard, *supra* note 6, at 258-59 (explaining that the safety data on the Mexican drayage fleet is not a fair representation of the Mexican trucking industry).

border crossings[231] and the coordination of inspection responsibility between state and federal enforcement officials.[232] The Act of 2002 makes no specific requirement as to the number of Mexican long-haul trucks that must be inspected at the border or the allocation of federal-state responsibility for inspecting trucks.[233] Presumably, there will be sufficient inspections given the increase in FMCSA personnel[234] and the improved infrastructure required by the Act of 2002.[235] The border states have also received funding under the Act of 2002 to increase the level of inspection resources at the border.[236] Furthermore, the initial number of Mexican long-haul trucks expected to operate under FMCSA authority is small.[237] However, lower percentages of Mexican truck inspections at the border crossings are likely to send up a red flag for interest groups motivated to attack the operational plan.[238] In addition to the potential for low rates of inspection, agreements have not been completed with border states on how to allocate inspections between state and federal enforcement officers.[239] Only two border states, California and Arizona, have enacted legislation authorizing state law enforcement to take action against a commercial vehicle that operates beyond the commercial zones without FMCSA authority.[240] Although the remaining defects in the border operational plans are minimal, protectionists are likely to capitalize on those defects if they result in unsafe Mexican trucks operating on U.S. roads.

2. *Improvements in the Mexican Regulatory Regime*

Uncertainty about whether Mexican trucks will comply with U.S. safety standards is based on Mexico's less stringent regulatory regime. Improvements of Mexican domestic trucking regulations will significantly lessen that

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231. Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(c)(1)(F), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (requiring a finding that there is adequate capacity at each border crossing to conduct a sufficient number of meaningful vehicle inspections).

232. GAO Report No. 02-238, *supra* note 40, at 19.

233. Department of Transportation and Related Agencies Appropriation Act of 2002 § 350.

234. *See id* § 350(c)(1)(A) (requiring the IG to verify that all new inspector positions funded by the Act of 2002 are filled).

235. *See* Mead Statement, *supra* note 103 (finding that the FMCSA planned to hire 214 new border inspectors).

236. *See* Mead Memorandum, *supra* note 102 (explaining that the Act of 2002 allocates $18 million to border states for inspection).

237. *See* Press Release, *supra* note 125, *at* http://www.dot.gov/affairs/dot10702.htm (indicating that only 130 applications have been received by the FMCSA).

238. *See* Mead Memorandum, *supra* note 102 (explaining that there is a correlation between the frequency of inspection and the condition of Mexican trucks entering the United States). More border inspections will result in better Mexican truck safety records. *Id.*

239. *See* GAO Report No. 02-238, *supra* note 40, at 3 (reporting that Department of Transportation officials have not made progress toward a coordinated operational plan).

240. *See* Mead Memorandum, *supra* note 102 (calling the attention of the Secretary of Transportation and Congress to the absence of state legislation).

uncertainty. Mexico has taken steps to implement compatible commercial vehicle safety regulations. In July of 2001, Mexico implemented commercial vehicle inspection regulations.[241] By 2006, Mexican officials plan to have increased the number of inspections per year to fifty percent of the total commercial motor fleet.[242] Mexico has plans to complete construction of twenty inspection facilities by the end of 2003.[243] Mexico has also established additional driver training requirements for issuing and renewing commercial driver's licenses.[244] In addition, five Mexican databases accessible by U.S. enforcement authorities have been created to verify important driver and motor carrier information.[245]

If the safety record of Mexican long-haul trucks is found to be comparable to U.S. domiciled long-haul trucks, the FMCSA will have achieved its goal.[246] Conversely, a poor safety record on Mexican long-haul trucks would be a strong indicator that the FMCSA operational plan is not sufficiently deterring unsafe Mexican trucks from crossing the border. Because Mexican long-haul trucks will be stringently scrutinized under the Federal Motor Carrier Safety Regulations, it seems inevitable that the Mexican long-haul trucks will attain a safety record equivalent to U.S. trucks. Ironically, a good Mexican long-haul safety record could prove that prior data collected on drayage trucks was misleading. Mexico could also argue that improved commercial transportation regulations in Mexico should be credited for a satisfactory safety record. Either way, the safety concerns that justified the more stringent regulatory scheme because they were based on inaccurate data or insignificant differences in regulatory regimes between Mexico and the United States will diminish the legitimacy of differential treatment.

