

# NAFTA Cross-Border Trucking: Mexico Retaliates After Congress Stops Mexican Trucks at the Border

## ABSTRACT

*The North American Free Trade Agreement (NAFTA) entitles Mexican tractor-trailers to enter the U.S. to deliver cargo from Mexico. In spite of NAFTA, the U.S. has only allowed Mexican trucks to operate in the U.S. during a controversial demonstration project that granted U.S. operating licenses to a select number of Mexican trucks during the Bush administration. The dispute over NAFTA's cross-border trucking provisions climaxed on March 16, 2009, when Mexico imposed \$2.4 billion in retaliatory tariffs on U.S. imports in response to U.S. noncompliance.*

*This Note chronicles the U.S.–Mexico cross-border trucking dispute and argues that the U.S. should re-start a cross-border trucking demonstration project in exchange for Mexico ceasing its retaliatory tariffs. A demonstration project would inform a U.S. policy that fully complies with NAFTA regarding cross-border trucking's challenges and safety issues. In addition, this Note addresses the risks associated with allowing Mexican trucks to operate in the U.S. and offers the U.S. some practical suggestions for addressing these risks while complying with NAFTA.*

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## I. INTRODUCTION

On March 16, 2009, Mexico announced its intention to impose \$2.4 billion in tariffs on United States (U.S.) imports in response to the termination of a cross-border trucking Demonstration Project by the U.S.<sup>1</sup> The Demonstration Project, which licensed a select number of Mexican tractor-trailers (motor carriers) to operate in the U.S., was created by the Bush administration after a North American Free Trade Agreement (NAFTA) arbitration panel held that the U.S. was in violation of NAFTA's cross-border trucking provisions.<sup>2</sup> Although the Demonstration Project did not technically satisfy the NAFTA cross-border trucking provisions, which basically entitled all Mexican trucks to operate within the U.S., it served as an armistice in the growing controversy between the U.S. and Mexico.<sup>3</sup> However, Congress broke the truce on March 11, 2009, when it removed funding from the Demonstration Project, and Mexico immediately struck back with tariffs on a variety of agricultural and industrial

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1. Press Release, Press Briefing by Press Secretary Robert Gibbs 1 (Mar. 16, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Briefing-by-WH-Press-Secretary-Gibbs-3-16-09](http://www.whitehouse.gov/the_press_office/Briefing-by-WH-Press-Secretary-Gibbs-3-16-09) [hereinafter White House Press Release]; Adriana Barrera & Doug Palmer, *Mexico Slaps Tariffs on U.S. Goods in Truck Feud*, REUTERS, Mar. 16, 2009, <http://www.reuters.com/article/topNews/idUSTRE52F7KN20090317?pageNumber=1&virtualBrandChannel=10112&sp=true>. For a list of the eighty-nine products and the applicable tariff on each, see Ley de Comercio Exterior [Law of Foreign Trade], as amended, Diario Oficial de la Federación [D.O.], Mar. 18, 2009 (Mex.).

2. Mark J. Andrews et al., *International Transportation Law*, 42 INT'L LAW. 631, 635–36 (2008); Michael C. McClintock, *NAFTA'S 13th Year: Steadily Increasing Trade Between the U.S. and Mexico, Transportation Infrastructure Crisis, Building a "Dry Canal" Across Southern Mexico, and More*, 14 SW. J.L. & TRADE AM. 25, 36, 38 (2007).

3. See McClintock, *supra* note 2, at 38 (arguing that if the Demonstration Project is successful, Mexico will presumably make a reciprocal commitment).

products.<sup>4</sup> The dispute over cross-border trucking has incited a “trade war”<sup>5</sup> that threatens tens of thousands of U.S. jobs<sup>6</sup> and seriously undermines U.S.–Mexico relations.<sup>7</sup> The U.S. must take swift action in order to restore trade relations with Mexico and preempt further weakening of the U.S. economy.<sup>8</sup>

The Mexican retaliatory tariffs instantly elevated the subject of an inconsequential thirteen-year debate to front-page news and White House press statements.<sup>9</sup> The White House indicated that resolving the trade dispute with Mexico was an “important priority,” and stated that “exports create jobs here in this country and we don’t want to find ourselves, in time of economic slowdown, creating or erecting a barrier to [Mexico].”<sup>10</sup> Only five days after President Obama approved a law terminating the Demonstration Project,<sup>11</sup> Press Secretary Robert Gibbs reported that “[t]he President has tasked the Department of Transportation to work with the U.S. Trade Representative and the Department of State . . . to propose legislation creating a new trucking project that will meet the legitimate concerns of Congress and our NAFTA commitments.”<sup>12</sup>

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4. MARK P. SULLIVAN & JUNE S. BETTEL, CONG. RESEARCH SERV., MEXICO-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (2009); *see also* Barrera & Palmer, *supra* note 1, at 1 (“Mexico slapped tariffs on 90 American agricultural and manufactured exports on Monday in retaliation for Washington’s move to block Mexican trucks from using U.S. highways.”).

5. Mark Drajem, *Mexico Imposes Tariffs on U.S. Amid Trucking Dispute*, BLOOMBERG, Mar. 17, 2009, <http://www.bloomberg.com/apps/news?pid=20601086&sid=anFLZqfyNPgE>.

6. Richard Read, *Mexico’s New Tariffs Could Cost Oregon Millions*, OREGONLIVE, Mar. 18, 2009, [http://www.oregonlive.com/business/index.ssf/2009/03/mexican\\_tariffs\\_will\\_cost\\_oreg.html](http://www.oregonlive.com/business/index.ssf/2009/03/mexican_tariffs_will_cost_oreg.html) (“Mexico’s tariffs could cost the U.S. more than 40,000 U.S. jobs, including roughly 1,000 in Oregon, according to one economist.”).

7. Martin Hutchinson, *Doubly Dangerous Game*, BREAKINGVIEWS, Mar. 17, 2009, <http://www.breakingviews.com/2009/03/17/mexico-nafta.aspx?sg=nytimes&precompiled=true&keywords=martin%20hutchinson> (“[P]rotectionists both sides of the border will use [the \$2.4 billion in tariffs] to pick apart NAFTA, and that resulting economic problems could further stoke Mexican anti-US feelings and harm relations.”).

8. *See* Mark Landler, *Trade Barriers Rise as Slump Tightens Grip*, N.Y. TIMES, Mar. 23, 2009, at A1 (stating Kenneth S. Rogoff’s prediction that “[t]he next two years could be a disaster for free trade”).

9. *See, e.g., id.* (“Mr. Obama . . . scrapped a program enabling Mexican trucks to haul cargo over long distances on American roads. Mexico retaliated by imposing duties on \$2.4 billion worth of American goods . . .”); Marc Lacey & Ginger Thompson, *Obama’s Next Foreign Crisis Could Be Next Door*, N.Y. TIMES, Mar. 25, 2009, at A1 (“After the United States shut the border to Mexican trucks, in violation of a promise it made under the North American Free Trade Agreement, Mexico placed tariffs on 89 American products . . .”); White House Press Release, *supra* note 1, at 1 (“Today, Mexico announced its intent to take retaliatory actions against a range of U.S. exports.”).

10. White House Press Release, *supra* note 1, at 8.

11. *See* H.R. Res. 1105, 111th Cong. (2009) (enacted).

12. White House Press Release, *supra* note 1, at 1.

This press statement is somewhat surprising considering the President's campaign statements. During his campaign for the presidency, then-Senator Obama opposed granting access to Mexican motor carriers and argued that the U.S. needed to re-negotiate NAFTA.<sup>13</sup> Nevertheless, the Obama administration announced that Ray LaHood, the Secretary of Transportation, will soon meet with members of Congress and propose guidelines in an effort to resolve the dispute.<sup>14</sup> The administration seems to be slowly moving towards compliance with NAFTA, but strong political forces continue to impede significant reforms.<sup>15</sup> The administration may have some difficulty in convincing Congress such reform is desirable, considering that Congress has thus far overwhelmingly opposed licensing Mexican motor carriers to operate in the U.S.<sup>16</sup>

Nevertheless, situations have changed and Congress may be forced to re-evaluate its views on cross-border trucking with Mexico, just as President Obama appears to be reconsidering his position on the issue.<sup>17</sup> Mexico strategically devised the retaliatory tariffs to have the greatest impact by "[choosing] products that originate in forty U.S. states so U.S. lawmakers would receive the maximum political pressure from constituents."<sup>18</sup> As a result, constituents in many areas are clamoring for an international solution as the tariffs

13. Press Release, Obama For Am., Obama Asks United Auto Workers To Support the Candidate with a Record of Fighting for Them (Nov. 13, 2007), available at [http://www.barackobama.com/2007/11/13/obama\\_asks\\_united\\_auto\\_workers.php](http://www.barackobama.com/2007/11/13/obama_asks_united_auto_workers.php).

The only trade agreements I believe in are ones that put workers first—because trade deals aren't good for the American people if they aren't good for working people. . . . That's why I voted to block Mexican trucks from entering this country. And that's why we need to amend NAFTA."

See also WIS. FAIR TRADE COAL., TRADE QUESTIONS FOR 2008 PRESIDENTIAL CANDIDATES: RESPONSES OF BARACK OBAMA 1–2, available at [http://www.citizenstrade.org/pdf/wftc\\_obamaresponsetotradequestionnaire\\_02182008.pdf](http://www.citizenstrade.org/pdf/wftc_obamaresponsetotradequestionnaire_02182008.pdf) (documenting Obama's affirmative response to a question asking presidential candidates whether they would commit to renegotiating NAFTA within their first term of office).

14. Steve Miller, *Idling Ends for Rules on Mexican Trucks: U.S. Businesses Await End to Ban, Retaliatory Tariffs*, WASH. TIMES, July 27, 2009, at A1; *LaHood to Share Mexico Trucking Proposal with Congress 'Soon'*, INSIDE U.S. TRADE, May 1, 2009, at 9.

15. Steve Miller, *New Mexican Truck Rules Please U.S. Business: U.S. Businesses Await End to Ban, Retaliatory Tariffs*, WASH. TIMES, July 27, 2009, <http://www.washingtontimes.com/news/2009/jul/27/idling-ends-for-rules-on-mexican-trucks>.

16. See, e.g., 153 CONG. REC. S11,393 (2007) (documenting the Senate's vote of 75 to 23 for the Dorgan Amendment, which prohibited funds from being used to establish a Mexican cross-border trucking Demonstration Project).

17. *Obama Says This is Not the Time to Reopen NAFTA*, REUTERS, Aug. 7, 2009, <http://www.alertnet.org/thenews/newsdesk/N07416487.htm>.

