

THE TRUCK STOPS HERE: THE IMPENDING MEXICO-US TRUCKING DISPUTE

Ryan Hynes

Introduction

The North American Free Trade Agreement (NAFTA) is now over 20 years old. NAFTA was intended to throw open borders between Canada, Mexico, and the US, and create an economic powerhouse in the process.¹ While the success of NAFTA is debatable, US compliance with the agreement is not. For much of its life, the US has violated the terms of NAFTA, and imposed a moratorium on Mexican truckers wishing to transport goods into the US.

Mexican trucking companies that wish to import goods into the US may do so only in certain defined commercial zones, which are all less than 100 miles from the US-Mexico border.² To travel outside the commercial zone, goods must be offloaded from Mexican trucks, and onto domestic US carriers.³ This system is wasteful, discriminatory, and ultimately, protectionist.

The US imposes no such restriction on Canadian truckers, citing substantial similarities between US and Canadian motor carrier regulations.⁴ This Canadian-Mexican double standard has existed since Ronald Reagan lifted requirements for Canadian motor carriers in the early 1980s.⁵

¹ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter "NAFTA"].

² *What is the Commercial Zone?*, FMCSA, <http://www.fmcsa.dot.gov/faq/what-commercial-zone> (last updated Apr. 16, 2014).

³ Cindy Skrzycki, *The Regulators*, THE WASHINGTON POST (Mar. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/02/AR2009030202535.html>.

⁴ *Statement on Signing the Bus Regulatory Reform Act of 1982*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=43014> (last visited Nov. 21, 2014).

⁵ Klint W. Alexander and Bryan J. Soukup, *Obama's First Trade War*, 28 BERKELEY J. INT'L L. 313 (2010).

In 2000, Mexico challenged the US policy in the NAFTA dispute panel.⁶ The NAFTA panel held that the policy was in violation of NAFTA's most favored nation (MFN) principle, and subsequently authorized Mexico to cross-retaliate via import tariffs on US goods.⁷ Mexico imposes these retaliatory tariffs on approximately 90 different US goods, to the tune of \$2.4 billion per year.⁸

The US has waffled over granting Mexican truckers more freedom to operate. President George W. Bush vowed to live up to our obligations under NAFTA, then sat back as enabling legislation stalled in Congress.⁹ President Obama has both lifted, and re-imposed the ban on Mexican carriers.¹⁰ The result of this drawn out fight has been the Federal Motor Carrier Safety Administration's (FMCSA) U.S.-Mexico Cross-Border Trucking Pilot Program.¹¹

The three year pilot program started in 2011 with the goal of allowing certain registered Mexican trucking companies to operate outside of the commercial zone.¹² The pilot was designed to collect data on the safety of Mexican truckers and operators, and make a definitive ruling on whether safety concerns about Mexican trucks warrant the US moratorium.¹³ Those opposed to opening borders to Mexican truckers, like the Teamsters and the Owner Operators Independent Drivers Association (OOIDA), have been critical of the program. They argue that it would be dangerous to generalize the results of the program, whose participants were self-selected, to the entire Mexican trucking industry,

⁶ Chad MacDonald, *NAFTA Cross-Border Trucking*, 42 VAND. J. TRANSNAT'L L. 1631, 1640-1650 (2012).

⁷ Robert J. Carbaugh, *NAFTA and the U.S.-Mexican Trucking Dispute*, 4 J. INT'L & GLOBAL ECON. STUD. 1, 1-10 (2011).

⁸ *Mexico Trade Summary*, UNITED STATES TRADE REPRESENTATIVE, <https://www.ustr.gov/sites/default/files/2013%20NTE%20Mexico%20Final.pdf> (last visited Nov. 21, 2014).

⁹ See Alexander and Soukup, *supra* note 5.

¹⁰ *Don't keep on trucking*, The Economist (Mar. 19, 2009), <http://www.economist.com/node/13331117>.