C. The Heavy Burden Placed on Mexican Trucking Firms

The heavy burden placed on the Mexican commercial trucking companies is a third concern affecting the implementation of the post-moratorium policy established by the Act of 2002. Even in the absence of a moratorium, few Mexican motor carriers may be able to absorb the inflated operational costs associated with establishing operations beyond the commercial zones.[247] In addition to the extra entry burdens,[248] there are several other factors likely to create a long-term competitive disadvantage for Mexican trucking companies operating long-haul trucks in the U.S. market under the policy established by the

241. GAO Report No. 02-238, *supra* note 40, at 21.

242. *Id.* at 22.

243. *Id.*

244. *Id.*

245. *Id.* at 23.

246. *Id.* at 19.

247. *See id.* at 7 (explaining that a number of economic and regulatory factors may limit Mexican long-haul operations in the United States).

248. *See* notes 168-290 accompanying text (discussing the cross-border provisions of the Federal Motor Carrier Safety Regulations).

Act of 2002. Two factors that could delay a shift from the drayage system to a long-haul system are the availability of competitively priced insurance and continued border congestion.

1. Availability of U.S. Licensed Insurance

Unavailability of U.S. insurance may create a barrier that effectively pushes trucking operational costs to an unprofitable level.[249] The Act of 2002 requires Mexican motor carriers operating in the United States to carry insurance with a U.S. licensed insurer.[250] However, the meaning of "insurance company licensed in the United States" is uncertain.[251] A narrow interpretation of the statutory language significantly limits the kind of insurance companies that may offer insurance to Mexican motor carriers because it would eliminate participation by all non-U.S. licensed insurers.[252] Such an interpretation of the term "U.S. licensed insurer" prolongs unaffordable insurance costs, preventing Mexican long-haul carriers from gaining practical access to U.S. markets with the same discriminatory effect as the moratorium condemned by the NAFTA arbitration panel.[253]

In addition, other insurance industry related factors limit the number of insurance companies willing to insure Mexican trucks.[254] Only a few U.S. insurance companies have shown interest in the market because it is anticipated that only a small number of Mexican motor carriers will initially operate in the U.S. market.[255] Furthermore, U.S. insurance companies are challenged by the absence of good underwriting information in order to assess the risk of insuring Mexican trucks.[256] These factors create more risk and work for the insurer, resulting in higher costs for the insured.[257]

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249. Price, *supra* note 88, at 282.

250. *See* Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(a)(8), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902) (prohibiting the FMCSA from granting U.S. operating authority to Mexican carriers unless the carrier provides proof of valid insurance with an insurance company licensed in the United States).

251. *See id.* (quoting the statutory language).

252. *See Few Mexican Trucks Expected*, INS. ACCT., July 1, 2002, at 10, *available at* 2002 WL 4770767 (explaining that this issue was a potential point of controversy since a narrow interpretation of the statutory language would have excluded the companies most interested in offering insurance to Mexican trucking companies operating in the United States).

253. *See* Price, *supra* note 88, at 281-82 (postulating that conditions preventing Mexican carriers from obtaining operational authority in the United States should be based on the qualifications of the individual motor carrier). Preventing a Mexican truck from obtaining operational authority based on the unavailability of affordable insurance seems to work as a blanket moratorium.

254. *See Few Mexican Truck Expected*, *supra* note 252 (mentioning that the reluctance stems from fear of the initial cost).