18. Oscar Avila, *Border Allies Are on Edge*, CHI. TRIB., Mar. 25, 2009, at 4, available at [http://www.chicagotribune.com/news/nationworld/chi-mexico-clinton\\_25mar25,0,2051506.story](http://www.chicagotribune.com/news/nationworld/chi-mexico-clinton_25mar25,0,2051506.story).

threaten to snuff out their businesses.<sup>19</sup> Lawmakers are listening<sup>20</sup> and will likely be more receptive to seeking compliance with NAFTA in order to economically benefit many of their constituents. Moreover, if President Obama seeks to bring the U.S. into compliance with NAFTA, he can probably compel congressional acquiescence as he continues to enjoy a relatively high approval rating and Democratic control of Congress.<sup>21</sup> Therefore, the critical question is not whether President Obama can create a new cross-border trucking program but instead goes to what *kind* of program the Obama administration plans to create.

The details of the Obama administration's objectives remain unclear,<sup>22</sup> but Press Secretary Gibbs stated that President Obama wanted to create a new trucking project that would meet the United States' NAFTA obligations.<sup>23</sup> Although a compromise or other temporary diplomatic solution with Mexico, such as the Demonstration Project created by the Bush administration, would be easier to achieve, Gibbs's statement implies that the current administration has chosen to finally bring the U.S. into full compliance with its NAFTA obligations. Complying with NAFTA will undoubtedly be a challenging and unpopular task, but this Note argues that the U.S. should prioritize compliance with international law over domestic convenience.<sup>24</sup> Since entering office, President Obama has continually proclaimed that the U.S. is looking to re-establish relationships with other countries.<sup>25</sup> During one of his

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19. Doug Palmer, *LaHood Sends Obama Advice on Ending Trucking Dispute*, REUTERS, Apr. 13, 2009, <http://www.reuters.com/article/politicsNews/idUSTRE53C68F20090413>.

20. *E.g.*, Letter from U.S. Representative Jeff Flake to President Barack Obama 1 (Mar. 19, 2009), *available at* <http://flake.house.gov/UploadedFiles/obamaletter.pdf> (expressing support for the U.S.–Mexico cross-border trucking program and encouraging steps to promote economic activity).

21. David Lightman, *Democrats in Congress Go Along with Obama—So far*, MCCLATCHY TRIB. BUS. NEWS, Mar. 29, 2009, <http://www.mcclatchydc.com/106/story/65014.html> (“As long as Obama remains popular, most Democratic members of Congress will likely be loyal and only occasionally show flashes of independence, while most Republican lawmakers will be shut out of any meaningful role.”).

22. *See* Miller, *supra* note 14, at A1 (stating that weeks have passed without any action towards a plan to re-launch the trucking program).

23. White House Press Release, *supra* note 1, at 1 (“The President has tasked the Department of Transportation to work with the U.S. Trade Representative and the Department of State, along with leaders in Congress and Mexican officials, to propose legislation creating a new trucking project that will meet the legitimate concerns of Congress and our NAFTA commitments.”).

24. Public Citizen, *Bush's Mexico-Domiciled Trucks Plan Flunks Safety Rules*, [http://www.citizen.org/autosafety/Truck\\_Safety/mex\\_trucks/articles.cfm?ID=16846](http://www.citizen.org/autosafety/Truck_Safety/mex_trucks/articles.cfm?ID=16846) (last visited Oct. 31, 2009) (identifying a study that showed 56% of Americans believed allowing Mexican motor carriers past the commercial zones would be dangerous for U.S. drivers).

25. *See, e.g.*, Sue Pleming, *Obama Pledges New Start with Muslims*, REUTERS, Jan. 20, 2009, <http://www.reuters.com/article/GCA-BarackObama/idUSTRE50J5XK20090120>

recent visits to Mexico he spoke of the need to “launch a new era of cooperation and partnership between” the U.S. and Mexico.<sup>26</sup> Now is the time to act on these principles and demonstrate that the U.S. honors its international agreements.

Part II of this Note provides a comprehensive chronology of cross-border trucking between the U.S. and Mexico. This Part describes the legal status of cross-border trucking prior to NAFTA, as well as how NAFTA and other preceding legislation impacted the flow of Mexican trucks into the U.S. Although the U.S., Mexico, and Canada agreed to cross-border trucking provisions in NAFTA, this Part will discuss how and why these obligations have not been met between the U.S. and Mexico. Finally, this Part will cover the multitude of congressional actions dealing with cross-border trucking, as well as the Bush administration’s recently terminated Demonstration Project.

Part III will seek to establish the scope of the United States’ international cross-border trucking obligations under NAFTA. A detailed review of the text of NAFTA and the 2001 NAFTA arbitration panel’s findings and recommendations will help provide a framework for understanding these international obligations.<sup>27</sup> This Part will review the NAFTA treaty and the arbitration panel’s report in order to provide legal guidelines for how the U.S. can treat Mexican motor carriers differently than U.S. motor carriers but remain in compliance with NAFTA. This treatment is an essential pre-requisite for the proposal offered in Part IV. Part III will confirm that the U.S. policy currently violates NAFTA and that the Mexican retaliatory tariffs are legal under NAFTA.

Part IV will lay out a two-part solution that seeks to bring the U.S. into compliance with NAFTA while also addressing the safety concerns associated with allowing Mexican motor carriers into the U.S. As it would be naïve to expect the U.S. to hastily reform its trucking policies to comply with NAFTA cross-border trucking provisions, this Part recommends that the Obama administration first seek to re-establish a trucking pilot program with Mexico, similar to the Demonstration Project in effect under the Bush administration, in exchange for Mexico’s elimination of retaliatory tariffs. Once the pilot program is operational, the Obama administration should cautiously reform U.S. trucking policies to

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(“President Barack Obama promised to improve U.S. ties with the Muslim world in his inauguration address . . .”).

26. Joint Press Conference with President Barack Obama and President Felipe Calderón in Mexico City, Mex. (Apr. 16, 2009), *available at* [http://blogs.suntimes.com/weet/2009/04/obama\\_calderon\\_mexico\\_city\\_pre.html](http://blogs.suntimes.com/weet/2009/04/obama_calderon_mexico_city_pre.html) [hereinafter Mexico City Press Conference].

27. Dana T. Blackmore, *Continuing to Put the Brakes on Mexican Truckers: Will the U.S. Ever Implement NAFTA Annex I?*, 9 LAW & BUS. REV. AM. 699, 708 (2003).

bring the U.S. into full compliance with NAFTA. In addition, this Part discusses the risks associated with allowing Mexican motor carriers onto U.S. roads and proposes practical restrictions and regulations that will minimize safety concerns.

## II. BACKGROUND

### A. *Events Preceding NAFTA*

On July 1, 1980, President Carter declared that he had signed the Motor Carrier Act of 1980, which “remove[d] 45 years of excessive and inflationary Government restrictions and redtape” on the trucking industry.<sup>28</sup> This deregulatory Act allowed new trucking companies to become licensed by the Interstate Commerce Commission (ICC) by showing that they were “fit, willing, and able to provide the transportation,” and that “the service proposed will serve a useful public purpose.”<sup>29</sup> This standard was substantially easier to meet than the standard set in the Motor Carrier Act of 1935 and caused rapid growth in new trucking companies in the early 1980s.<sup>30</sup> Because the 1980 Act did not distinguish between U.S., Canadian, and Mexican trucking companies, the statute also made it easier for Canadian and Mexican trucking firms to become certified to operate in the U.S.<sup>31</sup> Nevertheless, only five Mexican carriers seized the opportunity before Congress removed this right to certification in 1982.<sup>32</sup>

Although the U.S. allowed Mexican and Canadian motor carriers to operate in the U.S. with certification, Mexico refused to open its border to U.S. trucking companies.<sup>33</sup> Consequently, in an effort to encourage reciprocal agreements with Canada and Mexico on cross-

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28. Statement on Signing S. 2245 into Law, 16 PUB. PAPERS 1265, 1265 (July 1, 1980).

29. Motor Carrier Act of 1980, Pub. L. No. 96-296, § 5(b)(1), 94 Stat. 793, 793 (1980) (codified at 49 U.S.C. § 10101).

30. See Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (repealed 1983) (requiring trucking applicants to show that their service was “required by the present or future public convenience and necessity”); Motor Carrier Act of 1980, <http://www.nationmaster.com/encyclopedia/Motor-Carrier-Act-of-1980> (last visited Oct. 31, 2009) (“A result of the law was that the number of new firms has increased dramatically, especially low-cost, non-union carriers. By 1990 the number of licensed carriers exceeded forty thousand, more than double the number in 1980.”).

31. Final Report of the Panel, *In the Matter of Cross-Border Trucking Services*, para. 36, Secretariat File No. USA-Mex-98-2008-01 (Feb. 6, 2001) [hereinafter NAFTA Final Report], available at <http://www.worldtradelaw.net/nafta20/truckingservices.pdf>.

32. *Id.* para. 59.

33. See Memorandum on the Bus Regulatory Reform Act of 1982, 18 PUB. PAPERS 1180, 1181 (Sept. 20, 1982) (President Reagan’s statement to the U.S. Trade Representative noting “[a] substantial disparity between the relatively open access afforded Mexican trucking service coming into the United States and the almost complete inability of United States trucking interests to provide service into Mexico”).

border trucking,<sup>34</sup> Congress passed the Bus Regulation Reform Act of 1982, which imposed a two-year moratorium on the issuance of new U.S. highway authorizations for motor carriers domiciled in a foreign country or owned or controlled by foreigners.<sup>35</sup> This Act, which applied equally to Canada and Mexico, authorized the President to remove or modify any part of the moratorium, and President Reagan exercised this power immediately.<sup>36</sup> On September 20, 1982, the same day the President issued his signing statement on the bill, President Reagan suspended the moratorium with regards to Canada because he believed “[the U.S.] trucking industry is not now, nor has it been, precluded from providing service into [Canada].”<sup>37</sup> In the same memorandum, President Reagan noted that he would not modify the moratorium with regards to Mexico given “the almost complete inability of U.S. trucking interests to provide service into Mexico.”<sup>38</sup> This moratorium, which effectively prevented Mexican motor carriers from qualifying for operating licenses in the U.S., was extended in 1984, 1986, 1988, 1992, and 1995.<sup>39</sup>

Although the moratorium generally prevented Mexican motor carriers from entering the U.S., there were a few exceptions that continue to apply today. First, Mexican motor carriers that already had a license to operate in the U.S. were “grandfathered in” and not affected by the Bus Regulatory Act of 1982.<sup>40</sup> Second, Mexican motor carriers destined for Canada were permitted to transit through the U.S., as long as they complied with U.S. safety regulations and insurance requirements.<sup>41</sup> Third, and most significantly, Mexican motor carriers were allowed to cross the border into “commercial

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34. See NAFTA Final Report, *supra* note 31, para. 43 (“The purpose of the moratorium was to encourage Mexico and Canada to lift their restrictions on market access for U.S. firms.”); *cf.* Memorandum on the Bus Regulatory Reform Act of 1982, *supra* note 33, at 1181 (President Reagan’s statement regarding the moratorium, urging the U.S. Trade Representative to “intensify our efforts to negotiate a fair and equitable resolution of [the transborder trucking issue] with both Canada and Mexico”).

35. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 6(g)(1), 96 Stat. 1102 (codified as amended at 49 U.S.C. § 902(c) (2005)).

[T]he Commission . . . shall not issue any certificate to any motor common carrier, or any permit to any motor contract carrier, domiciled in any contiguous foreign country or owned or controlled by persons of any contiguous foreign country in the two-year period beginning on the effective date of this subsection.

36. *Id.* § 6(g)(1)(2).

37. Memorandum on the Bus Regulatory Reform Act of 1982, *supra* note 33, at 1181.

38. *Id.*

39. NAFTA Final Report, *supra* note 31, para. 41.

40. *Id.* para. 44, 59.

41. *Id.* para. 44, 57.

zones” in the U.S.,<sup>42</sup> which extend between 2 and 20 miles into the U.S. depending on the population of the border city.<sup>43</sup> Although Mexican motor carriers were still required to obtain a Certificate of Registration before entering the commercial zones, the certification has been relatively easy to attain;<sup>44</sup> consequently, Mexican truck traffic in the commercial zones of the U.S. has increased greatly since 1982.<sup>45</sup> Currently, thousands of Mexican trucks cross the border into U.S. commercial zones each day.<sup>46</sup>

Critics have found fault with the process of transporting goods across the border into U.S. commercial zones, describing it as inefficient, expensive, and environmentally damaging.<sup>47</sup> Generally, long-haul Mexican motor carriers stop short of the border and a Mexican “drayage” service truck ferries the goods across the border into the U.S. commercial zones.<sup>48</sup> Thereafter, the goods are transported to a U.S. motor carrier that carries the goods to their final destination in the U.S., while the drayage service truck returns to Mexico without any cargo and picks up another load.<sup>49</sup> This

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42. *Id.* para. 44, 178–79; *see also* U.S. Department of Transportation, Cross Border Truck Safety Inspection Program, <http://www.dot.gov/affairs/cbtsip/factsheet.htm> (last visited Oct. 31, 2009) (noting that Mexican trucks can enter U.S. commercial zones in areas such as San Diego, El Paso, and Brownsville).

43. NAFTA Final Report, *supra* note 31, para. 47; *see also* 49 C.F.R. § 372.241 (1997) (defining commercial zones).

44. NAFTA Final Report, *supra* note 31, para. 48.

45. Paul Stephen Dempsey, *Free Trade But Not Free Transport? The Mexican Standoff*, 30 DENV. J. INT'L L. & POL'Y 91, 91 (2001).

46. *See, e.g.*, CAL. AIR EMISSIONS BD., NAFTA/MEXICAN TRUCK EMISSIONS OVERVIEW 2 (rev. 2005) (stating that as of 2005, 3,500 Mexican trucks entered California commercial zones per day).

47. *See, e.g.*, *Trucks Across the Border: Direct Shipping Between the U.S. and Mexico Stirs Heated Debate*, KNOWLEDGE @ W.P. CAREY, Sept. 26, 2007, <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1475> [hereinafter *Trucks Across the Border*] (“[T]he process generates pollution, raises costs for shipping companies and exasperates producers and retailers.”).

48. *See id.* (stating that once the Mexican vehicle leaves a shipment at the border, “[t]he goods are then picked up by drayage companies that specialize in the time-consuming hop across the border and through U.S. Customs”); Meredith Vesledahl, *Economic Implications of the Bush Demonstration Project on Cross-Border Trade Between the U.S. and Mexico*, 14 LAW & BUS. R. AM. 631, 636 (2008) (elaborating on the “drayage” process).

49. Dempsey, *supra* note 45, at 92 (“Mexican carriers would deliver trailers to U.S.-based long-haul trucks, which slowed the movement of goods and increased transportation costs.”); Vesledahl, *supra* note 48, at 636–37 (explaining that a Mexican truck delivers the goods to a U.S. long-haul carrier at the drayage yard, then returns to Mexico empty). In most cases, rather than physically transferring the goods from one truck to another, the goods remain in one trailer and the trucks alternate hauling the trailer. *See id.* at 636 (describing this process of “shuttl[ing]” the same trailer). In the NAFTA arbitration panel proceedings, the U.S. claimed they were not worried about the trailers from Mexico being pulled by U.S. trucks in the U.S. because eighty to ninety percent of these trailers were U.S. owned. NAFTA Final Report, *supra* note 31, para. 180.

cumbersome process has been nicknamed “the slow dance of the three trucks.”<sup>50</sup> The criticism of this inefficient mode of transporting goods, along with the United States’ frustration that Mexico continued an absolute ban on U.S. motor carriers, contributed to the inclusion of cross-border trucking provisions in NAFTA.<sup>51</sup>

### B. Creation of NAFTA and Cross-Border Trucking Obligations

In 1990, the U.S., Canada, and Mexico began negotiations to create the North American Free Trade Agreement.<sup>52</sup> On December 17, 1992, the three countries agreed to a treaty that would reduce and remove tariffs and grant “Most-Favored-Nation Treatment” and “National Treatment” status to each country.<sup>53</sup> The Treaty specifically addressed the ability of motor carriers to cross the U.S.–Mexico border, but it did not address motor carriers crossing the Canada–U.S. border because this had been occurring without problems for over a decade.<sup>54</sup> Ironically, it was the U.S. delegation that sought to include a U.S.–Mexico cross-border trucking provision.<sup>55</sup>

The Treaty laid out a two-stage plan to open the border to motor carriers. In the first stage, which was to start on December 18, 1995, the U.S. would allow Mexican motor carriers into the four U.S. bordering states—California, Arizona, New Mexico, and Texas—and Mexico would allow U.S. motor carriers into Mexico’s six border states.<sup>56</sup> The second stage was to begin on January 1, 2000, after which motor carriers from the U.S. would be entitled to travel

50. *Trucks Across the Border*, *supra* note 47.

51. Dempsey, *supra* note 45, at 92.

52. Earl H. Fry, *The North American Free Trade Agreement: U.S. and Canadian Perspectives*, in *IMPLICATIONS OF THE NORTH AMERICAN FREE TRADE REGION: MULTIDISCIPLINARY PERSPECTIVES* 18 (Joseph A. McKinney & M. Rebecca Sharpless eds., 1992) (describing how the free-trade agreement was first discussed between President George H. W. Bush and President Carlos Salinas de Gortari from Mexico, and that Brian Mulroney from Canada later also entered into the talks).

53. Maryse Robert, *Free Trade Agreements*, in *TOWARD FREE TRADE IN THE AMERICAS* 87, 90 (José M. Salazar-Xirinachs & Maryse Robert eds., 2001).

54. *Cf.* ALICE ADAMS, *TRUCKING GUIDE TO BORDER CROSSING: A NAFTA GUIDEBOOK FOR NORTH AMERICAN TRUCKERS* 50 (2004) (“NAFTA permits Mexican trucking firms to provide cross-border delivery and the backhaul of cargo. Canadian trucking companies operate in the United States under an agreement that was made prior to NAFTA.”).

55. *See* Counter-Submission of the United States, *In the Matter of Cross-Border Trucking Services*, at 3, Secretariat File No. USA-Mex-98-2008-01 (Feb. 23, 2000) [hereinafter U.S. Counter-Submission] (on file with the Vanderbilt Journal of Transnational Law) (“During the negotiation of the NAFTA, the United States pressed for a commitment by Mexico to phase out Mexican restrictions on cross-border trucking services.”).

56. Dempsey, *supra* note 45, at 92.

throughout Mexico, and Mexican motor carriers would be entitled to travel throughout the U.S.<sup>57</sup>

However, motor carriers never started crossing the border as called for in the NAFTA provisions. On December 17, 1995, the day before the first stage of the cross-border trucking was to begin, President Clinton issued a surprising executive order that effectively extended the moratorium on cross-border trucking with Mexico.<sup>58</sup> Although his official reason was that Mexican motor carriers were not as safe as U.S. motor carriers and more time was needed to evaluate the situation, many claim President Clinton ordered the delay in order to appease the U.S. trucking industry.<sup>59</sup> The Mexican government responded by initiating NAFTA's Chapter 20 dispute resolution mechanism.<sup>60</sup> Eventually, an arbitration panel was formed to evaluate Mexico's complaint alleging that the U.S. was violating NAFTA.<sup>61</sup>

In 2001, the arbitration panel unanimously concluded that the U.S. violated NAFTA by refusing to allow Mexican motor carriers into the four U.S. border states as required by the Treaty. The panel condemned the "blanket refusal" to consider Mexican motor carriers for licensing<sup>62</sup> and authorized Mexico to impose economic sanctions on the U.S.<sup>63</sup> However, the newly elected President George W. Bush promised to promptly begin admitting Mexican motor carriers into the U.S., satisfying the Mexican government, which chose not to impose retaliatory tariffs at that time.<sup>64</sup>

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57. *Id.*

58. *Id.* at 93.

59. *Id.*; see also Andrews et al., *supra* note 2, at 635 ("Although concerns about the safety of Mexican trucks and drivers were the rationale offered by the Administration for its action, concerns by the International Brotherhood of Teamsters about losing work to allegedly lower paid Mexican drivers were the underlying cause for this first violation of the NAFTA trucking provisions.")

60. Dempsey, *supra* note 45, at 94; see also Blackmore, *supra* note 27, at 704. Chapter twenty of NAFTA proscribes that disputes should be settled by following a three-step process. See North American Free Trade Agreement pt. 7, ch. 20, § B, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 693 (1993) [hereinafter NAFTA Treaty] (providing for dispute settlement procedures). First, the states in disagreement should consult. *Id.* pt. 7, ch. 20, § B, art. 2006. If unsuccessful, the parties may seek mediation by the NAFTA Free Trade Commission (FTC). *Id.* pt. 7, ch. 20, § B, art. 2006. Finally, the complaining party may request an arbitration panel, as was requested by Mexico in this instance. See NAFTA Final Report, *supra* note 31, para. 18–21 (after consultations failed and the NAFTA FTC was unable to resolve the dispute, Mexico requested the formation of an arbitral panel).

61. NAFTA Final Report, *supra* note 31, paras. 22–23.

62. Blackmore, *supra* note 27, at 708 (citing NAFTA Final Report, *supra* note 31, para. 295).

63. Katharine G. Shirey, *International Implications: The Elephant in the Living Room in Public Citizen v. Department of Transportation*, 34 ENVTL. L. 961, 981 (2004).

64. Blackmore, *supra* note 27, at 709–10; see also Andrews et al., *supra* note 2, at 635 ("The panel decision opened the door for Mexico to seek reparations against the

Despite President Bush's announcement that the U.S. would comply with the NAFTA arbitration panel's decision and allow Mexican motor carriers into the U.S. by January 1, 2002,<sup>65</sup> his administration came nowhere near reaching this goal. In fact, the NAFTA cross-border trucking provisions became a divisive issue, particularly between the President and Congress, and the Bush administration experienced little success in bringing the U.S. closer to complying with NAFTA before the end of his presidency.

