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ROAD BLOCK: THE U.S.-MEXICAN TRUCKING DISPUTE

Andrew G. Edson*

I. INTRODUCTION

FROM the end of 2007 to March 2009, approved Mexican truckers under a U.S. Department of Transportation pilot program traveled across the U.S.-Mexican border (“border”) to a destination within one of the states, unloaded its cargo, and then returned to Mexico. The pilot program was the first successful attempt to implement a provision of the 1994 North American Free Trade Agreement (NAFTA) that permitted Mexican trucks to travel on American roads, set to begin in 2000 but delayed for seven years. Yet, the pilot program lost funding after two years and Mexican truckers were again subjected to a buffer zone that only allowed Mexican trucks to drive a few miles onto U.S. soil, unload its cargo, and have the cargo reloaded onto an American truck.

The delay to implement NAFTA provisions for cross-border trucking is a frequent and ongoing trade dispute between Mexico and the United States, and it garnered more recent attention when U.S. President Barack Obama signed into law the Omnibus Appropriations Act of 2009 (OAA). The bill contained a provision terminating the pilot program (also called the demonstration project) that allowed a limited number of Mexican trucks to transport cargoes across the border. Mexico retaliated by slapping tariffs on imported goods from American industries ranging from strawberries to wine to cell phones. Despite high levels of trade overall with Mexico, road transport across the border never received full approval from the United States, and the termination of the pilot program is the latest bump in the road.

Neither country has resolved the dispute since the demonstration project lost funding. Obama visited Mexican President Felipe Calderon during the summer of 2009 to promise a resolution over the trucking

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2. Id.
4. Don’t Keep on Trucking, supra note 1.
6. Don’t Keep on Trucking, supra note 1.
7. Id.
dispute. Calderon requested that the United States restore the ability of Mexican trucks to cross the border. A year has passed since the United States ceased the pilot program with virtually no resolution. The action by Obama and the U.S. Congress unquestionably violates NAFTA provisions, but far greater implications could result in job losses in the United States and Mexico, as well as growing animosity between two important trading partners. This protectionism mode "could drive the world into an even worse economic slump than it is already [experiencing]."

II. BACKGROUND OF UNITED STATES-MEXICO TRUCKING DISPUTE

Prior to NAFTA, the Interstate Commerce Commission (ICC) regulated "motor carriers" and did not distinguish between Mexican, Canadian, or United States applications. In 1980, the passage of the Motor Carrier Act essentially removed any barrier to transporting goods, thus paving the way for Mexican and Canadian motor carriers to obtain licenses from the ICC. But, two years later the United States issued a moratorium on granting licenses to Mexican companies, citing safety concerns. The moratorium signaled an end of the equal treatment given to U.S. and foreign applicants for motor carrier operating authority.

The moratorium continued through the signing of NAFTA on December 18, 1992. Under Annex I of NAFTA, a Mexican motor carrier had the ability to obtain operating authority in bordering U.S. states three years from the date of signing (i.e. December 18, 1995) and to gain operating authority in any of the states after January 1, 2000. But on the eve of its initiation, then U.S. President Clinton delayed the start date, citing safety reasons again as political pressures from the International Brother-

9. Id.
14. Id.
17. Id. at 14.
18. Id.
hood of Teamsters escalated from fears over losing American jobs. The Teamsters union, whose members included some American motor carriers, argued that Mexican trucks were unsafe, polluted, and their drivers had insufficient training.

Due to the moratorium, a NAFTA arbitration panel ruled in 2001 that the United States was violating NAFTA provisions governing cross-border trucking and gave Mexico the remedy of imposing retaliatory tariffs. The Panel "unanimously determine[d] that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations. . . of NAFTA." Mexico declined to implement tariffs in hopes that the United States would abide by NAFTA.

Former U.S. President Bush attempted to ease border entry for Mexican trucks during his administration, and ultimately was successful in creating a pilot program in 2007 to allow up to one hundred trucking firms from each country to cross the border. Prior to this demonstration program, Mexican trucks were limited to a short distance north of the border, where their cargo was then transferred to American trucks. Ricardo Alday, spokesman for the Mexican Embassy in the United States, stated that during the demonstration program, "26 carriers from Mexico, with 103 trucks—and 10 from the U.S. [with] 61 trucks crossed the border over 45,000 times without a significant incident."

