

# The NAFTA Trucking Dispute: Pretexts for Noncompliance and Policy Justifications for U.S. Facilitation of Cross-Border Services

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## INTRODUCTION

With the passage of the North American Free Trade Agreement (NAFTA) in 1993, the United States and Mexico envisaged liberalization of restrictions pertaining to cross-border services. Pursuant to Chapter 12 of NAFTA, these countries anticipated the allowance of cross-border trucking, whereby commercial vehicles would have the freedom to travel the entire treaty region by the end of the millennium. This transportation ideal notwithstanding, the United States has refused to permit cross-border trucking, citing the allegedly unsafe nature of Mexican trucks and drivers. A NAFTA arbitral panel recently held that the United States must comply with its treaty obligations within a relatively short period.<sup>1</sup> While the determination of the arbitral panel allows the United States to impose different requirements on Mexican trucks, such disparate treatment must be (i) performed in good faith, (ii) implemented to protect a legitimate safety concern, (iii) conducted on a case-by-case basis,

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1. See Final Report of the Arbitral Panel Established Pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services, NAFTA, Secretariat File No. U.S.A-MEX-98-2008-01, at para. 299 (Feb. 6, 2001), available at <http://www.ustr.gov/enforcement/trucking.pdf> [hereinafter Final Report].

and (iv) fully compliant with all relevant NAFTA provisions.<sup>2</sup>

In response to this mandate, the U.S. Department of Transportation (DOT) has recently issued three regulations designed to simultaneously ensure NAFTA compliance and safety on U.S. roads (DOT Trucking Regulations).<sup>3</sup> Despite the directive of the arbitral panel and legislative efforts by the DOT, several opposition groups insist that the moratorium on cross-border trucking must continue. They believe complete exclusion of Mexican vehicles is the only method available to guarantee U.S. highway safety.<sup>4</sup> Through the use of fierce admonitions and apocalyptic predictions regarding road safety, these groups have effectively managed to convert the "NAFTA debate" of the early 1990s into the "NAFTA implementation debate" of the year 2000.

Supporting the proposition that the United States should take all necessary steps to facilitate cross-border trucking as rapidly as possible, including the implementation of the DOT Trucking Regulations, this article is organized in the following manner. Part I provides a historical perspective of the dispute, tracing the discussion from the concept of cross-border services to the DOT reaction of the NAFTA arbitral panel's decision. Part II discusses the truck-safety argument used by multiple NAFTA opponents to substantiate continued disregard for U.S. treaty obligations. Part III examines the potential ulterior motives that such NAFTA opposition groups may possess. Part IV demonstrates that the United States has multiple reasons for complying with NAFTA. On the basis of these arguments, Part V of this article concludes that swift enactment and implementation of the DOT Trucking Regulations constitutes the most pragmatic remedy.

## I. HISTORICAL PERSPECTIVE OF THE NAFTA TRUCKING DISPUTE

### A. A HISTORY OF DISCRIMINATION AGAINST MEXICAN TRUCKS

In 1982, Congress enacted the Bus Regulatory Reform Act, which included a two year moratorium on the issuance of new U.S. highway authorizations to trucks domiciled in a foreign

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2. *See id.* at para. 301.

3. *See discussion infra* Part I.C.

4. *See discussion infra* Part II.A-C.

country, or those owned or controlled by foreign persons.<sup>5</sup> In addition to imposing a trucking standstill, the Bus Regulatory Reform Act authorized the President to eliminate or otherwise modify the legislation, provided that such action was in the national interest.<sup>6</sup> The cessation applied to Mexico and Canada, but was immediately lifted for Canada pursuant to a presidential memorandum indicating that Canadian safety standards were equal or superior to those existing in the United States.<sup>7</sup> Despite the longstanding restriction on Mexico, certain exceptions were made to facilitate cross-border trade, including the ability of Mexican trucks to operate within designated commercial zones in the four border states of California, Arizona, New Mexico and Texas.<sup>8</sup>

Discussions between the United States, Mexico and Canada concerning NAFTA began in 1990. In August 1992, the three countries announced that they had reached a comprehensive agreement, which included provisions designed to gradually liberalize cross-border trucking throughout the continent. Annex I provided that Mexican trucks would be permitted to operate in the four U.S. border states by December 18th, 1995.<sup>9</sup> Annex I provided, furthermore, that Mexican trucks would be allowed to operate throughout the entire United States on January 1, 2000.<sup>10</sup>

Prior to these pivotal dates, the United States indicated

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5. See 49 C.F.R. pt. 368 (1982).

6. See 49 U.S.C. § 13902(c)(1982).

7. See Presidential Memorandum, 47 Fed. Reg. 41,721 (Sept. 22, 1982) [hereinafter Memorandum]. In the president's opinion, "our national interest is best served by fair and equitable competition between the United States and Canadian trucking interests in our two markets." *Id.*

8. See Off. of Inspector Gen., U.S. Dep't of Transp. Audit Report: Mexico-Domiciled Motor Carriers, Rep. No. TR-2000-013 (Nov. 4, 1999), available at [http://www.oig.dot.gov/item\\_details.php?item=220](http://www.oig.dot.gov/item_details.php?item=220) [hereinafter DOT Report 1999]. While ninety-eight percent of Mexican trucks were restricted to operating in the commercial zones, the remaining two percent retained the right to travel throughout the entire United States under one of the following exceptions: (i) Mexico-domiciled trucks that have U.S. citizens as majority owners, (ii) Mexico-domiciled, Mexican-owned trucks "grandfathered" because they received operating authority prior to the enactment of the Bus Regulatory Reform Act, and (iii) Mexico-domiciled, Mexican-owned trucks that use the United States as a "land bridge" to Canada, without stopping to load or unload cargo. See *id.*

9. North American Free Trade Agreement, Dec. 18, 1992, 107 Stat. 2057, 23 I.L.M. 605 (stating that Mexican trucks would be permitted to operate in the four U.S. border states three years after the signing of the NAFTA agreement) [hereinafter NAFTA].

10. See *id.* at Annex I.

that it intended to uphold its treaty obligations in a timely fashion. For instance, while announcing certain measures to facilitate the implementation of the NAFTA trucking provisions, the Secretary of the DOT stated that “[i]t is clear that this December [1995] will mark a visible, fundamental change in the way trade and commerce is conducted in our hemisphere . . . the United States is determined that NAFTA is enacted properly and works right for each of our countries.”<sup>11</sup> The United States changed its position soon afterward. On December 18th, 1995, the U.S. Secretary of the DOT explained that documentation from Mexican truckers would be stalled, and “final disposition of pending applications will be held until those consultations [on safety and security issues] have been completed.”<sup>12</sup>

The Mexican government reacted by implementing a series of maneuvers provided for in NAFTA to resolve the quarrel expeditiously. It requested formal consultations with the United States pursuant to Chapter 20 of NAFTA, which were held in January 1996.<sup>13</sup> The dispute was not resolved, and Mexico requested a meeting in July 1998 with the Free Trade Commission in accordance with Article 2007 of NAFTA.<sup>14</sup> The parties were unable to reach a resolution at this stage, forcing Mexico to solicit the formation of an arbitral panel in September 1998 (NAFTA Panel) as provided for in NAFTA Article 2008.<sup>15</sup>

While this dispute continued unresolved, the United States failed to adhere to the January 1, 2000, NAFTA deadline, which

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11. Press Release, U.S. Dep’t of Transp., Peña Announces Key Measures for Smooth, Safe and Efficient NAFTA Transition (Sept.5, 1995) (on file with author) [hereinafter NAFTA Transition].

12. Press Release, U.S. Dep’t of Transp., Remarks Prepared for Delivery: NAFTA Border Opening Remarks (Dec. 18, 1995) (on file with author) [hereinafter Border Remarks].

13. See John M. Nagel, NAFTA: U.S.-Mexico Consultations to Continue on Trucking, Tomato Quota, SECOFI Says, 13 Int’l Trade Rep. (BNA) 102 (Jan. 24, 1996), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author); See also NAFTA, *supra* note 9, at art. 2006 (providing that “[a]ny party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement”).

14. See NAFTA, *supra* note 9, at art. 2007 (dictating that if the consulting parties are unable to resolve the matter within thirty days of the request for consultation, then any Party may request in writing a meeting with the [Free Trade] Commission).

15. See *id.*, art. 2008 (establishing that if the Free Trade Commission convenes and does not resolve the matter within thirty days then any consulting Party may request in writing the establishment of an arbitral panel).

would have given Mexican trucks access to all American roads.<sup>16</sup> Similar to the justifications offered for noncompliance in 1995, the United States claimed that inadequate safety regulations and enforcement in Mexico warranted the extension of the moratorium against Mexican trucks.<sup>17</sup> Although the DOT acknowledged improvements in the Mexican system, the disparity in safety standards between the two nations was still too formidable.<sup>18</sup> Upon announcing its intention to disregard the second NAFTA deadline, representatives of the DOT summarily stated that “[w]e’ve made good progress [but] we’re simply not there yet.”<sup>19</sup> President Clinton also announced an indefinite prolongation of the trucking moratorium due to the difficulty of ensuring compliance with U.S. safety standards.<sup>20</sup> After a period of additional tactical submissions and requests, the NAFTA Panel duly conducted the arbitration in May 2000, and a final report thereof was issued in February 2001.<sup>21</sup>

#### B. THE NAFTA PANEL DECISION

In a unanimous decision against the United States, the NAFTA Panel held that the blanket refusal by the United States to review and consider applications from Mexican trucks for cross-border services constituted a breach of Annex I of NAFTA.<sup>22</sup> The NAFTA Panel described the arguments of the United States as “unpersuasive” and refused to entertain any *ex post facto*, self-serving justifications.<sup>23</sup> The report stated, in particular, that:

[t]he fact that the United States may not have available, for budgetary or other reasons, ‘safety investigators’ to travel to Mexico, is not an excuse to fail to comply with U.S. obligations under the [NAFTA] Agreement, particularly given the fact that Mexican regulatory conditions were well-known to the United States at least since September 1992, when NAFTA negotiations were completed.<sup>24</sup>

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16. See Rossella Brevetti, *DOT to Continue Current Policy Limiting Mexican Truck Access*, 17 Int’l Trade Rep. (BNA) 16 (Jan. 6, 2000), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

17. See *id.*

18. See *id.*

19. *Id.*

20. *Clinton Promises Teamsters to Keep Border Closed*, 19 WASH. TARIFF & TRADE LETTER 1 (Oct. 11, 1999) (on file with author).

21. See generally Final Report, *supra* note 1.

22. See *id.* at para. 295.

23. *Id.* at para. 273.

24. *Id.*

Based on its findings, the NAFTA Panel mandated that the United States take “appropriate steps” to bring its practices regarding cross-border trucking services into compliance with its obligations under NAFTA.<sup>25</sup>

### C. DOT TRUCKING REGULATIONS

True to its established pattern, the United States failed to take “appropriate steps” to rectify the situation within the allotted thirty day period.<sup>26</sup> President George W. Bush, however, made several unambiguous statements that his administration would take all feasible measures to make the country NAFTA-compliant by, at the latest, January 1, 2002.<sup>27</sup> Shortly after the NAFTA Panel decision, the Bush administration announced that “[w]e have assured the Mexican government that we intend to live up to our NAFTA obligations to open the U.S.-Mexico border to trucking [and] [d]iscussions are underway on how to implement the recent NAFTA Panel decision in a safe and orderly fashion.”<sup>28</sup> The White House stated that a one-year waiting period would (i) allow Congress time to appropriate the necessary funds in the 2001-2002 budget to implement the new measures and (ii) grant the DOT sufficient opportunity to enact regulations aimed at ensuring safety compliance.<sup>29</sup> As a result of these gestures of good will, Mexico initially announced that it would not impose trade sanctions on the United States as long as conciliatory efforts continued.<sup>30</sup>

In accordance with the Bush administration’s announcement, in May 2001 the DOT Trucking Regulations were introduced.<sup>31</sup> Upon presentation for public comment, the U.S. Secretary of the DOT reiterated that the proposed guidelines were a direct reflection of the Bush administration’s adherence to the

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25. Final Report, *supra* note 1, at para. 299.