### C. Congressional Acts to Stop Cross-Border Trucking

Congress was closely involved in the cross-border trucking debate during the Bush administration. Although Congress ultimately urged President Bush to end the Demonstration Project and keep Mexican motor carriers off U.S. roads, the legislative branch was not as vehemently opposed to cross-border trucking during the early years of the Bush administration. Instead, after President Bush announced that the U.S. would comply with the NAFTA cross-border trucking requirement in 2001, Congress engaged in discussion with the administration but resisted hurried action.<sup>66</sup>

On July 18, 2001, the Subcommittee on Highway and Transit (the Subcommittee) held a hearing where Subcommittee members expressed their concerns that the Mexican motor carriers would not be safe enough to enter the U.S. because the Mexican safety standards applicable to motor carriers were inferior to U.S. safety standards.<sup>67</sup> The members of the Subcommittee also expressed concerns about illegal drugs and immigrants being transported by the motor carriers.<sup>68</sup> Norman Mineta, the Secretary of Transportation, argued that the Department of Transportation (DOT) policy requiring photo identification, insurance, and a vehicle inspection for all Mexican motor carriers that crossed the border was sufficient to safeguard the U.S.<sup>69</sup> Nevertheless, the Secretary was unable to convince the Subcommittee that Mexican trucks would meet the

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U.S. To date, Mexico has not yet walked through that door.”). Some speculate that the sanctions could have amounted to \$200 billion. Dempsey, *supra* note 45, at 94–95.

65. Blackmore, *supra* note 27, at 709. President Bush originally wanted to allow the motor carriers to begin entering the U.S. by September 2001, but the Secretary of Transportation said that would be an impossible timeframe. *NAFTA: Arbitration Panel Decision and Opening of the U.S.-Mexican Border to Mexican Motor Carriers: Hearing Before the Subcomm. on Highways and Transit of the H. Comm. on Transportation and Infrastructure*, 107th Cong. 35 (2001) (statement of Norman Y. Mineta, Secretary of Transportation), available at [http://commdocs.house.gov/committees/trans/hpw107-35.000/hpw107-35\\_of.htm](http://commdocs.house.gov/committees/trans/hpw107-35.000/hpw107-35_of.htm) [hereinafter *Arbitration Panel Decisions Hearing*].

66. See *infra* notes 67–70 and accompanying text.

67. *Arbitration Panel Decisions Hearing*, *supra* note 65.

68. *Id.* at 27, 46–47.

69. *Id.* at 28, 30 (statement of Secretary Mineta).

United States' safety standards, and the House of Representatives denied any funding to the program in the "Sabo Amendment."<sup>70</sup> A congressman mockingly said to the Secretary: "You can only do what we give you money to do."<sup>71</sup> Little did this congressman know, the Bush administration would later defy this view by continuing a program after Congress displayed a clear intent to stop the funding.<sup>72</sup>

Later in 2001, Congress took further action by passing Section 350, which imposed twenty-two requirements that the DOT had to fulfill before granting any Mexican motor carrier a license to operate in the U.S. beyond the "commercial zone."<sup>73</sup> One of the most onerous requirements of Section 350 was that all Mexican motor carriers had to be physically inspected in Mexico by U.S. inspectors before qualifying for a U.S. operating license.<sup>74</sup>

In an effort to comply with Section 350, the DOT began talks with Mexico about conducting inspections in Mexico.<sup>75</sup> Although Mexico was originally uncertain about the idea, it finally conceded to the plan in 2006.<sup>76</sup> Once again, the DOT began moving forward with plans to open the border to some Mexican-domiciled motor carriers.<sup>77</sup>

In addition to the delays caused by Congress, other regulatory issues complicated and delayed cross-border trucking programs. For example, after the DOT initiated rulemaking to regulate the Mexican-domiciled motor carriers, a group of environmentalists and labor groups collectively filed a lawsuit claiming that the DOT regulations were "arbitrary and capricious" because they did not prepare full environmental impact statements as required by the

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70. *Id.* at 29. Although this legislation arguably brought the U.S. back in violation of NAFTA, *id.* at 23 (statement of Peter F. Allgeier, Deputy U.S. Trade Rep.), the members of Congress argued that the safety of the U.S. was a greater concern than the treaty. *See, e.g., id.* at 15 (statement of Rep. Robert A. Borski) ("In carrying out our treaty obligations, we must guarantee that we do so in a matter [sic] that assures the safety of the United States citizens."). One concerned House member later stated that, "NAFTA is a trade agreement; it is not a suicide pact." 147 CONG. REC. H3,587 (daily ed. June 26, 2001) (statement of Rep. Obey).

71. *Arbitration Panel Decisions Hearing*, *supra* note 65, at 32.

72. *See infra* notes 95–96 and accompanying text.

73. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 108-87, § 350, 115 Stat. 864 (listing requirements). For a chronological summary of these events, see Mexican Border and DOT Pilot Program Project Chronology, <http://www.trucksafety.org/docs/Mexican%20Border%20%20DOT%20Pilot%20Program%20Chronology%20Update%20March%202008.doc> (last visited Oct. 31, 2009).

74. *See* Department of Transportation and Related Agencies Appropriations Act § 350(a)(1)(A) (provision requiring "safety examination" prior to granting Mexican motor carriers "conditional operating authority").

75. Brent E. Butzin, *The Effects of Transportation Regulation on the Transborder Metropolitan Areas of the U.S.-Mexico Border Region: NAFTA and the Mexican Truck Plan—Where Do We Go From Here?*, 34 TRANSP. L.J. 391, 409 (2007).

76. *See id.* at 408–09 (discussing opposition to the proposed safety rules by Mexico's trucking lobby).

77. *Id.* at 409–10.

Clean Air Act (CAA).<sup>78</sup> The case went all the way to the U.S. Supreme Court, which held that the DOT was not required to evaluate the environmental effects of allowing Mexican motor carriers to operate on U.S. roads.<sup>79</sup>

Finally, on Feb. 23, 2007, the newly appointed Secretary of Transportation, Mary Peters, announced that the U.S. and Mexico would engage in a “Demonstration Project” that would allow 100 approved Mexican-domiciled motor carriers into the U.S. within 60 days.<sup>80</sup> The plan also included a grant of “reciprocal rights” for U.S. domiciled motor carriers to enter Mexico.<sup>81</sup> The Subcommittee convened to discuss the Demonstration Project, but there was a noticeable difference in how the new Democrat-controlled Congress approached the cross-border trucking issue. Unlike the congressmen in the 2001 meeting, whose concerns focused on the safety of the Mexican motor carriers on U.S. roads, congressmen in 2007 argued against implementing any cross-border trucking programs because they believed NAFTA was ineffective overall and would hurt their constituents.<sup>82</sup> The opening remarks by Peter DeFazio, the Subcommittee Chairman, illustrate the views of several of the committee members:

[T]his is a way to displace American labor. . . . [W]hat I see as the grand vision here is that we will develop ports in Mexico, the junk will be made in China, shipped there, we can avoid the longshoreman’s union and not pay a living wage to people unloading the ships. Then we can load it onto trucks that will drive it from there into the U.S. with workers who are again not paid a living wage and may have a host of other problems inherent in that.<sup>83</sup>

Other members of Congress argued that the U.S. should only allow the same number of Mexican motor carriers into the U.S. as the number of U.S. motor carriers that enter Mexico.<sup>84</sup> Although

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78. Blackmore, *supra* note 27, at 714–15.

79. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 773 (2004); McClintock, *supra* note 2, at 36.

80. McClintock, *supra* note 2, at 38.

81. Demonstration Project on NAFTA Trucking Provisions Notice, 72 Fed. Reg. 23,884 (May 1, 2007).

82. See, e.g., *U.S./Mexican Trucking: Safety and the Cross-Border Demonstration Project: Hearing Before the Subcomm. on Highways and Transit of the H. Comm. on Transportation and Infrastructure*, 110th Cong. 2–3 (2007) [hereinafter *U.S./Mexican Trucking Hearing*] (statement of Rep. John J. Duncan, Jr.) (“I am concerned that treaties like NAFTA essentially want to do away with our borders and with Mexico and Canada and merge us into a North American Union. I am greatly opposed to this and want to protect U.S. political and economic sovereignty.”).

83. *Id.* at 2 (statement of Rep. Peter DeFazio).

84. E.g., *id.* at 3 (statement of Rep. Duncan) (“[W]e should let one Mexican trucking company in for every American trucking company that wants to go and gets permission to go into Mexico.”). Because this hearing made clear that only two U.S. companies had expressed interest in operating in Mexico, *id.*, implementing this policy would effectively eliminate the Mexican motor carriers’ authority to operate in the U.S.

concerns regarding reciprocity and the wage difference between the U.S. and Mexico were valid, the Subcommittee no longer considered *how* to safely implement a cross-border trucking program; instead, it worked to justify *why* it would not support the Demonstration Project or other similar cross-border trucking programs.

Later in 2007, the House adopted an amendment to the Fiscal Year 2008 Transportation, Treasury, Housing, and Related Agencies Appropriations Act to strip funding from the Demonstration Project. The Act provided that, “[n]one of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate beyond the commercial zones along the international border between the U.S. and Mexico.”<sup>85</sup> The bill passed both the House and the Senate with large margins but was not presented to the President.<sup>86</sup> In a Statement of Administration Policy, the Bush administration clarified that the President would veto the bill if it was placed before the President because “the Administration . . . strongly [opposes] any amendment that is intended to delay or restrict the [Demonstration Project].”<sup>87</sup>

Congress made two more attempts to stop the Demonstration Project in 2007. First, it added a provision in the U.S. Troop Remedies, Veterans Care, Katrina Recovery, and Iraq Accountability Appropriations Act that would eliminate funding for the program.<sup>88</sup> The President vetoed the bill, and Congress failed to override the veto.<sup>89</sup> Second, on December 26, 2007, after the Demonstration Project had already been initiated, Congress passed a Consolidated Appropriation Act with the “Dorgan Amendment,” which prohibited the DOT from using funds to “establish a cross-border motor carrier demonstration program.”<sup>90</sup> The President signed the Consolidated Appropriations Act, but the DOT continued the Demonstration Project because the Department “believed” that the legislation only

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85. H.R. REP. NO. 110-497, at 556 (2007); *see also* Govtrack.us, H.R. 3074: Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3074> (last visited Oct. 31, 2009) (providing a summary of the bill and the votes in the House and Senate) [hereinafter Govtrack.us, H.R. 3074]

86. Govtrack.us, H.R. 3074, *supra* note 85.

87. 153 CONG. REC. H8,246 (statement of Rep. Sessions reading the Statement of Administration Policy into the record).