¹¹ *Mexico Cross Border Trucking Pilot Program – Operational Updates*, FMCSA, <http://www.fmcsa.dot.gov/international-programs/mexico-cross-border-trucking-pilot-program/mexico-cross-border-trucking-pilot> (last updated Dec. 3, 2014).

¹² *Controversial Agreement: Mexican Trucks to Haul Goods throughout US*, THE NEW AMERICAN (Aug. 4, 2011), <http://www.thenewamerican.com/usnews/politics/item/9521-controversial-agreement-mexican-trucks-to-haul-goods-throughout-us>.

¹³ *Mexico Cross Border Trucking Pilot Program*, FMCSA, <http://www.fmcsa.dot.gov/international-programs/mexico-cross-border-trucking-pilot-program> (last updated Nov. 21, 2014).

citing a low participation rate and therefore a lack of statistical significance.¹⁴

The program ended October 14th, 2014 without achieving the desired number of Mexican trucking participants. Thus, the FMCSA was unable to make a decision on statistically significant data.¹⁵ On October 28, 2014 a committee from the FMCSA met with the DOT Inspector General to discuss the program results.¹⁶ Until the DOT issues its final decision, the FMCSA has authorized members of the pilot to continue operating outside of commercial zones.

The inconclusive results of the study and the strong, organized opposition to such a policy change makes it unlikely that the US will lift its moratorium. Mexico will not react kindly to any failure to change, and will immediately reinstate the import tariffs that it voluntarily lifted during the program. After over ten years of back and forth over this issue, and exhausting its remedies under NAFTA and the NAFTA Panel, it is almost certain that Mexico will bring a claim against the US in the WTO. Article 2005 of NAFTA allows a party to bring a claim in either the NAFTA courts, or the WTO, and the WTO has a history of settling RTA and PTA disagreements.¹⁷

Should the case reach the WTO, the US will almost certainly lose, and will in turn face steeper penalties for failing to comply with the terms of NAFTA, all to defend an outmoded and prejudicial policy that is protectionism hiding under the guise of safety regulations. This free trade double standard is not only detrimental to US reputation as a trustworthy trade partner and international leader, but it is also hurting the bottom line.

I. The Moratorium is Bad Policy

At the heart of this dispute and its long history of false starts and sudden stops, is outdated, irrational, and simply bad US policy. As Alexander and Soukup point out, the origins of this dispute date back to

¹⁴ *FMCSA's Mexico Decision Draws Opposition, Support*, TRUCKINGINFO (Oct. 15, 2014), <http://www.truckinginfo.com/news/story/2014/10/fmcsa-s-mexico-decision-draws-opposition-support.aspx>.

¹⁵ *Data on Cross Border Program Insufficient FMCSA Committee Says*, OVERDRIVE (Oct. 29, 2014), <http://www.overdriveonline.com/data-on-cross-border-program-insufficient-fmcsa-committee-says-mex-carriers-continue-operation/>.

¹⁶ *DOT Faces Cross Border Trucking Decision*, JOC (Oct. 21, 2014), http://www.joc.com/trucking-logistics/truckload-freight/dot-faces-cross-border-trucking-decision-us-mexico-trade-grows_20141021.html.

¹⁷ See NAFTA, *supra* note 1, at Ch. 20.

the Bus Regulatory Reform Act (BRRA) of 1982, which placed a moratorium on the operations of Mexican and Canadian trucks in the US.¹⁸ President Reagan created an exception for Canada, but not Mexico, citing health and safety concerns.¹⁹ These perceptions persisted through the 90's and the creation of NAFTA, when Ross Perot was warning of the "giant sucking sound" of American jobs to Mexico that NAFTA would create.²⁰ Time and economics have proven these accusations false, but the perception of Mexico as an unsafe and underdeveloped trading partner provides a convenient cover for truly protectionist intent. Thirty-year old concerns over the safety and regulation of Mexican trucks have now become an excuse to stifle international trade and competition.