26. David Hendricks, *Mexican Trucks Can Roll; White House Clears Road for Deliveries to Interior of the U.S.*, SAN ANTONIO EXPRESS NEWS, Apr. 5, 2001, at A1, available at <http://www.mysanantonio.com> (last visited Feb. 13, 2002).

27. *See id.*

28. Alan Larson, Under Secretary, U.S. Dep’t of State, *U.S. Outlines Potential for Expanded U.S.-Mexico Trade*, Remarks Before the 54th Plenary of the Mexico-U.S. Business Committee (Mar. 5, 2001), at <http://www.usinfo.state.gov/regional/ar/mexico/larson5.htm> (last visited Feb. 13, 2002).

29. *See* Hendricks, *supra* note 26.

30. *See U.S. Misses Deadline for Mexican Truck Access; Safety Concerns Postpone Policy Required by NAFTA*, ST. LOUIS POST DISPATCH, Mar. 8, 2001, at A13.

31. *See* 49 C.F.R. pt. 365.

NAFTA Panel ruling. He stated that "President Bush has made a firm commitment to implement NAFTA trucking provisions, and his Administration has begun doing that."<sup>32</sup>

The DOT Trucking Regulations are comprised of three separate parts.<sup>33</sup> The first regulation introduces new procedures designed to ensure that Mexican trucking companies, trucks and drivers comply with U.S. safety standards in order to attain authorization to operate in the four border states of California, Arizona, New Mexico and Texas.<sup>34</sup> Each Mexican applicant must, among other things, certify that it has in place a system to guarantee compliance with U.S. requirements related to (i) driver qualifications, (ii) hours of service, (iii) insurance coverage levels, (iv) drug and alcohol testing, (v) truck condition, (vi) accident monitoring, and (vii) hazardous materials transportation.<sup>35</sup> The second DOT Trucking Regulation sets forth similar rules and requirements for permits to operate beyond the border states.<sup>36</sup> Finally, the third regulation establishes a supplementary safety oversight program, whereby government officials may conduct roadside inspections and on-site compliance reviews at the headquarters of a Mexican trucking company.<sup>37</sup> In order to meet the requirements of the NAFTA Panel decision mandating immediate compliance with the treaty, the DOT Trucking Regulations dictate that Mexican trucks may obtain an initial provisional authorization on the basis of a legal affidavit pledging that all the necessary safety conditions have been met.<sup>38</sup> A thorough inspection of the trucking facilities, vehicles and drivers, however, is required within eighteen months of receipt of the temporary permit.<sup>39</sup>

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32. Rossella Brevetti, *DOT Proposes Rules to Open U.S. to Mexican Trucking Entities*, 18 Int'l Trade Rep. (BNA) 714 (May 3, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

33. *See id.*

34. *See generally* Federal Motor Carrier Safety Administration, 66 Fed. Reg. 86,22328 (May 3, 2001) (to be codified at 49 C.F.R. pts. 368 & 387).

35. *Id.* at 86,22330.

36. *See id.* at 86,22371.

37. *See id.* at 86,22415. The regulations specify that the measures included in these new regulations will fortify the existing system. It is stated specifically that "we wish to emphasize that the safety oversight program is intended to supplement, not replace, the regular safety fitness compliance and enforcement procedures applicable to all motor carriers within our jurisdiction." *Id.* at 86,22417.

38. *See id.* at 86,22416.

39. *See id.*

#### D. CONGRESSIONAL RESPONSE TO THE DOT

The DOT Trucking Regulations faced immediate Congressional opposition. Approximately one month after publication of these proposed rules, the U.S. House of Representatives approved an amendment (Sabo Amendment), “[d]ealing a blow to the [Bush] administration’s free trade agenda.”<sup>40</sup> The House overwhelmingly approved the amendment, which effectively precludes the expenditure of U.S. government funds to process any applications by Mexican truckers.<sup>41</sup> In light of the recent NAFTA Panel decision holding that the United States’ refusal to review applications from Mexican trucks was a clear breach of the treaty, the author of the Sabo Amendment admitted that this legislation was questionable.<sup>42</sup> He explained that “the amendment that we had earlier clearly was NAFTA-compliant. This [the Sabo Amendment] probably is not, because it is a total prohibition, but I know of no other way for us to deal with this

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40. Heather Rothman & Rossella Brevetti, *House Bars Funds for Processing of Mexican Truck Applications in U.S.*, 18 Int’l Trade Rep. (BNA) 1002 (June 28, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

41. *Comments on Department of Transportation and Related Agencies Appropriations Act, 2002*, Daily Digest at H3586-H3594 (June 26, 2001), available at <http://thomas.loc.gov/r107/r107d26jn1.html> (last visited Mar. 10, 2002) [hereinafter Comments]. Distracted by the fact that the DOT Trucking Regulations would allow Mexican trucks to operate in the United States for up to eighteen months without first satisfying U.S. safety standards, Representative Martin Sabo (Democrat – Minnesota) initially introduced a less stringent amendment that simply precluded funding for the DOT Regulations, unless safety requirements were satisfied before granting Mexican trucks a Certificate of Registration. The original language stated, in particular, that:

[n]o funding limited in this Act for the review or processing of applications by Mexican motor carriers for conditional authority to operate beyond U.S. municipalities and commercial zones on the U.S.-Mexico border may be obligated unless the Federal Motor Carrier Safety Administration has adopted and implemented as part of its review procedures . . . a requirement that each Mexican motor carrier seeking authority to operate beyond U.S. municipalities and commercial zones on the U.S.-Mexico border undergo a new entrant safety evaluation compliance review consistent with the safety fitness procedures . . . and receive a minimum rating of satisfactory before being granted such conditional operating authority.

*Id.* at H3589.

Due to the fact that this original version was not voted on due to procedural wrangling, Representative Sabo felt forced to introduce the Sabo Amendment, which contained a complete ban on funding. *See id.*

42. *See id.* at H3586.



issue on the floor.”<sup>43</sup> Other members of the House, in contrast, seemed wholly unconcerned with the validity of the legislation and lobbied fervently for upholding U.S. safety standards at all costs. In the words of one representative, “NAFTA is a trade agreement. It is not a suicide pact. We are not required to allow unsafe trucks on American highways in order to satisfy some pencil-happy bureaucrat dealing with NAFTA.”<sup>44</sup>

Compared to the radical Sabo Amendment, the legislation introduced in the U.S. Senate (Murray Amendment) in reaction to the DOT Trucking Regulations was portrayed as more of a “common sense compromise” on the issue.<sup>45</sup> From the perspective of the bill’s author, it is a compromise between the “laissez-faire” approach of the Bush administration that permits Mexican trucks in the United States and reviews them up to eighteen months later and the “strict-protectionist” approach of the House of Representatives that endeavors to exclude all Mexican trucks without reviewing any of them.<sup>46</sup> Proponents of the Murray Amendment rely on a liberal interpretation of the NAFTA Panel decision such that complete parity in terms of trucking provisions is not compulsory under the treaty. It is argued that “[w]hile the DOT has stated that it is seeking to treat U.S., Mexican and Canadian trucks in the same way, the fact is that we are not required to treat them in the same way. Where greater safety risks exist, we are entitled, under NAFTA, to impose stricter safety conditions.”<sup>47</sup>

The Murray Amendment has numerous requirements, including: (i) complete safety audits of Mexican trucks conducted before the issuance of authorizations to operate in the United States; (ii) performance of safety compliance reviews at trucking company headquarters in Mexico instead of at the border to ensure access to all necessary documentation; (iii) placement of weigh-in-motion machines at all border crossings; (iv) attainment of ample coverage from a U.S. insurer; (v) promulgation and implementation of all relevant DOT regulations before allowing any Mexican trucks to cross the border; and (vi) con-

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43. *Id.*

44. *Id.* at H3587.

45. Heather M. Rothman, *Senate Passes Transportation Bill; Showdown in September on Mexican Trucks*, 18 Int’l Trade Rep. (BNA) 1269 (Aug. 9, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

46. *Id.*

47. Press Release, Patty Murray, U.S. Senator, Remarks by Senator Murray on Ensuring the Safety of Mexican Trucks (July 24, 2001) (on file with author) [hereinafter Murray].

struction of additional border inspection facilities.<sup>48</sup> Contrary to the drafter of the Sabo Amendment, who concedes that his bill likely violates NAFTA, supporters of the Murray Amendment staunchly defend the validity of the proposed language.<sup>49</sup> Senator Murray maintains that:

[t]his bill won't violate NAFTA. The arbitration panel already told us that we can take steps to ensure our safety. Let me repeat that. The official panel that determines compliance with NAFTA has already told us we can take the safety measures we need. This bill does not violate NAFTA.<sup>50</sup>

Dissatisfied with the Murray Amendment, yet another bill was introduced, the Gramm/McCain Nondiscrimination Amendment. The authors of this bill suggest that the Murray Amendment is substandard for multiple reasons. The proposed Murray language would violate NAFTA because it forces the United States to discriminate against Mexican truckers.<sup>51</sup> While acknowledging that the NAFTA Panel decision allows the United States to establish "different" methods of treating trucks from Canada and Mexico, those championing the Gramm/McCain Nondiscrimination Amendment argue it does not give the United States carte blanche to discriminate against Mexican trucks.<sup>52</sup> They contend, in particular, that the Murray Amendment "would be a direct violation of NAFTA [since] [i]t effectively provides a blanket prohibition from allowing any Mexican motor carrier from operating beyond the commercial zones."<sup>53</sup> Advocates of the Gramm/McCain Nondiscrimination Act also insist that the majority of the provisions in the Murray Amendment are unfeasible or nonsensical.<sup>54</sup> The mandate that

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48. S. 1178, 107th Cong. § 343 (2001) (regarding the safety of cross-border trucking between the U.S. and Mexico).

49. See Murray, *supra* note 47, at 3.

50. *Id.*

51. See Press Release, John McCain, U.S. Senator, McCain Issues Statement on Gramm/McCain Nondiscrimination Amendment (July 25, 2001) (on file with author).

52. *Id.*

53. *Id.*

54. See Press Release, John McCain, U.S. Senator, McCain Issues Statement on NAFTA Trucking (July 24, 2001) (on file with author). As an example, the statement suggests that requiring the installation of a weigh-in-motion apparatus at each crossing would be extremely expensive, time-consuming and unnecessary, particularly since stationary weigh stations are already located throughout nearly every state. *Id.* The statement additionally points out that forcing Mexican truckers to acquire coverage from an American insurer is absurd since such a rule would exclude an array of major international insurers that deal precisely in this area and already insure many Canadian trucks, such

requires all DOT regulations be fully implemented before allowing Mexican trucks to operate in the United States caught the attention of one critic who suggested that such language “is as arbitrary as saying Mexican trucks cannot operate in the United States until the 29th of February falls on a Tuesday.”<sup>55</sup>

The final reason the Murray Amendment is deemed inadequate is that opponents on both sides of the border believe that it would be contrary to the “spirit” of the treaty.<sup>56</sup> These arguments against the Murray Amendment notwithstanding, the Gramm/McCain Nondiscrimination Act was overwhelmingly rejected, managing to capture the vote of only thirty-five senators. In reaction to the rejection of the Gramm/McCain Nondiscrimination Act, certain senators vowed to collaborate with the White House and Congress to reach an acceptable compromise regarding the NAFTA trucking dispute.<sup>57</sup> Failing this, the Bush administration has repeatedly threatened to veto any action that prevents Mexican trucks from operating on U.S. roads.<sup>58</sup>

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as Lloyds of London. *Id.*; see also Anitha Reddy & Helen Dewar, *DOT Against Inspection of Trucks in Mexico*, WASH. POST, July 19, 2001, at E2 (noting the DOT agrees that certain provisions in the Murray Amendment, i.e., those requiring on-site inspection of Mexican trucking facilities in Mexico, are unrealistic for logistical and economic reasons).