88. Govtrack.us, H.R. 1591: U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, <http://www.govtrack.us/congress/vote.xpd?vote=s2007-126> (last visited Oct. 31, 2009).

89. *Id.*

90. Consolidated Appropriations Act, 2008, H.R. 2764, 110th Cong. § 136 (enacted) (“None of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate beyond the commercial zones along the international border between the U.S. and Mexico.”).

prohibited the Department from establishing a *new* Demonstration Project.<sup>91</sup> However, the text and legislative history surrounding the Dorgan Amendment demonstrate that the Bush administration's creative interpretation of the amendment was at odds with congressional intent.

#### D. *The True Meaning of the Dorgan Amendment*

Congress made its biggest push to stop the cross-border trucking program with the Dorgan Amendment included in the 2008 Transportation, Housing and Urban Development, and Related Agencies Appropriations Act. Senator Dorgan of North Dakota, along with six other senators, including Senator Obama and Senator Clinton, sponsored the Amendment, which stated: "None of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate beyond the commercial zones along the international border between the U.S. and Mexico."<sup>92</sup> This amendment easily passed the Senate, with 75 senators supporting the amendment, 23 voting against it, and 2 abstaining.<sup>93</sup> While the Act never became law, the Dorgan Amendment was enacted through a large omnibus bill, the Consolidated Appropriations Act, which was signed by President Bush.<sup>94</sup>

Nevertheless, the DOT continued the Demonstration Project because, in its view, the Consolidated Appropriations Act only prohibited the Department from establishing a new Demonstration Project; it did not mandate stopping the Demonstration Project that was already in practice.<sup>95</sup> One could argue that interpreting the Act with a strict textual analysis leads to this conclusion, but the legislative history and implicit purpose behind the provision help demonstrate that Congress intended to stop the *current* Demonstration Project in addition to preventing the DOT from establishing future Demonstration Projects.<sup>96</sup> A review of Senator

91. See *infra* notes 95–96 and accompanying text.

92. Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, H.R. 3074, 110th Cong. (2007) (as passed by Senate, Sept. 11, 2007).

93. Govtrack.us, *S. Amdt. 2797: To Prohibit the Establishment of a Program that . . . to H.R. 3074 [110th]: Transportation, Housing and . . . (Vote on Amendment)*, <http://www.govtrack.us/congress/vote.xpd?vote=s2007-331> (last visited Oct. 31, 2009).

94. Ams. for Legal Immigration, Senator Thrashes Bush's Mexican Truck Hat Dance, <http://www.alipac.us/modules.php?name=News&file=article&sid=3032> (last visited Oct. 31, 2009).

95. *U.S. Moves Ahead With Mexican Truck Program: White House Defies Congress, Pointing to Loophole in New Law*, MSNBC, Jan. 4, 2008, [http://www.democraticunderground.com/discuss/duboard.php?az=view\\_all&address=102x3125132](http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x3125132) [hereinafter *White House Defies Congress*].

96. See *infra* text accompanying notes 97–106.

Dorgan's supporting statements, Senator Cornyn's statements in opposition, and President Bush's memorandum demonstrates that the statute, despite poor drafting, was intended to stop the current Demonstration Project.

During the floor debates on the Dorgan Amendment, Senator Dorgan stated that he did not think the Senate "ought to allow, *at this point*, the pilot project to go forward that will have long-haul Mexican trucks coming into this country now," and he thus urged the other senators to adopt his amendment.<sup>97</sup> Later in the debate, Senator Dorgan summarized what he hoped to achieve: "I hope by passing my amendment we will say to the DOT that they may not go forward with this pilot project because this is an issue of safety and we stand for safety in this country."<sup>98</sup> In both of these statements, the Senator showed that he intended his amendment to stop the DOT from allowing Mexican trucks into the country under the existing Demonstration Project.

As floor statements can be abused in hopes of slanting subsequent interpretation of a law, it is important also to consider the statements of Senator Cornyn, who opposed the bill. Senator Cornyn's statements demonstrate that he also believed the Dorgan Amendment would proscribe the current Demonstration Project. He argued that "instead of trying to kill this program, which will violate the treaty obligations of the U.S. as interpreted by the U.S. Supreme Court and international arbitration panels, [Congress has] a duty to find workable solutions that ensure as much as humanly possible the safety of trucks on our roads . . . ."<sup>99</sup> Clearly, Senator Cornyn believed and feared that the Dorgan Amendment would stop the existing DOT Demonstration Project. Indeed, he would have been relieved if the amendment's only goal were to stop future Demonstration Projects because that would neither "kill" any program, nor place the U.S. in violation of its NAFTA obligations.<sup>100</sup>

Finally, after the Dorgan Amendment was approved by Congress and placed in the 2008 Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, the Bush administration issued a Statement of Administration Policy.<sup>101</sup> In this statement, the Bush administration threatened to veto the bill if presented to the President in its current form.<sup>102</sup> Among the

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97. 153 CONG. REC. S11,388 (statement of Sen. Dorgan) (emphasis added).

98. *Id.* at S11,393.

99. *Id.* at S11,390 (statement of Sen. Cornyn).

100. *Id.*

101. 153 CONG. REC. H8,246 (statement of Rep. Sessions reading the Statement of Administration Policy into the record).

102. *Id.*

concerns was the Dorgan Amendment.<sup>103</sup> The administration cautioned that it “would strongly oppose any amendment that is intended to delay or restrict the Demonstration Project.”<sup>104</sup> This statement demonstrates the administration’s fear that Congress was trying to shut down the Demonstration Project. There is no rational reason why the administration would fear Congress preventing a *future* Demonstration Project, because the administration had the ability to extend the current Demonstration Project indefinitely.<sup>105</sup> As a result, the Bush administration’s later interpretation that the Dorgan Amendment only stopped the DOT from “establishing” a Demonstration Project seems inconsistent with the view the administration had when threatening to veto the bill.<sup>106</sup>

In summary, this Note suggests that the most natural interpretation of the Dorgan Amendment, and the interpretation that both the legislative and executive branches had at the time the amendment was written, was that the Secretary of Transportation could not use funds allocated by Congress to continue the Demonstration Project *or* to establish a new program. Although the Bush administration’s creative interpretation kept the Demonstration Project alive through the end of President Bush’s presidency, President Obama’s administration wasted little time in terminating the Demonstration Project.<sup>107</sup>

#### E. *The Bush Administration’s Demonstration Project*

In September 2008, select Mexican eighteen-wheeler trucks were permitted to cross the border into the U.S. in order to make deliveries in Chicago, Illinois.<sup>108</sup> The U.S. granted these motor carriers permission as part of a DOT Demonstration Project initiated to bring the U.S. closer to compliance with NAFTA requirements.<sup>109</sup> Although only a small number of Mexican motor carriers were allowed into the U.S. as part of this year-long Demonstration Project, there was significant outcry against the program and the possibility that many more Mexican trucks and drivers could soon be on U.S. freeways.<sup>110</sup>

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103. *Id.*

104. *Id.*

105. *White House Defies Congress*, *supra* note 95.

106. *Id.*

107. *See infra* notes 113–14 and accompanying text.

108. Oscar Avila, *Mexican Trucks Ready to Roll: A Demonstration Project to Allow the Haulers Anywhere in the U.S.—And Vice Versa—Is Stoking New Debates Over NAFTA on Both Sides of the Border*, CHI. TRIB., Sept. 8, 2007, [http://archives.chicagotribune.com/2007/sep/08/news/chi-trucks\\_avilasep08](http://archives.chicagotribune.com/2007/sep/08/news/chi-trucks_avilasep08).

109. *U.S./Mexican Trucking Hearing*, *supra* note 82, at 4 (statement by John Hill).

110. Vesledahl, *supra* note 48, at 632; *see also, e.g., Don’t Open U.S. Highways to Mexico-Domiciled Trucks Under Fake Pilot Project, Public Citizen Urges Congress*,

The U.S. Brotherhood of Teamsters, a union of U.S. truck drivers and a strong supporter of President Obama, insisted that allowing Mexican motor carriers into the U.S. would take jobs from U.S. truck drivers because the Mexican drivers' salaries are much lower.<sup>111</sup>

Because of the souring public opinion of NAFTA, particularly the provisions requiring the U.S. to allow Mexican motor carriers to cross the border into the U.S., Congress tried but was unable to stop the Demonstration Project during the Bush administration.<sup>112</sup> Once President Obama took office, Congress and the Executive branch united in opposition to the Demonstration Project and cross-border trucking. In addition to opposing the Demonstration Project for political reasons, President Obama and the Democratic Congress likely resented the program because President Bush had cunningly kept it alive despite clear congressional intent to shut it down.<sup>113</sup> The Obama–Congress alliance took definitive action on March 11, 2009, by cutting the funding to the Demonstration Project, thereby stopping all progress the U.S. and Mexico had made on the issue of cross-border trucking.<sup>114</sup> This time, the amendment was explicit in its intent to terminate the existing program:

None of the funds appropriated or otherwise made available under this Act may be used, directly or indirectly, to establish, implement, continue, promote, or in any way permit a cross-border motor carrier demonstration program to allow Mexican-domiciled motor carriers to operate beyond the commercial zones along the international border between the U.S. and Mexico, including continuing, in whole or in part, any such program that was initiated prior to the date of the enactment of this Act.<sup>115</sup>

Unfortunately, this U.S. action negatively affected U.S. relations with Mexico and could further deteriorate the challenging economic climate Americans currently face. Moreover, as will be further

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PUBLIC CITIZEN, Mar. 8, 2007, <http://www.citizen.org/pressroom/release.cfm?ID=2392> (lobbying for the termination of the Demonstration Project).

111. *E.g.*, The Incomparable [sic] Chuck Mack Speaks, WM and Graniterock, <http://www.teamster.net/index.php?autocom=blog&blogid=3> (May 8, 2008, 21:37 EST) (“To say American truckers are at a competitive disadvantage economically states the obvious. Mexican drivers will be lucky if they receive the U.S. minimum wage.”).

112. *See supra* notes 82–95 and accompanying text.

113. *Cf.* Dave Montgomery, *Mexican Trucks Allowed Deep into U.S. in Defiance of Congress, Lawmaker Says*, MCCLATCHY, Jan. 3, 2008, <http://www.mcclatchydc.com/100/story/24166.html>.

Sen. Byron Dorgan . . . scoffed at [the DOT's] interpretation and called on the Bush administration to end the program immediately. ‘The DOT response is both arrogant and wrong!’ Dorgan wrote. ‘The Department of Transportation is making a serious mistake if it believes it is not required to abide by this legislation.’

114. Barrera & Palmer, *supra* note 1.

115. Omnibus Appropriations Act, Pub. L. No. 111-8, § 136, 123 Stat. 524 (2009).

established below, terminating the Demonstration Project represents the clearest violation of NAFTA's cross-border trucking provisions that has occurred since NAFTA's creation.