255. *See id.* (emphasizing that the insurance companies need lots of business to make the law of large numbers work).

256. *See id.* (indicating that good underwriting information will be critical to lower cost for insurance).

257. *Id.*

A limited supply of insurance providers will keep costs high and perpetuate the competitive disadvantage between Mexican motor carriers and U.S. motor carriers. The problem will partially resolve itself as the number of Mexican motor carriers participating in long-haul operations in the United States increases. Over time, the presence of more Mexican trucks on U.S. roads and better methods to appraise risk will make the market more profitable and attractive for U.S insurance companies. In addition, a broad interpretation of the term "U.S. licensed insurer" will expand the insurance options available to Mexican trucking companies because it allows non-U.S. licensed surplus lines companies to offer coverage through the admitted U.S. licensed insurers.[258] An increase in the sources of insurance coverage will maximize the available capital to draw on and lower rates for Mexican motor carriers.[259]

2. *Border-Crossing Congestion*

Border congestion is another factor that creates a competitive disadvantage for Mexican long-haul operations. To meet the standards of the Federal Motor Carrier Safety Regulations, Mexican carriers will have to dedicate newer vehicles and more experienced drivers to long-haul operations.[260] It is costly to have expensive equipment and higher paid drivers sitting in gridlock at the border.[261] This is one reason that older, less expensive trucks and personnel were favored in the drayage system.[262] However, if the FMCSA efficiently manages border operations, the congestion and associated cost could be minimized.[263] On the other hand, long delays at the border would make it more advantageous to continue using the drayage system.[264] Accordingly, incentives to shift operations from the drayage system to a long-haul system are unlikely unless congestion is reduced at the border.[265] Ironically, the more restrictive requirements of the Act of 2002 may ultimately favor a long-haul system because drastic improvements in the operational plan for cross-border trucking had to be made before Mexican long-haul truck applications for operational authority could be processed.[266] Significant improvements in infrastructure and increased border personnel should

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258. *See id.* (advocating a broad interpretation by the federal government to allow more companies to offer insurance to Mexican carriers).

259. Meg Fletcher, NAFTA Trucking Legislation Steering Toward Enactment: But Insurance Provision Raising Questions, BUS. INS., Dec. 10, 2001, at 3.

260. *See* Sheppard, *supra* note 6, at 260 (explaining that older trucks are likely to fail the standards necessary to gain entry).

261. *Id.* at 258-59.

262. *Id.*

263. *See id.* (explaining that the drayage system was essentially mandated by the moratorium).

264. *See id.* (suggesting that there was no economic incentive to use safer trucks when the moratorium was in effect).

265. *Id.*

266. *See supra* notes 89-126 and accompanying text (discussing the implementation of the cross-border operational plan).

result in a reduction in the time required to cross the border.[267] Furthermore, increased inspections of truck traffic at the border is likely to result from improved border operations.[268] Consequently, trucks out of compliance with Federal Motor Carrier Safety Regulations are now more likely to be taken out of service.[269] Because the older equipment traditionally dedicated to drayage operations will be inspected more frequently and is more likely to fail inspection, the incentive to use this equipment will decrease.[270] Newer equipment dedicated to long-haul operations is more likely to meet standards upon inspection and pass without incident.[271]

If cross-border operations are too costly only a few Mexican carriers will have the financial means to sustain long-haul operations in the United States. On the other hand, if the higher cost of compliance is short-term more Mexican trucking firms will be able to absorb temporary disadvantages to get the long-haul trucks rolling and abandon the menacing drayage system. However, there are equally powerful incentives for protectionists to prolong these barriers for as long as possible.

