THE MEXICAN TRUCKING DISPUTE: A BOTTLENECK TO FREE TRADE. A TOUGH (ROAD) TEST ON THE NAFTA DISPUTE SETTLEMENT MECHANISM

I. INTRODUCTION

The harmonization of domestic concerns and international treaty obligations is out of tune at best, as the United States unacceptably delayed opening the border to Mexican trucking services. Under the North American Free Trade Agreement (NAFTA),[1] the United States, Canada, and Mexico provided for a gradual phase out of motor carrier restrictions.[2] The Agreement provides for allowing Mexican operators onto U.S. highways and

1. *See* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1–9); 32 I.L.M. 605 (chs. 10–22) [hereinafter NAFTA]. For the legislation implementing NAFTA, see the NAFTA Implementation Act of 1993, 19 U.S.C. § 3301 (2000) (referring to 19 U.S.C. § 1311(a)).

2. *See NAFTA: Arbitration Panel Decision and Safety Issues With Regard to Opening the U.S./Mexican Border to Motor Carriers Notice of Hearing Before the Subcomm. on Highways and Transit of the House Transp. Comm.,* 107th Cong. 2 (2001), *available at* http://www.house.gov/transportation/highway/07-18-01/07-18-01memo.html [hereinafter *Subcomm. on Highways and Transit Hearing*].

Mexican investment in the American trucking industry and vice versa.[3] To date, an enduring domestic battle may be resolved by legislation containing strict safety requirements, but implementation realities resulted in further stalling the opening of the border.[4]

In accordance with NAFTA, Mexican trucks should have been allowed into the four border states on December 18, 1995.[5] However, after an abrupt about-face, the United States delayed the opening, citing safety concerns.[6] Thereafter, Mexico initiated formal dispute resolution under Chapter 20 of NAFTA.[7] Following failed consultations, Mexico petitioned for formal dispute resolution, and the Arbitral Panel was established.[8] The Panel questioned

> whether the United States is in breach of Articles 1202 (national treatment for cross-border services) and/or 1203 (most-favored-nation treatment for cross-border services) of NAFTA by failing to lift its moratorium on the processing of applications by Mexican-owned trucking firms for authority to operate in the U.S. border states. Similarly . . . whether the United States breached Articles 1102 (national treatment) and/or

---

3. *See* NAFTA, *supra* note 1, 32 I.L.M. at 737–38, 746–47 (providing the schedules for phasing out restrictions in the sector of land transportation for Mexico and the United States).

4. *See* Rossella Brevetti, *Transportation: GAO Faults U.S. Readiness on Access for Mexican Trucks*, 19 INT'L TRADE REP. (BNA) 64, 64 (Jan. 10, 2002); Karen Brooks, *Cross-Border Trucking Between Mexico, United States Still Face Many Barriers*, FORT WORTH STAR-TELEGRAM, Dec. 27, 2002, *available at* 2002 WL 104729060 (contending that the trucking dispute is "a story of partisan politics, flaring tempers, eager anticipation and crushing disappointments").

5. *See* NAFTA, *supra* note 1, 32 I.L.M. at 746–47.

6. *U.S. Congress & Bush Administration Reach Compromise on Regulations to Allow Entry of Mexican Trucks*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Dec. 5, 2001, 2001 WL 10229601 [hereinafter *Congress & Bush Reach Compromise*]. The continuation of the moratorium resulted in "strong tensions between the two countries." *Id*.

7. *See id*.; *In the Matter of Cross-Border Trucking Servs.*, Secretariat File No. USA-MEX-98-2008-01, Final Report, para. 21, at 6 (Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf [hereinafter *Cross-Border Trucking Services Final Report*].

8. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 18–23, at 6–7.

> 1103 (most-favored-nation treatment) by refusing to permit Mexican investment in companies in the United States that provide transportation of international cargo.[9]

This Comment reviews the Arbitral Panel's final report of *In the Matter of Cross-Border Trucking Services*, evaluating the alleged breaches of NAFTA.[10] The Comment also assesses the non-compliance by the United States and questions the legitimacy and future of the NAFTA dispute settlement mechanism in light of the delayed cooperation. The thesis of this Comment argues that, evidenced by the Mexican trucking conflict, the NAFTA dispute settlement mechanism lacks effectiveness absent additional, workable provisions to monitor implementation of decisions. Although its weaknesses have not proved detrimental, the future success of NAFTA may be compromised if the mechanism remains unchanged.

Parts II and III discuss the growth and structure of NAFTA and the development of the trucking dispute therein. Part IV presents the findings and discusses the analysis of the Arbitral Panel. Part V addresses actions (or inactions) taken toward compliance with the Arbitral Panel's decision. Part VI concludes by considering the implications on the future of NAFTA and questioning the effectiveness of the NAFTA dispute resolution mechanism in light of the Mexican trucking dispute.

II. DEVELOPMENT AND STRUCTURE OF NAFTA

A. History

In 1993, NAFTA became the first free-trade agreement between the United States, Canada, and Mexico, a developing country.[11] The purpose of the innovative treaty is to form a free-trade zone between these countries,[12] eliminating tariff and

---

9. *Id*. para. 1, at 1.

10. *See generally id*. (explaining that the Panel's purpose was to decide whether the United States was in breach of certain Articles of the NAFTA agreement).

11. Michael Skahan, Comment, *The NAFTA Trucking Dispute with Mexico: Problem? What Problem?*, 5 NAFTA: L. & BUS. REV. AM. 603, 603–04 (1999).

12. *See* Stephen T. Weisweaver, Note, *International Trade: Partners, Politics,*

non-tariff barriers on trade to increase the flow of trade among the countries.[13] To preserve national autonomy, the Agreement "does not purport to serve as a constitution in the sense of altering the distribution of powers among its Parties."[14] Without endeavoring to alter the social policies of the parties, NAFTA primarily aims to create a regional economic trading agreement.[15]

B. Effects

Overall, the three parties to NAFTA have benefited from the Agreement.[16] NAFTA created a regional coalition competitive with the European Union.[17] As a result of NAFTA, Mexico has become the second largest trading partner of the United States, as trade grew from $100 billion in 1994 to $248 billion in 2000.[18]

---

and Promises: An Analysis of the North American Free Trade Agreement's Arbitral Panel Decision Concerning the United States-Mexico Trucking Dispute, 32 N.M. L. REV. 471, 471–72 (2002). NAFTA has been called "the most comprehensive trade agreement ever negotiated which creates the world's largest integrated market for goods and services." H.R. REP. NO. 103-361, pt. 1, at 8 (1993).

13. *See* Frederick M. Abbott, *The North American Integration Regime and Its Implications for the World Trading System*, *in* THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 169, 193, 199 (J.H.H. Weiler ed., 2000) (discussing the interactions of NAFTA and the WTO to find that "NAFTA is so far a healthy complementary institution to the WTO").

14. *Id*. at 171.

15. *See id*. at 197 ("The NAFTA does not make a compelling case for action on social welfare matters by regional integration arrangements. Yet the NAFTA did not set out with a social welfare charter; it set out with an economic charter.").

16. *See id*. at 194 ("On the whole, it appears reasonable to conclude that the NAFTA had a net positive economic welfare effect in its three Parties during its first years of operation."). But NAFTA remains a controversial agreement; proponents cite an enlarged job market, while opponents reference the loss of American jobs and increased poverty in Mexico. Skahan, *supra* note 11, at 605. In support of NAFTA, 1.7 million export-related jobs have been created primarily as a result of NAFTA; in opposition to NAFTA, the AFL-CIO estimates 300,000 to 400,000 American jobs have gone to Mexico. *Id*. In addition, positive and negative results in Mexico have been cited. *Id*. Increased trade has beneficial effects on a struggling Mexican economy, but has also increased the poverty of over half of the population. *Id*.; *see also* Michael Kleinberg, *Family Feud*, BUS. MEX., Oct. 1, 2001, *available at* 2001 WL 7671098 (explaining that positive effects on the Mexican economy because of NAFTA are indisputable and noting that between 1995 and 2000, the Mexican GDP grew at an average rate of 5.5%).

17. *See* Abbott, *supra* note 13, at 198.

18. Kate Snow, *Congress Poised to Put Safeguards on Mexican Trucks* (Dec. 1,

Combining Mexican and Canadian trade, the United States conducts about $1.25 million in trade every minute.[19]

Specific to trucking services, approximately five million commercial trucks cross the border annually between the United States and Mexico; between 1997 and 2000, the busiest border-crossing, Laredo, Texas, handled an average of 4,091 trucks daily.[20] These trucks transport almost three-fourths of the U.S.-Mexico trade.[21]

C. Provisions of NAFTA at Issue

NAFTA is comprised of twenty-two chapters addressing issues of trade in goods, services, and investment; intellectual property; and barriers to trade.[22] Various provisions and sections are addressed in and relevant to the trucking dispute,[23] which required their interpretation.[24] Article 102(2) defines the mandatory standard for interpretation of the trade agreement:

2001), *available at* http://www.cnn.com/2001/ALLPOLITICS/12/01/congress.mex.trucks/index.html. Canada is the United States' largest trading partner. *Id.*

19. *NAFTA: Arbitration Panel Decision and Safety Issues With Regard to Opening the U.S./Mexican Border to Motor Carriers Notice of Hearing Before the Subcomm. on Highways and Transit of the House Transp. Comm.: Testimony of Ambassador Peter F. Allgeier,* 107th Cong. 2 (2001), *available at* http://www.house.gov/transportation/highway/07-18-01/allgeier.html [hereinafter *Testimony of Ambassador Peter F. Allgeier*].

20. Steven Greenhouse, *Bush to Open Country to Mexican Truckers*, N.Y. TIMES, Feb. 7, 2001, at A12; Snow, *supra* note 18.

21. *See* Greenhouse, *supra* note 20, at A12. These statistics include multiple crossings by "drayage" trucks. *Subcomm. on Highways and Transit Hearing*, *supra* note 2, at 2. Because Mexican trucks are limited to commercial zones, which encompass a twenty mile radius from the border town, a system of freight exchange has developed in border towns. *See id*. at 1. The system usually involves three trucks:

> To transport goods from Mexico to the United States, a long-haul truck carries the freight from the interior of Mexico to a location near the border, the freight is transferred to a short-haul or 'drayage' truck, the drayage truck carries the freight across the border into a narrow commercial zone, and the freight is then transferred to a long-haul U.S. truck for carriage into the United States.

Id. at 2.

22. *See* NAFTA, *supra* note 1, 32 I.L.M. at 296.

23. *See id*.

24. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 1, 3, 9, at 1, 3.

"The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in [Article 102(1)] and in accordance with applicable rules of international law."[25] These objectives of NAFTA are announced in Article 102(1):

> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.[26]

1. Annex I: Reservations for Existing Measures and Liberalization of Commitments

Annex I provides timetables for phasing-out certain reservations to obligations imposed by Chapters 11 (Investment), 12 (Cross-Border Trade in Services), and 14 (Financial Services).[27] Each reservation defines the general

---

25. NAFTA, *supra* note 1, art. 102(1), 32 I.L.M. at 297; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 218, at 51. The Preamble states that NAFTA should "create an expanded and secure market for the goods and services produced in their territories," and the Preamble also notes that parties may "preserve their flexibility to safeguard the public welfare." NAFTA *supra* note 1, pmbl., 32 I.L.M. at 297; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 219, at 51 (extracting these portions of the Preamble to define the scope of the Panel's decision).

26. NAFTA, *supra* note 1, art. 102(1), 32 I.L.M. at 297.

27. *See id.* 32 I.L.M. at 704; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 67–68, at 14. Annex I primarily obliges elimination of

sector and sub-sector in which the reservation is taken; the NAFTA obligations affected; the domestic laws, regulations, or other measures affected; a description of the commitments intended to be liberalized; and a phase-out provision, which sets out a schedule for liberalization of commitments after the implementation of NAFTA.[28] Annex I presents a standard for interpretation, which requires consideration of all elements "interpreted in the light of the relevant provisions of the Chapters against which the reservation is taken."[29]

The U.S. Schedule for liberalization of land transportation established the timetable for phasing in access to border states for cross-border trucking operations on December 18, 1995 and access throughout the United States on January 1, 2000.[30] At the inception of NAFTA, commitments of the Cross-Border Services for Land Transportation are described as:

> 1. Operating authority from the Interstate Commerce Commission (ICC) is required to provide interstate or cross-border bus or truck services in the territory of the United States. A moratorium remains in

---

national treatment reservations, but also concerns most-favored-nation treatment reservations. *See* NAFTA, *supra* note 1, 32 I.L.M. at 704.

28. *See, e.g.*, *id*. 32 I.L.M. at 744–48 (providing the schedules for the United States to phase out reservations in the sector of transportation, including the sub-sectors of air transportation, land transportation, and custom brokers).

29. *Id.* 32 I.L.M. at 704. This standard is applicable to the extent that:

> (a) the Phase-Out element provides for the phasing out of non-conforming aspects of measures, the Phase-Out element shall prevail over all other elements;
>
> (b) the Measures element is qualified by a liberalization commitment from the Description element, the Measures element as so qualified shall prevail over all other elements; and
>
> (c) the Measures element is not so qualified, the Measures element shall prevail over all other elements, unless any discrepancy between the Measures element and the other elements considered in their totality is so substantial and material that it would be unreasonable to conclude that the Measures element should prevail, in which case the other elements shall prevail to the extent of that discrepancy.

Id. 32 I.L.M. at 704–05 (emphasis omitted).

30. *Id*. 32 I.L.M. at 746–47; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 231, at 57–59 (quoting the Schedule of the United States for Land Transportation in full).

> place on new grants of operating authority for persons of Mexico.
>
> . . . .
>
> 3. Under the moratorium, persons of Mexico without operating authority may operate only within ICC Border Commercial Zones . . . .
>
> 4. Only persons of the United States, using U.S.-registered and either U.S.-built or duty-paid trucks or buses, may provide truck or bus service between points in the territory of the United States.[31]

The investment description states: "The moratorium has the effect of being an investment restriction because enterprises of the United States providing bus or truck services that are owned or controlled by persons of Mexico may not obtain ICC operating authority."[32]

In short, Annex I calls for liberalized access to the transportation market of the other NAFTA parties, including expanded access for motor carriers and more relaxed restrictions for investment in the transportation sector.[33] Annex I does not change any U.S. safety standards or regulations, and "Mexican trucks operating in the U.S. under NAFTA must meet the same safety standards as U.S. trucks."[34]

2. Chapter 11: Investment

Article 1102 defines national treatment for investment purposes:

> 1. Each Party shall accord to investors of another Party *treatment no less favorable* than that it accords, in like circumstances, to its *own investors*

---

31. NAFTA, *supra* note 1, 32 I.L.M. at 746–47.

32. *Id*. 32 I.L.M. at 747. "The moratorium will remain in place on grants of authority for the provision of truck services by persons of Mexico between points in the United States for the transportation of goods other than international cargo." *Id*.; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 231, at 57–59 (explaining the continuing limitations for investment possibilities even after the investment reservations are phased out).

33. *See Subcomm. on Highways and Transit Hearing*, *supra* note 2, at 2.

34. *Id.*

with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party *treatment no less favorable* than that it accords, in like circumstances, to investments of its *own investors* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[35]

Article 1103 identifies the most-favored-nation (MFN) treatment requirement for Chapter 11:

1. Each Party shall accord to investors of another Party *treatment no less favorable* than that it accords, in like circumstances, to *investors of any other Party or of a non-Party* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to *investments of investors of another Party treatment no less favorable* than that it accords, in like circumstances to *investments of investors of any other Party or of a non-Party* with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[36]

Article 1104 provides the standard of treatment for Articles 1102 and 1103: "Each Party shall accord to investors of another Party and to investments of investors of another Party *the better of the treatment*" of national treatment or MFN treatment.[37]

National treatment necessitates that foreigners and nationals are treated equally, and MFN treatment contemplates that foreign nationals of different states are treated equally.[38]

---

35. NAFTA, *supra* note 1, art. 1102, 32 I.L.M. at 639 (emphasis added); *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 279, at 75.