Despite the excellent safety record during the pilot program, on March 11, 2009, President Obama signed into law the OAA, which provided that "[n]one of the funds appropriated. . . may be used. . . to continue a cross-border motor carrier demonstration program to allow Mexican-domiciled motor carriers to operate beyond. . . the border." The effect "scrapped" the pilot program that allowed a small number of Mexican trucks to enter past the previous twenty-five mile buffer zone where Mexican trucks historically could not pass. This time, Mexico opted on its privilege to respond with tariffs and imposed duties of up to forty-five percent on about ninety American agricultural and industrial imports. For example, Christmas trees received a twenty percent tariff, fresh grapes received a

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20. Don't Keep on Trucking, supra note 1.
21. Id.
23. Don't Keep on Trucking, supra note 1.
24. Id.
25. See Simon, supra note 3 (The actual limitation was twenty miles from the border, with the exception of Arizona where the limit was seventy-five miles.); see also Suzanne Gamboa, Congress May End Funding for Pilot Program, HOUS. CHRON., Mar. 6, 2009, at 3.
27. Omnibus Appropriations Act § 136, supra note 5.
28. Don't Keep on Trucking, supra note 1.
29. Id.
forty-five percent tariff, and sunglasses received a fifteen percent tariff. Bill Adams, U.S. Department of Transportation spokesman, said that President Obama acknowledged congressional concerns over the pilot program and was committed to creating a "new trucking project that will meet the legitimate concerns of Congress and our NAFTA commitments."

In addition, the Mexican National Chamber of Autotransporte de Carga, or Canacar, is representing around 4,500 trucking companies in a suit against the United States for six billion dollars in compensation for lost business opportunities that were possible if NAFTA provisions were enforced. Canacar filed a notice of arbitration on April 2, 2009, pursuant to NAFTA dispute resolution requirements, specifically claiming violations once the U.S. pilot program terminated. The United States indicates that it "intends to defend this claim vigorously." Canacar in its notice explained that the $2.4 billion of tariffs was not an arbitrary amount, but came from an independent consultant’s evaluation of the damages from delay of the NAFTA provisions.

On the one-year anniversary of the pilot program’s termination, the U.S. Congress remains deadlocked on resolving this trade dispute and the Mexican government said it “has no choice” in continuing its tariffs of American goods. The Federal Motor Carrier Safety Administration (FMCSA), a division of the Department of Transportation, commented that it had not even “floated any proposals with Mexico” for resolution. U.S. Trade Representative Ron Kirk acknowledged that the United States has not honored its agreement with Mexico.

The result of the termination of the pilot program meant the return of the twenty-five mile buffer zone, where Mexican goods going north will “have to be unloaded at the border, reloaded for the short hop across it, then loaded again onto an American truck.” Mexican authorities claim this is essentially a “trucking tax,” amounting to additional logistical costs on Mexican trucking businesses. Further, trucks used for the short drive across the border produce more environmentally damaging emis-

31. Simon, supra note 3.
35. Id. at 17.
37. Id.
39. Don’t Keep on Trucking, supra note 1.
40. Id.
sions, so pollution levels at the buffer zone have increased. This dispute has touched off diplomatic efforts by both countries to protect the overall trade status.

III. OBJECTIONS TO OPENING THE BORDER

Ever since the pilot program began in 2007, interest groups, led by the International Brotherhood of Teamsters, strongly campaigned against the program for alleged "safety" reasons. In response, Congress piled on more restrictions before the pilot program could begin. U.S. companies, perhaps somewhat ironically, showed little interest in participating in the pilot program - possible reasons included the uncertain future of the program, the beginning of the current recession, or wariness in trucking through the Mexican interior. The dispute over the program was much stronger by the transportation organizations on the U.S. side of the border.

A. SAFETY CONCERNS

Safety reasons were the cited rationale for terminating the cross-border trucking program in the Omnibus spending bill. As part of the OAA, the U.S. Office of Inspector General reviewed the safety inspections during the pilot program. The report contained statistics from June 2008 to June 2009 and found that FMCSA performed more than 220,000 inspections on Mexican trucks. In 2008, 21.8% of U.S. trucks removed from service for safety violations, while Mexican trucks were placed out of service a comparable 21.2% of the time. Interestingly, 6.9% of U.S. drivers who were inspected violated safety requirements as compared to only 1.2% of Mexican drivers.

Another report to the U.S. Congress by the Congressional Research Service (CRS) explained that "Mexican trucks are as safe as U.S. trucks and that the [Mexican] drivers are generally safer than U.S. drivers."

