NORTH AMERICAN FREE TRADE AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

IN THE MATTER OF

CROSS-BORDER TRUCKING SERVICES

(Secretariat File No. USA-MEX-98-2008-01)

Final Report of the Panel

February 6, 2001

Panel Members:

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I. INTRODUCTION

A. The Dispute

1. The Panel in this proceeding must decide 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.[1] Similarly, the Panel must decide whether the United States breached Articles 1102 (national treatment) and/or 1103 (most-favored-nation treatment) by refusing to permit Mexican investment in companies in the United States that provide transportation of international cargo. Given the expiration on December 17, 1995 of the Annex I reservation that the United States took to allowing cross-border trucking services and investment, the maintenance of the moratorium must be justified either under the language of Articles 1202 or 1203, or by some other provision of NAFTA, such as those found in Chapter Nine (standards) or by Article 2101 (general exceptions).[2]

The Parties' views are summarized as follows:

2. **Mexico** contends that the United States has violated NAFTA by failing to phase out U.S. restrictions on cross-border trucking services and on Mexican investment in the U.S. trucking industry, as is required by the U.S. commitments in Annex I, despite affording Canada national treatment.[3] Mexico believes such failure is a violation of the national treatment and most-favored-nation provisions found in Articles 1202 and 1203 (cross-border services) and Articles 1102 and 1103 (investment).[4]

3. Mexico also contests the U.S. interpretation of Articles 1202 and 1203, without arguing that the Mexican regulatory system is equivalent to those of the United States and Canada.[5] According to Mexico, Mexican trucking firms are entitled to the same rights as U.S. carriers under U.S. law, that is "(i) consideration on their individual merits and (ii) a full opportunity to contest the denial of operating authority."[6] Any other approach is a violation of Articles 1202 and 1203. During the NAFTA negotiations, both governments understood that "motor carriers would have to comply

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[1] The initial request for consultations on December 18, 1995 related to the requirement under Annex I that cross-border trucking services and related investment be permitted for persons of Mexico in the border states by the United States beginning December 18, 1995. However, the same considerations are applicable with regard to the obligation as of January 1, 2000 to permit cross-border services throughout the United States.

[2] The Panel also notes that similar questions have been raised concerning Mexico's obligations under Annex I and Articles 1202 and 1203, in light of its alleged refusal to permit U.S. owned firms to obtain authority to operate in the Mexican border states, but that specific matter is not before this Panel. *See* paras. 22 and 24, infra.

[3] MIS at 61-62.

[4] MIS at 75-81.

[5] Mexico also argues that adoption of an identical motor carrier regulatory system cannot properly be made a condition of NAFTA implementation. MIS at 62.

[6] MIS at 75.

fully with the standards *of the country in which they were providing service*."[7] However, the obligations of the Parties were "not made contingent upon completion of the standards-capability work program" or the adoption of an identical regulatory system in Mexico.[8]

4. Mexico asserts that the U.S. conduct must be reviewed in light of Article 102(2) of NAFTA, which requires that the "Parties shall interpret and apply the provisions of the [NAFTA] Agreement in the light of its objectives set out in paragraph 1." Among others, the objectives include eliminating barriers to trade in services and increasing investment opportunities "in accordance with applicable rules of international law."[9] Mexico contends that the U.S. conduct does not further these objectives.

5. According to Mexico, "There are no exceptions to the relevant NAFTA provisions that could even potentially be applicable."[10] Mexico contends that the U.S. failure to implement its cross-border trucking services and investment obligations is not justified by the standards provisions contained in Chapter Nine (standards) nor by Article 2101 (general exceptions), particularly in light of the fact that when NAFTA was negotiated the United States was well aware that Mexico's regulatory system was significantly different from those operating in the United States and Canada.[11]

6. Mexico charges that the U.S. inaction is motivated not by safety concerns but by political considerations relating to opposition by organized labor in the United States to the implementation of NAFTA's cross-border trucking obligations.[12]

7. The **United States** argues that because Mexico does not maintain the same rigorous standards as the regulatory systems in the United States and Canada, "the in like circumstances" language in Article 1202 means that service providers [from Mexico] may be treated differently in order to address a legitimate regulatory objective.[13] Further, since the Canadian regulatory system is "equivalent" to that of the United States, it is not a violation of the most-favored-nation treatment under Article 1203 for the United States to treat Canadian trucking firms which are "in like circumstances" vis-a-vis U.S. trucking firms in a more favorable manner than Mexican trucking firms.[14]

8. According to the United States, the inclusion in NAFTA Articles 1202 and 1203 of the phrase "in like circumstances" limits the national treatment and most-favored-

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[7] MIS at 74-75, emphasis added.

[8] MIS at 62, 64.

[9] MIS at 66.

[10] MIS at 64.