55. Rothman, *supra* note 45.

56. Philip Shenon, *Senate Backs Strict Safety Tests for Mexican Trucks in U.S.*, N.Y. TIMES, July 27, 2001, at A14; see also Yadir Mena, *Bloqueo a camiones mexicanos viola el espíritu del TLCAN*, EL ECONOMISTA, Aug. 1, 2001 (on file with author).

57. See Helen Dewar, *Senate Passes Safety Rules for Mexican Trucks*, WASH. POST, Aug. 1, 2001, at A19.

58. *Bush Vows Veto of Limits on Mexican Trucks*, WASH. POST, July 12, 2001, at A17; see also *White House Threatens Veto Over Restrictions on Mexican Trucks*, THE BULLETIN'S FRONTRUNNER, July 12, 2001 (on file with author); John Nagel, et al., *U.S.T.R. Reassures Mexico on NAFTA Truck Ban After Threat of Sanctions on U.S. Corn Syrup*, 18 Int'l Trade Rep. (BNA) 1041 (July 5, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author). Political analysts suggest that a compromise on this NAFTA implementation issue is inevitable due to the pressures generated by each legislators' constituents. In other words, the Bush Administration and Congress must eventually reach an agreement “to keep federal funds flowing for popular highway, transit, bridge and aviation projects in every lawmaker's state or district.” Dewar, *supra* note 57.

## II. THE ARGUMENT AGAINST CROSS-BORDER TRUCKING: SAFETY

### A. THE GOVERNMENT REPORT TRILOGY

The primary justification espoused to disregard NAFTA deadlines and preclude Mexican trucks from operating in the United States is that Mexican vehicles and their drivers are unsafe.<sup>59</sup> Some interest groups have passionately argued that allowing Mexican trucks to enter the United States would be tantamount to blessing the “inevitable future crashes [that] will lead to additional loss of life and to a massive public backlash against NAFTA.”<sup>60</sup> Some legislators also believe that cross-border trucking would cause American roads to be more dangerous.<sup>61</sup> Upon sending a letter to President Bush commenting on the proposed DOT Trucking Regulations, these legislators insisted that access be denied to all Mexican trucks “until the safety of the operator and the traveling public can be fully assured.”<sup>62</sup> The basis for these beliefs relies in part on three major studies conducted by U.S. government agencies.

In 1996, the General Accounting Office published a report wherein the chief discrepancies between U.S. and Mexican commercial trucking regulations and operating practices were identified.<sup>63</sup> In concluding that there existed “major differences” between the applicable rules that may have an impact on highway safety and infrastructure, the report pinpointed several areas in which incongruities existed, including: (i) limits on con-

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59. See generally *supra* notes 16-20 and accompanying text.

60. *The Coming NAFTA Crash: The Deadly Impact of a Secret NAFTA Tribunal's Decision to Open U.S. Highways to Unsafe Mexican Trucks*, PUB. CITIZEN GLOBAL TRADE WATCH, (Feb. 1, 2001), at <http://www.citizen.org/publications/release.cfm?ID=6839> [hereinafter Global Trade Watch].

61. Letter to President George W. Bush from John Kerry, Max Baucus, Jeff Bingaman, Tom Harkin, Tom Daschle, Ron Wyden, Ted Kennedy, Evan Bayh, Dick Durbin and Joe Lieberman (June 11, 2001), at <http://www.trucksafety.org/dltobush.html>.

62. See *id.*

63. See GAO, *Commercial Trucking: Safety and Infrastructure Issues Under the North American Free Trade Agreement*, GAO/RCED-96-61, at 12 (Feb. 29, 1996), available at <http://www.gao.gov/archive/1996/rc96061.pdf> [hereinafter G.A.O. Report 1996].

secutive hours of service, with the ten hour maximum in the United States absent from Mexican regulations; (ii) drivers in the United States must maintain accurate logbooks while their Mexican counterparts are not required to do so; (iii) U.S. trucks produced after 1980 are obligated to maintain front brakes, while Mexican trucks of equal age do not necessarily have this feature; and (iv) Mexican trailers are allowed to carry twenty percent more cargo under comparative maximum weight restrictions.<sup>64</sup> With regard to the condition of the Mexican trucks themselves, the report calculates that fifty percent of vehicles attempting to cross the border are “in poor condition and do not meet any U.S. safety standards for trucks.”<sup>65</sup>

A second report, conducted by the DOT in 1998, focused its criticisms primarily on the shortage of border inspection facilities and personnel.<sup>66</sup> According to this study there is a strong correlation (for economic reasons) between the number of inspectors and the condition of the Mexican trucks that seek admittance to U.S. roads.<sup>67</sup> For a Mexican company, having one of its trucks placed out-of-service at the border is a significant expense because of towing costs for extensive violations, the cost of mechanical repairs, contractual penalties associated with late deliveries, and costs incurred to transfer the cargo to another truck.<sup>68</sup> A “more robust” inspection presence will serve as an incentive to improve compliance because of strong economic consequences to those Mexican companies whose trucks are placed out-of-service.<sup>69</sup>

Conducted in 1999 by the DOT, a third report highlighted that Mexican trucks were found violating the law by entering the United States without first obtaining the requisite permit and by exceeding the scope of authority granted.<sup>70</sup> In addition to repeating earlier criticisms regarding the insufficiency of border facilities and inspectors, this document underscored the weak penalties imposed on Mexican trucks found transgressing the

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64. *Id.* at 3.

65. *Id.* at 4.

66. See OFF. OF INSPECTOR GEN., U.S. DEPT' OF TRANSP. AUDIT REPORT: *Motor Carrier Safety Program for Commercial Trucks at U.S. Borders*, Rep. No. TR-1999-034 (Dec. 23, 1998), available at [http://www.oig.dot.gov/show\\_pdf.php?id=264](http://www.oig.dot.gov/show_pdf.php?id=264) [hereinafter DOT Report 1998].

67. See *id.* at 4.

68. See *id.*

69. *Id.* at 3.

70. See DOT Report 1999, *supra* note 8, at 3 (noting how some Mexican trucks operated outside the designated commercial zones in the border states).

law.<sup>71</sup> Due to the relatively low punitive force of these sanctions, U.S. transportation laws have been virtually ineffectual: “[Mexican] motor carriers are likely to consider the fines to be a cost of doing business.”<sup>72</sup>

Analyzed in conjunction with the NAFTA Panel decision and the DOT Trucking Regulations, these three governmental studies have led multiple groups to argue that U.S. adherence to its NAFTA obligations would jeopardize the safety of the American public. Although delivered at varying levels of intensity, each group spearheaded campaigns to prolong the moratorium against Mexican trucks in the name of preeminence of safety on American highways. The strongest opposition groups include public interest organizations and organized labor.

## B. PUBLIC INTEREST ORGANIZATIONS

Public Citizen has situated itself at the forefront of public interest NAFTA trucking opposition.<sup>73</sup> In a paper generated in response to the NAFTA Panel decision, the organization argues that ensuring the safety of American motorists by inspecting each Mexican truck is unrealistic since current resources allow only one percent of Mexican trucks to be inspected at the border.<sup>74</sup> Furthermore, the expansion of NAFTA trucking would be catastrophic for U.S. towns located on the border.<sup>75</sup> The paper contends, in particular, that “NAFTA has concentrated these underpaid, overworked [Mexican] drivers in the border areas.

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71. *See id.* at 7.

72. *Id.* To substantiate the claim that penalties are rarely imposed on Mexican trucks caught violating U.S. traffic laws, this report indicates that (i) only three percent of Mexican trucks operating without permits were subjected to enforcement actions, (ii) absolutely no sanctions were imposed on Mexican trucks found operating illegally beyond the commercial zones, (iii) the fines applicable in the four border states are inconsistent, and (iv) fines are relatively low for first-time violations, i.e., between \$500 and \$1,000. *See id.*

73. This advocacy group has published a multiplicity of articles in opposition of the recent NAFTA Panel ruling. *See, e.g., NAFTA Truck Ruling Imperils U.S. Public Safety*, PUB. CITIZEN (Nov. 29, 2000), at <http://www.citizen.org/pressroom/release.cfm?ID=490> (on file with author); *Recent Mexican Trucking Rules Do Not Solve Serious Safety Hazards: NAFTA Ruling Could Expose U.S. Public to Dangerous Cross-Border Trucks*, PUB. CITIZEN (Feb. 7, 2001) (on file with author); *Mexican Truck Inspection Program Sorely Lacking, Allows Trucks with Faulty Brakes, Leaky Fuel Lines to Stay on Road*, PUB. CITIZEN (Feb. 7, 2001), at <http://www.citizen.org/pressroom/release.cfm?ID=710> (on file with author).

74. *See* Global Trade Watch, *supra* note 60.

75. *See id.*

There, the lucrative temptations of transporting narcotics, undocumented migrants, and contraband, like weapons and stolen cars, contribute to a border area that is more like the Wild West than the modern West."<sup>76</sup>

After reciting the major flaws with the Mexican trucking industry that were identified in the three governmental studies mentioned above, Public Citizen advocates that the United States continue to violate its NAFTA obligations by closing its border until an ever-elusive consensus is reached in Washington regarding safety standards.<sup>77</sup> In the meantime, they contend, the United States should opt to pay the fine for noncompliance.<sup>78</sup> As explained in the report:

This means that the Bush administration must resolve the current case by agreeing to pay the NAFTA sanctions and continue to limit access until there is a meaningful Mexican truck safety system. Otherwise, the public will learn, painfully and first-hand, the dangers that an anti-democratic and anti-safety decision by a secret international trade tribunal can bring to its front door.<sup>79</sup>

Along with Public Citizen, other public interest groups have actively lobbied for disregarding NAFTA obligations until more stringent safety measures are in place.<sup>80</sup>

## C. ORGANIZED LABOR

### 1. Teamsters

The International Brotherhood of Teamsters (Teamsters) also advocates a complete ban on Mexican trucks.<sup>81</sup> Citing the

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76. *Id.*

77. *See id.* (arguing that the NAFTA Panel's decision will force the opening of the border "far too soon and that the border should remain closed until there is a consensus that meaningful safety standards and oversight are in place).

78. *See* Global Trade Watch, *supra* note 60.

79. *Id.*

80. Other notable groups include Advocates for Highway and Auto Safety and Citizens for Reliable Safe Highways. *See, e.g., Submission to the Docket of the U.S. Department of Transportation Federal Motor Carrier Safety Administration on the Proposed Rules to Ensure Safety of Mexican Trucks and Buses*, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS (CRASH) (May 18, 2001), at <http://www.trucksafety.org/nftadkt.html> (last visited Feb. 13, 2002).

81. *See* Press Release, Teamsters, Inspector General's Report Confirms U.S. Is Not Ready to Open Border with Mexico (May 10, 2001) (on file with author) [hereinafter Teamsters 2001]; *see also* Press Release, Teamsters, ABC Nightline Reveals DEA Hid Information on Mexican Drug Smuggling During 1993 NAFTA Debate (May 8, 1997) (on file with author) [hereinafter Teamsters

“abysmal inspection statistics” of Mexican trucks and the potential negative repercussions such as endangering American drivers, eliminating thousands of U.S. jobs, facilitating drug smuggling and imperiling the environment, the Teamsters have zealously lobbied against cross-border trucking.<sup>82</sup> To fortify this argument and engender public support for its position, the Teamsters have disseminated several documents referencing potential safety risks. One news release, which epitomizes the disparagement commonly used by this labor union to bolster its standpoint, is overtly critical of many aspects of cross-border trucking.<sup>83</sup> It states that “[w]ith Mexican truckers, we have a double whammy--not only are they screwing us by bringing in more dope, but there is the matter of truck safety. They fix things with bubble gum and tape.”<sup>84</sup> Other news releases attempt to instill fear in American drivers with nightmarish scenarios and rhetorical questions:

Right now, we have unsafe Mexican trucks and drivers on highways all across the United States. Do you want to be driving in Michigan or Colorado or New York with your family and have the tractor-trailer coming up behind you driven by a sixteen-year-old making six dollars a day? Do you want that truck to be so unsafe that the wheels can fall off at any time?<sup>85</sup>

Akin to the solution proposed by the public interest organizations, the Teamsters advocate a provisional blockage of the border until stricter safety standards are imposed. They also advocate ignoring the fines that the United States will be forced to pay Mexico.<sup>86</sup> According to a Teamsters’ spokesperson, “[i]t doesn’t matter whether this faceless NAFTA panel fines the U.S. \$1 million or \$10 million . . . You can’t put a price on human life.”<sup>87</sup>

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1997].