36. NAFTA, *supra* note 1, art. 1103, 32 I.L.M. at 639 (emphasis added); *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 279, at 75.

37. NAFTA, *supra* note 1, art. 1104, 32 I.L.M. at 639 (emphasis added).

38. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 247, at 64.

Thus, applied to the present issue, national treatment requires equal treatment of Mexican and American service providers, and MFN treatment obliges equivalent treatment of Mexican and Canadian operators.

3. Chapter 12: Cross-Border Trade in Services

Article 1202 provides the national treatment requirement for cross-border services:

> 1. Each Party shall accord to service providers of another Party *treatment no less favorable* than that it accords, in like circumstances, to its *own service providers*.
> 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, *treatment no less favorable* than the most favorable treatment accorded, in like circumstances, by that state or province to *service providers of the Party of which it forms a part*.[39]

Article 1203 imposes MFN treatment: "[e]ach Party shall accord to service providers of another Party *treatment no less favorable* than that it accords, in like circumstances, to *service providers of any other Party or of a non-Party*."[40]

4. Chapter 21: Exceptions

Chapter 21 proclaims the general exceptions of the Agreement.[41] Raised defensively by the United States, Article 2101(2) states:

> Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on

---

39. NAFTA, *supra* note 1, art. 1202, 32 I.L.M. at 649 (emphasis added); *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 246, at 64. The Panel extracted and stressed the "in like circumstances" section of Article 1202. *See id*.

40. NAFTA, *supra* note 1, art. 1203, 32 I.L.M. at 649 (emphasis added); *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 246, at 64. The Panel again stressed the "in like circumstances" portion of Article 1203. *See id.*

41. NAFTA, *supra* note 1, 32 I.L.M. at 699.

> [international] trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.[42]

5. Chapter 20: Institutional Arrangements and Dispute Settlement Procedures.

NAFTA includes four dispute resolution mechanisms,[43] which are a "relatively complex set of distinct dispute resolution structures."[44] Relevant to the trucking dispute, Chapter 20 involves disputes brought by NAFTA-party governments in disagreement over the interpretation or alleged breaches of NAFTA.[45] Private parties have no standing to bring Chapter 20

---

42. *Id*. art. 2101(2), 32 I.L.M. at 699; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 261, at 69–70. The Panel extracted and condensed this particular portion of Article 1202. *See id.*

43. The four mechanisms are Chapter 20; Chapter 19, providing settlement procedures for antidumping and countervailing duty disagreements; and two side agreements, addressing labor and environmental disputes. *See* NAFTA, *supra* note 1, 32 I.L.M. at 682 (ch. 19), 693 (ch. 20); North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499, 1500; North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480, 1481.

44. David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 164–65 (1997) (developing lessons learned from early experiences of the NAFTA dispute resolution mechanism and contending that, in respect to Chapter 20 disputes, flexibility is fundamental to NAFTA's success).

45. *See* NAFTA, *supra* note 1, arts. 2003–04, 32 I.L.M. at 694. See the following sources for detailed analyses of NAFTA's dispute settlement mechanisms: David A. Gantz, *Dispute Resolution Under the North American Free Trade Agreement* (Nov. 1999) (unpublished manuscript, on file with author) (discussing the four dispute settlement mechanisms provided for in NAFTA and arguing that, specific to Chapter 20, the mechanism is primarily for consultations and conciliation because of "no or only very limited alternative means for redress"); William D. Merritt, Comment, *A Practical Guide to Dispute Resolution Under the North American Free Trade Agreement*, 5 NAFTA: L. & BUS. REV. AM. 169, 181-89 (1999) (covering, in detail, the procedures and limited precedent of the NAFTA dispute resolution mechanism); Patrick Specht, *The Dispute Settlement Systems of WTO and NAFTA—Analysis and Comparison*, 27 GA. J. INT'L & COMP. L. 57 (1998) (examining the GATT and NAFTA dispute resolution structures and arguing that Chapter 20 resolution falls short of being called an effective dispute

claims.[46] The scope of disputes reached by Chapter 20 is defined in Article 2004:

> [T]his Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement.[47]

The basic framework of Chapter 20 is based on the mechanism in the U.S.-Canada Free Trade Agreement, the predecessor of NAFTA.[48] The NAFTA dispute settlement structure focuses on party-initiated and party-implemented resolutions.[49] This intention is a result of the NAFTA aim to safeguard the sovereignty of each party.[50] The limited dispute resolution "is an arbitral procedure that refers determinations to Party governments for political resolution" rather than producing binding decisions.[51] A complaining party may opt for the more rule-oriented dispute resolution through the World Trade Organization (WTO).[52] If the dispute arises under the WTO or NAFTA, the complaining party may select either

---

resolution mechanism); and Lopez, *supra* note 44 at 164-65.

46. *See* Gantz, *supra* note 45, at 9. But private industries, small and large, may indirectly initiate and influence Chapter 20 disputes. *Id.* Although private parties have no direct standing, Chapter 20 does "encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." NAFTA, *supra* note 1, art. 2022, 32 I.L.M. at 698. However, parties may not utilize domestic law against another party to argue that a measure of the other party is inconsistent with NAFTA. *Id*. art. 2021, 32 I.L.M. at 698.

47. NAFTA, *supra* note 1, art. 2004, 32 I.L.M. at 694.

48. *See* Gantz, *supra* note 45, at 9.

49. *See* NAFTA, *supra* note 1, art. 2003, 32 I.L.M. at 694. According to Article 2003: Cooperation, "The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation." *Id*.

50. *See* Abbott, *supra* note 13, at 172.

51. *Id*.

52. *See* Specht, *supra* note 45, at 126; NAFTA, *supra* note 1, art. 2005, 32 I.L.M. at 694.

forum.[53]

Basically, the procedure begins with consultations between parties, conciliation of the Free Trade Commission, assembly of an arbitral panel, and implementation of the panel report.[54] At the initial stage of the dispute, a complaining party may request consultations with another party; in the consultations, the parties must "make every attempt to arrive at a mutually satisfactory resolution."[55] If consultations fail, any party may request a meeting of the Free Trade Commission, a body established under NAFTA empowered with supervisory, managerial, and conciliatory functions.[56] If the Commission fails to provide a resolution, any consulting party may call for the formation of an arbitral panel, and upon such a request "the Commission shall establish an arbitral panel."[57] Once the panel is convened, Article 2016 directs the panel to "base its report on

---

53. *See* NAFTA, *supra* note 1, art. 2005, 32 I.L.M. at 694. Once a forum is selected, it is used to the exclusion of the other. *Id*. The weight of forum selection is a developing issue outside the scope of this paper. *But see* Abbott, *supra* note 13, at 177–84, for a discussion of juridical interface of the WTO and NAFTA and the initial NAFTA cases defining the legal relationship of the agreements.

54. *See* NAFTA, *supra* note 1, arts. 2006–08, 2017–19, 32 I.L.M. at 694–95, 697–98.

55. *Id*. art. 2006(5), 32 I.L.M. at 694. To reach an agreement, the parties are obligated to:

> (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation of this Agreement; (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and (c) seek to avoid any resolution that adversely affects the interests under this Agreement of any other Party.

Id.

56. *Id*. arts. 2001, 2007, 32 I.L.M. at 693, 695. Comprised of cabinet-level representatives of the parties, the Commission may employ "technical advisors . . . or expert groups as it deems necessary, . . . have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or . . . make recommendations, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute." *Id*. arts. 2001(1), 2007(5), 32 I.L.M. at 693, 695.

57. *Id*. art. 2008(1)–(2), 32 I.L.M. at 695. The mandatory language in the Articles affords NAFTA parties a right to panel formation. *See id*. Articles 2009–11 establish the provisions for panel formation. *Id*. arts. 2009–11, 32 I.L.M. at 695–96. The panel formation is "a unique 'reverse selection process' [in which] one Party chooses the two national arbitrators of the *other* Party." Gantz, *supra* note 45, at 10.

the submissions and arguments of the Parties and on any information before it pursuant to Article 2014 or [Article] 2015."[58] The parties' submissions, the panel's initial report, the identity of panelists associated with majority or minority opinions, and other documents related to the proceedings remain confidential—only the panel's final report and any separate opinions are made public.[59]

Only two Articles address the implementation phase.[60] After the parties receive the panel's final report, NAFTA states that "the disputing Parties shall agree on the resolution of the dispute, which *normally shall conform* with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute."[61] Despite the mandatory language, a final decision by a panel is not binding.[62]

The second Article deals with non-implementation and possible suspension of benefits.[63] Article 2019 provides:

> If in its final report a panel has determined that a measure is inconsistent with the obligations of [NAFTA] . . . and the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution . . . within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the

58. NAFTA, *supra* note 1, art. 2016(1), 32 I.L.M. at 697. Article 2014 addresses expert participation. *Id*. art. 2014, 32 I.L.M. at 696. Article 2015 addresses the report of scientific review boards. *Id*. art 2015, 32 I.L.M. at 696–97.

59. *See id*. arts. 2016–17, 32 I.L.M. at 697. The initial report of the panel must contain "(a) findings of fact . . . (b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of [NAFTA] . . . and (c) its recommendations, if any, for resolution of the dispute." *Id*. art. 2016(2), 32 I.L.M. at 697.

60. *See id*. arts. 2017–18, 32 I.L.M. at 697.

61. *Id*. art. 2018(1), 32 I.L.M. at 697 (emphasis added). NAFTA states that "[w]herever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation." *Id*. art. 2018(2), 32 I.L.M. at 697.

62. Gantz, *supra* note 45, at 9–10.

63. *See* NAFTA, *supra* note 1, art. 2019, 32 I.L.M. at 697–98.

dispute.[64]

NAFTA does not require retaliatory actions; the discretionary language allows parties to delay, possibly indefinitely, any retaliatory procedure.[65]

III. CROSS-BORDER TRUCKING DISPUTE

On the surface, the Mexican trucking dispute requires harmonizing U.S. highway safety concerns with NAFTA obligations.[66] However, conflicts between the business sector, calling for freer trade, and a variety of domestic groups, worrying that American jobs will head south, stalled the harmonization.[67] The debate is reminiscent of the original squabbles surrounding the implementation of NAFTA in 1993.[68] For example, some commentators argue that the congressional concern for highway safety is simply a façade for the real issue of potential loss of American jobs.[69] Regardless of motivations, the trucking dispute is a complex problem that requires balancing a variety of almost irreconcilable interests. The

---

64. *Id*. art. 2019(1), 32 I.L.M. at 697. The suspension of benefits should first be imposed on the same sector or sectors, but if such suspensions prove insufficient, the suspension of benefits may be imposed on other sectors. *Id*. art. 2019(2), 32 I.L.M. at 697. The Article provides procedures to determine if the level of benefits suspended is manifestly excessive. *Id*. art. 2019(3)–(4), 32 I.L.M. at 697–98.

65. *See id*. art. 2019(1), 32 I.L.M. at 697.

66. *See* James C. Benton, *Debate Over Mexican Trucks Hinges on Labor Issues as Well as Safety: Echoing Original NAFTA Disputes, U.S. Businesses Seek Lower Transportation Costs While Teamsters Fight to Preserve Jobs*, CQ WKLY., Aug. 4, 2001, at 1924.

67. *See id*. One expert claims that opening the border will create "disastrous consequences, including lowering truckers' wages and eventually putting more Mexican drivers behind the wheels of U.S. long-haul trucks." Mary Boyle, *Influx of Mexican Truckers May Boost State Traffic*, GAZETTE (Colorado), Dec. 17, 2001, at A1, *available at* 2001 WL 31781095. Opponents argue that complying with the NAFTA obligation is necessary to promote free trade. *See id*.

68. Benton, *supra* note 66, at 1924.

69. *See* Matthew Gower, *The Border Trucking Dispute Is a Hodgepodge of Conflicting Interests*, BUS. MEX., Oct. 1, 2001, *available at* 2001 WL 7671099. Wages, rather than safety, may be driving the Teamsters' adamant campaign against opening the border, as U.S. drivers earn $14 per hour and Mexican drivers $5 per hour. *Id*. In addition, other transportation-sector jobs involving freight transferals at the border may be lost if the border opens. *Id*.

competing interests, however, must be resolved if the United States and Mexico want NAFTA to remain a legitimate and powerful free-trade agreement.

A. Origins of the Dispute

Prior to 1980, the Interstate Commerce Commission (ICC) granted authority to operate within the United States according to proposed route and economic justification for the service.[70] At that time, foreign and domestic applicants were treated equally.[71] In 1982, the scheme changed; the Bus Regulatory Reform Act established a moratorium on issuance of operating authority to foreign carriers.[72] Initially, the moratorium was set up to last for two years, but with respect to Mexican carriers,[73] it was extended six times until it was lifted by President Bush in late 2002.[74]

---

70. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 35, at 9.

71. *See id*. para. 38, at 9.

72. *Id*.; *see also* Weisweaver, *supra* note 12, at 472–74 (discussing the history of the moratorium). The purpose of the Act was to encourage Mexico and Canada to end restrictions on U.S. access to the foreign markets. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 43, at 10. If and when a foreign country lifted restrictions, allowing reciprocal entry, the President retained the authority to modify or eliminate the U.S. moratorium. *Id*.

73. In comparison, the moratorium was lifted against Canada after an agreed continuation of U.S. trucking access to the Canadian market. *Id*. paras. 38–40, at 9–10.

74. *Id*. paras. 41, 77, at 10, 16. Although U.S. legislation aimed to end the moratorium when extensive and stringent procedures and safeguards passed, President Bush lifted the moratorium in late 2002. *See* Brooks, *supra* note 4; discussion *infra* Part V. Despite the moratorium, there were some Mexican trucking operations in the United States; the moratorium provided various exemptions and exceptions. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 44, at 10. First, commercial zones were unaffected; generally these zones encompassed a radius of two to twenty miles from the nearest border town. *Id*. paras. 45, 47, at 10–11. In 1999, 8,400 Mexican trucks operated within the commercial zones. *Id*. para. 55, at 12. The operators had to comply with U.S. safety regulations; thus, operators were required to carry trip insurance, provide proof of insurance of the vehicle, and have a U.S.-registered agent. *Id*. para. 52, at 11. Second, Mexican operators could transport goods through the United States into Canada; one such Mexican firm transported through the United States. *Id*. paras. 56–58, at 12. Third, five Mexican carriers were 'grandfathered' through an exemption in the moratorium. *Id*. para. 59, at 12. Fourth, U.S.-owned, Mexican-domiciled trucks could operate cross-border; approximately 160 firms operated cross-border under this exception. *Id*. paras. 60–61, at 13. Lastly, Mexican and U.S. tour operations could provide cross-border services, and Mexican trailers were transported throughout the

In 1995, the domestic operating regulatory control was transferred from the ICC to the Department of Transportation (DOT) under the ICC Termination Act.[75] Both the Mexican and U.S. governments prepared for the 1995 lifting of Annex I reservations.[76] In 1994, Mexico and the United States participated in the North American Transportation Summit, which resulted in bilateral agreement concerning cooperation between transportation officials.[77] Under Chapter 9: Standards-Related Measures of NAFTA,[78] a Land Transportation Standards Subcommittee was formed to establish standards and procedures and respective deadlines thereto—including operator safety and vehicle requirements and standards.[79] The goal of the Land Transportation Standards Subcommittee was to synchronize the standards of the U.S. and Mexican regulatory regimes by January 1997.[80]

In addition to binational initiatives, domestic initiatives included

> adoption of a truck safety compliance and enforcement strategy, creation of a federal-state team to oversee final preparations for the Dec[ember] 17 market opening and initiation of a comprehensive education program for the trucking community on motor carrier requirements in Mexico, Canada and the United

---

United States on domestic tractors. *Id*. paras. 63–64, at 13; *see also supra* note 21 (explaining the "drayage" system of freight exchange).

75. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 42, at 10. "The legislation preserved the moratorium and the President's authority to modify or remove [the moratorium]." *Id*.

76. *Id*. para. 69, at 14.

77. *See* Peter J. Cazamias, Comment, *The U.S.-Mexican Trucking Dispute: A Product of a Politicized Trade Agreement*, 33 TEX. INT'L L.J. 349, 352 (1998). The summit produced other agreements including, for example, standardization of safety operations and an electronic communication system and advanced technology for border inspections. *Id*. In addition, Interstate 69, the proposed route for efficient travel through the three NAFTA countries, has been labeled the "NAFTA highway." Ann Saccomano, *Triple Play: Nashville, Memphis and Charlotte*, WORLD TRADE, Jan. 1, 2002, *available at* 2002 WL 5680076.

78. *See* NAFTA, *supra* note 1, 32 I.L.M. at 386.

79. *See id*. Annex 913.5.a-1, 32 I.L.M. at 392; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 70, at 14.

80. Cazamias, *supra* note 77, at 352.

States.[81]

In October 1995, the ICC created regulations that would require all U.S., Canadian, and Mexican cross-border service providers to assure compliance with the U.S. Federal Motor Carrier Safety Regulations; procedures for authorizing Mexican trucks would be predominantly identical to those in place for U.S. and Canadian operators.[82] Binational cooperation and the establishment of institutions implied timely compliance with the NAFTA phase-out obligations. As late as December 4, 1995, the lifting of Annex I reservations was on schedule.[83]

Despite the indications, on December 15, 1995, Transportation Secretary Federico Peña announced that the United States was unprepared to finalize any Mexican applications for authorization to operate because of unacceptable improvement in safety of Mexican carriers.[84] The implication of the decision confined Mexican trucks to the commercial zones

---

81. Press Release, U.S. Department of Transportation, Peña Announces Key Measures for Smooth, Safe and Efficient NAFTA Transition (Sept. 5, 1995) (on file with author). In late 1995, Secretary Peña stated: "[T]he United States is determined that NAFTA is enacted properly and works right for each of our countries. The steps being announced today will help us ensure that this transition continues smoothly, safely and efficiently." *Id*.; *see also Cross-Border Trucking Services Final Report*, *supra* note 7, para. 74, at 15.

82. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 75–76, at 15–16. An implementation plan printed in the *Federal Register* on December 13, 1995 was to be adopted and deemed effective on December 18, 1995. *Id*. para. 75, at 15–16.

83. *Id*. para. 77, at 16. A joint U.S.-Mexico press conference assured preparation and compliance with the December 18, 1995 deadline. *Id*. (citing Mexico's Initial Submission); *see also* Press Release, U.S. Department of Transportation, NAFTA Border Opening Remarks, (Dec. 18, 1995) (on file with author). The prepared statements acknowledged the safety concerns, but noted optimism and enthusiasm for the (supposed) imminent border opening. *See id.,* at 2. "I know we've had safety problems in the past. I've seen trucks with inadequate brakes and worn tires that shouldn't be anywhere near a highway. What NAFTA has done—in a very positive way—is draw attention to these problems and allow us to fix them, which would not have happened if there was no NAFTA." *Id*.

84. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 77, at 16. The United States would accept and process the applications, but no authorization would be granted. *Id.* At the time of the formal dispute proceedings, there were more than 160 applications pending. Greenhouse, *supra* note 20, at A12.

and "essentially continued the moratorium."[85] In addition to denying finalization of Mexican applications, "the [DOT] maintains a complete ban on Mexican nationals owning or controlling U.S. cargo and passenger motor carrier service providers . . . [and t]hese restrictions essentially ban any Mexican investment in U.S. carriers, because the applications would not be approved if they indicated Mexican ownership."[86]

In the United States, various religious, labor, and environmental groups voiced their support for further delay.[87] The staunchest advocates for the delay included the International Brotherhood of Teamsters (Teamsters).[88]

85. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 77, at 16. Secretary Peña cited two specific incidents in which hazardous material was spilled from Mexican trucks within the United States; in one of the accidents "the driver of the Mexican truck was 16 years old, carried no insurance or shipping papers and the truck involved had faulty brakes and a number of bald tires." *Id*. para. 78, at 16. Mexico claimed the accidents were irrelevant to the dispute concerning the opening of the border. *Id*.

86. *Id*. para. 84, at 17–18. This ban applies to both new and existing motor carriers. *Id*. The application process requires identification of Mexican ownership, thus informing the regulatory authorities to the foreign domicile of equipment or investor. *Id*.

87. *Id*. para. 80, at 17; *see also* Letter from International Brotherhood of Teamsters, AFL-CIO, to President Clinton (Dec. 12, 1995) (on file with author). The letter pleaded for delay of opening the border, stating that "the safety of Americans . . . is about to be seriously compromised." *Id*. The signatories included leaders of the Teamsters, Friends of the Earth, United Methodist Board of Church & Society, UNITE, Food & Allied Services Trades, Texas AFL-CIO, Citizens For Reliable & Safe Highways, Women for Economic Justice, and National Consumers League. *Id*.

88. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 81, at 17. The Citizens for Reliable and Safe Highways (CRASH) also led a strong campaign to delay the opening of the border. *See, e.g.*, Submission to the Docket of the U.S. Department of Transportation Federal Motor Carrier Safety Administration on Proposed Rules to Ensure Safety of Mexican Trucks and Buses, submitted by the CRASH Foundation, May 18, 2001, *available at* http://www.teamster.org/update-35.html (arguing that the proposal will not ensure safety on U.S. highways; including links to further CRASH literature condemning the NAFTA phase-out provisions); Testimony of Ron Carey, General President, International Brotherhood of Teamsters, AFL-CIO, House International Relations Subcommittee on International Economic Policy and Trade, Mar. 5, 1997, *available at* http://www.teamster.org/update-35.html ("Implementation of the trucking provisions would worsen NAFTA's economic harm to working families on both sides of the border. . . . [The provision] would undermine highway safety in the U.S. and increase drug trafficking."). Propaganda from the Teamsters claimed that "Big Corporations Are Threatening Our Jobs, Our Safety, Our Families With $7-a-Day Trucks from Mexico." International Brotherhood of Teamsters,

Supporting Mexico's argument that the U.S. delay was politically motivated, was the fact that the Teamsters issued a press release, revealing the delay, hours before Secretary Peña publicly announced it in a press conference.[89]

B. Progression to Formal Dispute Proceedings

Shortly after U.S. refusal to allow Mexican trucks into the border states, Mexico requested consultations in December 1995.[90] After the consultations failed to resolve the issue, Mexico requested a meeting with the NAFTA Free Trade Commission in July 1998; the Commission was unable to settle the dispute.[91]

Mexico called for the formation of an arbitral panel.[92] The Trucking Dispute Panel convened and a hearing was held on May 17, 2000.[93] The Panel was comprised of two Mexicans, two

---

Flyer (Dec. 17, 1998) (on file with author).

89. *See* Cazamias, *supra* note 77, at 353 (noting also that Secretary Peña and the DOT director made "contradictory remarks" concerning the opening of the border; this, in conjunction with the "untimeliness" of the Teamster release, suggested "a more political nature to the U.S. decision").

90. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 15, at 6. The request was pursuant to NAFTA Article 2006, which provides that "[a]ny Party may request . . . 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." NAFTA, *supra* note 1, art. 2006, 32 IL.M. at 694.

91. *Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 18–20, at 6.

92. *Id*. para. 21, at 6. The Panel members were J. Martin Hunter, Luis Miguel Diaz, David A. Gantz, C. Michael Hathaway, and Alejandro Ogarrio. *Id*. para. 23, at 7.

93. *Id*. paras. 23, 29, at 7. The United States also initiated dispute resolution procedures for Mexico's alleged reciprocal denial of cross-border authorization to U.S. carriers. *Id*. para. 22, at 6–7. No agreement was reached on the issue of whether both issues should be presented to the Panel. *Id*. In addition, Mexico raised the issue of U.S. refusal of operating authorization for cross-border bus services. *Id*. para. 24, at 7. Without a formal request for panel formation, the Cross-Border Trucking Panel did not reach either matter. *Id*. On May 16, 2000, the United States requested a formal report from a scientific review board to address the factual truck safety issues involved in the Panel proceeding. *Id*. para. 200, at 45. Providing a detailed record of factual issues in its scientific review board request, the United States argued that the legitimacy of NAFTA's dispute settlement mechanism would increase with a scientific report on the issue. *See id*. paras. 201–07, at 45–47. Mexico disputed the need for a scientific review board, maintaining that the factual issues were not in dispute. *See id*. paras. 208–11, at 48. Declining to establish a board and instead assuming the accuracy of the U.S. factual analysis, "the Panel . . . concluded that the relatively minor differences in the relevant

Americans, and a British chairperson.[94]

IV. ARBITRAL PANEL'S FINAL REPORT

A. Party Positions

The Parties involved agreed that the Mexican and U.S. domestic regulatory schemes are different; they disagreed as to whether the differences justified the absolute U.S. refusal to grant authority to Mexican service providers.[95] Additionally, the Parties "agree[d] that U.S. and Mexican transportation officials [had] been working together to enhance the Mexican safety regime and to develop cooperative exchanges."[96] Conceding that the regulatory systems are not comparable, Mexico argued that Mexican trucking firms and investors are entitled to the same individual consideration and should be given the opportunity to contest refusals as afforded to the U.S. and Canadian service providers under Articles 1202 and 1203.[97] Aligning with Mexico,

---

facts as viewed by the two Parties were not material." *Id*. paras. 212–13, at 49.

94. *See* Greenhouse, *supra* note 20, at A12.

95. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 88, at 18. A GAO report on the issue provided that "there were significant differences between United States and Mexican truck safety regulations . . . [and the] Mexican truck inspection and enforcement program . . . was lacking the facilities and personnel to initiate it." *Id*. para. 79, at 16–17. The procedure for U.S. service providers begins with obtaining authorization through the DOT's self-certification system. *Id*. para. 90, at 18. If authorization is granted, regulations are enforced through roadside inspections and at the provider's place of business. *Id*. The Federal Motor Carrier Safety Regulations control trucker requirements—such as drug and alcohol testing and equipment requirements. *Id*. para. 91, at 18–19. A "high degree of assurance" for safety is established by "a comprehensive system of rigorous vehicle and operator safety standards; imposing strict record keeping rules, and backing up those standards and rules with road side inspections, on-site audits and inspections and effective penalties; and a continuing commitment of enforcement resources and personnel." *Id*. para. 93, at 19. Comparatively, the Mexican system lacks such assurance. *See id*. para. 95, at 19. There are no regulations covering trucker requirements or equipment safety, outside of service providers carrying hazardous waste. *See id.* paras. 95–96, at 19.

96. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 97, at 19; *see also* Cazamias, *supra* note 77, at 353 (discussing Mexico's role in upgrading its motor carrier regulatory system, including joining the Commercial Vehicle Safety Alliance, a U.S.-Canada organization which organizes conformance of roadside inspections and upgraded standards for commercial driver licenses).

97. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 3, at 1.

Canada agreed that a blanket refusal by the United States treated Mexican applicants less favorably; the proper standard articulated by Canada "[was] a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically."[98] The United States contended that because of differing regulatory systems, the United States could treat nations and foreign applicants differently for a "legitimate regulatory objective," such as an assurance of adequate procedures to ensure U.S. highway safety.[99]

1. Mexico

Noting that the essence of the phase-out provision is liberalization without contemplation of exceptions,[100] Mexico argued that Annex I, Article 2102, and other sources require the conclusion that:

> the "ordinary meaning" of NAFTA . . . was that Mexican-owned carriers would be accorded national and most-favored-nation treatment in their ability to obtain operating authority to provide cross-border truck services in the border states as of [December 18, 1995] and throughout the United States as of [January 1, 2000]. This meant that Mexican-owned carriers would be allowed to apply pursuant to the same or equivalent procedures, and be evaluated based on the same criteria, as those applied to U.S. and Canadian carriers, absent a reasonable modification adopted in accordance with an applicable NAFTA exception.[101]

Mexico maintained that the U.S. blanket refusal without proper justification was sufficient to show that the U.S. actions were inconsistent with NAFTA provisions.[102] Arguing that interpretation of NAFTA provisions must reflect the objectives of the treaty and applicable rules of international law,[103] Mexico

98. *Id*. para. 11, at 3.

99. *Id*. paras. 7–8, at 2–3.

100. *Id*. para. 141, at 29–30.

101. *Id*. para. 145, at 30–31 (quoting Mexico's Post-Hearing Submission at 36).

102. *Id*. para. 103, at 21.

103. *Id*. para. 105, at 21–22.

contended that no conditions were provided in NAFTA that required Mexico to adopt an identical regulatory safety system.[104] The proper interpretation provided that the phase out would require Mexican trucks to comply with U.S. standards.[105] Mexico explained that the U.S. non-compliance was an impermissible refusal of individual consideration for Mexican operators and a denial of their opportunity to contest decisions.[106] By arbitrarily refusing to examine all Mexican applications, the United States inappropriately defined a select, few Mexican applicants by the entire class of Mexican service providers functioning under the Mexican safety system.[107] Because U.S. operators are granted these opportunities under U.S. law and Mexican operators are denied them, Mexico asserted a direct violation of NAFTA's national treatment obligation.[108]

Mexico also argued violation of MFN treatment because the United States does not impose the same rigid safety requirements, regulations, and restrictions on Canadian service providers.[109] Disagreeing on the scope and definition of "in-like circumstances"[110] in Articles 1202 and 1203, Mexico interpreted the term as satisfied when "Mexican carriers are seeking to provide long-haul truck service—the exact same type of service provided by U.S. and Canadian carriers."[111] By affording

104. *Id*. para. 112, at 23.

105. *See id*. paras. 109–13, at 22–23. In Mexico's Initial Submission, it stated that "there was a clear expectation that a Mexican motor carrier applying for operating authority in the United States would have to demonstrate that it could comply with all requirements imposed on U.S. motor carriers [while transiting the United States]." *Id*. para. 112, at 23 (quoting Mexico's Initial Submission at 74–75). Mexico also dismissed the U.S. argument of failure to prepare as an insufficient explanation for non-compliance with the phase-out provisions. *Id*. para. 108, at 22.

106. *Id*. para. 117, at 24.

107. *See id*. para. 125, at 25–26.

108. *Id*. para. 117, at 24.

109. *Id*. para. 119, at 24. Mexico's Initial Submission included an additional argument concerning Chapter 9 in anticipation of U.S. reliance, but the United States did not assert such a defense. *See id*. paras. 126–30, at 26–27.

110. *See id*. paras. 121–24, at 25.

111. *Id*. para. 121, at 25. "Mexico supports this interpretation by noting that if the simple fact that a service provider is from a particular country was sufficient to constitute 'unlike circumstances' with domestic companies, NAFTA national treatment

different treatment to Mexican and Canadian applicants seeking to provide cross-border services, Mexico alleged a direct violation of MFN treatment obligation.[112]

Mexico next addressed Article 2101 and alleged that the exception did not justify the U.S. position.[113] Citing analogous General Agreement on Tariffs and Trade (GATT) and WTO jurisprudence,[114] Mexico provided that the Appellate Body of the WTO identifies arbitrary discrimination as a rigid and inflexible U.S. measure requiring adoption of a foreign regulatory program.[115] Additional WTO jurisprudence requires that

> the U.S. moratorium must *secure compliance* with another law or regulation that is NAFTA-consistent; the moratorium must be *necessary* to secure compliance; and the moratorium must not be applied in a manner that would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or *a disguised restriction on trade*.[116]

Mexico argued that explanation for the blanket refusal under Article 2101(2) was inappropriate because "the U.S. government [was] not acting to secure compliance with any law or regulation . . . [and] the U.S. measure [was] an arbitrary and unjustifiable discrimination against persons from Mexico and a disguised restriction on trade."[117] Thus, Article 2101 was not an acceptable exception for obligations of national treatment and

---

obligation would have no meaning." *Id*. para. 124, at 25 (citing Mexico's Reply Submission at 14–15).