41. Id.
42. Id.
43. Mark J. Andrews et al., International Transportation Law, 42 INT'L LAW. 631, 636 (Summer 2008).
44. Id.
45. Id.
46. Id.
49. Id. at 20.
50. Id.
51. Id.
The supposed safety concern over permitting Mexican drivers and trucks from crossing the border is considerably weakened when Mexican drivers and trucks receive better safety reports than U.S. drivers and trucks, and appears to be merely a "flimsy cover for protectionism." Data from both the U.S. Department of Transportation and the CRS demonstrate that Mexican trucks and drivers have a better inspection record and fewer violations than U.S. drivers and trucks. Further, an American court and the NAFTA arbitral panel rejected the alleged safety concerns raised by the Teamsters. The panel recognized that safety concerns are a legitimate regulatory objective, but that a blanket moratorium without addressing safety issues was improper. Mexican companies attempted to disarm safety concerns by investing in new trucks and training drivers to meet the safety requirements under the demonstration project.

**B. Loss of American Jobs**

The driving force behind the opposition to the pilot program and implementation of NAFTA provisions results instead from fear over outsourcing American jobs to Mexico, as well as the increased competition that would come from Mexican trucking companies. The strongest opposition to the pilot program comes from the U.S. trucking unions, who claim that U.S. drivers would lose their jobs to lower-paid Mexican drivers. These concerns were raised in the debate to initiate the pilot program in 2007, and comments made to FMCSA complained that the demonstration program “tilt[ed] the competitive advantage to Mexican carriers and creat[ed] increased competition for smaller carriers in the U.S.”

Further, with lower labor costs and less adherence to trucking regulations, Mexican trucking companies could force small U.S. carriers to lower costs and further decrease profit margins, which may prevent some from operating. The Owner Operator Independent Drivers Association, critical of the demonstration project and later proponents to end the project, commented that Mexican carriers had the advantage of arriving into the United States with fuel tanks filled to capacity, thus avoiding the federal and state fuel taxes. This would create an uneven economic competitive environment where U.S. drivers would face higher fees and

54. *Id.*
55. *Don’t Keep on Trucking*, supra note 1.
57. *Don’t Keep on Trucking*, supra note 1.
61. *Id.*
62. *Id.*
would lose out on bids. But, the FMCSA responded that the demonstration would not have a "significant adverse impact on U.S. motor carriers or drivers." Mexican carriers under the project did not have authority to handle domestic freight jobs within the United States but only those across the border, so the fears of U.S. carriers were unfounded. This illustrates that the motive for opposing implementation of the pertinent NAFTA trucking provisions is trade protectionism.

Instead of job losses in either the United States or Mexico, NAFTA has benefited both countries in creating jobs and increasing the number of goods purchased and sold according to the United States Trade Representative. Between 1993 and 2007, trade between the countries tripled to $930 billion, U.S. employment rose twenty-four percent, and workers in Mexico received higher wages than previously paid. Of course, the trade was accomplished with transportation means other than trucking services, but the statistics above help demonstrate that concerns over U.S. jobs due are largely unfounded.

IV. CURRENT EFFECTS ON THE UNITED STATES AND MEXICO

The United States and Mexico have a lot at stake in the trucking dispute, considering the $350 billion of commerce between two countries every year. Besides the annual commerce, the tariffs imposed by Mexico on about ninety American imports are hurting states that produce such goods. The tariff penalties were "carefully chosen to avoid pushing up prices of staples in Mexico while hitting goods that are important exports for a range of American states." But more dangerous effects are apparent from this trade spat.

In the United States, these tariffs could result in job losses, export losses, and extra transportation fees. A report by the U.S. Chamber of Commerce states that the termination of the demonstration project will lead to a decline in exports of $2.6 billion and could lead to a loss of 25,600 jobs. Noneconomic effects include loss of confidence that the United States will honor its trade agreements during difficult economic

63. Id.
64. Id.
65. Id.
66. A Small and Dangerous Spat, supra note 10.
68. Id.
69. Id.
70. Don't Keep on Trucking, supra note 1.
71. Id.
72. Chamber Report, supra note 11.
73. Id.
times. Moreover, cities along the U.S.-Mexican border, such as Laredo, Texas, with about $110 billion in two-way freight crossing over its bridges yearly, will likely lose the benefit of the trucking program. White House spokesman Robert Gibbs acknowledged the harm when he said that the United States is not interested in creating barriers to valuable trading partnerships during a recession.