82. Teamsters 2001, *supra* note 81.

83. See Press Release, Teamsters, The NAFTA Trucker (May 10, 2001) (on file with author).

84. *Id.*

85. Press Release, Teamsters, Cross-Border Press Conference 6/24/99 James P. Hoff General President, International Brotherhood of Teamsters (June 24, 1999) (on file with author).

86. See Press Release, Teamsters, Teamsters and Rep. Brown Decry NAFTA Panel’s Proposal to Diminish U.S. Safety Laws: NAFTA Panel Expected to Overturn U.S. Public Safety Laws (Sept. 28, 2000) (on file with author) [hereinafter Press Release].

87. *Id.* (quoting Bret Caldwell).



## 2. AFL-CIO

Relying primarily on the argument that the value of a human life is incalculable, labor organizations like the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) have pressured the Bush administration to disregard the mandate from the NAFTA Panel despite the economic consequences.<sup>88</sup> Based on the three studies conducted by the U.S. government identifying potential safety problems with Mexican trucks, the AFL-CIO questions the functionality of the DOT Trucking Regulations issued in response to the NAFTA Panel decision.<sup>89</sup> Such recurrent findings, it is argued, cannot be surpassed by simple political persuasion: “years of well documented safety evidence cannot be negated by a photo op earlier this year between President Bush and President Fox.”<sup>90</sup>

### III. ULTERIOR MOTIVES OF OPPOSITION GROUPS

The heavy reliance on the safety issue is attributable in part to its sensational nature that grabs and maintains the public’s attention.<sup>91</sup> Currently, there is an alleged “death watch” being conducted by NAFTA opponents, who are anxiously awaiting the first incident in which a Mexican truck kills an American in a highway accident.<sup>92</sup> When this scenario comes to fruition, opposition groups will most likely seize the opportunity to blame the tragedy on President Bush and instigate renewed hostility toward the cross-border trucking provisions of NAFTA.<sup>93</sup> Such morbidity is evident in recent announcements by public interest organizations that warn that “[t]he first time the inevitable NAFTA truck crash happens, the Bush admini-

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88. See *Transportation Labor Endorses House Resolution to Keep Unsafe Mexican Trucks and Buses Off U.S. Highways*; U.S. NEWSWIRE (May 24, 2001), available at 2001 WL 21894138.

89. See *id.*

90. *Id.*; see also Peter Szekely, *AFL-CIO Urges Delay in Mexican Truck Entry to U.S.* (Feb. 15, 2001), at <http://www.teamster.org/nafta/01naftaaf1.htm>.

91. See *No Truck With Free Trade-Only the Truckers Gain from an Illegal Ban on Mexican Trucks*, THE ECONOMIST, Aug. 4, 2001, at 35 [hereinafter *No Truck*].

92. Kenneth Sheets, *Truckin’ Into a Treaty Flap*, U.S. NEWS & WORLD REP., Feb. 19, 2001, at 48.

93. See *id.*

stration is going to be in big trouble.”<sup>94</sup>

This sensationalism attracts attention and garners some support for NAFTA opposition among certain groups. Ironically, it also enfeebles the safety justification by omitting other legitimate arguments that should logically be recognized such as air quality, drug trafficking, migrant labor smuggling, etc.<sup>95</sup> The absence of arguments against NAFTA based on other related issues fortifies the position that the safety argument has been repeatedly used because its scandalous nature tends to dominate the debate, infuriate the general public and obfuscate the issues.

The most potent opposition groups include public interest organizations, organized labor associations such as the Teamsters and the AFL-CIO and certain U.S. legislators. All of these groups, in varying degrees, identify safety as the fundamental reason to exclude Mexican trucks.<sup>96</sup> This safety argument, however, seems slightly disingenuous once the potential ulterior motives of the aforementioned opposition groups are revealed.

#### A. POLITICAL MOTIVATION OF THE FORMER ADMINISTRATION

The safety justification given by the Clinton Administration is widely believed to be a mere pretext for the real reasons to halt cross-border trucking: political self-interest and protection of U.S. jobs.<sup>97</sup> In the months prior to the scheduled opening of the border in December 1995, the DOT gave every indication it

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94. Robert Collier, *Ruling By NAFTA Tribunal Raises Fears for Highway Safety*, SAN FRANCISCO. CHRON., Feb.7, 2001, at A3.

95. See Julie Schneider, *Ruling by NAFTA Tribunal Raises Fears for Highway Safety*, 8 *Borderlines* 5 (2000), available at <http://www.us-mex.org/borderlines/2000/bl67/bl67.html>. A recent study conducted in the San Diego-Tijuana area demonstrates that, although commercial trucks accounted for only four percent of use of highways, they produced eighty percent of the dangerous particulate matter and twenty-five percent of the nitrous oxides. Their lower air quality affects the entire community to such an extent that local experts claim that “[c]learly, there are serious questions of public safety [involving the environmental and health problems involved.]” *Id.*; see also *Senate Bill Would Tie Approval of Truck Licenses to Drug Interdiction*, 13 *Int’l Trade Rep.* (BNA) 5 (Jan. 31, 1996), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author) (noting how some legislators attempted to use trucking access (which was already granted under NAFTA) as leverage to force Mexico to increase drug enforcement); Ginger Thompson, *Cash Tempts Mexican Truckers to Hull Migrants*, N.Y. TIMES, Aug. 16, 2001, at A10 (discussing migrant labor smuggling).

96. See *supra* notes 60-90 and accompanying text.

97. See John Harrington, *United States-Mexico Transportation Bill: Full NAFTA Implementation Essential* (Jan. 1998), at <http://www.usmcoc.org/n11.html>.

was planning to open the border as scheduled.<sup>98</sup> In September 1995, the Secretary of the DOT announced measures for safe and efficient trucking operations under NAFTA and stated that “the United States is determined that NAFTA is enacted properly and works right for each of our countries.”<sup>99</sup> After inspecting the crossing facilities in multiple border towns in early December 1995, and praising the cooperation between federal, state and local agencies, representatives of the DOT announced that “on December 18th, all three countries will be united in our efforts to make our roads safer [and] as we open borders, this spirit will help to ensure North America has the safest and most efficient transportation system in the world — bar none.”<sup>100</sup> Despite this message so oft repeated, the DOT announced the day before the 1995 deadline that safety reasons precluded the United States from opening the border.<sup>101</sup>

Critics of the last-minute refusal argue that the decision was politically motivated, and that President Clinton yielded under the pressure of labor unions such as the Teamsters in order to ensure his reelection in 1996, and later in 2000 to assist Al Gore’s campaign.<sup>102</sup> This eleventh-hour reversal of plans, from the perspective of free trade advocates, constituted a “vote-grabbing tactic” designed to appease those associated with organized labor, and those who were fearful that the liberalization of trucking would result in (i) a loss of profits to U.S. trucking companies due to increased foreign competition, and (ii) a massive displacement of U.S. truck drivers by their Mexican counterparts accustomed to earning lower salaries and benefits.<sup>103</sup> Opponents categorize this maneuver as simply veiled job protectionism using safety concerns to intentionally undermine NAFTA, a move that is “the last refuge of the desperate and

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98. NAFTA Transition, *supra* note 11.

99. *Id.*

100. Press Release, U.S. Dep’t of Transp., Remarks Prepared for Delivery, U.S. Secretary of Transportation Federico Peña, Press Conference with Mexico’s Secretary of Communications and Transportation Carlos Ruíz (Dec. 4, 1995) (on file with author); *see also* Press Release, U.S. Dep’t of Transp., Peña Assesses NAFTA Preparations: Gives California Group Its Funds to Ease Truck Clearance at Border Crossings (Dec. 4, 1995) (on file with author).

101. Border Remarks, *supra* note 12; *see also* Press Release, U.S. Dep’t of Transp., Remarks Prepared for Delivery, U.S. Secretary of Transportation Rodney E. Slater, Third U.S.-Mexico Border Infrastructure Conference, Tijuana, Mexico (June 3, 1999) (on file with author).

102. Harrington, *supra* note 97.

103. *The Trucks That Hold Back NAFTA*, THE ECONOMIST, Dec. 11, 1997, at 23.

scurrilous.”<sup>104</sup>

## B. LEGISLATORS AND SPECIAL INTEREST DOLLARS

The motives of those legislators opposed to cross-border trucking have also been scrutinized. Certain politicians advocating the extension of the trucking moratorium have labeled border inspection facilities “woefully inadequate,”<sup>105</sup> while others claim that opening the border pursuant to the NAFTA Panel decision is “a disaster waiting to happen.”<sup>106</sup> Still others, upon introducing legislation to completely bar Mexican trucks, argue that “[w]e cannot allow NAFTA to open our borders and roll over the public safety laws that keep American families safe.”<sup>107</sup>

The authenticity of this clamor for safety seems suspect when one examines the principal funding sources of those politicians presenting the most fervent opposition.<sup>108</sup> According to a recent study by the Center for Responsive Politics, many political opponents of NAFTA receive the majority of their money from labor organizations that are keenly interested in protecting U.S. jobs.<sup>109</sup> Due to this economic influence, other groups have categorized the safety argument as nothing more than a “political smokescreen.”<sup>110</sup>

## C. ORGANIZED LABOR AND INTERNATIONAL COMPETITION

The Teamsters center their complaints on safety, calling it “unacceptable” and “shocking” that Mexican trucks are allowed to operate within designated commercial zones in the four border states since a total exclusion is imperative for “the safety

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104. Davide Dukcevic, *Mexican Truckers Win a Big One*, FORBES, Feb. 7, 2001, at 16, available at <http://www.forbes.com/2001/02/07/0207global.html>.

105. *Members of Congress, Hoffa Urge Continued Restrictions on Mexican Trucks*, 16 Int'l Trade Rep. (BNA) 1104 (June 30, 1999), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

106. Elizabeth Walpole-Hofmeister, *Teamsters, Leaders in Congress Urge Bush to Go Slow in Implementing Trucking Rule*, 18 Int'l Trade Rep. (BNA) 176 (Feb. 15, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

107. Rossella Brevetti, *Rep. Brown Prepares Legislation to Keep Mexican Trucks From Gaining NAFTA Access*, 17 Int'l Trade Rep. (BNA) 1363 (Sept. 7, 2000), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

108. See Mark Murray, *Turned Back at the Border*, THE NAT'L J., July 7, 2001, available at 2001 WL 7182409.

109. See *id.*

110. *Id.*

and protection of the American public.”<sup>111</sup> It is frequently argued that the Teamsters’ true motive is job protectionism.

This speculation is confirmed by declarations from the labor unions themselves, whose campaign money and votes have considerable influence in Washington.<sup>112</sup> As a representative of the AFL-CIO explains it, “[o]rganized labor’s opinions especially count on Capitol Hill, where reelection is job one.”<sup>113</sup> On several occasions this group has warned that because the hourly rate of Mexican drivers is lower than that in the United States, “American trucking companies will simply close their U.S. factories and move their headquarters across the border.”<sup>114</sup> The Teamsters’ claims are more likely economically motivated. As reported by one journalist, “[c]haracterizations of Mexican trucks wildly taking over U.S. highways are flights of fancy with no basis in fact . . . It’s a tactic on the part of the Teamsters and unions in general to scare the public . . . They’re creating an enemy to build up their ranks.”<sup>115</sup>

The Teamsters also have a history of action against cross-border trucking. In 1991, they sued the Secretary of the DOT over an agreement with Mexico allowing for reciprocal recognition of commercial drivers’ licenses.<sup>116</sup> In summarizing the arguments of the Teamsters, the court clearly recognized that then, like now, the Teamsters were actually motivated by pecuniary self-interest and job protectionism instead of safety.<sup>117</sup> The Teamsters asserted that they will suffer “both from the extra competition and from a possible increase in the number of truck accidents; in their view, the [proposed agreement] threatens both their pocketbooks and their safety.”<sup>118</sup>

The Teamster’s vehemence illustrates the polarity of its stance on safeguarding domestic drivers.<sup>119</sup> In reaction to the contracting of one hundred foreign drivers by a U.S. company to compensate for the unavailability of U.S. drivers, the Teamsters

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111. Teamsters 2001, *supra* note 81.