112. *Id*. para. 119, at 24.

113. *See id*. paras. 131–34, at 27–28.

114. Mexico cited three specific rulings: *Canada—Certain Measures Concerning Periodicals*, *U.S.—Standards for Reformulated and Conventional Gasoline*, and *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products*. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 136–39, 143, 145 & nn.118–20, at 28–31. Mexico argued that Article 2101(2) is analogous to GATT Article XX(d). *See id*. para. 133, at 27–28.

115. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 138, at 29.

116. *Id*. para. 139, at 29 (citing Mexico's Post-Hearing Submission at 22–23).

117. *See id*. paras. 131–34, at 27–28. In addition, NAFTA does not include provisions for further negotiations of the phase-out obligations. *Id*. para. 135, at 28.

MFN.

Similar to the refusal to finalize applications for operating authorization of Mexican-owned carriers within the U.S., the United States denied access for Mexican investment in U.S. trucking enterprises.[118] Mexico asserted that the denial of investment possibilities was a clear violation of Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation Treatment).[119] According to Mexico, investment could not validly be denied under the auspices of safety concerns, and "[t]he United States declined to provide an explanation for this position."[120]

2. United States

The United States primarily rested on the argument that the delay was "both prudent and consistent with U.S. obligations under the NAFTA" because of Mexico's inadequate safety regulatory system.[121] The United States found no

118. *See id*. para. 146, at 31.

119. *See id*. para. 147, at 31.

120. *See id*. paras. 146–47, at 31.

121. *Id*. para. 153, at 33. See paragraphs 153–94 of the *Cross-Border Trucking Services Final Report* for the complete U.S. position. "Thus, the United States is not obligated to grant Mexican trucking firms operating authority when there are not yet adequate regulatory measures in place in Mexico to ensure U.S. highway safety." *Id*. para. 154, at 33. For example, because of Mexico's lacking regulatory system, the United States argued that there was insufficient documentation of Mexican operators' service history and justified the delay of opening the border because of the futility in monitoring Mexican operators in United States without any service history. *Id*. paras. 156–57, at 33–34 (noting other shortcomings of the Mexican system); *see also Subcomm. on Highways and Transit Hearing*, *supra* note 2, at 5–6 (providing details of the DOT Inspector General's report on Mexican trucks safety). Findings by the DOT identify the Mexican system's shortcomings:

1. the FMCSA does not have an implementation plan to assure safe opening of the border;
2. border States have neither permanent truck inspection facilities nor inspectors during all commercial vehicle operating hours at 25 of the 27 southern border crossings accounting for 79 percent of the truck traffic from Mexico;
3. existing inspections areas lack sufficient and safe space to perform inspections and park out-of-service vehicles;
4. there are only 50 Federal safety inspectors at the U.S.-Mexico border, less than 36 percent of the minimum number needed;

obligation

> to license the operation of Mexican trucking firms in circumstances in which: (1) serious concerns persist regarding their overall safety record; (2) Mexico is still developing first-line regulatory and enforcement measures needed to address trucking safety standards; and (3) essential bilateral cooperative arrangements are not fully in place.[122]

Responding to the obligations of national and MFN treatment, the United States defined "like circumstances" as not necessitating that "a particular measure must in every case accord exactly the same treatment to U.S. and Canadian Service providers . . . [and t]hus . . . 'the United States may make and apply legitimate regulatory distinctions for purposes of ensuring the safety of U.S. roadways'."[123] The United States stressed the importance of the "regulatory environment" in the United States and Canada compared to that in Mexico.[124] Because of the

---

5. Federal safety inspectors at 20 of the 27 southern border crossings do not have dedicated telephone lines to access databases, such as those databases validating a commercial drivers license; and
6. inspectors in Arizona, New Mexico, and Texas do not routinely review certificates of registration; and State laws (except for California) do not provide for enforcement against motor carriers that operate without a certificate of registration or operate beyond the authority granted.

Id. at 6.

122. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 161, at 35 (quoting U.S. Counter-Submission at 35).

123. *Id*. paras. 166, 168, at 36–37 (quoting the U.S. Counter-Submission at 42). The United States referenced other treaties, including the United States-Canadian Free Trade Agreement and NAFTA negotiating histories. *Id.* paras. 166–67, at 36. The United States employed an analogous illustration of justified differential treatment: "[*A*] *state may impose special requirements on Canadian and Mexican service providers if necessary to protect consumers to the same degree as they are protected in respect of local firms" Id*. para. 168, at 37 (quoting the U.S. Counter-Submission at 40–41).

124. *See id*. paras. 169–73, at 37–38. Specifically, the United States listed as considerations the "strictly limit[ed] drivers' hours of service" and the requirement of logbooks for U.S. operators, when there is no directly applicable regulation which limits the hours that a Mexican operator may drive; no access for U.S. safety regulators to Mexican driving record data; and higher incidence of failed safety checks for Mexican equipment. *Id*. paras. 168–72, at 37–38 (quoting the U.S. Counter-Submission at 43). "The out-of-service rate for Mexican carriers is over 50 percent higher than the rate for

differences between the regulatory systems, "the 'circumstances' relevant to the treatment of Mexican-based trucking firms for safety purposes are not 'like' those applicable to the treatment of Canadian and U.S. carriers."[125]

Regarding national treatment and MFN treatment for services, the United States formulated the question as

> whether the U.S. actions are consistent . . . in light of the different circumstances applicable to U.S. and Canadian trucking firms, on the one hand, and Mexican trucking firms on the other . . . it is acting reasonably and appropriately by delaying the processing of Mexican firms' applications for operating authority while U.S. and Mexican transportation officials work cooperatively to establish adequate safety enforcement tools to ensure that the grant of additional operating authority to Mexican firms does not undermine highway safety.[126]

The United States justified the delay as consistent with NAFTA, citing Article 2101 (General Exceptions) and the Preamble because these sections allow exceptional actions based on legitimate public welfare concerns, including, for example, safety restrictions.[127]

3. Canada

Opting to participate,[128] but avoiding specific fact

U.S. carriers." *Id*. para. 172, at 38 (quoting the U.S. Counter-Submission at 45–46). In comparison, the Canadian system is defined as highly compatible to the U.S. system and assures "a high level of confidence that [Canadian] trucks comply with U.S. standards and requirements at least to the same degree as U.S.-based trucks." *Id*. para. 173, at 38 (quoting the U.S. Counter-Submission at 47–48).

125. *Id*. para. 174, at 38–39 (quoting the U.S. Counter-Submission at 49).

126. *Id*. para. 181, at 40–41 (second alteration in original) (quoting the U.S. Second Submission at 17).

127. *Id*. paras. 186–87, at 42.

128. Canada may participate in Chapter 20 dispute resolution proceedings under Article 2013. *See* NAFTA, *supra* note 1, art. 2013, 32 I.L.M. at 696. Article 2013 provides: "A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties." *Id*.

commentary, Canada sided with Mexico on both issues of investment and cross-border service.[129] Canada framed the MFN issue as "a comparison between a service provider providing services cross-border, and a service provider providing services locally."[130]

Applying such a standard, Canada found that "[a] blanket refusal . . . would, on its face, be less favorable . . . treatment."[131] Responding to U.S. denial of Mexican investment, Canada asserted that

> Unless there is a difference in circumstances between a Mexican investor seeking a license in the United States and a United States investor seeking a similar license, the Mexican investor is entitled to like treatment. [Therefore, m]aintaining a regulation that requires the licensing authority to deny a license to a Mexican investor because the investor is Mexican accords less favorable treatment to a Mexican investor than to a like [United States] investor.[132]

B. Findings, Determinations, and Recommendations

The Panel unanimously held against the United States, finding the blanket refusal for operating authority and investment for Mexican nationals impermissible under NAFTA.[133] The Panel offered three determinations. First, the U.S. failure to review and consider applications for cross-border authority from Mexican nationals "was and remains a breach of the U.S. obligations under Annex I" and Articles 1202 and 1203.[134] Second, the Panel dismissed the U.S. justification for

---

129. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 195–99, at 44–45.

130. *Id*. para. 196, at 44 (quoting Canada's Submission at 3).

131. *Id*.

132. *Id*. para. 197, at 44–45 (quoting Transcript of the Hearing at 133). Canada also responded to Chapter 9 issues, anticipating assertion of such by the United States. *See id*. paras. 198–99, at 45.

133. *See id*. paras. 295–97, at 81.

134. *Id*. para. 295, at 81. The Panel noted that neither the language of Articles 1202 and 1203 nor the exceptions in Chapter 9 and Article 2101 provide a valid explanation for the U.S. failure to abide by the NAFTA obligations. *Id*.

inaction—the inadequacies in the Mexican regulatory system.[135] Lastly, in respect to investment, the Panel determined again that "the United States was and remains in breach of its obligations under Annex I" and Articles 1102 and 1103.[136] The Panel recommended that the United States comply with NAFTA obligations for cross-border trucking services and investment, but also noted that compliance is not a specific number of applications granted nor exact treatment applied to Mexican applicants as that to U.S. or Canadian applicants.[137] The Panel stated,

> [T]o the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the United States may not be 'like' those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable. However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those imposed on U.S. or Canadian carriers, then any such decision must (a) be made in *good faith* with respect to a legitimate safety concern and (b) implement differing requirements that fully *conform with all relevant NAFTA provisions*.[138]

---

135. *Id*. para. 296, at 81.

136. *Id*. para. 297, at 81. Under Findings and Determinations, the Panel stressed the importance of what was not determined by the decision. *See id*. para. 298, at 81. The Panel did not find that:

> the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the Panel imposing a limitation on the application of safety standards properly established and applied pursuant to the applicable obligations of the Parties under NAFTA . . . [and] the Panel expresses neither approval nor disapproval of past determinations by appropriate regulatory authorities relating to the safety of any individual truck operators, drivers or vehicles.

Id. Despite the continued moratorium of Mexican investment in U.S. companies, U.S. investors could buy into Mexican companies, even a controlling interest, but most U.S. trucking companies did not exercise the option. Benton, *supra* note 66, at 1924.

137. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 299–301, at 81–82.

138. *Id*. para. 301, at 82 (emphasis added).

In short, the Panel "hand[ed] Washington its biggest defeat in a Nafta [sic] case."[139]

C. Arbitral Panel's Analysis

The Panel began the analysis of the Mexican trucking dispute by defining the scope of the decision.[140] Denying Mexico's subjective intent argument, the Panel properly did not examine the U.S. motivations,[141] but rather "confine[d] its analysis to the consistency or inconsistency of [the U.S. blanket refusal] . . . with NAFTA."[142]

The Panel continued the examination by setting out rules for interpreting NAFTA and providing a general legal framework within which to resolve the dispute.[143] Identifying trade liberalization as the primary objective of NAFTA, the Panel noted that any exceptions "must perforce be viewed with caution."[144] Citing the Vienna Convention as defining rules of interpretation,[145] the Panel properly consulted the ordinary

---

139. *Year-End Review of Markets & Finance 2001: Review of What Was News: One Year, Two Worlds: What Was News in 2001*, WALL ST. J., Jan. 2, 2002, at R12, *available at* 2002 WL-WSJ 3381826 [hereinafter *Year-End Review*].

140. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 214–15, at 50.

141. *See* Weisweaver, *supra* note 12, at 478–79 (noting that limiting the review is consistent with WTO precedent). Mexico contended that "the U.S. motivation is relevant . . . [and] the U.S. ban . . . is not a safety measure, but rather an 'economic embargo.'" *Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 150–51, at 32 (quoting Mexico's Post-Hearing Submission at 6–7). Citing WTO precedent, the U.S. response provided that the subjective motivations were not relevant and construed the relevant issue as "whether safety concerns warrant the differential treatment provided to Mexican carriers, and not . . . the subjective motivations of U.S. decision-makers in December 1995." *Id*. paras. 191–93, at 43–44 (quoting the U.S. Post-Hearing Submission at 14–17). The United States further appealed to the Panel requesting that the review focus on "fact-specific analysis of the U.S. measure and all of the relevant circumstances" without reaching subjective intentions. *Id*. para. 194, at 44 (quoting the U.S. Post-Hearing Submission at 17).

142. *Id*. para. 214, at 50.

143. *See id*. paras. 216–24, at 50–54.

144. *Id*. para. 219, at 51 (quoting *Dairy Products* Panel).

145. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) (citing Article 31(1) which states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

meaning of language and the context, object, and purpose of the treaty as a whole.[146]

Addressing the interpretation of the phase-out provision, the Panel found that "implementation of the very concrete Phase-Out provisions of the Reservations in this case is not conditioned by any other element"[147] because the plain language is unambiguous and no conditions are noted in the provision.[148] The Panel provided that the Parties completely understood that the then-existing measures were not in conformity with the principal objective of the Agreement and were also inconsistent with specific provisions including, Articles 1102 and 1202 (National Treatment) and Articles 1103 and 1203 (Most-Favored-Nation Treatment).[149] The Panel held that the United States failed to adhere to the explicit Annex I obligations to phase out the motor carrier provision.[150]

The Panel turned to evaluation of the NAFTA sections that potentially superseded the phase-out provisions. It broke down

---

146. *Cross-Border Trucking Services Final Report, supra* note 7, paras. 220–21, at 52; Weisweaver, *supra* note 12, at 479–81. The Panel provided additional procedures if the preceding rules proved insufficient. *See Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 222–23, at 53. The Panel also noted that the use of domestic Mexico or U.S. law is improper, thus "references to their national legislation on land transportation . . . should [not] be utilized for the interpretation of NAFTA." *Id*. para. 224, at 53–54. *But see* Weisweaver, *supra* note 12, at 480–81 (discussing a narrower interpretation of provisions).

147. *Cross-Border Trucking Services Final Report*, *supra* note 7, para. 239, at 61.

148. *See id*. paras. 233–40, at 59–61. At the Oral Hearing, the U.S. representative argued that Annex I did not create an obligation stating: "The phase-out didn't, per se, obligate us to do anything. . . . So a phase-out of national treatment just means that you lose your right as of that day not to follow certain obligations." *Id*. para. 226, at 54–55 (quoting Transcript of the Hearing at 230). The Panel fully disagreed with this position. *See id*. para. 277, at 74.

149. *See id*. paras. 233, 236–37, at 59–61.

> The very title of Annex I conveys the will of the parties: "Reservations for Existing Measures and Liberalization Commitments." . . . The reservations and their liberalization are very well identified. The parties agreed *not only* which reservations were acceptable for them *but also* Phase-Out commitments concerning the reservations. The wording is *lucid and comprehensive*.

Id. para. 236, at 60 (emphasis added).

150. *See id*. paras. 239–40, at 61.

the issues as follows: (1) services[151]—focusing on interpretations of Articles 1202, 1203, and 2101 and (2) investment[152]—concerning possible breaches of Articles 1102, 1103, and 1104.[153]

1. Services.

Addressing services, the Panel narrowed the inquiry to "whether the decision by the United States not to consider applications from Mexican service providers *as a group* is consistent with the applicable NAFTA obligations of the United States."[154] Restated in the "most succinct terms," the issue questioned

> whether the "in like circumstances" language (or some other limitation on or exception to national treatment and most-favored-nation treatment) permits the United States to deny access to all Mexican trucking firms on a blanket basis, regardless of the individual qualifications of particular members of the Mexican industry, unless and until Mexico's own domestic regulatory system

---

151. In response to the issue of services, the Panel questioned "whether the United States was in breach of Articles 1202 (national treatment for cross-border services) and 1203 (most-favored-nation treatment for cross-border services) of NAFTA by failing to lift its moratorium on the processing of applications by Mexican owned trucking firms for authority to operate in the U.S. border states." *Id*. para. 241, at 62.