### III. DEFINING U.S. OBLIGATIONS UNDER NAFTA

#### A. *Looking at the Text of NAFTA*

Many of the obligations under NAFTA depend on the principles of "National Treatment" and "Most-Favored-Nation Treatment." With regards to the cross-border trucking obligations, the U.S. committed itself to extend the same privileges to Mexican motor carriers as it grants to U.S. motor carriers (national treatment) and to Canadian motor carriers (most-favored-nation treatment).<sup>116</sup>

The following NAFTA articles establish the requirements of national treatment and most-favored-nation treatment with regards to service providers of other NAFTA countries:

Article 1202: National Treatment

(1) Each 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. . . .

Article 1203: Most-Favored-Nation Treatment

Each 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.

Article 1204: Standard of Treatment

Each Party shall accord to service providers of any other Party the better of the treatment required by Articles 1202 and 1203.<sup>117</sup>

Articles 1202, 1203, and 1204 require the members of NAFTA to treat each other's service providers no worse than they treat their own—or other members'—service providers.<sup>118</sup> Although this chapter of NAFTA did not specially mention the trucking industry, the definition of "service provider" given in Article 1213 is so broad that truck drivers could easily qualify as "service providers."<sup>119</sup> Thus, it seems that the U.S. has been in almost constant violation of NAFTA Articles 1202 and 1203 because both U.S. and Canadian motor carriers have been allowed to operate in the U.S. while Mexican

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116. NAFTA Final Report, *supra* note 31, para. 247.

117. NAFTA Treaty, *supra* note 60, arts. 1202–04.

118. *Id.*

119. *Id.* art. 1213 ("[S]ervice provider of a Party means a person of a Party that seeks to provide or provides a service . . ."); *see also* NAFTA Final Report, *supra* note 31, para. 252 ("Given [the NAFTA] definitions, the Panel considered the undisputed facts in the record that the essential service in question involves the commercial transportation of goods from Mexico to points in the United States by service providers of Mexico.").

motor carriers have not. Indeed, Mexico relied heavily on this straightforward argument before the NAFTA arbitration panel.<sup>120</sup>

However, this simplistic argument overlooks a limited exception found in Article 2101 as well as the extremely debated phrase “like circumstances” in Articles 1202 and 1203. Article 2101 provides an exception to the national treatment and most-favored-nation treatment obligations discussed above.<sup>121</sup> Under this Article, Member States are given some leeway to adopt or enforce “measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.”<sup>122</sup> Thus, a NAFTA party could treat other NAFTA members’ service providers *less* favorably than required by national treatment or most-favored-nation treatment as long as the measures chosen are “necessary to secure compliance” with a proper law or regulation.<sup>123</sup> However, a NAFTA party cannot use the flexibility provided by this article to engage in “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or as a “disguised restriction on trade between the Parties.”<sup>124</sup>

Many free trade agreements include provisions similar to Article 2101 in order to grant each country some flexibility to run the country as needed, even if doing so conflicts with a treaty obligation.<sup>125</sup> However, one of the main limiting factors of these provisions is that the measures chosen have to be “necessary” to achieve compliance with the law. If a country chooses a method out of convenience or because that method is the most cost-effective, this article will likely not apply.

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120. See Initial Submission, *In the Matter of Cross-Border Trucking Services*, para. 188, Secretariat File No. USA-Mex-98-2008-01 [hereinafter NAFTA Initial Mexican Submission] (“[f]lagging’ of all Mexican carriers is a denial of national treatment, because domestic carriers are entitled under U.S. law to both (i) consideration on their individual merits and (ii) a full opportunity to contest the denial of operating authority.”).

121. NAFTA Treaty, *supra* note 60, art. 2101.

122. *Id.*

Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.

*Id.*

123. See *id.*

124. *Id.*

125. NAFTA Final Report, *supra* note 31, paras. 260, 263–64.

In addition, the three words “in like circumstances” found in Articles 1202 and 1203 also limit the national treatment and most-favored-nation treatment obligations.<sup>126</sup> Presumably, if “circumstances” differed, a member state could treat another country’s service providers less favorably without violating either Article 1202 or 1203. The exact meaning of this phrase, and its applicability to the U.S. cross-border trucking obligations, was an issue of enormous debate before the NAFTA arbitration panel and will be discussed more fully below.<sup>127</sup>

Although the parties to NAFTA agreed that the Treaty would enter into force on January 1, 1994,<sup>128</sup> the parties delayed the implementation of the cross-border trucking requirements. The U.S. reservation stated that “[a] person of Mexico will be permitted to obtain operating authority to provide . . . Cross-Border truck services to or from border states (California, Arizona, New Mexico and Texas)” by December 18, 1995, and cross-border truck services to the entire U.S. by January 1, 2000.<sup>129</sup> The Mexican reservation paralleled the U.S. reservation; this phase-out provided that cross-border trucking would commence to Mexico’s border states by December 18, 1995, and to all of Mexico by January 1, 2000.<sup>130</sup> Because of the reservations, the U.S. had no obligation to allow Mexican motor carriers beyond the commercial zones of the U.S. before December 1995. However, this date came and went without the U.S. allowing Mexican motor carriers to go beyond the commercial zones.<sup>131</sup> In response, Mexico brought the dispute to a NAFTA arbitration panel.<sup>132</sup>

#### B. NAFTA Arbitration Panel Holds U.S. in Violation of NAFTA

Because there was no disagreement that the U.S. had extended the moratorium against cross-border trucking, the principal issue for the arbitration panel was to determine whether this action was consistent with the parties’ obligations under NAFTA.<sup>133</sup> The crux of the debate centered on the meaning of the words “like circumstances.”

126. NAFTA Treaty, *supra* note 60, arts. 1202–03.

127. See discussion *infra* Part III.B.

128. NAFTA Treaty, *supra* note 60, art. 1019.

129. Blackmore, *supra* note 27, at 702.

130. *Id.* Annex II at 752 (Schedule of Mexico).

131. Barry E. Prentice & Mark Ojah, NAFTA in the Next Ten Years: Issues and Challenges in Transportation (May 24–25, 2001) (unpublished paper presented at NAFTA in the New Millennium Symposium, Univ. of Alberta, 2001), available at <http://apps.business.ualberta.ca/wcer/pdf/NAFTAPrentice.pdf>.

132. Dempsey, *supra* note 45, at 93–94.

133. Cf. NAFTA Final Report, *supra* note 31, para. 214 (noting that “[the panel] confines its analysis to the consistency or inconsistency of” the United States’ continuation of its moratorium on cross-border trucking.).

The U.S. argued that the trucking regulatory system in each of the three NAFTA countries was a “critical” circumstance relating to cross-border trucking.<sup>134</sup> Because Mexico lacked regulations regarding drivers’ hours, use of logbooks, commercial motor vehicle (CMV) safety equipment, and out-of-service rates, the U.S. believed that Mexican motor carrier circumstances were fundamentally *unlike* the circumstances of U.S. and Canadian motor carriers.<sup>135</sup> Following this logic, affording Mexican motor carriers fewer privileges than U.S. and Canadian motor carriers did not violate NAFTA because the less favorable treatment occurred because of different circumstances.

Mexico rejected the U.S. argument, and declared that the U.S. decision to continue the moratorium on cross-border trucking was motivated by politics, effectively imposing an “economic embargo on Mexico.”<sup>136</sup> Alternatively, Mexico argued that “even if the U.S. government actually were motivated by concerns over safety and security, it [had] not proceeded in the appropriate manner,”<sup>137</sup> because the decision to deny any Mexican trucking firm, regardless of its individual qualifications, an application to operate in the U.S. was a violation of the national treatment and most-favored-nation treatment obligations under NAFTA.<sup>138</sup> Specifically, Mexico argued that the U.S. considered domestic motor carriers on their individual merits, and owners of these motor carriers have the privilege to contest the denial of operating authority; however, the U.S. did not extend either of these rights to motor carriers owned or operated by Mexicans.<sup>139</sup> Neither of the parties intended a “blanket exception” to the national treatment and most-favored-nation treatment during negotiations, and more fundamentally, reading the nationality of a trucking company as constituting unlike circumstances would deprive the national treatment clauses of any force.<sup>140</sup> The Mexican government acknowledged that different circumstances in the Mexican regulatory framework may support some difference in treatment but demanded that any distinction in treatment occur on a case-by-case basis, rather than as a default blanket ban on Mexican motor carriers.<sup>141</sup>

The U.S. responded that a case-by-case, or “[a] carrier-by-carrier approach . . . cannot effectively ensure safety compliance by Mexican motor carriers operating in the U.S.” because Mexico does not have a

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134. U.S. Counter-Submission, *supra* note 55, at 43.

135. *Id.* at 43–44.

136. NAFTA Final Report, *supra* note 31, paras. 149–51.

137. *Id.* para. 116.

138. NAFTA Initial Mexican Submission, *supra* note 120, para. 196.

139. *Id.* para. 188.

140. *Id.* para. 124.

141. NAFTA Final Report, *supra* note 31, para. 123.

“comprehensive, integrated safety regime.”<sup>142</sup> Essentially, the U.S. argued that it would be fruitless to seek to establish whether an applicant was a safe driver when the Mexican government did not maintain records of driver performance.<sup>143</sup>

Canada chose to participate in the arbitration panel, as allowed by Article 2013 of NAFTA,<sup>144</sup> and for the most part agreed with Mexico.<sup>145</sup> According to Canada, “[a] blanket refusal to permit a person of Mexico to obtain operating authority to provide cross-border truck services . . . would, on its face, be less favorable than the treatment accorded to U.S. truck service providers in like circumstances.”<sup>146</sup>

In establishing the proper interpretation of “like circumstances,” and Articles 1202, 1203, and 1204, the NAFTA arbitration panel specifically declined to examine the United States’ motivation for continuing the moratorium on cross-border trucking.<sup>147</sup> Instead, the panel focused on the text of the delayed implementation provisions in the reservation section, as well as on Articles 1202 and 1203.<sup>148</sup> First, the panel held that the delayed implementation requirement was not conditional, and thus was mandatory on the U.S. unless some other article in NAFTA provided an exception.<sup>149</sup> Second, the panel addressed the proper interpretation of “like circumstances” in Articles 1202 and 1203. The arbitration body concluded that “there is no legally sufficient basis for interpreting ‘like circumstances’ as permitting a blanket moratorium on all Mexican trucking firms,” therefore concluding that the action by the U.S. violated NAFTA.<sup>150</sup>

142. *Id.* para. 155.

143. *See id.* paras. 156–57, 171 (stating that Mexico’s database does not contain safety information and that it would be futile to track drivers since they are not required to carry records for inspection).

144. NAFTA Treaty, *supra* note 60, art. 2013.

145. NAFTA Final Report, *supra* note 31, para. 196.

146. *Id.*

147. *Id.* para. 214 (“The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters.”).