112. *See id.*

113. Frank N. Wilner, *Delivering Votes*, J. OF COM. (June 14, 1999), at <http://www.joc.com> (on file with author).

114. *Teamsters Asks DOT About Change in Highway Access for Mexican Trucks*, 16 Int’l Trade Rep. (BNA) 1537 (Sept. 22, 1999), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

115. *Id.*

116. Int’l Brotherhood of Teamsters v. Pena, 17 F.3d 1478, 1480 (1994).

117. *Id.* at 1483-86.

118. *Id.* at 1483.

119. *See* Frank N. Wilner, *Island Truckers*, J. OF COM. (July 5, 1999), at <http://www.joc.com> (on file with author).

acted dismayed, claiming that “[i]t is unbelievable that any company needs to go outside of our borders to find skilled workers [and] these hirings . . . can only be seen as an effort to undercut the middle class standard of living that the American truck drivers enjoy.”<sup>120</sup> These statements are made notwithstanding the current substantial shortage of qualified truck drivers in the United States.<sup>121</sup> The job protectionism argument is also suspect because Mexico has merely 375,000 trucks, while over seven million U.S. trucks and drivers currently transit the United States.<sup>122</sup>

#### D. PUBLIC INTEREST GROUPS

Certain public interest groups, such as Public Citizen, have also been accused of obscuring their real motives for lobbying the exclusion of Mexican trucks.<sup>123</sup> According to one skeptic who criticizes Public Citizen, the validity of this group’s information should be scrutinized since its president is also on the board of Citizens for Reliable and Safe Highways (CRASH), an organization that has traditionally assailed trucking while obtaining substantial funding from the competing railroad industry.<sup>124</sup> More outspoken critics have also questioned certain public interest organizations’ motivations since they appear to be simply “exploiting America’s prejudice against Mexico to keep the trucks out.”<sup>125</sup>

### IV. ARGUMENTS IN SUPPORT OF NAFTA TRUCKING

#### A. THE TRUCK-SAFETY ARGUMENT LACKS CREDIBILITY

Although opposition to cross-border trucking has been highly publicized since the United States disregarded the first

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120. *Id.*

121. See Clayton Boyce, *Open Up*, TRAFFIC WORLD, Feb. 19, 2001, available at 2001 WL 7289805 (stating the job protectionism argument is unfounded since there is already a shortage of drivers in United States); see also Rip Watson, *Contentious Rail, Truck Issues Face Congress*, J. OF COM. (Oct. 12, 1999), at <http://www.joc.com> (on file with author) (stating that other experts agree that the Teamsters’ unspoken argument of job protectionism is nonsense).

122. See *No Truck*, *supra* note 91, at 35.

123. See Boyce, *supra* note 121.

124. See *id.*

125. Paul de la Garza, *Coming to U.S. Roads: More Mexican Trucks*, ST. PETERSBURG TIMES, Feb. 27, 2001, at A2.

NAFTA deadline in 1995, it is beneficial for the United States to fulfill its obligations under NAFTA by permitting cross-border trucking as soon as possible. The rationale used almost exclusively by the opponents of cross-border trucking is that such activity would be unsafe for those on U.S. roads. A more detailed examination of the relevant facts shows this safety justification seems to be of questionable merit.

### *1. Distorted Statistics Generate Inaccurate Conclusions*

Parties opposed to cross-border trucking have repeatedly used scare tactics regarding supposed safety hazards to engender support for their position. As one expert explains, “[s]ome press coverage has included predictions of doom and gloom, going so far as to suggest American highways will be in carnage.”<sup>126</sup> As genuine as the concern for public safety may be, these emotive messages have been based, in large part, on inaccurate statistics.<sup>127</sup> Citing the fact that failure rates between U.S. and Mexican trucks are very similar, one expert warned that “[i]t should also be kept in mind that the safety issue, as legitimately important as it is, has been somewhat distorted.”<sup>128</sup> Other experts condemn the use of inappropriate figures by NAFTA opponents, stating that such groups have employed safety statistics that upon close examination are “misleading or incomplete.”<sup>129</sup> To better comprehend the distorted nature of the truck-safety argument, it is imperative to understand how goods are currently transported between the United States and Mexico.

### *2. The Current Mexican Trucking System*

Under the present system, the overwhelming majority of Mexican trucks are unable to travel outside of designated commercial zones in the four border states, so goods destined for the United States are transported using a so-called drayage system.<sup>130</sup> First, a Mexican long-haul truck transports the trailer of

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126. Susan Kohn Ross, *Customs Update: New Turn For Mexican Trucks?*, J. OF COM. (Feb. 22, 2001), at <http://www.joc.online> (on file with author).

127. *See id.*

128. *Id.*

129. Tim Weiner, In Rebuttal, *Mexicans Dispute Claim Their Trucks Are Unsafe*, N.Y. TIMES, Aug. 2, 2001, at A1.

130. *See* Teresa Puente, *Mexico Trucking Fight Gears Up*, CHI. TRIB., Aug. 27, 2001, at A1, available at 2001 WL 4107757.

goods to a drayage yard in Mexico located near the border.<sup>131</sup> Here, the goods are transferred to a Mexican short-haul truck (a “Mexican Drayage Truck”) utilized exclusively within the commercial zones to transport goods across the border.<sup>132</sup> After passing through customs and crossing the border, the Mexican Drayage Truck enters a drayage yard in the United States, whereupon the goods are relocated to a U.S. long-haul truck that will transport the goods to their final destination in the United States.<sup>133</sup> Free of cargo, the Mexican Drayage Truck returns to Mexico.<sup>134</sup>

### 3. *The Drayage System Skews Statistics*

The three U.S. government studies described above indicated that the failure rates for Mexican trucks at border inspection stations ranged from fifty percent in 1996 to thirty-six percent in 1999.<sup>135</sup> A failure due to a “safety violation” does not necessarily involve actual hazards since violations can be issued for relatively minor shortcomings. Failures include not displaying a DOT number, neglecting to obtain state permits, or not maintaining driver logbooks and other documentation.<sup>136</sup> However, utilizing these statistics as a whole, opposition groups have argued that Mexican trucks are unsafe and should be prohibited from transiting U.S. roads.

The arguments of the opposition groups lack credibility for several reasons. First, the vehicles producing such elevated failure rates are exclusively Mexican Drayage Trucks, which are intentionally maintained at minimum levels because they are used strictly to transport goods for short distances within the commercial zones.<sup>137</sup> As one expert explains it, “Mexican truckers are not going to employ their newest equipment to sit in long waiting lines in order to transport cargo only a few miles. It makes no sense economically.”<sup>138</sup> Simple economics dictate that

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131. *See id.*

132. *See id.*

133. *See id.*

134. *See* Jerry Pacheco, *Issue of Mexican Trucks Dims U.S. Prestige*, ALBUQUERQUE J., July 30, 2001, at 5.

135. *See* G.A.O. Report 1996, *supra* note 63; *see also* DOT Report 1998, *supra* note 66; DOT Report 1999, *supra* note 8, at 23.

136. Debra Rose, *U.S.-Mexico Trucking: Standoff at the Border Continues*, BORDERLINES, at <http://www.us-mex.org/borderlines/2000/bl67/bl67truck.html>.

137. Ross, *supra* note 126.

138. *Id.*



only the worst vehicles in a fleet should be used for drayage purposes. According to trucking officials in Mexico, for instance, “[n]obody invests \$100,000 for drayage [because] drayage is where trucks go to die.”<sup>139</sup> Still other experts explain that the use of Mexican Drayage Trucks is essentially mandated by the current rules, which, when using public safety as a goal, seem counterintuitive.<sup>140</sup> “The irony of the system is that it increases the economic incentive to use less-safe trucks.”<sup>141</sup> Despite attempts by opposition groups to argue the contrary position, the evidence shows that the Mexican Drayage Trucks examined in the three governmental studies are not representative of the quality of the Mexican trucks in general.<sup>142</sup> The NAFTA Panel decision, for example, explicitly stated:

Mexico and the United States agreed that Mexican trucks used for drayage operations in the commercial zones tended to be older trucks [and] Mexico submitted that the comparatively poorer condition of the Mexican drayage trucks cannot be taken as an indicator for the condition of Mexican long-haul trucks.<sup>143</sup>

#### 4. *The United States Has Similar Failure Rates*

The safety argument relies on a one-sided analysis that fails to address U.S. domestic trucking concerns. According to the most recent government study, only thirty-six percent of Mexican short-haul trucks, exclusively Drayage Trucks, failed inspection at the border, while the failure rate for U.S. trucks during the same period is twenty-five percent.<sup>144</sup> The twenty-five percent failure rate was obtained from inspections that were conducted on mainly U.S. long-haul trucks.<sup>145</sup> There is an inherent logical fallacy in making a safety argument based on a comparison between the best U.S. trucks and the worst Mexican trucks.<sup>146</sup> If comparable statistics were used, the condition of U.S. short-haul trucks used to transport items to and from one of the largest railroad hubs in the country would produce a fail-

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139. Bill Mongelluzo, *Safety Still Obstacle to Open Border*, J. OF COM. (Oct. 22, 1999), at <http://www.joc.com> (on file with author).

140. See *No Truck*, *supra* note 91.

141. *Id.*

142. See *id.* The only trucks used at the border are “short-hop rigs” used for short distances.

143. Final Report, *supra* note 1.

144. Weiner, *supra* note 129, at 3.

145. See *id.*

146. See *No Truck*, *supra* note 91.

ure rate of forty-five percent, which eclipses the thirty-six percent failure rate of comparable Mexican Drayage Trucks.<sup>147</sup> The report also indicates that U.S. long-haul trucks already have considerable safety problems of their own, registering approximately 5,000 deaths per year during the last fifteen years due to accidents.<sup>148</sup> Based on this more inclusive analysis of the available data, the true safety situation can be explained with a simple rhetorical question: "Will there be accidents in the U.S. involving Mexican trucks? You can bet on it, just as there are accidents every day involving American-owned-and-operated trucks."<sup>149</sup>

### 5. Mexican Incentives to Use High-Quality Trucks

Assuming *arguendo* that Mexican Drayage Trucks do have a significant failure rate, several business-related factors dictate that Mexican companies would use only their long-haul trucks of highest quality if they were able to operate in the United States. "Those who wring their hands in anguish at the thought of Mexican commercial trucks barreling down U.S. highways ignore some facts. One is cold, hard cash."<sup>150</sup> It is argued that once the border is liberalized, those Mexican companies desirous of operating in the United States would send only their best equipment and drivers in an attempt to avoid financial loss caused by: (i) towing and repair costs for broken trucks; (ii) spoilage of perishable items as a result of wrecks; (iii) increased insurance rates due to accidents; and (iv) personal injury lawsuits in the United States.<sup>151</sup> Contrary to unsubstantiated stereotypes, the degree of sophistication possessed by Mexican business persons in the trucking industry is high.<sup>152</sup>

Mexico may seem like a quaint and backward place, and in many regards it is. But the business interests helping to modernize that country are as shrewd as any on the planet. Their desire to profit from the opportunities provided by NAFTA is the most reliable and enduring reason why Mexican trucks traveling U.S. highways won't be danger-

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147. Weiner, *supra* note 129, at 3.