Interest groups like the Teamsters and OOIDA understandably do not wish to jeopardize their monopoly on domestic US shipping. They are the first to rattle off the potential environmental and health hazards of Mexican trucks.²¹ The only complication, however, is that their allegations are not true. One of the key findings of the most recent FMCSA pilot program is that Mexican trucks are as safe, if not safer than their US counterparts.²²

As part of the pilot, Mexican trucks were subject to random inspections. On average, each Mexican truck was inspected 18 times per year.²³ These inspections revealed that Mexican trucks had a lower overall out-of-service rate than their US counterparts.²⁴ That Mexican trucks complied with stricter FMCSA requirements while maintaining a better out of service rate than US trucks speaks to Mexican motor carriers' ability to adequately meet US safety requirements. If there was any justification for implementing a moratorium in 1982, there certainly is not today.

¹⁸ See Alexander and Soukup, *supra* note 5.

¹⁹ *Id.*

²⁰ Ross Perot on Free Trade, ONTHEISSUES, http://www.ontheissues.org/celeb/Ross_Perot_Free_Trade.htm (last visited Nov. 21, 2014).

²¹ John Porretto, *Teamsters President James Hoffa Blasts Mexican Truck Decision*, MINDFULLY.ORG (Sept. 8, 2007), <http://www.mindfully.org/WTO/2007/Hoffa-Mexican-Trucking8sep07.htm>.

²² See FMCSA, *supra* note 11.

²³ *Mexico Domiciled Motor Carriers*, FMCSA, <http://www.fmcsa.dot.gov/international-programs/mexico-cross-border-trucking-pilot-program/mexico-domiciled-motor-carriers-17> (last updated Oct. 24, 2014).

²⁴ Kyle Burns, *It's Time to Implement Cross Border Trucking*, INBOUND LOGISTICS (Aug. 2010), <http://www.inboundlogistics.com/cms/article/its-time-to-implement-cross-border-trucking/>.

The moratorium insulates domestic industries from international competition and is expensive. Mexican retaliatory import tariffs totaled nearly \$2.4 billion dollars in 2007.²⁵ That is not the only cost of the moratorium however. The US is restricting free trade and competition, and insulating the domestic trucking industry from international competition. The punitive tariffs imposed by Mexico also make other US goods less competitive.²⁶ In this way, the costs of protecting the domestic US trucking industry is not borne by that industry, or the US government itself, but by the business and industries directly affected by Mexico's punitive tariffs.

If Mexican motor carriers were allowed to operate outside of the commercial zone, the need to offload goods to domestic US carriers would be eliminated, saving considerable transportation time and additional transaction costs. Mexican carriers might also compete on price, and offer US business more competitive rates on domestic shipping. Fears that Mexican motor carriers will compete for pennies on the dollar are overblown however.

While it is difficult to forecast the effects of completely opening US borders to Mexican Trucking, it would not be the doomsday scenario that many opponents describe.²⁷ There would be several structural barriers to entry that Mexican truckers must still overcome. Border inspections, high insurance costs, language, and uncertainty of a backhaul are all obstacles that Mexican truckers would face.²⁸ These challenges will likely erode most of the competitive price advantage that Mexican truckers have over their US contemporaries.

What seems more likely, is that the major determinant of the growth of trucking between the US and Mexico will not be price, but the growth in trade itself.²⁹ As a larger volume of goods flow between the two countries, Mexican shipping will increase. However, a larger volume of trade means that Mexican truckers will not be cutting into US truckers business, and a substantial increase in trade will likely increase demand for US trucking as well.

²⁵ Christopher Conkey, Jose De Cordoba, and Jim Carlton, *Mexico Issues Tariff List in U.S. Trucking Dispute*, THE WALL STREET JOURNAL (Mar. 19, 2009), <http://www.wsj.com/articles/SB123739445919172781>.