148. *Id.* paras. 235, 278.

149. *Id.* para. 235.

150. *Id.* para. 278. In addition to claiming the U.S. violated Articles 1202 and 1203 pertaining to cross-border trucking, the Mexican government also claimed that the “[t]he U.S. has denied Mexican nationals the opportunity to invest in U.S. motor carriers in violation of Articles 1102 and 1103.” NAFTA Initial Mexican Submission, *supra* note 120, pt. II.G. Articles 1102 and 1103 allowed Mexican citizens to invest in U.S. trucking enterprises. *See* NAFTA Treaty, *supra* note 60, arts. 1102–03 (providing for investors of “another Party”). Because these businesses would continue to be operated by U.S. managers, drivers, and trucks, there is no safety concern to justify the United States’ failure to comply with these obligations. *See id.* at para. 197 (“The fact that the United States also failed in the transportation sector as required by its Schedule to Annex I further confirms that safety and security concerns had nothing to do with the U.S. decision to refuse to implement its NAFTA obligations.”). In the findings section, the NAFTA arbitration panel concluded “that the U.S. was and

Although the NAFTA arbitration panel found that the U.S. had violated NAFTA and authorized Mexico to impose economic sanctions on the U.S.,<sup>151</sup> its “recommendations” clarified the NAFTA provisions in a way that makes future U.S. compliance more attainable. While the report explicitly stated that a “blanket” refusal to consider Mexican motor carriers’ applications violated NAFTA, it recognized that a differing treatment of Mexican applications might be permissible under NAFTA, as long as the Mexican motor carriers were “reviewed on a case by case basis.”<sup>152</sup> The panel even recognized that, “to the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the U.S. may not be ‘like’ those in place in the U.S., different methods of ensuring compliance with the U.S. regulatory regime may be justifiable.”<sup>153</sup>

Because the inspection and licensing remain quite different between Mexico and the U.S., the arbitration panel’s decision opens the door for the U.S. to implement a cross-border trucking program that is consistent with NAFTA but responds adequately to the safety concerns of the U.S. The proposal offered in Part IV suggests how this can be accomplished.

### C. *Stopping the Demonstration Project Violated NAFTA*

President Bush’s Demonstration Project arguably violated NAFTA’s most-favored nation treatment provision because it did not limit the number of Canadian trucks that could operate in the U.S., while it simultaneously imposed quotas on the number of licenses granted to Mexican applicants.<sup>154</sup> Nevertheless, Mexico consented to the Demonstration Project as part of a compromise agreement with the U.S.<sup>155</sup> However, the U.S. broke the compromise when it terminated the Demonstration Project in Spring of 2009.

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remains in breach of its obligation under . . . Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) . . .” NAFTA Final Report, *supra* note 31, para. 297.

151. Karen A. Lobdell, *Mexico Announces Retaliatory Tariffs on U.S. Goods*, CLIENT ALERT (Drinker Biddle, Chicago, Ill.), Mar. 19, 2009, at 1, available at [http://www.drinkerbiddle.com/files/Publication/d7fb4b92-a3e7-4390-8fb7-071f5a2c5cd9/Presentation/PublicationAttachment/b55543d6-ed3e-4cd9-9ec8-0b11373301a2/Mexico\\_Retaliatory.pdf](http://www.drinkerbiddle.com/files/Publication/d7fb4b92-a3e7-4390-8fb7-071f5a2c5cd9/Presentation/PublicationAttachment/b55543d6-ed3e-4cd9-9ec8-0b11373301a2/Mexico_Retaliatory.pdf).

152. NAFTA Final Report, *supra* note 31, para. 300 (“The U.S. may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis.”).

153. *Id.* para. 301.

154. Avila, *supra* note 108.

155. To read a statement from the Transportation Undersecretary of the Secretaría de Comunicaciones y Transportes (SCT) endorsing the Demonstration Project, see Statement of Manuel Rodrigues Arregui, [http://dgaf.sct.gob.mx/fileadmin/Piloto/Acuerdo\\_ingl.pdf](http://dgaf.sct.gob.mx/fileadmin/Piloto/Acuerdo_ingl.pdf) (last visited Oct. 31, 2009).

Currently, no Mexican trucks are allowed to enter the U.S. beyond the commercial zones.<sup>156</sup> This complete ban on Mexican trucks creates the same situation as the Clinton era ban on Mexican trucks, which gave rise to the NAFTA arbitration panel. Because the arbitration panel decided that the Clinton-era ban violated the national treatment and most-favored-nation treatment obligations under NAFTA, it follows that the current ban also violates NAFTA.

Despite the evident violation of NAFTA by the U.S., some congressmen have attempted to deny the violation or denounce Mexican tariffs, rather than work towards compliance. For example, Senator Peter Defazio, Chairman of Congress' Highway and Transit Subcommittee, suggested that the tariffs are illegal "scare tactics" and encouraged President Obama to "call Mexico's bluff" by threatening to withhold U.S. aid to Mexico if Mexico does not eliminate the tariffs.<sup>157</sup> However, the NAFTA arbitration panel in 2001 specifically authorized these tariffs, and Mexico patiently gave the U.S. eight years in which to comply with NAFTA before finally imposing the tariffs.<sup>158</sup> The delay in imposing the tariffs does not make them any less legal under NAFTA.<sup>159</sup> Moreover, the Obama administration has not given any indication that the administration believes the Mexican tariffs are illegal or excessive. Instead, the administration's statements implicitly acknowledge that the U.S. is currently violating NAFTA's cross-border provisions.<sup>160</sup>

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156. White House Press Release, *supra* note 1.

157. Letter from Peter DeFazio, U.S. Congressman, to President Barack Obama (Mar. 20, 2009), available at <http://www.defazio.house.gov/index.php?option=content&task=view&id=464>; see also *Lou Dobbs Tonight: AIG Outrage; Economy Showdown; Obama Overreaching; Credit Card Rip-off; Stealing Your Identity* (CNN television broadcast Mar. 19, 2009), available at <http://transcripts.cnn.com/TRANSCRIPTS/0903/19/ldt.01.html> (quoting Sen. Dorgan, who called the tariffs "an outrage" and argued, "this is a country that has a nearly one-half trillion trade surplus with us over the last ten years or we have a one-half trillion dollar trade deficit with them and they're suggesting that we are somehow violating trade agreements or guilty of unfair trade").

158. Barrera & Palmer, *supra* note 1.

159. Hutchinson, *supra* note 7 ("Mexico's tariffs on \$2.4bn of US exports is both modest and permitted under the 1994 North American Free Trade Agreement.").

160. See Mexico City Press Conference, *supra* note 26 (implying that the U.S. is not complying with NAFTA). In response to a question about NAFTA, President Obama responded:

I know that there has been some concern about a provision that was placed in our stimulus package related to Mexican trucking. That wasn't a provision that my administration introduced, and I said at the time that we need to fix this because the last thing we want to do at a time when the global economy is contracting and trade is shrinking is to resort to protectionist measures.

*Id.*; see also White House Press Release, *supra* note 1 ("The President has tasked the Department of Transportation to work with the U.S. Trade Representative and the Department of State . . . to propose legislation creating a new trucking project that will meet the legitimate concerns of Congress and our NAFTA commitments.").

Other congressmen have argued that U.S. obligations under NAFTA differ from obligations under a typical treaty because NAFTA was ratified as a congressional-executive agreement rather than with two-thirds consent of the U.S. Senate.<sup>161</sup> During the floor debate, Senator Dorgan emphasized this distinction by arguing that “[t]here is no *treaty* that requires us to open our borders to long-haul Mexican trucking at this moment . . . .”<sup>162</sup> However, this view fails to recognize that an international agreement that is signed by the President carries international obligations regardless of how the agreement is ratified.<sup>163</sup> As early as 1945, scholars wrote that “[w]hile constitutional usage generally requires that the President ratify treaties before they come into effect as the ‘law of the land,’ this does not mean that any particular form of ratification must be followed, nor does it condition the international effectiveness of a treaty upon the prior completion of an act of ratification.”<sup>164</sup> Since that time, many international treaties, such as the treaty that formed the WTO, have been ratified in the U.S. by passing a majority of both houses of Congress rather than achieving the two-thirds approval of the Senate.<sup>165</sup>

Senator Dorgan correctly stated that Congress could amend NAFTA’s application in the U.S. by passing another law that supersedes the original international agreement.<sup>166</sup> However, despite the ability of Congress to change the domestic application of the international agreement, U.S. international obligations remain fixed and cannot be modified by Congress.<sup>167</sup> Therefore, once Congress stopped the Demonstration Project through domestic legislation, the U.S. found itself violating NAFTA’s international obligations, and Mexico was within its rights to impose tariffs on U.S. imports.

#### IV. PROPOSAL

Up to this point, the U.S. positions on cross-border trucking have consisted of a series of radical decisions, often along party lines, to

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161. MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 197 (2007).

162. 153 CONG. REC. S11,390 (statement by Sen. Dorgan) (emphasis added).

163. Myres S. McDougal & Asher Lans, *The Identical Legal Consequences of Treaties and Executive Agreements*, 54 YALE L.J. 307, 320 (1945).

164. *Id.*

165. JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 269 (2006).

166. *Whitney v. Robertson*, 124 U.S. 190 (1888).

167. See generally Memorandum from Christopher Schroeder, Acting Assistant Attorney Gen., to Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the Nat’l Sec. Council, *The Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations Under an Existing Treaty* (Nov. 25, 1996), available at <http://www.usdoj.gov/olc/treaty.top.htm> (discussing limits on the power of congress to modify international obligations).

either stop cross-border trucking with Mexico or to allow it. The Clinton administration abruptly shut the border to Mexican motor carriers in 1995,<sup>168</sup> whereas the Bush administration vowed to open the border in 2001.<sup>169</sup> Congress passed legislation that made opening the border impracticable from 2001 to 2006,<sup>170</sup> and the Bush administration responded by initiating the Demonstration Project.<sup>171</sup> Finally, after several skirmishes over the interpretation of congressional amendments,<sup>172</sup> Congress slammed the door on cross-border trucking on March 11, 2009.<sup>173</sup> These extreme positions on cross-border trucking have rallied great support from separate groups of constituencies,<sup>174</sup> but they have not meaningfully moved the U.S. towards rational, safe compliance with NAFTA cross-border trucking obligations.

Going forward, the U.S. should commit itself to allowing cross-border trucking with Mexico and adopt a regulatory framework that addresses the safety concerns associated with allowing Mexican motor carriers to operate in the U.S. The Obama administration should begin this process by restarting a cross-border pilot program similar to the Bush administration's Demonstration Project. The Obama administration can study the challenges and safety issues that the pilot program presents and use this data when bringing U.S. trucking policies into compliance with NAFTA's cross-border trucking provisions. Swift reinstatement of a cross-border trucking pilot program will also benefit the U.S. economy because Mexico has promised to cease the retaliatory tariffs if the U.S. once again institutes a cross-border trucking pilot program.<sup>175</sup>

Undoubtedly, allowing Mexican motor carriers to traverse U.S. roadways, whether as part of the pilot program or in complete compliance with NAFTA's obligations, will have some associated safety concerns. These safety concerns can be categorized as either "generic concerns" or "particularized concerns." The former category recognizes the concerns that are germane to all motor carriers,

168. Prentice & Ojah, *supra* note 131, at 9.

169. *See supra* note 65.