148. *Id.*

149. *Bring on the Trucks*, COURIER J., Feb.10, 2001, at LEXIS-NEXIS:AllSources/News/NewsGroupFile/MostRecentTwoYears.

150. *Cold Cash Will Make Mexico's Trucks Safe; Businesses Won't Risk Profits in Bad Rigs*, ARIZ. REPUBLIC, May 2, 2001, at B8.

151. *Id.*

152. *See id.*

ous rattletraps.<sup>153</sup>

## 6. *No Major Problems with Mexican Trucks in the United States to Date*

Finally, the safety argument lacks merit based on a review of actual experiences. While the Bus Regulatory Reform Act of 1982 served to deny access to the U.S. roads to the majority of Mexican trucks, certain vehicles have been operating throughout the United States for many years under one of the following exceptions: (i) Mexico-domiciled trucks that have U.S. citizens as majority owners, (ii) Mexico-domiciled, Mexican-owned trucks “grandfathered” because they received operating authority prior to the enactment of the Bus Regulatory Reform Act, and (iii) Mexico-domiciled, Mexican-owned trucks that use the United States as a “land bridge” to Canada, without stopping to load or unload cargo.<sup>154</sup> Those advocating a complete restriction on Mexican trucks have failed to provide any evidence suggesting that the Mexican trucks currently operating in the United States under these exceptions constitute an exceptional safety threat.<sup>155</sup>

## 7. *Mexican Trucking Standards Are Improving*

Since the first discussions of NAFTA in 1992, Mexican truck safety standards have considerably improved.<sup>156</sup> According to a 2001 study conducted by the DOT, the failure rate for Mexican Drayage Trucks has dropped by approximately twenty percent during the last three years.<sup>157</sup> In addition, Mexico has made some significant progress in establishing truck safety requirements, including: (i) enacting regulations requiring all drivers to log hours of service; (ii) issuing truck inspection stan-

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153. *Id.*

154. DOT Report 1999, *supra* note 8.

155. *See No Truck*, *supra* note 91, at 36 (noting that a 1999 study conducted by the DOT indicated that Mexican trucks that were caught illegally going beyond the commercial zones had a failure rate of thirty percent, whereas U.S. trucks operating legally in the United States had nearly the same failure rate, at twenty-five percent).

156. *See OFF. OF INSPECTOR GEN., U.S. DEPT OF TRANSP. AUDIT REPORT: Interim Report on Status of Implementing the North American Free Trade Agreement's Cross-Border Trucking Provisions*, Rep. No. MH-2001-059 (May 8, 2001), available at [http://www.oig.dot.gov/item\\_details.php?item=398](http://www.oig.dot.gov/item_details.php?item=398).

157. *Id.*

dards; (iii) automating its information systems for trucks, drivers and cargo; (iv) implementing procedures for administering drug and alcohol tests harmonized between United States and Mexico; and (v) establishing medical requirements for obtaining a commercial drivers' license.<sup>158</sup>

According to a recent report by the World Bank, "[i]mproved vehicle standards will better position Mexican transport industry to compete under NAFTA."<sup>159</sup> Although trucking standards have obviously improved in recent years and serve to weaken the safety argument espoused by NAFTA opponents, Mexican officials claim that safety standards will naturally advance even more once access to the United States is granted.<sup>160</sup> Once the border is opened "the safety of the Mexican fleet would improve dramatically because truckers would be forced to meet safety standards in return for access. You have to give them [an] incentive to modernize."<sup>161</sup>

#### B. THE BORDER STATES ARE PREPARED TO ENSURE SAFETY

The four U.S. border states most directly affected by cross-border trucking are working to handle the potential increase in cross-border trucking operations and intensified border inspections. "U.S. border states would like Washington assistance [because] while benefiting from NAFTA-related trade, these states do not want to be left with the entire bill for enforcing safety for trucks that may be headed all over the U.S."<sup>162</sup> These pleas for economic aid, however, by no means indicate that the border states are opposed to cross-border trucking because of safety. In conjunction with certain trucking industry organizations, these state politicians explained that the "[c]ontinued imposition of the freeze has strained our relations with Mexico, stymied resolution of other essential bilateral transportation issues and denied the United States the benefits of expanded trade."<sup>163</sup> Like-

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158. *Id.*

159. *The Transport Sector in Mexico: An Evaluation*, World Bank Group, Rep. No. 18153 (June 30, 1998), at <http://www.worldbank.org>.

160. See Lorraine Woellert, *Mexican Trucks: Unsafe at Any Speed?*, BUS. WK. ONLINE (Jan. 15, 1999), at <http://www.businessweek.com/bwdaily/dnflash/jan1998/nf90115d.htm>.

161. *Id.*

162. *Mexico Wins Award on Cross-Border Trucks*, 8 INTER-AM. TRADE REP. 2029 (Mar. 12, 2001) (on file with author).

163. Rossella Brevetti, *Trucking Provision Implementation Urged by Industry, State Officials*, 14 Int'l Trade Rep. (BNA) 27 (Jan. 1, 1997), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author); see also

wise, other commentators have determined that the irritation of the politicians of the four border states with the prolonged delay of cross-border trucking actually surpasses that felt by Mexico.<sup>164</sup> The board of governors of these states categorizes the safety argument as “bogus” since “road safety is a state matter . . . and one which [the border states] are fully prepared to handle.”<sup>165</sup>

### C. THE INEVITABILITY OF PAYMENT AND PROPER CANALIZATION OF U.S. FUNDS

The NAFTA Panel was unambiguous in its determination that the blanket refusal by the United States to consider applications from Mexican trucks constituted a breach of Annex I of NAFTA.<sup>166</sup> Based on its findings, the dispute resolution panel mandated that the United States take “appropriate steps” to bring its practices regarding cross-border trucking services into compliance with NAFTA within thirty days.<sup>167</sup> If the United States refuses to comply, it would face retaliatory measures and economic penalties by Mexico, which may reach \$200 billion.<sup>168</sup> The United States has two options: (i) allow access to Mexican trucks that meet U.S. safety standards on the basis of a case-by-case inspection, or (ii) disregard its NAFTA obligations (temporarily or permanently) and suffer the economic and political repercussions.<sup>169</sup>

Mexican officials initially displayed leniency after the Bush Administration announced that it would take all actions necessary to comply with the NAFTA Panel decision as soon as possible. This clemency evaporated as fierce opposition to cross-border trucking manifested itself in Congress through the Sabo and Murray Amendments.<sup>170</sup> The Mexican government has stated, for example, that failure by the United States to comply

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*Bush wants to Open Borders to Mexican Trucks*, COMM. CARRIER J. (Mar. 1, 2001), available at 2001 WL 16614056 (noting that while governor of Texas, George W. Bush wanted Mexican trucks to be allowed into the U.S.).

164. See *The Trucks That Hold Back NAFTA*, *supra* note 103.

165. *Id.*

166. See Final Report, *supra* note 1.

167. See *id.*

168. See Daniel McCosh, *DOT, Mexico Talk Trucks*, J. OF COM. (Mar. 22, 2001), at [www.joc.com](http://www.joc.com) (on file with author).

169. See Ricardo Alonso-Zaldívar, *NAFTA Panel Rejects U.S. Constraints on Mexico Trucks: The Bush Administration Must Decide Whether to Allow Full Access or to Pay Compensation*, L.A. TIMES, Feb. 7, 2001, at A1.

170. See Larson, *supra* note 28.

with the ruling of the NAFTA Panel would leave this nation “no choice but to take measures in response.”<sup>171</sup> Mexico has considered: (i) the closing of the Mexican border to all U.S. trucks,<sup>172</sup> (ii) seeking a fine of some \$200 billion,<sup>173</sup> (iii) introducing new tariffs on U.S. exports of fructose sweetener to Mexico,<sup>174</sup> and (iv) denying access to various Mexican markets.<sup>175</sup> Such measures would allow Mexico to salvage at least some national dignity and prevent Mexico from continuing to be a “joke” in the United States.<sup>176</sup>

The threat of economic sanctions does not change the stance of all interest groups in the United States. Organized labor, for example, holds firm on their commitment to keep border access restricted, regardless of potential political and economic consequences. They center their objections on trucker and motorist safety, an issue more vibrant to the average driver than the indirect threat of NAFTA sanctions.<sup>177</sup> Likewise, other labor groups have contended that “[a]ny trade sanctions that the U.S. may face as a result of this dispute resolution process cannot outweigh the safety of American highway users.”<sup>178</sup> Certain politicians have argued that “given the seriousness of the highway safety issues involved . . . the United States should refuse to lift its current restrictions and accept the fines that then would be imposed for failure to comply with the panel’s decision.”<sup>179</sup>

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171. Edwin Chen, *White House, Decry Truck Vote*, L.A. TIMES, June 28, 2001, at A22; see also John Nagle & Rossella Brevetti, *Mexico to Suspend Trade Benefits if United States Ignores Truck Panel Decision*, 18 Int’l Trade Rep. (BNA) 253 (Feb. 15, 2001), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

172. See *Cierre de Fronteras a Camiones de EU Pide Senador*, EL FINANCIERO, Aug. 7, 2001, at <http://www.elfinanciero.com.mx>.

173. See McCosh, *supra* note 168.

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

175. See *Mexico May Block Trucks From U.S.*, WASH. POST, Aug. 3, 2001, at A13; see also Peter J. Cazamias, *The U.S.-Mexican Trucking Dispute: A Product of a Politicized Trade Agreement*, 33 TEXAS INT’L L.J. 349, 356 (1998).

176. See Chumacero Quintero, *México amenaza con cerrar las fronteras a los camions de EU*, EL ECONOMISTA, Aug. 3, 2001, at <http://www.economista.com.mx> (last visited Feb. 13, 2002).

177. See Press Release, *supra* note 86 (noting how a spokesperson for one labor organization argued that “[i]t doesn’t matter whether this faceless NAFTA panel fines the U.S. \$1 million or \$10 million . . . You can’t put a price on human life.”)

178. See *id.*

179. See *Brown Introduces Resolution Urging Continued Limits on Mexican Truck Access*, 17 Int’l Trade Rep. (BNA) (1526) (Oct. 5, 2000), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author).

While this defiance may appear admirable and even patriotic at first glance, public policy mandates a contrary result. First, the fines imposed by Mexico could reach exorbitant amounts (i.e., ranging up to \$200 billion).<sup>180</sup> Second, as explained in detail below, the reluctance to obey treaty obligations would undoubtedly damage the U.S. image in the international political arena.<sup>181</sup> Third, one way or another, the United States will suffer economic loss as a result of the NAFTA Panel determination if they do not comply with the ruling.<sup>182</sup> Faced with this eventuality, U.S. government funds would be better directed at constructing new inspection facilities, hiring additional enforcement personnel, developing highway infrastructure, etc., as opposed to maintaining the status quo and simply paying Mexico to cease and desist.<sup>183</sup> The United States should live up to its NAFTA agreements while concurrently ensuring that trucks from Mexico are safe.<sup>184</sup> If this requires additional government resources, at least the money "is better spent on enforcement of safety regulations than on payment of trade sanction penalties."<sup>185</sup> Finally, the real persons injured by this one-sided safety rationale are U.S. consumers who will be forced to pay higher prices because the transportation costs added to the merchandise will continue to be unnecessarily elevated.<sup>186</sup> Representatives from the U.S. trucking industry also adhere to this position. As one person explains, "long lines at the border mean wasted time at the border which raises the cost of shipping goods for my customers . . . They pass this increased cost along to the consumer, who is the real victim of the border transportation inefficiencies that exist today."<sup>187</sup>

#### D. AVOID ALIENATING ALL NAFTA PARTNERS

Canada was not directly involved in this dispute because

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180. See McCosh, *supra* note 168.

181. See *infra* Part IV(C).

182. See Brendan M. Case, *Fox Warns of Ban of U.S. Trucks*, DALLAS MORNING NEWS, Aug. 3, 2001, at 10, available at 2001 WL 26639691 (noting that in lieu of adopting trade sanctions, Mexico has threatened to close the border to U.S. trucks).