D. Protectionists' Continued Effort to Block Mexican Long-Haul Trucks

A final interest affected by the post-moratorium policy established by the Act of 2002 is U.S. job protectionism. The protectionists' methods to further delay cross-border trucking must be considered. If improved border operations and the Federal Motor Carrier Safety Regulations legitimately address U.S. safety concerns, then protectionists will need a new battle cry to stop the diesels from rumbling across the border. As a method to further prolong the dispute, protectionists have formed a partnership with those who have legitimate concerns about the environmental impact of Mexican long-haul trucks on the health of U.S. citizens

A recent decision by the Ninth Circuit Court of Appeals, to which the Teamsters were a party, is responsible for the latest round of delay in the NAFTA trucking dispute.[272] A three-judge panel decided that the Department of Transportation failed to do the necessary environmental impact studies on the rules promulgated by the FMCSA to initiate cross-border trucking service between Mexico and the United States.[273] The court held that the Department of Transportation failed to comport with U.S. environmental law.[274] Specifically, the Department of Transportation should have prepared an Environmental Impact

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267. *See supra* notes 108-22 and accompanying text (discussing the IG findings).

268. *See supra* notes 227-28 and accompanying text (discussing inspection rates at the border).

269. *See* Messenger, *supra* note 5, at 621 (estimating that only one-third of Mexican trucks crossing the border were inspected).

270. *See* Sheppard, *supra* note 6, at 260 (suggesting that using older equipment presents a higher risk of financial loss).

271. *Id.*

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

273. *Id.* at 1032.

274. *Id.*

Statement in accordance with the National Environmental Protection Act [275] and a conformity determination in accordance with the Clean Air Act.[276]

Although President Bush lifted the moratorium that prohibited the FMCSA from processing Mexican applications for operational authority,[277] the Act of 2002 continues to prohibit the FMCSA from processing Mexican applications until the rules required by the Act of 2002 are in force.[278] The Ninth Circuit decision prevents the FMCSA from using the rules established for cross-border trucking until the appropriate environmental studies are completed.[279] Notwithstanding the lifting of the moratorium, the United States remains in breach of its NAFTA obligations.[280] The NAFTA arbitration panel concluded that the United States had to process Mexican long-haul applications on a case-by-case basis.[281] However, the Ninth Circuit decision in effect reinstates the moratorium despite the efforts of the President and Congress. It bans all trucks of Mexican origin without regard for individual ability. This is exactly the kind of restriction that the NAFTA arbitration panel previously condemned.

The Department of Transportation has two choices at this stage, appeal the Ninth Circuit decision or comply with the judicial order.[282] Either way, the FMCSA's action on Mexican applications will be delayed at least six more months.[283] The Department of Transportation will most likely comply with the judicial order and prepare the Environmental Impact Statement and conformity determination ordered by the court.[284] However, this will not be the end of the environmental battle. The Environmental Impact Statement and conformity determination findings will, in all likelihood, be challenged in the U.S. court system. Like the safety dispute, the environmental impact of Mexican trucks on U.S. roads will be equally illusive. As the Ninth Circuit pointed out, emissions standards in Mexico are not as strict as U.S. standards.[285] Furthermore, the number of Mexican trucks meeting U.S. emissions standards remains unknown.[286]

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275. National Environmental Protection Act of 1969, 42 U.S.C. §§ 4321-4370f (2000).

276. Clean Air Act , 42 U.S.C. §§ 7401-7671q (2000).

277. *See* Bush Memorandum, *supra* note 15, *at* http://www.whitehouse.gov/news/releases/2002/11/print/20021127-6.html (announcing that the moratorium would be lifted).

278. Department of Transportation and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-87, § 350(a), 115 Stat. 833, 864 (2001) (to be codified at 49 U.S.C. § 13902).

279. *See Pub. Citizen*, 316 F.3d at 1032 (remanding to the Department of Transportation for a full Environmental Impact Statement and Clean Air Act conformity determination for the three regulations).

280. *In re* Cross-Border Trucking Services (U.S. v. Mex.), Secretariat File No. USA-MEX-98-2008-01, para. 295 (Final Report of the Panel, Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/ trucking.pdf.