152. Regarding the question of investment, the Panel examined "whether the failure by the U.S. government to take appropriate regulatory actions to eliminate the moratorium on Mexican investments in companies providing international transportation by land constitutes a breach of Articles 1102, 1103 and 1104 of NAFTA." *Id*. para. 279, at 75.

153. *See id*. para. 279, at 75. See paragraphs 242–44 of the *Cross-Border Trucking Services Final Report* for the specific positions synopsized by the Panel concerning services of each Party. The United States primarily argued that because of dissimilarity of the regulatory systems in Mexico and the United States, the different treatment of Mexican service providers was justifiable as a legitimate regulatory objective. *See id*. para. 242, at 62 (quoting the U.S. Counter-Submission at 2). Mexico did not contest the dissimilarity, but argued that a blanket refusal is not permissible under any provision of NAFTA. *Id*. para. 243, at 62–63. Supporting the position of the Mexican government, Canada argued that, by definition, the blanket refusal of operating authority to Mexican carriers was "necessarily less favorable" treatment than that afforded to U.S. carriers. *Id*. para. 244, at 63 (citing Canada's Submission at 3).

154. *Id*. para. 245, at 63–64. The Panel noted that there is no significant factual disagreement as to the regulatory systems, but rather the disagreement revolved around "the implications of the differences in regulatory standards." *Id*.

meets U.S. approval.[155]

The Panel focused on the individual procedure afforded to U.S. and Canadian truckers requesting authorization to operate; in comparison to the blanket refusal imposed on Mexican operators, the U.S. policy "suggests inconsistency" of both national treatment (because of individual attention to U.S. drivers) and MFN treatment (because of individual consideration to Canadian operators).[156] Defining the essential service at issue as "the commercial transportation of goods from Mexico to points in the United States by service providers of Mexico"[157] and those providing that service as the relevant "service providers," the Panel compared service providers in the United States with Mexican service providers requesting authority for U.S. operation.[158] The Panel correctly found that the United States was not abiding by its national treatment obligations under Article 1202.[159]

The United States refuted the finding, citing safety concerns.[160] Responding to the U.S. contention, the Panel

---

155. *Id*. para. 247, at 64. The Panel provided an alternative wording: "[W]hether or not the United States is required to examine Mexican carriers seeking operating authority in the United States on an individual basis to determine whether each individual applicant meets (or fails to meet) the standards for carriers operating in the United States." *Id*.

156. *See id*. para. 248, at 65.

157. *Id*. para. 252, at 67.

> This essential service presently includes: (1) trucking services in which a tractor and trailer provide service from a point in Mexico to a point in the United States and (2) trucking services in which a trailer from Mexico is transferred from a Mexican tractor to a U.S. tractor in a Border Commercial Zone from which the service continues to a point in the United States. . . . [and] the relevant trucking services . . . through the United States to Canada.

Id. para. 253, at 67.

158. *See id.* paras. 252–56, at 67–68.

159. *See id*. The Panel found a *de jure* violation of Article 1202 (National Treatment). *Id*. para. 257, at 68. Although a few Mexican service providers do operate outside of the commercial zones, these limited exceptions did not fulfill the NAFTA obligation, and absent these exceptional cases, "presumably hundreds or even thousands of [Mexican] firms . . . have been denied access to the U.S." *See id*. paras. 254–55, at 67–68; *see also supra* note 74 (explaining limited exemptions and exceptions to the moratorium).

160. *Cross-Border Trucking Services Final Report*, *supra* note 7, paras. 154–55,

referenced the NAFTA objective of trade liberalization, holding that "the proper interpretation of Article 1202 requires that differential treatment should be *no greater than necessary* for legitimate regulatory reasons such as safety, and that such different treatment be *equivalent to the treatment accorded to domestic service providers*."[161] Finding that the U.S. interpretation of "in like circumstances" was overly-broad because its interpretation could render Articles 1202 and 1203 meaningless,[162] the Panel held:

> the continuation of the moratorium beyond December 18, 1995, was a violation of the national treatment and most-favored-nation provisions of Articles 1202 and 1203, respectively, in that there is no legally sufficient basis for interpreting "in like circumstances" as permitting a blanket moratorium on all Mexican trucking firms.[163]

The Panel next focused on the application of Article 2101 as a potential exception to national treatment and MFN treatment.[164] Siding again with the Mexican interpretation, the Panel found the U.S. interpretation of Article 2101 unpersuasive to validate the U.S. blanket refusal based on safety concerns.[165] According to the Panel, under Article 2101, a party may justify safety concerns "only to the extent that they are 'necessary to secure compliance' with laws or regulations that are otherwise consistent with NAFTA."[166] Referencing GATT/WTO jurisprudence[167] and the NAFTA exception itself, the Panel interpreted the sources to find that "any [Article 2101]

---

at 33.

161. *See id.* para. 258, at 68–69 (emphasis added).

162. *Id.* para. 259, at 69. To illustrate the overly-broad interpretation by the United States, the Panel noted that if the regulatory systems of two NAFTA countries were required to be substantially identical, few services would be permitted to provide cross-border service and such a result would hinder trade liberalization. *Id.*

163. *Id.* para. 278, at 74–75. The Panel noted that analysis for MFN treatment is primarily the same as that for national treatment. *See id.* para. 276, at 74.

164. *See id.* paras. 261–70, at 69–72.

165. *See id.* paras. 268–70, at 71–72.

166. *Id.* para. 262, at 70.

167. *See id.* paras. 263–67, at 70–71 (discussing interpretation of similar language in GATT Article XX in four GATT/WTO decisions).

moratorium must secure compliance with some other law or regulation that does not discriminate; be necessary to secure compliance; and must not be arbitrary or unjustifiable discrimination or a disguised restriction on trade."[168] Applying the GATT/WTO precedent,[169] the Panel found that "the United States [had] failed to demonstrate that there [were] no alternative means of achieving U.S. safety goals that [were] more consistent with NAFTA requirements than the moratorium."[170] In short, the use of Article 2101 as justification for exceptions to Articles 1202 and 1203 was insufficient.[171]

The Panel dealt next with the U.S. contention that difficulties and obstacles are sufficient to justify the blanket refusal to finalize Mexican applications for operating authority.[172] Discounting the U.S. explanation as an excuse, the Panel held that the United States was well-informed from the onset of NAFTA as to the shortcomings of the Mexican safety regulations.[173] In addition, no conditions are included in Annex I that would delay the phase out of reservations if the Mexican regulatory system had not progressed to an acceptable level for

---

168. *Id.* para. 269, at 72.

169. Especially persuasive is *United States—Import Prohibitions on Certain Shrimp and Shrimp Products*, [WTO] Panel Report adopted Oct. 12, 1998, WT/DS58/AB/R, in which the United States imposed a rigid standard to import shrimp depending on the exporting country's policy on sea turtle protections. *Id.* para. 267, at 71. Examining the holding in *Shrimp*, the Panel noted:

> '[I]t is not acceptable in international relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.' The Appellate Body also rejected the idea that one member could attempt to dictate another member's regulatory policies by refusing access to the dictating member's market, where that access was otherwise required under the GATT.

Id. (quoting the WTO Appellate Body).

170. *Id.* para. 270, at 72. "[T]here is no evidence in the record that the United States considered more acceptable, less trade restrictive, alternatives, except to the extent that it does so for specific Mexican service providers exempted from the moratorium." *Id.* para. 268, at 71.

171. *Id.* para. 278, at 74–75.

172. *See id.* paras. 273–75, at 73–74.

173. *See id*. para. 274, at 73.

the United States.[174] As such, the United States may not impose a blanket determination on Mexican service providers as a class because of difficulties and obstacles.[175] Lastly, with respect to services, the Panel held that the U.S. reliance on the preambular language—"resolve[] to . . . preserve their flexibility to safeguard the public welfare"—is unpersuasive because no indication that the Preamble supersedes other sections exists; rather, its purpose is primarily "aspirational and horatory."[176]

2. Investment

Turning to the issue of investment, the Panel framed the relevant inquiry as "whether the failure by the U.S. government to take appropriate regulatory actions to eliminate the moratorium on Mexican investments in companies providing international transportation by land constitutes a breach of Articles 1102, 1103 and 1104 of NAFTA."[177] Citing the authority

---

174. *See id.* paras. 273–74, at 73. Mexico stressed the point that "both governments understood that motor carriers would have to comply fully with the standards *of the country in which they were providing service*." *Id.* para. 243, at 62–63.

175. *See id.* para. 275, at 73–74. "It is unclear *when, if ever,* the United States will be satisfied that the Mexican regulatory system is adequate to lift the moratorium with respect to all Mexican providers of trucking services." *Id.* (emphasis added). Because of this uncertainty, "the Panel believes it unlikely . . . that *all Mexican providers of trucking services* . . . can properly be subject to a blanket U.S. determination not to process the applications." *Id.* (emphasis added).

176. *Id.* para. 277, at 74 (omission in original). "The Panel also notes that in the Preamble, the Parties have also 'resolved to . . . create an expanded and secure market for the goods and services produced in their territories . . .' which is consistent with the obligations placed upon the United States by Articles 1202 and 1203, and under Annex I." *Id*. (omission in original).

177. *Id.* para. 279, at 75. See paragraphs 281–82, at 76–77 for the specific positions concerning investment of the governments of Mexico and the United States synopsized by the Panel. Alleging violations of national treatment and MFN treatment, Mexico argued that the U.S. policy that allows U.S. ownership or control of Mexico-domiciled carriers to operate interstate is impermissibly granting or denying authority based on nationality. *Id.* para. 281, at 76. In contrast, the United States cited economic realities and lack of Mexican investors as failure to establish a *prima facie* violation of Chapter 11 investment obligations. *Id.* paras. 282–83, at 76–77. The United States did not dispute that the policy does not permit Mexican investment to establish U.S.-domiciled enterprises providing transportation services within the United States. *Id.* para. 284, at 77. The United States did not offer justification for the differential treatment. *Id.*

of Model Rules 33 and 34, the Panel established the proper burden allocation: "Mexico must establish that the actions (and inactions) of the United States are inconsistent with the schedule for implementation of NAFTA. The U.S. Government bears the burden of proving that its actions and inactions in connection with Chapter Eleven are authorized by an exception to NAFTA."[178]

Applying the required allocations, the Panel found that Mexico satisfied its *prima facie* burden because regulatory policy in the United States would deny operating authority to any application in which a Mexican investor applied through a newly created or an existing U.S-domiciled company.[179] The United States offered no significant defense on the point of investment.[180]

GATT/WTO precedent does not require that a party show injury when a measure is inconsistent with the treaty's obligations,[181] and as such, the Panel found the U.S. policy was

---

178. *Id.* para. 285, at 77–78. The United States argued that Mexico failed to satisfy its burden of proof for the investment issue because Mexico did not produce any investors denied access to the U.S. market. *Id.* para. 182, at 41, para. 283, at 77. Similarly, the United States contended Mexico bore the burden of proving violations, including the "likeness" of circumstances and failed to satisfy the burden, when Mexico did not "describe the 'circumstances' under which the United States is treating Mexican Firms for safety purposes." *Id.* paras. 162–64, at 35–36.

179. *See id.* paras. 286, 291, at 78, 80. Even though Mexico did not produce a specific investor, the Panel found that an application would be pointless in light of the U.S. policy. *Id.* para. 286, at 78.

180. *Id.* para. 287, at 78–79. At the Oral Hearing the U.S. representative explained that Mexican investors did not have the capital to invest in U.S. companies and that "'when the services case is resolved, the investment case will be resolved.'" *Id.* (quoting Transcript of the Hearing at 193–94). "In essence, the United States has effectively conceded that the safety concerns, which are the claimed basis of the U.S. refusal to implement its cross-border service obligations, are not applicable to investment." *Id.*

181. *See id.* para. 289, at 79.

> Long-established doctrine under the GATT and WTO holds that where a measure is inconsistent with a Party's obligations, it is unnecessary to demonstrate that the measure has had an impact on trade. . . . Moreover, it is well-established that parties may challenge measures mandating action inconsistent with the GATT regardless of whether the measures have actually taken effect.

Id. The Panel also noted that Article 2004, which is not the Article under which the

in violation of Articles 1102 and 1103.[182]

The Panel found that

> [b]ecause the United States expressly prohibits [this type of] investment, . . . such prohibitions [are] inconsistent with NAFTA, even if Mexico cannot identify a particular Mexican national or nationals that have been rejected. A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face, less favorable than the treatment accorded to U.S. truck service providers in like circumstances, and is contrary to Article 1102.[183]

In conclusion, the Panel unanimously found the blanket refusal by the United States to grant operating authority to Mexican service providers or investors is a violation of clear NAFTA obligations under Annex I and Chapters 11 and 12, and neither exceptions in NAFTA nor arguments of inadequate Mexican safety regulations justify the U.S. failure to open the border in accordance with the phase-out schedule in Annex I.[184] The Panel allowed for a case-by-case review in place of a blanket restriction, thereby allowing the United States to impose its safety standards on Mexican operators "as long as they are made in good faith with respect to legitimate safety concerns and conform to all relevant NAFTA provisions."[185]

---

trucking dispute was brought, but was relevant by analogy, allows resolution when the dispute is proposed and potentially inconsistent. *See id.* para. 290, at 79–80.

182. *See id.* para. 291, at 80.

183. *Id.* para. 292, at 80. Because the violation is direct, the Panel did not go further to identify injury. *Id.* The Panel addressed the issue of Chapter 9 and noted that it was applicable to services, but did not affect investment. *See id.* paras. 271–72, 293, at 72–73, 80. The Panel found that actions taken under Chapter 9 must conform to obligations of national treatment and MFN treatment. *See id.* paras. 271–72, at 72–73.

184. *See id.* paras. 295–97, at 81.

185. Weisweaver, *supra* note 12, at 482.

V. ACTIVITY AFTER THE ARBITRAL PANEL'S DECISION

A. U.S. Activity Toward Compliance

After the Panel's ruling, the Bush Administration pledged a reversal of the Clinton Administration's policy maintaining the moratorium and promised to fulfill NAFTA obligations by opening the border to cross-border trucking services and investment.[186] In June 2001, the United States complied with the investment portion of the Panel's decision and allowed Mexican investment in U.S. transportation companies, subject to all U.S. safety laws and regulations.[187] The Bush Administration followed through on its pledge and lifted the moratorium in late 2002;[188] however, almost two years passed between the NAFTA decision and the end of the blanket restriction.

1. Domestic Political Squabbles.

The inordinate delay in implementing the Bush Administration's promise to comply with the Panel's decision was in part due to resistance from Congress.[189] Congress was

186. *See Subcomm. on Highways and Transit Hearing*, *supra* note 2, at 3 (background section) (stating that after the Panel's decision was handed down, "President Bush expressed his intent to comply with it and took steps to prepare the U.S. to honor its NAFTA obligations."); *see also* Fact Sheet on Trucking, Sept. 5, 2001, *at* http://www.whitehouse.gov/news/releases/2001/09/ 20010905-8.html (urging by President Bush that Congress "deal fairly with Mexico and to not treat the Mexican truck industry in an unfair fashion," noting that Mexico could impose $1 to $2 billion a year in retaliatory sanctions).

187. *See Subcomm. on Highways and Transit Hearing*, *supra* note 2, at 4 (background section) ("DOT is now able to process applications from Mexican carriers for authority to fully own and operate companies in the U.S. that transport international cargo between points in the U.S. and provide bus services between points in the U.S. This action allows Mexican-owned motor carrier companies to be established in the U.S., subject to all of the same laws, regulations and procedures that currently apply to U.S. and Canadian owned motor carrier companies operating in the U.S.").