183. See Boyce, *supra* note 121.

184. See *id.*

185. *Id.*

186. See David Hendricks, *Enact All of NAFTA Sooner, Rather than Later*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 1999, at E1.

187. ATA, NITL, *Chamber of Commerce Protest NAFTA Crossing Delay*, HAZMAR TRANSPORT NEWS, Dec. 24, 1996, available at 1996 WL 7902834.

the trucking moratorium imposed under the Bus Regulatory Reform Act of 1982 was not applicable to Canada.<sup>188</sup> Nonetheless, due to its keen interest in the issue, Canada exercised its right to participate in the NAFTA arbitration.<sup>189</sup> Concurring with Mexico's position in its submission to the NAFTA Panel, Canada reasoned that the blanket refusal by the United States to allow Mexican trucks to acquire authorization to operate on U.S. roads constituted discriminatory treatment, thereby violating the NAFTA provisions regarding cross-border services.<sup>190</sup> The Canadian Trucking Alliance also opposed the U.S. stance, describing the situation as "archaic."<sup>191</sup> This group also stated that U.S. action has minimized the effectiveness of the treaty by limiting the ability of truckers from all three NAFTA countries to take "full advantage" of the potential growth in trade on the continent.<sup>192</sup>

Straining and perhaps irreparably damaging the United States' relationship with one NAFTA partner as a result of the trucking dispute is lamentable. Simultaneously damaging the rapport with the only remaining NAFTA partner would be foolhardy. In their respective submissions to the NAFTA Panel, both Mexico and Canada expressly chastised U.S. actions.<sup>193</sup> Accordingly, public policy should discourage the United States from alienating both of its NAFTA partners over the cross-border trucking issue.

#### E. THE UNITED STATES IS LEGALLY OBLIGATED TO COMPLY WITH NAFTA PANEL

According to the Supremacy Clause of the United States Constitution, all treaties made under the authority of the United States shall be the "supreme law of the land" and enjoy legal superiority over any conflicting provision of a state constitution or law.<sup>194</sup> NAFTA took effect on January 1, 1994.<sup>195</sup> At this time, due to its status as a treaty, the provisions contained therein became the "supreme law of the land" of the United

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188. See Memorandum, *supra* note 7.

189. See NAFTA, *supra* note 9, at art. 2013.

190. See Final Report, *supra* note 1.

191. See *NAFTA Not Living Up to Promise, CTA Says*, MOD. BULK TRANSPORTER, Nov. 30, 2000, available at 2000 WL 12749465.

192. *Id.*

193. See Final Report, *supra* note 1, at 21-45.

194. See U.S. CONST., art. VI, § 2.

195. See Harrington, *supra* note 97.



States.<sup>196</sup> The United States agreed to, among other things, permit cross-border trucking pursuant to a predetermined schedule and to resolve any disputes in accordance with the mechanisms provided for in NAFTA.<sup>197</sup> In February 2001, the NAFTA Panel held that the United States had violated its treaty obligations and mandated that it quickly take “appropriate steps” to rectify its practices.<sup>198</sup> Thus, initiatives to prolong the trucking moratorium in light of the circumstances are a contravention of both international treaty obligations and sound public policy. As one U.S. legislator said:

NAFTA is now the law of the land. It is the treaty between our neighbors and us . . . NAFTA says we are going to open the borders up to Mexico and Canada. This President says January of next year is when we do it. This amendment would prohibit [trucks] from Mexico to enter the United States. Period. You cannot do that. You are in violation of a treaty; in violation of the law; in violation of the majority that passed the treaty through this body.<sup>199</sup>

Adhering to this line of reasoning, groups such as the U.S. Chamber of Commerce have underscored the importance of fulfilling a promise, arguing that “[t]he United States made a solemn commitment under NAFTA to open its border to Mexican trucks – just as Mexico promised to do for American trucks. It’s time we both kept our word.”<sup>200</sup> Albeit expensive and arduous to comply with NAFTA, the answer is not to simply ignore trade agreements because implementation is difficult.<sup>201</sup>

#### F. THE HYPOCRISY OF PROPOSED U.S. NONCOMPLIANCE

In describing the Bush Administration’s trade agenda, the office of the U.S. Trade Representative emphasized this nation’s intolerance of treaty violations. Recent reports by the agency demonstrate “the importance of vigilant monitoring of U.S. trade agreements and quick responses to noncompliance — in-

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196. See U.S. CONST., art. VI, § 2.

197. See NAFTA, *supra* note 9, at Annex I.

198. Final Report, *supra* note 1, at 81.

199. See Comments, *supra* note 41, at H3587.

200. Press Release, United States Chamber of Commerce, U.S. Chamber Hails Opening of Mexican Border to Trucks- NAFTA Ruling is Good For Business (Feb. 7, 2001) (on file with author); see also Press Release, United States Chamber of Commerce, Chamber Applauds Ruling on Trucking Dispute with Mexico (Dec. 1, 2000) (on file with author).

201. See Paul Magnusson, *Lift the Roadblocks to Mexican Trucks*, BUS. WK. ONLINE (Feb. 13, 2001), at [http://www.businessweek.com/bwdaily/dnflash/feb2001/nf20010213\\_330.htm](http://www.businessweek.com/bwdaily/dnflash/feb2001/nf20010213_330.htm).

cluding the use of WTO and NAFTA dispute settlement procedures."<sup>202</sup> Moreover, if the United States is to maintain an effective trade policy, U.S. citizens must have confidence that international trade is fair and beneficial to them.<sup>203</sup> This requires, among other things, "ensuring that other countries live up to their obligations under the trade agreements they sign."<sup>204</sup>

In light of these and similar announcements, U.S. refusal to adhere to its NAFTA commitments regarding trucking appears to be unjustifiable hypocrisy. The contradiction in U.S. trade policy is disturbingly clear. "We are clearly violating our own agreement . . . We are doing something that is not one whit better than what we criticize in other countries."<sup>205</sup> Clinging to such double standards in terms of treaty compliance could prove detrimental to the United States in several manners. By refusing to concede on the relatively discreet issue of cross-border trucking, the United States has essentially opened "Pandora's box" allowing either of the other NAFTA parties to disregard virtually any other provision using similar arguments.<sup>206</sup> Until this "blemish" regarding NAFTA implementation is rectified, "the U.S. is in a difficult position when arguing for other countries to follow particular trade rules."<sup>207</sup> This decision, furthermore, may prejudice the success of future trade agreements because they are designed to provide the legal and financial predictability sought by international investors.<sup>208</sup> The instability generated by this trucking dispute will likely thwart investment under NAFTA and other international agreements.<sup>209</sup>

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202. Press Release, Office of United States Trade Representative Executive Office of the President, U.S.T.R. Releases Reports Emphasizing Enforcement Priorities (Apr. 30, 2001) (on file with author).

203. Press Release, Executive Office of the President, Identification of Trade Expansion Priorities Pursuant to Executive Order 131164 (Apr. 30, 2001) (on file with author).

204. *Id.*

205. Carter Dougherty, *Truck Stop? U.S. Seen Apt to Lose Big-Rig Fight to Mexico*, WASH. TIMES, Oct. 10, 2000, at B8.

206. *Mexico and United States Examine Trucking Safety Review Process*, 13 Int'l Trade Rep. (BNA) 680 (April 24, 1996), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author) (referring to comments made by Don Michie, chair of a BTA transportation committee).

207. Harrington, *supra* note 97.

208. *See id.* at 6.

209. According to this group, the delay in implementing the cross-border trucking provisions of NAFTA is a "thorn" in the U.S. position that NAFTA is an example of a rule-based trading system. Politically, it is important to give confidence to investors that rules will not be changed arbitrarily. *Id.*

## G. ADHERENCE TO ESTABLISHED U.S. FOREIGN POLICY

Compliance with NAFTA Panel decisions is consistent not only with domestic policy, but also with well-established U.S. foreign policy for a number of reasons. First, facilitating cross-border trucking would generally further the free trade agenda so commonly espoused by the current presidential administration.<sup>210</sup> According to White House representatives, the introduction of political initiatives such as the Sabo Amendment constitutes a “troubling sign of isolationism on [Capitol] Hill” whose supporters are “economic isolationists and false purveyors of fright and retreat.”<sup>211</sup> The refusal by the United States to recognize the cross-border trucking provisions has been viewed as the most recent “free trade fraud,” and effectively supporting the free trade agenda requires more than political rhetoric.<sup>212</sup>

Diverse representatives have announced that the U.S. government is dedicated to complying with the NAFTA Panel decision. It has been stated, for instance, that “President Bush has made a firm commitment to implement NAFTA trucking provisions”<sup>213</sup> and that the U.S. government has “assured the Mexican government that we intend to live up to our NAFTA obligation to open the U.S.-Mexico border to trucking.”<sup>214</sup> Implementing the NAFTA trucking provisions would afford the Bush Administration the opportunity to fulfill its promise to Mexican officials, thereby elevating the trustworthiness of the President.<sup>215</sup>

The failure to live up to obligations in the trucking dispute will likely hinder any expansion of NAFTA.<sup>216</sup> Chile, for example, suspended talks with NAFTA signatories and opted instead to become an associate member of MERCOSUR, in part due to its “growing impatience with the United States’ internal politi-

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210. Dana Milbank & Helen Dewar, *Ban on Mexican Trucks Called ‘Isolationist’ Sign*, WASH. POST, July 31, 2001, at A8.

211. *Id.*

212. Gary M. Galles, *Undermining Free Trade by Stalling Mexican Trucks*, SAN DIEGO UNION-TRIB., Oct. 28, 1999, at B9.

213. Brevetti, *supra* note 32.

214. Larson, *supra* note 28, at 4.

215. See Marcela Sanchez, *U.S. Risks Losing Credibility on Trade*, WASH. POST, July 25, 2001, at A4 (explaining that although President Bush has demonstrated a significant personal interest and commitment to Latin American trade issues, the difficulty implementing the NAFTA trucking provisions seriously undermines the credibility of the U.S. going into a trade agreement).

216. See Michael R. Skahan, *The NAFTA Trucking Dispute with Mexico: Problem? What Problem?*, 5 NAFTA L. & BUS. REV. AM. 603, 603 (1999).

cal squabbles” and the perceived deficiencies of the NAFTA provisions related to trucking.<sup>217</sup>

Adherence to the cross-border trucking provisions also comports with the obligation of the United States to integrate transportation throughout the entire hemisphere.<sup>218</sup> As part of the Western Hemisphere Transport Initiative of the Free Trade Area of the Americas, the United States is already committed to working toward facilitating truck transportation throughout the two American continents.<sup>219</sup> Improving transportation within the NAFTA region first, therefore, could serve as a paradigm for larger scale development in the near future. Moreover, the trucking dispute weakens the credibility of NAFTA as an appropriate instrument for economic development because it undermines investor confidence, which is based on predictability and security.<sup>220</sup>

Finally, U.S. foreign policy dictates that the cross-border provisions be recognized by the United States immediately in order to preserve the benefits thus far achieved under NAFTA and to safeguard the tight interrelationship between the United States and Mexico.<sup>221</sup> Since NAFTA’s inception, annual household savings have increased by approximately \$2,000, some thirteen million jobs have been created, and trade with Mexico

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217. *Id.*

218. See The Secretariat of the Economic Commission for Latin America and the Caribbean (ECLAC), *FAL Bulletin 149, Transportation in the 21st Century: A Vision for the Integration* (1999), at <http://www.eclac.org/Transporte/noticias/bolfall/6/5106/Fal149eng.htm>.

219. The primary objective of the Western Hemisphere Transport Initiative is to

integrate air, land and sea transportation policies and practices both across modes and between countries in the Western Hemisphere, through improved planning in the development and maintenance of transportation infrastructure, the linking of regional and subregional transportation institutions and systems, and the sharing of information on ‘best practices’ in utilizing traditional and innovative financing mechanisms.

*Id.*; see also The Secretariat of the Economic Commission for Latin America and the Caribbean (ECLAC), *FAL Bulletin 143, Integrated Transport Systems in Latin America and the Caribbean: Converging Initiatives* (1998) (explaining that plans for multimodal transport are also underway in South and Central America).