281. *Id.* at para. 300.

282. *Our Turn: Court's Truck Ruling Another Roadblock*, SAN ANTONIO EXPRESS-NEWS, Jan. 24, 2003, at 6B, *available at* 2003 WL 5584295.

283. *See id.* (indicating that the appeal process would take longer than the six months required to do the environmental study).

284. *Id.*

285. *See* Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1026 (9th Cir. 2003) (criticizing the Department of Transportation for not citing any known Mexican government plans to improve emissions standards beyond the current requirements).

286. *See id.* at 1025 (discussing the Department of Transportation's determination that one-third of Mexican trucks were identical to U.S. trucks manufactured after 1994 baseless). In 1994, Mexican emissions standards were made identical to U.S. standards. *Id.*

It is also unknown how many Mexican trucks will cross the border and to what extent they will harm the environment.[287] The lesson learned from the safety debate is that protectionists will take advantage of the unknowns.[288] In the absence of facts, protectionists will focus on the worst-case scenario.[289]

The number of willing Mexican motor carriers is likely to be small at first, but booming NAFTA business could eventually attract a larger number of new cross-border trucking service providers, causing further alarm for protectionists.[290] Not surprisingly, alternative issues that once took a back seat to safety issues now serve as the next stage of objection to Mexican long-haul trucking. When the environmental issue has been exhausted, other issues such as illegal immigration, drug trafficking, and homeland security will be used to produce the same kind of passionate objection and public outcry. In the end, the only way to preempt endless delay will be to address the real motivation for continued obstruction, protecting American truckers from Mexican competition.

IV. CONCLUSION: ENDING THE DISPUTE

U.S. policy makers have made progress toward resolving the NAFTA trucking dispute with the implementation of the border operational plan and the cross-border provisions of the Federal Motor Carrier Safety Regulations. These actions bring the United States closer to honoring NAFTA, address the transportation safety concerns on U.S. roads, and represent manageable burdens for Mexican trucking companies. Nevertheless, policy makers have failed to understand that some public interest groups will continue to promote delay if it protects American jobs from competition. The Ninth Circuit decision is a prime example of protectionist vigor. Notwithstanding this latest victory, one fact remains: excluding Mexican trucks simply because they are owned by Mexico-domiciled companies is a dangerous policy choice for the United States. Trucking is an essential NAFTA service. If the dispute remains unresolved, it will spoil a decade of free trade policy success.

Legitimate issues regarding safety, the environment, and homeland security should not be ignored. However, these same issues should not be used as weapons to delay progress toward implementing binding international obligations. The effect is counter-productive. Delaying Mexican long-haul trucks access to the United States only serves to preserve the drayage system, a system

287. *See id.* at 1023 (stating that the Department of Transportation failed to consider the possibility of increased numbers of Mexican trucks that may enter the United States as a result of the new regulations). The Court also criticized the Department of Transportation for not taking a closer look at regional impact of the regulations. *Id.* The Department of Transportation found that increased emissions from Mexican trucks would be very small relative to national levels of emissions. *Id.*

288. *See* Sheppard, *supra* note 6, at 252 (stating that "the safety argument has been repeatedly used because its scandalous nature tends to dominate the debate, infuriate the general public and obfuscate the issue.").

289. *See id.* at 257 (suggesting that NAFTA opponents distort statistics to mislead and scare the public).

290. Simon, *supra* note 11.

that is less safe, less environmentally friendly, less secure, and less efficient. A better solution would be to admit that a competitive fleet of Mexican long-haul trucks could harm job security for U.S. truckers. U.S. job protectionism is not necessarily an illegitimate issue, but disguising it with other issues only serves to delay resolution. If the fear is real, then U.S. policy makers should focus on minimizing the harm caused to U.S. jobs by Mexican competition. The alternative is to accept endless delay that prevents the implementation of a better system of transporting goods between NAFTA partners and harms the international reputation of the United States.

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