188. Press Release, Memorandum for the Secretary of Transportation, Determination Under the Interstate Commerce Commission Termination Act of 1995 (Nov. 27, 2002), *available at* 2002 WL 25975046 [hereinafter Memo for the Secretary of Transportation]; Jenalia Moreno & Cynthia Lee, *Mexican Trucks Get Go-Ahead from U.S.: Ban's End to Allow Cross-Border Travel*, HOUS. CHRON., Nov. 28, 2002, at 01.

189. *See Congress & Bush Reach Compromise*, *supra* note 6.

initially unwilling to budge from U.S. highway safety concerns.[190] Taking a rigid stance against allowing Mexican trucks, the House passed a bill completely disallowing any transportation monies toward border improvement to allow for cross-border trucking services.[191] The House effectively forbade the finalization of any Mexican applications for permanent or conditional operating authority.[192]

In comparison, the position of the Senate was not as extreme; although the Senate did not ban Mexican trucks from U.S. highways, its bill included tough, inflexible restrictions.[193] Two Republican Senators filibustered the bill for nine days, calling the prohibitive language "discriminatory and protectionist,"[194] fearing that "restrictions, which would apply solely to Mexico, would be in violation of NAFTA."[195] Further, the Bush Administration threatened to veto the bill because of the rigid restrictions.[196]

---

190. *See id.*

191. *See* Janet Hook, *Senate Puts Brakes on Mexican Trucks; Safety Measure Would Restrict Access to U.S.*, CHI. TRIB., Aug. 2, 2001, *available at* 2001 WL 4099983. The banned monies would have been aimed at regulating Mexican trucks entering the United States. *See* John Nagel & Heather Rothman, *Transportation: Mexican Truckers, Senate Panel Urge Suspension of NAFTA in Trucking Sector*, 18 INT'L TRADE REP. (BNA) 1397, 1397 (Sept. 6, 2001) [hereinafter *Urge Suspension of NAFTA*]. Critical of the bill, Ambassador Peter F. Allgeier of the Office of the U.S. Trade Representative stated that, "[I]f enacted into law, that action could jeopardize our relations with Mexico and impede President Fox's efforts to promote openness and reform." *Testimony of Ambassador Peter F. Allgeier*, *supra* note 19, at 1.

192. *See* Hook, *supra* note 191.

193. *See id.*

194. Heather Rothman, *Transportation: Senators Overhaul Limits on Mexican Trucks; Conferees Hoping to Inspect Deal by Nov. 16*, 18 INT'L TRADE REP. (BNA) 1839, 1839 (Nov. 15, 2001) [hereinafter *Senators Overhaul Limits*]; Benton, *supra* note 66, at 1924.

195. *Senators Overhaul Limits*, *supra* note 194, at 1839; *see also* Cheryl Bolen & Nancy Ognanovich, *Transportation: Sens. McCain, Gramm Allow Conferees on Transportation Spending Legislation*, 18 INT'L TRADE REP. (BNA) 1744, 1744 (Nov. 1, 2001).

196. *See Senators Overhaul Limits*, *supra* note 194, at 1839; *see also* Benton, *supra* note 66, at 1924. Criticism also resonated from the Chamber of Commerce, disapproving a bill which would require Mexican operators "'to provide far more detailed information regarding their ability to meet U.S. safety requirements than their American or Canadian counterparts.'" Gower, *supra* note 69 (quoting Thomas Donahue,

2. The U.S. Legislation Addressing Safety Concerns and Lifting of the Moratorium.

In late October 2001, a surprising bipartisan compromise was reached.[197] The Murray-Shelby compromise[198] sought to find a midpoint between the House's absolute ban and the Administration's pledge to open the border by January 1, 2002.[199] The overly optimistic date was not met. However, from a U.S. political perspective, the bill achieved a proper domestic balance between concerns of highway safety and obligations under NAFTA.[200] After passing both the House and the Senate,[201] the bill appropriating funds for the DOT and related agencies was signed by President Bush, more than ten months after the Panel's ruling.[202]

---

president of the U.S. Chamber of Commerce). The Bush Administration's policy came at some surprise because the Administration had courted the Teamsters Union. *See* Greenhouse, *supra* note 20, at A12. The policy also caused some critics to note that it could have negative repercussions if Americans die on U.S. highways because of Mexican trucks. *See id.* President Bush's allegiance to the big business sector may have dictated the policy because transportation costs may decrease by $50–120 per freight if the same trucks deliver the goods from Mexico to their final U.S. destination, in place of the time-consuming drayage system at the border. *See* Gower, *supra* note 69. One estimation provides that a half-billion dollars could be saved if the drayage system were abolished, but the commentator also noted that the drayage will not be abolished by cross-border trucking for a variety of reasons. *See* David Hendricks, *Traffic Buildup at Border Endless Without Processing Changes*, SAN ANTONIO EXPRESS-NEWS, Aug. 8, 2001, at 01E, *available at* 2001 WL 24771632.

197. *See* Bolen & Ognanovich, *supra* note 195, at 1744; *Congress & Bush Reach Compromise, supra* note 6.

198. Senators Patty Murray, a Democrat from Washington state, and Richard Shelby, a Republican from Alabama, co-sponsored the compromise. *Congress & Bush Reach Compromise*, *supra* note 6.

199. *Senators Overhaul Limits*, *supra* note 194, at 1839.

200. *See id.*

201. *See* Heather M. Rothman, *Transportation: Senate, House Pass Transportation Bill After Conferees Agree on Mexican Trucks*, 18 INT'L TRADE REP. (BNA) 1959, 1959 (2001) [hereinafter *Senate, House Pass Bill*]. The bill passed in the House by a vote of 371–11. *Id.* The bill passed in the Senate by a vote of 97–2. *Id.*

202. *See* Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107–87, 115 Stat. 833 (2001). President Bush signed the bill on December 18, 2001. C. Jeffrey Price, Comment, *Update: Department of Transportation and Related Agencies Appropriations Act of 2002*, 11 MINN. J. GLOBAL TRADE 277, 277 (2002).

The legislation bars the use of any appropriated funds to finalize Mexican applications until the Federal Motor Carrier Safety Administration (FMCSA) and the DOT Inspector General satisfy an extensive list of conditions.[203] The conditions imposed upon the FMCSA require that the agency perform extensive safety reviews on all vehicles, including proof of U.S. insurance, evaluation of the carrier's history, on-site inspections, and electronic verification of Mexican operators' driver licenses.[204] The legislation requires the FMCSA to publish various regulations in final form, which primarily requires development

---

203. *See* § 350(a), 115 Stat. at 864.

204. *See* § 350(a)(1)(A)–(B), 115 Stat. at 864; Price, *supra* note 202, at 277–79 (discussing the stringent trucking requirements). The conditions are that the agency:

> (1) (A) . . . requires a safety examination of such motor carrier to be performed before the carrier is granted conditional . . . authority to operate . . . ; (B) requires the safety examination to include . . . an evaluation of that motor carrier's *safety inspection, maintenance, and repair facilities* or management systems . . . ;
>
> . . . .
>
> (3) . . . requires Federal and State inspectors to verify electronically the status and validity of the *license of each driver of a Mexican motor carrier* commercial vehicle crossing the border;
>
> (4) gives a distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules . . . ;
>
> . . . .
>
> (6) requires State inspectors [to check and enforce or report violations of Federal standards] . . . ;
>
> (7) (A) equips all United States-Mexico commercial border crossings with . . . weigh-in-motion (WIM) systems . . . [and] requires inspectors to verify the weight of each . . . commercial vehicle entering the United States . . . ;
>
> (8) [assure that] the [FMCSA] has implemented a policy to ensure that no . . . carrier will be granted authority to operate beyond United States municipalities and commercial zones on the United States-Mexico border, *unless that carrier provides proof of valid insurance with an insurance company licensed in the United States*;

§ 350(a)(1), (3)–(4), (6), (7)(a), (8), 115 Stat. at 864–66 (emphasis added). "For purposes of this section, the term 'Mexican motor carrier' shall be defined as a Mexico-domiciled motor carrier operating beyond United States municipalities and commercial zones on the United States-Mexico border." § 350(e), 115 Stat. at 868.

and implementation of a broad regulatory scheme.[205] The legislation imposes additional requirements on the DOT Inspector General.[206] Three distinctively rigid requirements are directed at synchronizing Mexican and U.S. regulatory systems. These sections require the Mexican government to make changes within Mexico; the Mexican government must: maintain a reliable information infrastructure, create a database of information on Mexican operators accessible by the United States, and develop an enforcement scheme similar to that in the United States.[207]

The compromise received positive reactions from domestic

---

205. *See* §350(a)(10), 115 Stat. at 866. The final publications must include: (1) recitation of minimum requirements for U.S. and foreign carriers to ensure that drivers are knowledgeable; (2) implementation plans to improve auditor education and procedures; (3) regulations prohibiting authorization of foreign carriers who either operated illegally in the United States or are subject to a suspension, restriction, or limitation, but want to lease its trucks to another company; and (4) regulations which forbid border-crossing by Mexican trucks if no inspectors are on duty. § 350(a)(9)–(10), 115 Stat. at 866; s*ee also Transportation: U.S. Federal Agency Issues Rules Related to Opening of Border to Mexican Trucks*, 19 INT'L TRADE REP. (BNA) 503, 503 (2002) (discussing rule formation by the FMCSA).

206. *See* § 350(c)(1), 115 Stat. at 867.

207. These strict provisions require:

> (E) *the information infrastructure of the Mexican government is sufficiently accurate, accessible, and integrated with that of United States enforcement authorities* to allow United States authorities to verify the status and validity of licenses, vehicle registrations, . . . while operating in the United States . . . ;
>
> . . . .
>
> (G) *there is an accessible database containing sufficiently comprehensive data to allow safety monitoring of all Mexican motor carriers* that apply for authority to operate commercial vehicles beyond United States municipalities and commercial zones on the United States-Mexico border . . . ; and
>
> (H) measures are in place [*in Mexico*] to enable United States law enforcement authorities to ensure the effective enforcement and monitoring of license revocation and licensing procedures . . . .

§ 350(c)(1)(E),(G),(H), 115 Stat. at 867–68 (emphasis added). In addition, the Inspector General must certify that (1) new inspector positions are filled with adequately trained personnel (and not simply transferred for other areas); (2) the FMCSA has implemented a policy assuring adherence by Mexican service providers of hour-of-service rules; and (3) border crossings are able to conduct and accommodate a sufficient number of meaningful vehicle safety inspections. § 350(c)(1)(A),(C),(D), (F), 115 Stat. at 867.

interest groups that had previously advocated for the delay, including the Teamsters.[208] However, not all safety-concerned advocates have supported the compromise; some critics, for example, demanded stricter limitations on driving hours for Mexican drivers entering the United States.[209] Yet other observers maintained that the bill is too strict and considered it to be "a sop to the Teamsters union,"[210] because the harsh requirements will keep most Mexican trucks off U.S. highways.[211]

A year after enacting the appropriations bill, with the conditions of the legislation in place, President Bush lifted the moratorium; the memorandum stated: "Expeditious action is

---

208. *See Congress & Bush Reach Compromise*, *supra* note 6. A Teamsters spokesman called the bill "'a clear victory for highway safety.'" *Id.*

209. *See id.* (citing a *San Francisco Chronicle* editorial, naming exhausted Mexican operators "a menace to public safety"). These critics contended that Mexican operators will enter the U.S. interstates extremely exhausted and dangerous. *See id.* This concern stemmed from the fact that the U.S. legislation does not or cannot limit the hours of driving time for Mexican operators in Mexico, thus Mexican truck drivers entering the United States and continuing to drive, after driving many hours in Mexico, would not be violating U.S. regulations. *See* Judy L. Thomas, *NAFTA to Bring More Tired Truckers Across the Border*, MILWAUKEE J. & SENTINEL, Dec. 29, 2001, at 1A, *available at* 2001 WL 27445459. But falsified logbooks are not a new problem; doctoring of logbooks is not uncommon for American operators, who refer to the logbooks as 'comic books.' *Id.*

210. Hook, *supra* note 191. These critics cited the inclusion of non-safety requirements—for example, requiring Mexican operators to hold U.S. insurance—as evidence that the standards are too strict. *Id.*

211. *See Congress & Bush Reach Compromise*, *supra* note 6; *see also* Sara Silver, *Rules Put Pressure on Mexican Trucking-New Legislation Stops Trucks from Mexico from Using US Highways Until Their Companies Are Certified for Safety*, FIN. TIMES, Dec. 5, 2002, at P2, *available at* 2002 WL 103396377. The President of the Confederacion Nacional de Autotransporte de Mexico argues that 99% of Mexican trucks cannot comply with the "'extreme U.S. security measures.'" *Congress & Bush Reach Compromise*, *supra* note 6 (quoting Elias Dip). The GAO contended that Mexican operators will have difficulties obtaining operating authorization for a variety of reasons including "competitively priced insurance, high registration fees, delays at the border reducing the profitability of long-haul operations, and lack of established business relationships beyond U.S. commercial zones as limiting factors." *See* Brevetti, supra note 4, at 64; *see also Insurers Still Seek Clarity on Mexican Trucks*, BEST'S INS. NEWS, Dec. 10, 2001, *available at* 2001 WL 24726073 (noting possible hindrances to insure Mexican operators if the operators cannot provide the U.S. insurers with the required information); Price, *supra* note 202, at 279–80 (discussing the GAO report, and noting that it stated that the DOT was unprepared to implement the Act).

required to implement this modification . . . [and] the Department of Transportation is authorized to act on applications, submitted by motor carriers domiciled in Mexico, to obtain operating authority to provide . . . cross-border truck services."[212]

B. Mexico's Responses

Before and after the Panel's ruling, some Mexican officials and organizations, including the Trade Commission of the Mexican Senate, called for retaliatory action, including suspension of NAFTA benefits.[213] Mexican President Vicente Fox even threatened to close the border to American trucks.[214] The National Cargo Chamber (CANACAR), a prominent Mexican trucking association, called for sanctions until "competitive prices for auto parts, fuel, equipment, and financing for expansion of operations" could be assured.[215]

Initial responses out of Mexico to the legislation were mixed, but "mostly negative."[216] Although the Mexican government approved of the Bush Administration's attitude toward the issue and was confident of an imminent opening of the border, some observers maintained that further NAFTA "complications" might arise out of the U.S. legislation.[217] Mexican officials were

---

212. Memo for the Secretary of Transportation, *supra* note 188. The modification also lifted the ban as to cross-border scheduled bus services. *Id.* The memo noted that the Mexican operators are "subject to the same Federal and State laws, regulations and procedures that apply to carriers domiciled in the United States." *Id.*

213. *Urge Suspension of NAFTA*, *supra* note 191, at 1397. Senator Humberto Roque Villanueva, president of the Trade Commission in the Senate, did not call for monetary sanctions, but rather wanted "'[m]ore than an economic recuperation . . . , we are looking for the border to be closed and a hold put on investment, until there is an accord between the United States and Mexico' for the ordered entrance of trucks from the other country." *Id.*

214. *'Two Amigos' Meet Again: Bush and Fox Agree on Principles But No Proposals—Yet*, 78 INTERPRETER RELEASES 1431, 1432 (2001).

215. *Urge Suspension of NAFTA*, *supra* note 191, at 1397.

216. *See Congress & Bush Reach Compromise*, *supra* note 6.