220. See Jimmie V. Reyna et al., *Cross-Border Movement of Goods: Developments in U.S.-Mexico Customs Procedures*, 7 U.S.-MEX. L. J. 169, 174 (1999).

221. The majority of Mexico’s “international” issues are really “North American” issues because of this nation’s physical proximity to the United States, and the increasingly integrated economic and social structures of these two countries. G. POPE ATKINS, *LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM* 30 (3rd ed. 1995).

has reached over \$250 billion per year.<sup>222</sup> Based on these accomplishments, “[t]he success of NAFTA underscores the importance of expanding free trade throughout the hemisphere . . . As Latin America grows, the United States benefits.”<sup>223</sup> On a larger scale, other benefits of NAFTA have occurred, such as institutional development of environmental organizations, research centers and civic organizations.<sup>224</sup> President Bush understands what Mexico means both to the United States and the rest of Latin America, evidenced by one of his common campaign slogans: “What is good for Mexico is good for the United States.”<sup>225</sup> According to experts, the moratorium on cross-border trucking involves much broader issues since over eighty-five percent of the goods sold between these two nations are transported by trucks. It is argued, in particular, that “[c]ontinued imposition of the freeze has strained our relations with Mexico [and] stymied resolution of other essential bilateral transportation issues . . .”<sup>226</sup>

#### H. THE INCREASE IN CROSS-BORDER TRUCKING WILL BE MINIMAL

Opponents have attempted to instill fear in the collective mind of the U.S. public by claiming that, upon the opening of the border, Mexican trucks would literally flood the U.S. roads and imperil the lives of all persons transiting thereon.<sup>227</sup> Albeit attention-grabbing, this eventuality can be refuted.

##### 1. *The Mexican Perspective*

Cross-border trucking pursuant to NAFTA is extremely un-

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222. Press Release, Executive Office of the President, Joint Statement of the NAFTA Free Trade Commission Building on a North American Partnership (July 31, 2001) (on file with author).

223. Robert B. Zoellick, *Free Trade and the Hemispheric Hope*, Prepared Remarks at the Council of the Americas (May 7, 2001), at [http://www.ustr.gov/speech-test/zoellick/zoellick\\_2.html](http://www.ustr.gov/speech-test/zoellick/zoellick_2.html).

224. See Sidney Weintraub, *NAFTA Evaluation*, INT’L POL. ECON. (Aug. 2000), at <http://www.csis.org/americas/pubs/weintraubnewsletters082000.html>.

225. Ron Fournier, *Bush Keeps Training Wheels on Foreign Policy with Mexico Trip*, A.P. WORLDSTREAM, Feb. 15, 2001, at LEXIS-NEXIS: News-GroupFile/MostRecentTwoYears.

226. Brevetti, *supra* note 163, at 27 (quoting Edward Emmet, National Industrial Transportation League President).

227. See Press Release, Teamsters, Hoffa Joins Members of Congress to Oppose NAFTA Ruling (Feb. 8, 2001) (on file with author).

attractive for several reasons. The vast majority of Mexican truckers oppose opening the border because they fear that they would be ill-equipped to compete against their U.S. counterparts.<sup>228</sup> It is argued, for example, that “[i]t’s never going to make economic sense to send Mexican trucks to New York or Chicago. No way. It would be more practical for us to close up all our operations and reincorporate in the United States’ and that is a highly unlikely prospect.”<sup>229</sup> This position is shared by the preeminent Mexican trucking association, which argues that the “the border should remain closed, because it would be impossible for Mexican truckers to compete.”<sup>230</sup> This alleged inability to compete with U.S. truckers is attributable to the sub-standard transportation infrastructure in Mexico, which forces Mexican truckers to spend approximately thirty percent of their earnings on maintenance.<sup>231</sup> Mexican truckers argue that their inaccessibility to reasonable truck financing also places them at a competitive disadvantage.<sup>232</sup> Mexican trucking companies “are crippled by far higher interest rates and shorter payment terms” than U.S. firms.<sup>233</sup> Based on this anxiousness about competing with U.S. trucks, Mexican trucking organizations have requested that the Mexican government postpone the opening of the border for a period of five years, despite the NAFTA Panel ruling in Mexico’s favor.<sup>234</sup>

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228. Weiner, *supra* note 129, at A1 and A8.

229. *Id.*

230. The largest Mexican trucking organization, The National Cargo Transport Chamber (CANACAR), accuses the Mexican government of acting in a manner detrimental to Mexican truckers in order to protect its reputation. As representatives of CANACAR explain it, the government lobbies for opening the border “to keep their prestige intact,” yet the local truckers oppose this move because of fears of foreign competition. Alan Stowell and John Nagel, *Interim NAFTA Panel Report Tells U.S. to Allow Mexican Trucks to Operate*, 17 Int’l Trade Rep. (BNA) 1837 (Dec. 7, 2000), available at <http://www.bna.com/products/corplaw/itr.htm> (on file with author) (quoting Antonio Vazquez, spokesperson for CANACAR).

231. See Antonio Sánchez, *Esperan Transportistas que les Cumplan*, REFORMA, Mar. 19, 2001, at [http://www.reforma.com/negocios\\_y\\_dinero/articulo/080403/](http://www.reforma.com/negocios_y_dinero/articulo/080403/).

232. See *Mexico Threatens Import Ban Over Truck Snub*, J. OF COM. (June 28, 2001), at <http://www.joc.com> (on file with author).

233. *Id.*

234. See *Se Agrandan el Problema de Transportistas*, EL INFORMADOR – DIARIO INDEPENDIENTE (Jan. 12, 2000), at <http://www.informador.com.mx/lastest/2000/enero/12ene2000/12pr02a.htm>.

## 2. DOT Trucking Regulations

In addition to these declarations by Mexican truckers and industry leaders, the notion that the liberalization of the border will have only a minor effect on continental trucking is confirmed in the recent DOT Trucking Regulations. The proposed rules estimate that a mere 3,200 Mexican trucks will apply for permits during the first year.<sup>235</sup> Of these, seventy-five percent will solicit a permit using Form OP-2, which restricts movement of the Mexican trucks to the four border states.<sup>236</sup> Expressed in a different manner, these DOT Trucking Regulations predict that, even if cross-border trucking were allowed under NAFTA, only eight hundred new Mexican trucks per year would be transporting goods in the United States.<sup>237</sup> The insignificance of this number is clear when one realizes that some seven million U.S. trucks and drivers currently operate on U.S. roads. Based on the foregoing, even if cross-border trucking were immediately available, the increase in Mexican trucks transiting U.S. highways would be negligible.

## V. DOT TRUCKING REGULATIONS CONSTITUTE A FEASIBLE SOLUTION

Even if the truck-safety concern was legitimate and a significant increases of Mexican trucks on U.S. roads were probable, such apprehensions should be completely mitigated by the DOT Trucking Regulations. First, a Mexican truck must undergo a mandatory "safety review" by the DOT in order to obtain conditional operating authority, which consists of making spe-

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235. The FMCSA considers 3,200 to be the high estimate for permit applications, and assumes that the number will fall to 2,500 applicants per year after the first year of implementation. Federal Motor Carrier Safety Administration, 66 Fed. Reg. 86,22331 (proposed May 3, 2001) (to be codified at 49 C.F.R. pts. 368 & 387).

236. *Id.* (The remaining twenty-five percent will apply for OP-1 (MX) authority).

237. The proposed regulations indicate that, after the first year, only six hundred twenty-five Mexican trucks will solicit permits on an annual basis. *Id.* According to the rules, this limited number is attributable to two factors. First, the majority of large Mexican trucking companies that benefit from U.S. operations presumably have authorization to operate within the commercial zones. *Id.* Second, some new applicants may desire to take advantage of operating in the United States, but the majority of them lack the financial and administrative capacity to do so. *Id.*

cific certifications regarding the trucking company's ability to comply with U.S. safety regulations.<sup>238</sup> Upon the satisfactory completion of the safety review, the Mexican truck is granted a provisional operating permit that is valid for eighteen months.<sup>239</sup> During that eighteen month period, the DOT will collect safety and operational data on the Mexican truck, monitoring traffic violations, accidents, insurance coverage and other relevant information.<sup>240</sup> If significant safety problems are detected, then the DOT would take immediate action to either ensure that the problematic truck come into compliance or remove the provisional operating permit.<sup>241</sup> After sufficient safety and operational data has been compiled on a particular Mexican truck, for example after approximately twelve months, it is forced to submit to an obligatory "safety audit" by the DOT<sup>242</sup> Unlike the initial "safety review," this investigation is not based on affidavits by the Mexican applicant.<sup>243</sup> Instead, the DOT conducts an investigation at the Mexican truck's base in Mexico or at specially-designed offices at the U.S.-Mexico border.<sup>244</sup> Finally, if the vehicle successfully passes the in-depth safety audit, the DOT will award a permanent operating authority.<sup>245</sup>

In order to implement these DOT Trucking Regulations, the Bush Administration's budget for fiscal year 2002 contains "an unprecedented increase in funds" to augment inspection personnel and facilities.<sup>246</sup> For example, in terms of staff, the budget includes approximately \$30 million allocated for the hiring of additional federal and state inspectors to reach a total of nearly 500.<sup>247</sup> This amount of inspectors represents a ten-fold increase since 1995 and clearly surpasses the number of inspectors called for in the three government studies mentioned earlier.<sup>248</sup> With regard to facilities, the DOT budget includes over

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238. See *supra* notes 33-39 and accompanying text; see also *Transportation Chief on Safety of Mexican Trucks in U.S.* (July 18, 2001), at <http://usinfo.state.gov/regional/ar/mexico/safety18.htm> (statement of the Honorable Norman Y. Mineta, Secretary of Transportation) [hereinafter *Statement*].

239. See *Statement, supra* note 238.

240. See *id.*

241. See *id.*

242. *Id.*

243. *Id.*

244. See *id.*

245. See *Statement, supra* note 238.

246. *Id.*

247. *Id.*

248. *Id.*



\$50 million for the construction and/or improvement of state inspection stations.<sup>249</sup> In addition to these measures, the DOT Trucking Regulations require this agency to conduct a series of safety seminars designed to educate Mexican truckers and companies about complying with the new rules.<sup>250</sup>

### CONCLUSION

For a period of over five years, the United States has been in violation of its NAFTA obligations regarding cross-border services. In an attempt to rationalize this continuous transgression, opposition groups and previous presidential administrations have cited the alleged unsafe condition of Mexican trucks and drivers. As this article demonstrates, however, the truck-safety argument lacks credibility for a multitude of reasons. Based on the evidence, it is clear that even if the border is liberalized pursuant to NAFTA, the amount of Mexican trucks that intend to operate in the United States is miniscule. For those that do, the proposed DOT Trucking Regulations establish a procedure designed to ensure the roadworthiness of Mexican trucks and the qualifications of their drivers.

Under international treaty law, the United States is absolutely required to comply with the NAFTA provisions related to cross-border services. Accordingly, instead of paying enormous fines to further extend the trucking moratorium, facing retaliatory trade measures by Mexico, and hypocritically disregarding well-established U.S. foreign trade policy, the United States should take all actions necessary to foster cross-border trucking as soon as practicable. The initial step should be the enactment of the DOT Trucking Regulations, which would serve to ensure safety on U.S. roads and compliance with NAFTA.

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249. *Id.*

250. The comprehensive safety enforcement program of the DOT has five basic elements, including: (i) a safety review of Mexican trucks before granting a provisional operating authority, (ii) an expanded vehicle inspection regime made possible by increased inspection personnel and facilities, (iii) safety audits of drivers to assure compliance with licensing, hours of service rules, etc., (iv) considerable border infrastructure improvements, and (v) educational compliance programs on both sides of the border. According to Mineta, a true understanding of the DOT Trucking Regulations is necessary to resolve the debates because "the actual safety considerations in implementing our NAFTA obligations are very different from the picture painted by some opponents." *Id.*