²⁶ *Id.*

²⁷ Steven Greenhouse, *US Delays Opening Border to Trucks from Mexico*, NEW YORK TIMES (Jan. 8, 2000), <http://www.nytimes.com/2000/01/08/us/us-delays-opening-border-to-trucks-from-mexico.html>.

²⁸ See Carbaugh, *supra* note 7, at 8.

²⁹ *Id.*

In short, the BRRRA moratorium is an outmoded policy whose fundamental assumptions are no longer accurate, and whose effects are protecting one industry at the expense of many others. Not only is the current policy hurting domestic US industries, but lifting the policy would likely increase in a net benefit due to gains from trade. This policy has also frustrated relations with Mexico, and has given the US a black eye in the international trade community. The moratorium on Mexican trucking is the ghost of a bygone era, and needs to be put to rest.

II. This Dispute is Bound for the WTO, Where the US Will Lose

Mexico brought this dispute to the NAFTA arbitration panel in 2000 and won a retaliatory judgment against the US.³⁰ In the years following the decision, Mexico has enforced and suspended its import tariffs several times as the US has waffled over lifting the moratorium and started, then cancelled multiple pilot programs.³¹ Should the US fail to lift the moratorium after the most recent pilot program, Mexico is not likely to entertain US vacillation any longer.³² Mexico will immediately reinstate their import tariffs and, having exhausted all other recourse under NAFTA, will likely bring a claim against the US in the WTO.

The interaction between the WTO and RTAs like NAFTA raises some interesting questions. Dispute settlement under the WTO is compulsory once a claim has been brought, and while NAFTA Article 2005 allows parties to bring a claim under NAFTA or the WTO, jurisdictional issues still exist.³³ In this instance, it is unclear whether the NAFTA tribunal or the WTO Dispute Settlement Understanding (“DSU”), will have jurisdiction on the issue. As Kwak and Marceau point out,

“Article 23 of the DSU mandates exclusive jurisdiction in favour of the DSU for WTO violations. By simply alleging that a measure affects or impairs its trade benefits, a WTO Member is

³⁰ Final Panel Report, *Cross-Border Trucking Services*, USA-MEX-98-2008-1 (Feb. 2, 2001), <http://www.worldtradelaw.net/document.php?id=nafta20/truckingservices.pdf>.

³¹ *Mexico Trucking Retaliation*, INTERNATIONAL TRADE ADMINISTRATION, http://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp (last updated July 29, 2013)

³² See William Cassidy, *Mexico May Hike Tariffs If Trucking Plan Fails*, JOURNAL OF COMMERCE (June 30, 2011), http://www.joc.com/regulation-policy/customs-regulations/mexico-may-hike-tariffs-if-trucking-plan-fails_20110630.html.

³³ See NAFTA, *supra* note 1, at Art. 2000.

entitled to trigger the quasi-automatic, rapid and powerful WTO dispute settlement mechanism, excluding thereby the competence of any other mechanism to examine WTO law violation claims.”³⁴

Mexico previously argued that the US moratorium violated the terms of NAFTA, and brought a complaint under the NAFTA dispute resolution procedures. If Mexico alleges that the US is violating a WTO agreement as well as NAFTA, it may then invoke the WTO DSU to adjudicate this dispute.

This collision of jurisdiction raises another procedural question, should the WTO be able to hear this dispute, given that the NAFTA panel already heard and resolved the issue. The US will likely argue *res judicata*, and that Mexico’s punitive import tariffs remedy any injury the moratorium causes Mexico.³⁵ This argument is unlikely to succeed however, because Mexico’s original complaint alleged that the US violated the terms of NAFTA, and not a WTO agreement. To bring a case to the DSU panel, Mexico will likely allege that the continued US moratorium violates the General Agreement on Trade in Services (GATS).