217. *See* John Nagel, *Transportation: Mexico Studying NAFTA Truck Rules, Sees Definitive Entry of Trucks to U.S.*, 18 INT'L TRADE REP. (BNA) 1958, 1958 (2001). Luis Ernesto Derbez, Mexico's Economy Minister stated, "'My opinion is that the government of the United States has kept its word, has managed a strong, tough relationship with Congress, and has permitted a text to emerge.'" *Id.* But he also stated

wary of the strict restrictions under the U.S. legislation.[218] An Economy Ministry official, Luis de la Calle, stated, "If the United States in the publication or the implementation of the regulations takes an attitude contrary to its international obligations and discriminates against Mexican trucks, Mexico has the facility to use our right under the NAFTA to reverse the situation."[219]

Stronger criticism resonated from CANACAR, which was concerned with discrimination against, and disastrous effects on the small Mexican transportation business.[220] The group was especially critical of the legislation, which they felt imposed stricter restrictions on Mexican operators than on U.S. and Canadian operators, violating national treatment and MFN obligations.[221] Manual Gomez Garcia, president of CANACAR, further appealed to the Mexican government to suspend trade benefits because of delays.[222]

---

that he did not "know how the regulations will come out." *Id.*

218. *See* John Nagel, *NAFTA: Wary of Discrimination, Mexico to Inspect Coming Rules on Cross-Border Truck Safety*, INT'L TRADE DAILY (BNA), Dec. 13, 2001, at d4 [hereinafter *Wary of Discrimination*].

219. *Id.* De la Calle also noted potential problems, for example, testing Mexican drivers' English proficiency and "'the type and frequency of inspections.'" *Id.* De la Calle called for "mirroring" the provisions, noting that stricter regulations should not be imposed "just for the fact of being Mexican." *Id.*

220. *See id.* Mexican drivers threatened to close the border in protest of American inaction; even a twelve-hour closure could result in millions of dollar in losses. *See Mexican Truckers Consider Closing Borders, Interfering with Maquiladoras*, CORP. MEX.: EL UNIVERSAL, Dec. 13, 2001, *available at* 2001 WL 26761234.

221. *See Congress & Bush Reach Compromise*, *supra* note 6.

222. *Wary of Discrimination*, *supra* note 218, at d4. Gomez Garcia observed that because most Mexican operations are one-man operations and the carriers are significantly older, Mexican companies will be inspected every time they cross the border. *Id.* Despite an initiative to help finance new carriers for Mexican truckers, Gomez Garcia noted, "'Neither country is ready.'" *Id.* Another response includes a $4 billion dollar class action suit filed in Brownsville, Texas, on behalf of eleven Mexican trucking companies, claiming constitutional violations, because similar restrictions are not imposed on Canadian operators. *See* Associated Press, *Mexico Firms Sue, Say Truck Policies NAFTA Violation*, HOUS. CHRON., Dec. 19, 2001, *available at* 2001 WL 31481556. Another suit complains that the failure to complete an environmental impact study of Mexican trucks violates the National Environmental Policy Act and the Clean Air Act. *See* Heather M. Rothman & Carolyn Whetzel, *NAFTA: Federal Court Denies Emergency Injunction to Block Mexican Truck Access*, 19 INT'L TRADE REP (BNA) 855, 855 (2002); *see also U.S. Lawsuit Threatens to Further Delay Opening Border to Mexican*

The trucking dispute is one of numerous issues between the trading partners.[223] Although Mexican officials can opt to retaliate against the U.S. non-compliance under NAFTA,[224] to date, the Mexican government has chosen not to pursue retaliatory tactics.[225] The Mexican government must balance the various issues to achieve the long-term goal of a healthy, lasting relationship with the United States, and the trucking dispute has not proved significant enough for Mexico to pursue a hard-line position.[226]

C. Questioning NAFTA-Compliancy of the U.S. Legislation

In addition to retaliatory sanctions, Mexico may initiate another dispute resolution proceeding to determine whether the bipartisan compromise violates NAFTA obligations.[227] Although the United States, having complied with the case-by-case review process, no longer maintains a blanket restriction, the Panel also maintained that procedures must not unjustifiably discriminate and disguise an actual trade restriction.[228] However, because of the severity of some provisions, the legislation may not comply with that portion of the Panel's decision and NAFTA obligations.[229] As tough advocates for

---

Trucks, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Dec. 11, 2002, *available at* 2002 WL 9679562 (discussing the second attempt delaying the opening of the border by a coalition of U.S. labor, industry, and environmental groups).

223. *See* Kleinberg, *supra* note 16 (arguing that despite improvement in the Mexican economy because of NAFTA, the relationship between the trading partners is plagued by several ongoing disputes).

224. *See* NAFTA, *supra* note 1, art. 2019(1), 32 I.L.M. at 697.

225. *See Mexican Government Makes Trucking Expectations Clear to United States*, CORP. MEX.: REFORMA, Dec. 13, 2001, *available at* 2001 WL 26761220. Although the Mexican government publicly announced its option of retaliatory sanctions, they have not formally instituted them. *See id.*

226. *See* Lopez, *supra* note 44, at 206–207. A hard-line approach could include retaliatory sanctions of up to $2 billion a year. *See Year-End Review*, *supra* note 139.

227. Chapter 20 does not provide measures to review panel decisions. *See generally* NAFTA, *supra* note 1, ch. 20, 32 I.L.M. 693–97 (detailing dispute resolution mechanisms); *see also* discussion *infra* Part VI.B.

228. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 269, at 72.

229. *See* Hook, *supra* note 191 (stating that "The [Bush] administration argues that additional checks are unnecessary and could keep Mexican trucks off the road for

NAFTA compliance, Senators Gramm and McCain addressed section 343(1)(A)—requiring on-site inspections—and stated that "'the Transportation Department would not have to perform on-site inspections of every Mexican carrier . . . [but rather] would be given flexibility to 'target on-site inspections where concerns have been identified, just as they do in the United States and Canada.'"[230]

Some legal observers reason that the legislation is NAFTA-compliant.[231] Arguing that it "establishes an appropriate framework for implementing both the panel decision and the underlying the NAFTA obligations"[232]—despite provisions that differentiate Mexican services providers from U.S. counterparts[233]—some observers refute allegations that this differentiation is impermissible discrimination.[234] Even noting the three provisions that single out Mexican motor carriers, these observers maintain that the provisions are permissible under Article 2101 of NAFTA as necessary to secure compliance

---

two or more years. That would violate NAFTA and expose the U.S. to more than $1 billion in sanctions, the administration warned."); *see also* Weisweaver, *supra* note 12, at 486–487.

230. *Senate, House Pass Bill*, *supra* note 201, at 1959–60.

231. *See e.g.*, Dewey Ballantine LLP for Transportation Trades Department, AFL-CIO, *The Cross-Border Truck and Bus Dispute with Mexico: NAFTA-Consistency of Murray Shelby Legislation*, *at* http://www.ttd.org/Library/facts sheet, summaries, studies/112701_dewey report.htm (Nov. 27, 2001) [hereinafter Dewey report]. The report concluded that:

> This legislation has been wrongly criticized as NAFTA-inconsistent. First, Murray-Shelby expressly contemplates *removal* of the current moratorium on consideration of Mexican applications for cross-border operating authority. Second, the new regulatory regime which would replace the moratorium respects the NAFTA non-discrimination commitments, as virtually all of the requirements to be made applicable to Mexican carriers likewise apply, in one form or another, to U.S. carriers. To the extent that any provisions in Murray-Shelby result in different (and arguably disadvantageous) treatment of Mexican carriers, they can be defended as necessary to secure compliance with other generally applicable elements of the highway safety regime—and are therefore justified under the exception provided in NAFTA Article 2101.

Id.

232. *Id.* at 6.

233. *See id.* at 6–8.

234. *See id.*

to other collectively applicable provisions.[235] Another view holds that the legislation is compliant with the Panel's decision so long as the requirements of "inspectors at the border facilities at all times, to have scales at every crossing and weigh-in-motion scales at the busiest five crossings, and to electronically verify at least half of the Mexican drivers' documentation" are in good faith.[236]

However, the NAFTA-compliancy of the U.S. legislation is not an uncontested position. One position maintains that "the conditions [that] do not go to merits and qualifications of the individual motor carriers . . . probably continue[] to violate NAFTA."[237] Even if the conditions are in good faith, their discriminatory nature may violate the NAFTA obligation of fair treatment.[238] If the same requirements are not imposed on Canadian operators, the provisions may violate MFN obligations.[239]

In addition, the implementation realities of the compromise are daunting.[240] The Panel also held that difficulties and obstacles were insufficient justifications for the blanket moratorium, and an observer may question whether the implementation realities, which may keep most Mexican drivers off U.S. highways, may be a continuing violation of the Panel's decision.[241] For example, most trucks are not inspected at the

---

235. *See id.* at 10–12. Even if the provisions are violative of NAFTA, the report contends that retaliatory actions, which Mexico could potentially impose because of lost business, "would be quite modest in comparison with overall highway spending in the United States." *Id.* at 12.

236. Price, *supra* note 202, at 281.

237. *Id.* at 282.

238. *Id.* at 282. "Very stringent requirements permit only the very affluent and ambitious Mexican motor carriers to apply for authority to operate beyond the border. Delays, expensive U.S. insurance, and maintenance on current fleets serve as powerful deterrents from operating outside the current commercial zone." *Id.*

239. *See* Weisweaver, *supra* note 12, at 487.

240. The problem of maintaining a border that is open to freer trade and yet secure has been especially acute since the September 11, 2001 bombings. *See* William B. Cassidy, *Tale of Two Borders*, TRAFFIC WORLD, Dec. 10, 2001, *available at* 2001 WL 27563667. Tightened security at the borders may further frustrate opening the border to Mexican trucks. *See id.*

241. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 273, at 73.

border,[242] and the new regulations require that "a sufficient number of meaningful vehicle safety inspections" be conducted.[243]

Another related question of NAFTA-compliancy is whether the Panel's decision was implemented in a timely manner. What constitutes a reasonable compliance time has not been directly addressed under NAFTA. With the United States having knowledge of NAFTA obligations from the inception of the Agreement, any further delays are unreasonable and must persuade the United States to finally and expediently adhere to its international obligations and open to cross-border trucking.

VI. IMPLICATIONS

Recalling NAFTA's primary goal of trade liberalization, allowing cross-border trucking will be a step closer to achieving the objective. The long-term benefits of cross-border investment and services should dictate the outcome of the dispute.[244] Yet, the United States failed to comply with unambiguous NAFTA obligations for seven years[245] and continues its non-compliance because of bureaucratic squabbles and implementation realities. This failure—or, at best, unacceptable delay—begs the question whether the eventual resolution resulted from domestic political environment or effective dispute resolution. In addition, questions also arise concerning the impact the dispute may have on the development of NAFTA and future interactions of the parties.

---

242. Thomas, *supra* note 209, at 1A.

243. Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107–87, 115 Stat. 833 § 350(c)(1)(F) (2001).

244. *See* Gower, *supra* note 69 (arguing that nationalist sentiments are blurring the wider picture, which "would not only consolidate Mexico's position within the Nafta [sic] marketplace, but also heighten the advantages of the nation's proximity to North America").

245. Brooks, *supra* note 4.

A. Effects of the Trucking Dispute on NAFTA and International Trade

Even when the restrictions are eventually phased out, the system for transporting goods between the United States and Mexico may remain the same.[246] For example, U.S. trucking companies may not send U.S. operators into Mexico, "owing to fears about liability, language and cultural barriers."[247] In addition, there is resistance to sending Mexican operators into the United States.[248] When the moratorium was lifted, approximately 150 of 25,000 Mexican trucking companies applied for operating authority, and of that small number, a little more than half were granted authority pending successful completion of safety inspections.[249]

The structure of provisional certification for the limited border commercial zones may remain the dominant system.[250] More than half of the approximately 850 applicants for the limited authorization to transport goods within twenty miles of the border were issued provisional certificates.[251] Some observers speculate that the number of Mexican operators entering the U.S. market will only increase gradually.[252]

Additionally, predictions indicate that an open border will drastically increase the undetected importation of illegal

---

246. *See* Jeff D. Opdyke, *Freight Expectations: Laredo Has Little to Fear in Trucking Shake-Up*, WALL ST. J.: TEX. J., Aug. 12, 1998, *available at* 1998 WL-WSJ 3505242.

247. *Id.*

248. Bonnie Pfister, *Mexican Trucks Still Stalled at Border, Despite Lift on Ban*, SAN ANTONIO EXPRESS-NEWS, Dec. 6, 2002, *available at* 2002 WL 104377518 (noting criticisms that the regulations are discriminatory and Mexican operators are "not eager to drive cross-country in a foreign land, or to compete with giant U.S. companies").

249. *See* Brooks, *supra* note 4.

250. *See* Moreno & Lee, *supra* note 188 (citing various reasons that the system would maintain the status quo, including the lack of alliances between Mexican and U.S. companies, the expense, and the disallowance of intra-U.S. point-to-point travel for Mexican operators).

251. Press Release, State Department, Transportation Dept. Enacts NAFTA Provisions for Mexican Trucks, Buses—U.S. Fulfills its NAFTA Obligations on Mexican Commercial Vehicles (Nov. 27, 2002), *available at* 2002 WL 25973527.

252. *See e.g.*, Pfister, *supra* note 248.

drugs.[253] In expectation of the opening of cross-border transportation services, many smugglers shifted focus from the air to land and developed a system of "truck cargo, railway, and illegal or migrant workers" to move illegal drugs.[254] Other critics contend that potential members to NAFTA may be discouraged because of the "whimsical mood" of U.S. politics.[255]

Despite critical and skeptical predictions, proponents of cross-border trucking anticipate creation of jobs, economic improvement in cities along the main routes linking NAFTA countries, and continued overall regional economic improvement.[256] For example, a joint venture between Mexican and U.S. investors expects to provide lower prices for transportation in the border states.[257]

B. Legitimacy of the NAFTA Dispute Resolution Mechanism

Potentially, the most devastating effect of the trucking dispute is destabilization of the entire Agreement.[258] Although the possibility of disintegration of NAFTA based solely on the trucking dispute is slim, the problem has proved to be a tough road for the NAFTA dispute settlement mechanism. The dispute has illuminated flaws in Chapter 20. Without additional provisions to monitor implementation or bind parties to the

---

253. J. Patrick LaRue, *The "Ill-icit" Effects of NAFTA: Increased Drug Trafficking into the United States Through the Southwest Border*, 9 CURRENTS: INT'L TRADE L.J. 38, 38 (2000) (discussing the problem of increasing trade, while fighting to keep illegal drugs out). "NAFTA has undoubtedly 'opened' the floodgates for Mexican drug traffickers by . . . increasing trucking and railway traffic." *Id.* at 45; *see also* Skahan, *supra* note 11, at 614–15 (citing a sound-bite describing NAFTA as "a deal made in narco-heaven").

254. LaRue, *supra* note 253, at 40–41.

255. *See* Weisweaver, *supra* note 12, at 488–89.

256. *See* Pamela C. Schmidt, Note, *NAFTA: The Effect of the Motor Carrier Provisions on the Future of the Agreement*, 20 HASTINGS INT'L & COMP. L. REV. 505, 515 (1997).

257. *U.S. Lawsuit Threatens to Further Delay Opening Border to Mexican Trucks*, *supra* note 222.

258. *See* Lopez, *supra* note 44, at 201 (arguing that Mexican and Canadian officials are aware of protectionist U.S. attitudes and that "the escalation of certain disputes . . . such as trucking . . . to arbitral proceedings may endanger NAFTA and, in that sense, cause greater injury or loss than any single dispute"); Schmidt, *supra* note 256, at 523; Weisweaver, *supra* note 12, at 486.

panel decisions, the trucking dispute could have indefinitely remained in neutral. In addition, if the illuminated faults remain unchecked and future disputes are unresolved or improperly delayed, the future of NAFTA may be compromised.[259]

Considering that the moratorium should have been partially lifted in 1995 and completely phased out in 2000, the trucking dispute exemplifies the limitations of scant implementation provisions and a complete lack of appellate review. Without required adherence to NAFTA provisions and panel decisions,[260] the reality of higher profile cases, such as the trucking dispute, is that outcomes may depend completely on political will.[261] The United States has consistently not bowed to international obligations, but rather has permitted domestic political agendas to dictate action or inaction.[262] Skeptical of U.S. unilateralist approaches to NAFTA issues, critics maintain that "[p]art of the fundamental problem is the disproportionate weight of the United States in the tri-lateral relationship."[263] In addition, the issue-by-issue approach to dispute resolution has proved ineffective and may result in a loss of cohesion between the

259. *See* Kleinberg, *supra* note 16 (noting that "[w]hile it is unlikely that any single melee will scuttle the agreement, their cumulative impact could have significant ramifications for the regional economy and efforts to expand free trade to the rest of the hemisphere"); *see also* Silver, *supra* note 211 (noting the potential for Mexican disenchantment with NAFTA due to resentment from uneven application of rules).