170. *See discussion supra* Part II.C.

171. Avila, *supra* note 108.

172. *See discussion supra* Part II.D.

173. *See Omnibus Appropriations Act, Pub. L. No. 111-8, § 136, 123 Stat. 524 (2009) (cutting funding for any "demonstration program").*

174. *See, e.g.,* Editorial, *A Small and Dangerous Spat*, N.Y. TIMES, Mar. 19, 2009, at A30 (warning that tit-for-tat protectionism could result in an even worse economic slump and noting that the Teamsters union and its allies in congress are using safety concerns as a pretext for protectionism); Public Citizen, *supra* note 24 (denouncing the Bush Administration's plan).

175. *See* Ioan Grillo, *Obama's "Trade War": No Truck with Mexico*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887494,00.html> (quoting Mexican Economy Secretary as promising to "eliminate all the tariffs" once the "United States returns to its commitments").

regardless of their country of origin. In contrast, the latter category identifies safety concerns that are attributable specifically to Mexican motor carriers. The following sections will provide examples of the two types of concerns, as well as detail regulations that properly address these concerns.

#### A. *Generic Concerns*

Many of the concerns with Mexican motor carriers are generic concerns. For example, the speed at which a Mexican motor carrier operates in the U.S. is not a safety concern relevant to Mexican motor carriers only. Jurisdictions within the U.S. seek to enforce speed limits for all trucks because speeding is a potential safety concern for any motor carrier. Therefore, the regulations addressing the generic concerns of Mexican motor carriers should be equivalent to the regulations of U.S. motor carriers because the concern is shared for both U.S. and Mexican motor carriers.

Responding to the generic concerns of Mexican motor carriers is easy because the U.S. already has laws and regulations in place that address these concerns. It is imperative to strongly reiterate that Mexican motor carriers operating in the U.S. are fully subject to U.S. trucking laws and regulations.<sup>176</sup> Therefore, the laws and regulations in place regarding speed limits, freight weight limits, and insurance apply automatically to Mexican motor carriers once they cross the border into the U.S.<sup>177</sup>

Some of the cross-border trucking opposition likely arose because U.S. citizens do not understand that Mexican motor carriers will be subject to U.S. laws and regulations while operating in the U.S. This misconception probably stems from opponents of cross-border trucking, such as the U.S. Brotherhood of Teamsters, who have successfully misled the public into believing that Mexican motor carriers will somehow operate as rogue trucks. For example, James Hoffa, the president of the Brotherhood of Teamsters, stated in an article that “[k]eeping America safe . . . means making sure our families . . . don’t have to dodge 90,000-pound unguided missiles from Mexico on our highways.”<sup>178</sup> This memorable quote implies that Mexican motor carriers will be larger and heavier than U.S. carriers. In reality, Mexican motor carriers must comply with the same size and weight restrictions as U.S. motor carriers.

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176. NAFTA Initial Mexican Submission, *supra* note 120, para. 112.

177. *Id.*

178. James P. Hoffa, Op.-Ed., *Bush Lets Mexican Trucks Menace America’s Roads; Transportation Secretary Keeps Border Open an Additional Two Years*, DETROIT NEWS, Aug. 8, 2008, at 13.

B. *Particularized Concerns*

As Mexico's laws and regulations regarding motor carriers differ from those in the U.S.,<sup>179</sup> granting Mexican motor carriers access to the U.S. presents some additional safety concerns. For example, Mexico does not generally limit the number of hours a truck driver can operate his vehicle.<sup>180</sup> Unlike the U.S., which requires driver logbooks, Mexico does not require drivers to keep records of their travels or hours of operation.<sup>181</sup> Once a Mexican driver crosses into the U.S., he will have to follow U.S. laws and regulations on driver hours and logbooks,<sup>182</sup> but this ignores the possibility that he may be exhausted from driving for an extended period of time in Mexico before crossing the U.S. border.

This safety concern is the product of different "regulatory environments" between the U.S. and Mexico, and this specific example has been repeatedly cited as an illustration of why cross-border trucking with Mexico cannot safely proceed.<sup>183</sup> To resolve the differences, the U.S. government has favored a "comprehensive, integrated safety regime" between Mexico and the U.S.,<sup>184</sup> but no such regime has materialized. This Note proposes a much simpler solution to this problem and other particularized concerns. NAFTA gives the U.S. significant leeway to adopt regulations that would apply only to Mexican motor carriers if those regulations are adopted in good faith to "[ensure] compliance with the U.S. regulatory regime."<sup>185</sup> Even Mexico concedes that the U.S. can impose requirements that make the Mexican motor carriers "like" U.S. and Canadian motor carriers.

Therefore, the U.S. should tailor new regulations to address particularized concerns about Mexican motor carriers. For example, a practical solution accounting for the difference in U.S. and Mexican law on hours-of-service would be to impose a requirement that Mexican motor carriers—or U.S. carriers returning to the U.S. after operating in Mexico—rest for a certain time period somewhere in the commercial zones of the U.S. before being allowed to proceed. The

179. U.S. Counter-Submission, *supra* note 55, at 43 ("As elaborated in the Statement of Facts, Mexican carriers in fact operate within a less stringent regulatory regime than that in place in either Canada or the U.S.").

180. *Id.* at 43–44.

181. *Id.*

182. NAFTA Initial Mexican Submission, *supra* note 120, para. 112.

183. *See, e.g.*, U.S. Counter-Submission, *supra* note 55, at 43–44 (citing examples of the problems with the different regulatory environments); Public Citizen, *supra* note 24 (criticizing the Bush Administration for moving forward with the pilot program without requiring Mexican trucking companies to meet the safety requirements required of U.S. trucking companies thereby endangering the public).

184. NAFTA Final Report, *supra* note 31, para. 155.

185. *Id.* para. 301.

regulation could also make an exception for truck drivers who voluntarily stayed under the U.S. limits while operating in Mexico, if the driver can prove that he complied with U.S. standards by showing a logbook and supporting documents, such as receipts. This proposed regulation adequately ensures that truck drivers entering the U.S. are “like” U.S. truck drivers because it ensures that all truck drivers in the U.S. are adequately rested. In addition, this regulation could indirectly lead to a more harmonious regulatory system with Mexico because it gives truck drivers an incentive to stay within the U.S. hours-of-service limits while in Mexico in order to avoid a mandatory stop in the U.S.

Another particularized concern comes from the different U.S. and Mexican requirements regarding the inspection of motor carriers. In the U.S., all motor carriers must obtain periodic safety inspections, whereas a similar requirement does not exist in Mexico.<sup>186</sup> This example was also employed by the U.S. as a justification for not complying with NAFTA.<sup>187</sup> However, there is also an easy solution to this safety concern.<sup>188</sup> The U.S. should implement a regulation that specifically requires Mexican motor carriers to undergo inspections in the commercial zone of the U.S. on a periodic basis. If the motor carrier fails the inspection, then, like U.S. motor carriers, it should be placed out-of-service until repaired.<sup>189</sup>

These are just a few examples of particularized concerns specific to Mexican motor carriers. However, as the previous examples illustrate, practical solutions for particularized concerns can be relatively easy to envision and implement. Furthermore, once the U.S. restarts a pilot trucking program with Mexico, DOT officials will be better able to identify concerns specific to Mexican motor carriers and rules and regulations that can address those concerns.

## V. CONCLUSION

The Obama administration has promised to bring the U.S. into compliance with NAFTA,<sup>190</sup> a goal the U.S. should have been pursuing for the past thirteen years. The administration and Congress should begin this process by restarting a cross-border pilot program similar to President Bush’s Demonstration Project and then reforming U.S. trucking policies to comply with NAFTA cross-border obligations.

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186. U.S. Counter-Submission, *supra* note 55, at 44.

187. *Id.*

188. NAFTA Final Report, *supra* note 31, para. 300 (recommending that the U.S. enforce its safety regulations against Mexican trucking companies the same way it does against U.S. and Canadian trucking companies).

189. *Id.*

190. White House Press Release, *supra* note 1.

Unfortunately, the international opinion of the U.S. has dwindled in recent years.<sup>191</sup> The U.S. has an opportunity to combat this declining international opinion by demonstrating that it is a nation that honors its international obligations. If the U.S. continues to disregard its commitments under NAFTA, it will further its declining international reputation. In addition, continuing noncompliance may indirectly affect customary international law.<sup>192</sup> Though many might support U.S. noncompliance out of fear that cross-border trucking will endanger the U.S., an expansive view of a domestic safety exception could significantly derogate the predictability of international treaty obligations.<sup>193</sup> Most importantly, the U.S. should comply with NAFTA in order to restore strong trade relations with Mexico—it's third-largest trading partner.<sup>194</sup>

In order to create a lasting solution to this problem, President Obama should break the United States' volatile pattern and instead pursue a solution that both complies with NAFTA and also employs practical rules and regulations to minimize the particularized concerns associated with Mexican motor carriers. The U.S. has been in defiance of NAFTA for far too long; hopefully, in the near future, it will correct its path and embrace NAFTA's cross-border trucking provisions.

~ Chad MacDonald\*

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191. Cf. BBC World Service Poll: Global Views of USA Improve, [http://www.worldpublicopinion.org/pipa/pdf/apr08/BBCevals\\_Apr08\\_rpt.pdf](http://www.worldpublicopinion.org/pipa/pdf/apr08/BBCevals_Apr08_rpt.pdf) (last visited Oct. 31, 2009) (reporting that of “the countries that have been polled in each of the last four years, positive views of the US eroded from 2005 (38% on average), to 2006 (32%), and to 2007 (28%); recovering for the first time [in 2008] to 32 per cent”).

192. See John Sweeney, *Fulfilling the Promise of NAFTA: A New Strategy For U.S.-Mexican Relations*, HERITAGE FOUND., Mar. 6, 1996, <http://www.heritage.org/Research/tradeandeconomicfreedom/BG1070.cfm> (“By cheating on NAFTA, the Clinton Administration has established a negative precedent that Mexico, Canada, and other countries could follow in the future.”).

193. See *id.* (discussing the negative effects of noncompliance).

194. United States International Trade Commission, U.S. Trade Balance, by Partner Country 2008 in Descending Order of Trade Turnover (Imports Plus Exports), [http://dataweb.usitc.gov/scripts/cy\\_m3\\_run.asp](http://dataweb.usitc.gov/scripts/cy_m3_run.asp) (last visited Oct. 31, 2009).

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