GATS was a result of the Uruguay Round of trade negotiations, and was designed to extend the same protections afforded to goods under the General Agreement on Tariffs and Trade (GATT) to services and the service sector.³⁶ As such, GATS includes protections such as most favored nation (MFN), national treatment, and market access. MFN prohibits WTO members from discriminating against their trading partners, and requires all parties to treat one another as if they were their most favored trading partner.³⁷ National treatment requires parties to treat another country’s goods or services no less favorably than similar domestic goods or services.³⁸ Market access compels parties to allow

³⁴ Kyung Kwak and Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and RTAS*, WORLD TRADE ORGANIZATION (Apr. 26, 2002), http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf.

³⁵ *Id.* at 7.

³⁶ *GATS: objectives, coverage and disciplines*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#7 (last accessed Nov. 21, 2014).

³⁷ *Principles of the Trading System*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last accessed Nov. 21, 2014).

³⁸ *National treatment*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/glossary_e/national_treatment_e.htm (last accessed Nov. 21, 2014).

other countries to offer services within the domestic market.³⁹ GATS extends powerful protections traditionally enjoyed only by trade in goods to the service sector.

Through the DSU, Mexico will likely argue that the US moratorium violates GATS articles II (MFN), XVI (market access), and XVII (national treatment). The disparate treatment of Mexico relative to Canada violates the MFN provision of Article II.⁴⁰ The moratorium itself violates the market access protections of Article XVI.⁴¹ Finally, the moratorium and limited commercial zones give US trucking companies a major advantage over their Mexican counterparts, which violates the national treatment protections of Article XVII.⁴²

However, GATS allows for exceptions. Because GATS affords such powerful protections to traditionally domestic industries, countries were hesitant to sign on to GATS.⁴³ To pass GATS, the WTO allowed countries to make a one-time list of exemptions to the Article II MFN provisions of the agreement. An exemption must list the area of GATS and the countries to which it applies, as well as the scope and length of time for which the exemption is claimed.⁴⁴ These exemptions allow a country to breach the terms of GATS, provided it is in the scope defined in the exemption.⁴⁵ Exemptions were not intended to last any longer than ten years, though in reality they have lasted much longer.⁴⁶ The WTO also required the mandatory, periodical review of exemptions, and investigation into whether the circumstances that prompted the exemption still exist.⁴⁷ Once again, this provision has not been treated with the

³⁹ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter "Marrakesh Agreement" or "WTO Agreement"]

⁴⁰ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].

⁴¹ *Id.*

⁴² *Id.*

⁴³ See WTO, *supra* note 36.

⁴⁴ *Services: rules for growth and investment*, WORLD TRADE ORGANIZATION (Nov. 21, 2014),

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

⁴⁵ Aaditya Mattoo, *MFN and the GATS*, INSTITUTE FOR AGRICULTURE AND TRADE POLICY (Jan. 1999), http://www.iatp.org/files/MFN_and_the_GATS.htm.

⁴⁶ *Id.*

⁴⁷ *Id.*

gravity that was initially intended, and in practice, exemptions are not seriously reviewed or removed.

The US has hundreds of exemptions to GATS on file.⁴⁸ One of those exemptions covers the 1982 BRRA, which grants the President authority to impose a moratorium. The US states that the exemption applies to Canada and Mexico, and is for an indefinite period of time.⁴⁹ In the description of the exemption however, the US states that the moratorium does not apply to Canada. Specifically,

“The US government has discretion to limit the issuance of trucking licenses to persons from contiguous countries on the basis of reciprocity. The Bus Regulatory Reform Act of 1982 permits the President to remove or modify in whole or in part the moratorium on a finding that such removal or modification is in the national interest. Domestic and cross-border trucking operations are permitted within designated Interstate Commerce Commission commercial zones. The moratorium was lifted for Canada in October 1982.”⁵⁰

This is very strange for an exemption, and while it states that it applies to both Canada and Mexico, in the same breath, it removes Canada from the exemption.