In Mexico, the economy is already suffering from the recession in the United States. Mexico’s export factories have lost over 65,000 jobs from October 2008 to March 2009. This is due to the decline in exports generally; automobile exports fell fifty percent in the beginning of 2009. The U.S. Bureau of Transportation Statistics reported that U.S.-Mexico surface trade fell 17.1% in July of 2009 compared to July 2008. The value of imports carried by truck was 13.7% lower in July 2009 than July 2008, while the value of exports carried by truck was 14.7% lower. President Calderon of Mexico confirmed these statistics when he told President Obama that “the dispute has hurt trade, raised consumer costs and reduced job creation.”

The economic effects of the trucking dispute between the United States and Mexico has united regional leaders in finding a solution. U.S. governors of Arizona, California, New Mexico, and Texas along with Mexican governors of Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora and Tamaulipas issued a joint statement at the Border Governors Conference in Monterrey, Mexico that called for a resolution of the trucking dispute. The Governors acknowledged that border security concerns exist, but believe that both governments can honor “[NAFTA’s] . . . regulations to allow U.S. and Mexican trucks to safety [sic.] operate across our international border between our countries.”

Yet no signal of how the U.S. administration plans on resolving the dispute has appeared, providing little solace to agricultural producers, such as California grape growers, hit hard by the tariffs implemented by Mexico. U.S. Agricultural Secretary Tom Vilsack stated that the resolution to the trucking dispute was taking too long and that he would act sooner

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74. A Small and Dangerous Spat, supra note 10.
76. Id.
77. Marc Lacey & Ginger Thompson, Obama’s Next Foreign Crisis Could be Next Door, N.Y. Times, Mar. 25, 2009, at Al.
78. Id.
79. Id.
81. Id.
82. Johnson & Gould, supra note 8.
84. Id.
85. Id.
86. Id.
if it were within his authority.87

The U.S. grape market is illustrative of the harmful effects the trucking dispute has upon the economy.88 Grapes face the highest tariff rate, forty-five percent. The tariff has “effectively closed” the $58 million industry, harming the 58,000 people employed in the grape industry.89 The tariffs provided incentive for over 150 manufacturers, retailers, and agricultural producers to form a coalition called the “Alliance to Keep U.S. Jobs.”90 Pressure to resolve the trucking dispute has come from private industries, government leaders, elected officials, yet no resolution has resulted since President Obama promised action to President Calderon.

V. NAFTA AT THE CROSSROADS

President Obama’s administration has a large checklist currently, and resolving the trucking dispute may sit lower on the list as compared to healthcare or fighting the Taliban.91 But, the United States can “walk and chew gum at the same time. . .[i]t can move forward with other priorities, but there’s no reason to put trade on the back burner.”92 President Obama should encourage Congress either to revive the demonstration project or to start a new pilot program.93 One solution is to insert funding for the project into another bill.94 There is a lot at stake—fulfilling NAFTA requirements and reassuring U.S. trading partners that it will honor its trade agreements during difficult economic times.95 Between the United States and Mexico alone, lack of resolution on this dispute could threaten more than $350 billion of commerce annually.96 Approximately two-thirds of that commerce is transported across the border roadways.97

Mexico has demonstrated its willingness to cooperate, and despite the termination of the demonstration project that permitted a few Mexican truckers onto American roadways, Mexico still permits U.S. truckers to cross its borders as a sign of good will.98 The demonstration project showed the benefits of open cross-border trade, such as one participating carrier shaving off $600,000 of fuel costs and trip time.99 The demonstration project had initial positive results about implementing a broader

87. Id.
89. Id.
90. Id.
91. Chamber Report, supra note 11.
92. Id.
93. Id.
94. Gamboa, supra note 25.
95. Id.
96. A Small and Dangerous Spat, supra note 10.
97. Don’t Keep on Trucking, supra note 1.
99. Id.
trucking policy as envisioned by NAFTA between the United States and Mexico. Yet protectionism won out when the Congressional spending bill eliminated funding for the program.\textsuperscript{100}

The failure of a resolution over the trucking dispute may extend beyond the two trading partners to other countries. Brazil is threatening to join Mexico’s retaliation measures for United States’ failure to honor trade agreements regarding cotton.\textsuperscript{101} Brazil may place tariffs of up to one hundred percent on U.S. exports of health care products, which could amount to $591 million in retaliatory relief.\textsuperscript{102} The trucking dispute concerns more than authorizing a few trucking companies to cross the border; resolving the dispute is a signal that U.S. trade agreements are honored and important. Further, it signals the continuing viability of NAFTA.

\textsuperscript{100} Don’t Keep on Trucking, supra note 1.
\textsuperscript{101} Landers, supra note 36.
\textsuperscript{102} Id.
Updates