260. *See* NAFTA, *supra* note 1, arts. 2017–18, 32 I.L.M. at 697.

261. *See* Kleinberg, *supra* note 16; Lopez, *supra* note 44, at 206 (referring to the trucking dispute as "a fairly clear violation of NAFTA inspired by domestic political interests").

262. *See* Lopez, *supra* note 44, at 206 ("The early dispute resolution experience under NAFTA . . . confirms that, even though the parties were serious in creating comprehensive and sophisticated dispute settlement processes, in some instances those processes must be overridden or disregarded to serve a government's internal political needs . . . . Arguably, each instance involves a fairly clear violation of NAFTA inspired by domestic political interests."); Weisweaver, *supra* note 12, at 485–86 ("Politics have arguably been a large factor in the decision on the part of the United States to withhold lifting the moratorium.").

263. Kleinberg, *supra* note 16. Critics also maintain that NAFTA does not have an effective mechanism for addressing disputes and that U.S. special interest groups influence the government to avoid and undermine NAFTA provisions. *Id.*

member states.[264]

One author noted that "the effectiveness of Chapter 20 depends on the parties agreeing to adhere closely to NAFTA's substantive provisions [and] [a]ny party's failure to comply with a panel decision sets a precedent for essentially nullifying the Chapter 20 process."[265] To avoid compromising Chapter 20, the dispute resolution mechanism should be revised, and the lessons learned from the trucking dispute should provide the catalyst for reform.[266]

1. Shortcomings of the Dispute Resolution Mechanism

Noting the limited history of NAFTA, the dispute settlement mechanisms "are flawed . . . [even though] they create new mechanisms and remedies for governmental violations of private citizens' rights, and, in that sense, may provide remedies that simply did not exist earlier."[267] Considering the flaws of Chapter 20, any reform should aim for optimal dispute resolution, and

---

264. *Id.*

265. Weisweaver, *supra* note 12, at 485–86.

266. In addition to the trucking dispute, the lessons learned from previous Chapter 20 proceedings support reform. *See* Gantz, *supra* note 45, at 13–15. The first Chapter 20 panel, initiated by the United States, found that Canada's high tariffs on agricultural products were permissible under NAFTA. *See id.* at 12. Prior to the eventual compliance by the United States, one scholar noted:

> On one hand, failure by the United States to respect the Chapter 20 panel's ruling in the agricultural products case may do irreparable damage to Chapter 20's dispute resolution mechanism. On the other hand, full compliance with that decision, regardless of the domestic political cost, could greatly strengthen Chapter 20.

Lopez, *supra* note 44, at 203 n.405 (noting existing precedent of non-compliance by the United States with the binational panel ruling in the softwood lumber dispute under Canada-United States Free Trade Agreement). The second Chapter 20 panel addressed the industry of broom corn brooms. *See* Gantz, *supra* note 45, at 12. The panel held for Mexico, but for nine months the United States refused to comply with the panel decision. *Id.* Mexico opted for retaliatory sanctions until the United States lifted its safeguards. *Id.* at 12–13. Considering that compliance only required the United States to withdraw a tariff, nine months seems an unreasonable amount of time to comply. The trucking dispute decision was handed down in February, but it was mid-year before the United States even moved toward compliance. *Mexico & U.S. Continue Longstanding Trade Disputes on Telecommunications, Sweeteners, Trucks, & Avocados*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Feb. 20, 2002, *available at* 2002 WL 9679462.

267. Gantz, *supra* note 45, at 3.

such a mechanism has been described as a system that

> (1) investigates complaints on a timely basis and reaches principled conclusions that are binding and enforceable upon the parties;
>
> (2) prevents multiple jeopardy in the form of commencement of a series of trade disputes until the domestic industry's result is achieved;
>
> (3) eliminates tactical advantages to both parties so that disputes are not launched simply to obtain interim relief, which often may dictate the outcome; and
>
> (4) eliminates the possibility of retaliatory trade legislation that is designed to punish the successful party and/or overturn the dispute settlement panel determination.[268]

Chapter 20 "only come[s] close" to satisfying these requirements.[269]

Criticism of Chapter 20 includes: (1) "inordinate delays" because of lacking adherence to strict time limits and procedural rules and endemic shortcomings of the ad hoc process;[270] (2) unnecessary secrecy of the proceedings;[271] and (3) limited external participation, including restricted expert involvement and failing to provide for submission of amicus curiae briefs.[272]

Assuming an ideal case abiding by time limits, a dispute should take 220 days from the request for formation of a panel until the final report.[273] These time limits were crafted to

---

268. Specht, *supra* note 45, at 66–67. A system absent these characteristics may lead to friction or demise of the Agreement. *Id.*

269. *Id.* at 125.

270. Gantz, *supra* note 45, at 15 (noting in particular the delays associated with panel formation, because of the "apparent inability of the Parties to agree on panelists").

271. *Id.*; Specht, *supra* note 45, at 118.

272. Gantz, *supra* note 45, at 15.

273. *See* Lopez, *supra* note 44, at 204 (criticizing the disregard for the specified time limits); NAFTA Secretariat, *General Information: Fig. 1: Ideal Timeline for NAFTA Chapter 20 Arbitral Panel as Per the Rules of Procedure (Two Disputing Parties)*, *at* http://www.nafta-sec-alena.org/english/home.htm#fig2 (last visited Mar. 22, 2003) (setting out the timetable for the ideal case). The first dispute to escalate to panel formation lingered in the consultation phase (intended to last only about a month) and

promote efficiency.[274] The cross-border trucking conflict obviously was not the ideal case. The trucking dispute was initiated by Mexico on December 18, 1995 and produced a decision by the Panel on February 6, 2001, a period of more than six years.[275] Consultations and conciliation lasted more than thirty months, and the formation of the Panel spanned a period sixteen months.[276] The Panel took a year to produce its final report.[277]

The lack of procedures to review panel decisions is another criticism.[278] In theory, the disputing parties are required to agree on a resolution after a panel hands down its decision,[279] but in actuality, NAFTA does not provide a mechanism by which parties may enforce the obligation.[280] If Mexico claims that the U.S. legislation is an unsatisfactory solution, Mexico may be able to reinitiate Chapter 20 proceedings alleging continuing or further breach of NAFTA obligations, although the procedure has not been attempted. The time commitment and energy necessary for another Chapter 20 proceeding on the same issue with similar ineffective results is an unpleasant prospect.

Lastly, the effectiveness of the system of retaliatory sanctions has been criticized.[281] The distribution of power and

---

ultimately, 660 days passed between the request for consultations and final report. Lopez, *supra* note 44, at 204–05.

274. Specht, *supra* note 45, at 98–99.

275. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 15, at 6.

276. *See id.* paras. 18–21, 23, at 6–7. Mexico requested formation of a panel in a letter dated September 22, 1998, and the Panel was not constituted until February 2, 2000. *Id.* paras. 21, 23, at 6–7. "The Chapter 20 mechanism has proved somewhat less successful [than side agreements], primarily in terms of failure of the governments to appoint roster members due in part to the absence of an effective administering authority, and the long delays that have arisen between the initiation of consultations and implementation of results." Gantz, *supra* note 45, at 29.

277. *See Cross-Border Trucking Services Final Report*, *supra* note 7, para. 23, at 7.

278. *See* Schmidt, *supra* note 256, at 524 (arguing that the lack of such measure to review panel decisions "effectively limits the options that the parties have," and questioning the constitutionality of the lack of judicial review); Gantz, *supra* note 45, at 11 (pointing out that the WTO's dispute settlement mechanism provides appellate review through its Appellate Body).

279. *See* NAFTA, *supra* note 1, art. 2018, 32 I.L.M. at 697.

280. Schmidt, *supra* note 256, at 523.

281. Specht, *supra* note 45, at 118, 127.

dependence varies among the NAFTA parties so that sanctions may not upset or even affect the U.S. economy, but the same sanctions may distress the Mexican economy.[282] In the trucking dispute, an alternative to opening the border is simply accepting the sanctions. If the U.S. legislation violates NAFTA, some observers propose simply paying the sanctions, because the monetary amount imposed would be quite modest in comparison to the overall highway spending in the United States.[283]

2. Proposals

Although the dispute resolution mechanism has been successful "in a number of instances in resolving or at least diffusing the issue politically,"[284] Chapter 20 nevertheless requires review and modification.[285] The success is limited to the extent that "Chapter 20 is viewed primarily as a mechanism for consultations and conciliation."[286] The trucking dispute escalated beyond the point of consultation and confirms that additional procedures are necessary to ensure effective dispute resolution.[287]

A central institution for dispute settlement,[288] a NAFTA court,[289] or provisions for appellate review[290] may strengthen the

---

282. *See id.* at 118; Weisweaver, *supra* note 12, at 485–86 ("This [unequal bargaining position] may result in compelling a weaker political or economic party to accept a compromise not fully reflective of its legal rights under the agreement. This may end in an ineffective result if the disadvantage party is dissatisfied with the outcome of the dispute.").

283. Dewey report, *supra* note 231 (arguing that "Mexico would be entitled to compensation or retaliation only in an amount equivalent to the amount of trucking business lost as a result of the NAFTA-violative aspects of the new regime . . . [and this] would be trivial.").

284. Gantz, *supra* note 45, at 15.

285. *See* Lopez *supra* note 44, at 208.

286. Gantz, *supra* note 45, at 15.

287. Although Chapter 20 proved somewhat successful, "the value of a particular dispute resolution tool varies over times and depends on the type of dispute at issue." Lopez, *supra* note 44, at 207–08. The trucking problem is the type of dispute that may not be effectively resolved through the party-implemented resolution. *See id.* at 208.

288. *See* Kleinberg, *supra* note 16 (arguing that it would be a constructive addition to NAFTA to provide a centralized institution for dispute resolution).

289. *See* Specht, *supra* note 45, at 118 (examining the advantages and disadvantages of a permanent panel, and noting that such an institution would

Agreement in place of or in addition to the current *ad hoc* panel proceedings. Strengthening the independence and effectiveness of administration and toughening current implementation provisions may also improve the dispute resolution scheme under NAFTA.[291]

The more rule-oriented mechanism under the WTO contains provisions that reformers may consider if Chapter 20 is restructured.[292] For example, unlike the NAFTA procedure, the WTO dispute resolution system provides for surveillance of implementation by the dispute settlement body (DSB).[293] The DSB reviews "the implementation after a six month period and continuously thereafter until the issue is completely resolved."[294] Under NAFTA, no institution monitors the disputing parties after a panel decision; instead, the monitoring responsibility is placed on the parties, which has proved ineffective, as evidenced

---

advantageously alleviate some responsibility of the Secretariat to find eligible panelists and formulate a "consistent jurisprudence"). *But see* Gantz, *supra* note 45, at 3 (noting that the creation of a permanent judicial resolution was purposefully avoided in order to "provide a significant level of protection to individual citizens whose interest are adversely affected by actions of NAFTA government agencies").

290. *See* Specht, *supra* note 45, at 117.

291. *See* Gantz, *supra* note 45, at 29. If the NAFTA dispute resolution mechanism is revised, the reformers must carefully consider the advantages and disadvantages of the pragmatic approach compared with the legalistic approach. *See* Specht, *supra* note 45, at 127. "There has . . . been a general tendency to reduce the political influence and to become more adjudicatory the longer the agreement exists, the more complex and complicated it gets, and the more signatories it has." *Id.* at 126.

292. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URAGUAY ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS vol. 404, 33 I.L.M. 112 (1994) [hereinafter Understanding on Rules and Procedures Governing the Settlement of Disputes]; *see also* Specht, *supra* note 45, at 90.

293. The DSB is "responsible for administering the rules and procedures of the [Dispute Settlement Understanding], establishing panels, adopting panel and Appellate Body reports, surveying the implementation of rulings and recommendations, and allowing disciplinary action in the case of non-complying member states." Specht, *supra* note 45, at 79.

294. *Id.* at 88. However, this surveillance is the exception, rather than the rule. *See id.* at 123. Still, even under the WTO and other international agreements, "the problem of how to deal with a recalcitrant party that refuses to comply with a ruling" is unresolved. *Id.* at 126.

by the Mexican trucking dispute.[295] The appellate process under the WTO is another possible model for Chapter 20 reform.[296] The Appellate Body of the WTO has the power to "uphold, modify or reverse the legal findings and conclusions of the panel."[297] In short, any reform of the NAFTA dispute resolution mechanism must provide disputing parties with a more effective system that produces binding and implementable decisions.

VII. CONCLUSION

Politically motivated non-compliance may be accepted because of the overall economic benefits of NAFTA.[298] Mexico may tolerate "'America's penchant for unilateralism,'" such as putting up with U.S. non-compliance with the trucking decision, for the larger goal of strengthening its domestic and regional economies.[299] However, this tolerance must not be limitless. Mexico properly proceeded through the Chapter 20 dispute resolution procedure, and the Panel properly found the United States in violation of its NAFTA obligations and recommended

---

295. *Id.* at 104–05. Even when retaliatory sanctions are imposed, there is no involvement by a NAFTA institution, unless the party, upon whom the sanctions are imposed, complains that the sanctions are manifestly excessive. *Id.* at 104–05.

> The effectiveness of this provision has been questioned because the reviewing panel only makes recommendations, whereas any action has to be taken by the disputing parties or the [Free Trade Commission], and "[s]ince the [p]arty levying 'manifestly excessive' sanctions will necessarily be a member of both groups, it will be able to block any action because both bodies act by consensus."

Id. at 105.

296. *See* Specht, *supra* note 45, at 86–87. But the WTO appellate process and implementation provisions are not free of criticism. *See id.* at 90–91. The criticisms include needless secrecy, unclear requirements for appeals, and the ineffective provisions to deal with non-compliant parties. *Id.*

297. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 292, art. 17(13), 33 I.L.M. at 1237; *see also* Specht, *supra* note 45, at 86–87.

298. *See* Lopez, *supra* note 44, at 206–07.

299. *See* Kleinberg, *supra* note 16 (quoting Robert Pastor, Professor at American University). However, Mexico's patience is not limitless. *See Mexico & U.S. Continue Longstanding Trade Disputes on Telecommunications, Sweeteners, Trucks, & Avocados*, *supra* note 266 (noting that "Mexican officials . . . are growing impatient with the delays").

that the United States comply with its NAFTA commitments. Yet, the mechanism has failed to produce a timely resolution.

Effective dispute resolution is an essential component of a successful international agreement.[300] Under the current structure of NAFTA dispute resolution—in which dispute resolution is primarily self-help—U.S. politics and nationalistic attitude have proved to wield controlling power.[301] The cross-border trucking conflict exemplifies the ineffectiveness of a mechanism that lacks workable provisions to monitor implementation of decisions. To realize the primary NAFTA goal of an integrated free-trade region, Chapter 20 requires revision.[302]

*Carrie Anne Arnett**

300. *See* Specht, *supra* note 45, at 65–66.

301. *See* Lopez, *supra* note 44, at 200–01 (noting that "political considerations factor heavily into some Chapter 20 disputes" and "political reality helps to explain, in part, why Chapter 20 generated relatively few conclusive results during NAFTA's first three years"). One of the early lessons learned concluded, "NAFTA's dispute resolution systems will bow to politics (as governments deem necessary)." *Id.* at 208.

302. *See id. at* 208.

* This Comment received the James W. Skelton, Jr. Writing Award for an Outstanding Casenote or Comment in the field of Public International Law.