This exemption is discriminatory on its face, and should be invalidated. The exemption purports to apply to both Mexico and Canada, yet in reality applies only to Mexico. Its indefinite term also violates the general principles of GATS exemptions.⁵¹ More importantly, the conditions that prompted the exemption, and the moratorium, no longer exist. Preliminary data from the FMCSA pilot shows that Mexican trucks and truckers are as safe, if not safer than their US counterparts.⁵² If there ever were legitimate reasons for imposing a moratorium on Mexico, there are not any now. Concerns over safety and the environment are thinly veiled attempts by us industries to protect themselves from increased competition, and are stifling free trade.

⁴⁸ *United States of America: Final List of Article II (MFN) Exemptions*, WTO Documents Online (Apr. 15, 1994), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=16552,60254,14206,26635&CurrentCatalogueIdIndex=3&FullTextSearch=.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See WTO, *supra* note 44.

⁵² See Burns, *supra* note 24.

The WTO has never ruled on the legitimacy of an exemption, nor has it held that an exemption may be invalidated. The facts of this case, and the US BARRA exemption certainly raise that question however. When faced with new or untouched issues, the WTO typically refers back to its core principles of MFN, national treatment, and free trade.⁵³ Given the disparate treatment between Canada in Mexico within the text of the exemption itself, there is a good chance that the WTO will find the exemption invalid. The WTO must tread lightly however.

For all of its success, the WTO's main weakness is that it is a voluntary system that lacks any central enforcement authority. Should the WTO push the envelope too far, there is a chance that the US will simply choose to ignore the decision, which would severely damage the credibility and authority of the WTO. The US is easily the WTO's largest member, and there is a risk that the US will be handled with 'kid gloves' to avoid this very problem.⁵⁴ Should the US fail to comply, the WTO will allow Mexico to retaliate, similar to Antigua and Barbuda in the Online Gambling case.⁵⁵ In that case, the US failed to comply with a DSU decision, and the governments of Antigua and Barbuda were allowed to retaliate under the Trade in Intellectual Property Agreement (TRIPS).⁵⁶ It is difficult to predict how and to what extent the WTO would allow Mexico to retaliate against the US, however, cross-retaliation under an agreement like GATS would be a larger deterrent than the current punitive tariffs, and would spark greater debate domestically. Hopefully the WTO will take this opportunity to establish a precedent of limiting GATS exemptions that are blatantly protectionist, and in violation of the basic principles of international trade.

The US – Mexico trucking case raises some interesting questions for the WTO, the answers to which are unclear. First, can the WTO decide a case that has already been heard by an RTA arbitration panel, even if the claim is brought under a WTO agreement? More importantly, can the WTO invalidate a GATS exemption if the assumptions on which that exemption was based are no longer true, and the exemption itself is so unfair as to violate the fundamental principles of the world trading

⁵³ See WTO, *supra* note 37.

⁵⁴ *United States Trade Profile*, WORLD TRADE ORGANIZATION (Sept. 2014), <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=US>.

⁵⁵ See *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last accessed Nov. 21, 2014).

⁵⁶ *Id.*

system? These are thorny issues, but ones of tremendous merit and consequence. Should the US fail to lift the moratorium, the WTO could be faced with these questions sooner rather than later.

Conclusion

The US-Mexico trucking saga has gone on long enough. Outdated, protectionist domestic policy has incubated a domestic industry, violated the fundamental principle of international trade, and passed the costs of doing so onto US exporters, making them less competitive abroad. Should the US fail to lift the moratorium on US trucking, Mexico will be forced to bring a complaint against the US under the DSU. Instead of pandering to the size and strength of the US, the WTO should make an example of the protectionist policy, and carve out more authority for the GATS agreement. The WTO is Mexico's last line of defense against a blatant violation of international trade, the WTO must send the message that the buck stops here.