[11] MIS at 74-75; 81-83; 87-90.

[12] MIS at 70-74.

[13] USCS at 2.

[14] USCS at 2-3.

nation obligations to circumstances with regard to trucking operations which are like, and that because "adequate procedures are not yet in place [in Mexico] to ensure U.S. highway safety," NAFTA permits "Parties to accord differential, and even less favorable, treatment where appropriate to meet legitimate regulatory objectives."[15]

9. The United States believes its interpretation is confirmed by Article 2101, which provides that:

> 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.[16]

10. The United States also rejects Mexico's contention that the U.S. failure to implement Annex I with regard to cross-border trucking services and investment was politically motivated. At best, the United States contends, political motivation is "only of marginal relevance" to this case in the sense that highway safety has generated controversy in the United States.[17] Moreover, the United States asserts that WTO practice is to avoid inquiring into the intent of parties accused of WTO violations.[18] The issue, rather, is "whether Mexico has met its burden of proving a violation by the United States of its NAFTA obligations."[19]

11. **Canada**, which exercised its right to participate in accordance with Article 2013, insists that the major issue in interpreting Article 1202 is 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. Canada also contends that a "blanket" refusal by the United States to permit Mexican carriers to obtain operating authority to provide cross-border trucking services would necessarily be less favorable than the treatment accorded to United States' truck services in like circumstances.[20] Canada also asserts that the United States is precluded from relying on Chapter Nine because levels of protection established under Chapter Nine must still be consistent with the national treatment requirements of Article 1202 and other NAFTA provisions.[21]

B. Terms of Reference

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[15] USCS at 39.

[16] USCS at 40.

[17] USCS at 50.

[18] USPHS at 16-17.

[19] USCS at 50.

[20] CS at 3.

[21] CS at 4.

12. Since the Parties did not provide to the Panel an agreed Terms of Reference, under Article 2012:3, the terms of reference for this Panel are:

> To examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2).

13. Mexico requested a Commission meeting in a letter dated July 24, 1998 addressed to U.S. Trade Representative Charlene Barshefsky. The letter included the following language which, under Article 2012:3, serves as the terms of reference for this proceeding:

> The Government of Mexico considers that the refusal of the U.S. to grant a certain amount of access to the Mexican transporters, and permitting Mexican persons to establish with the intent to provide transport services, according to the provisions of NAFTA, constitutes a violation of the obligations of liberalizing trade in this sector, as the U.S. obligated itself by Annex I of NAFTA, in addition to breaching other provisions of the treaty, including Chapter Twelve and could cause nullification and impairment of the benefits that Mexico reasonably expects to receive from the treaty.

14. The following abbreviations (in alphabetical order) are used herein:

CS	Canada's Submission
GAO	U.S. General Accounting Office
FHWA	U.S. Federal Highway Administration
FMCSA	U.S. Federal Motor Carrier Safety Administration
FMCSR	U.S. Federal Motor Carrier Safety Regulations
FTA	The United States-Canada Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICC	U.S. Interstate Commerce Commission
MFN	Most-Favored-Nation
MIS	Mexico's Initial Submission
MPHS	Mexico's Post-Hearing Submission
MRB	Mexico's Reply Brief
MSRB	Mexico's Comments on the Request for a Scientific Review Board
NAFTA	The North American Free Trade Agreement
SECOFI	Mexico's Secretary of Commerce and Industry
SRB	Scientific Review Board
TR	Transcript of the Hearing

USCS	United States' Counter-Submission
USDOT	U.S. Department of Transportation
USPHS	United States' Post-Hearing Submission
USSS	United States' Second Submission
USTR	United States' Trade Representative
WTO	World Trade Organization

II. HISTORY OF THE PROCEEDINGS

15. In a letter to then-United States Trade Representative ("USTR"), Michael Kantor, dated December 18, 1995, Mexico's Secretary of Commerce and Industry ("SECOFI"), Herminio Blanco, requested consultations pursuant to NAFTA Article 2006, regarding the refusal of the United States Government to allow Mexican trucking firms to provide cross-border trucking services into the border states.

16. Responding on December 20, 1995, Ambassador Kantor stated that Mexico and the United States had decided to seek agreement on further safety and security measures, and that the United States was not aware of any action or proposed action by the United States government which could give rise to a request for consultation under Chapter Twenty. This letter also stated that the initiation of Chapter Twenty proceedings could adversely affect the work currently being undertaken by both countries' transportation officials on such measures.

17. In a letter dated December 21, 1995, Secretary Blanco replied to Ambassador Kantor, re-affirming Mexico's request for consultations in light of the obligation of NAFTA to allow cross-border truck service. Secretary Blanco denied that there had been a decision to modify or postpone any of the Parties' NAFTA obligations.

18. On January 19, 1996, consultations were held between the United States and the Mexican governments under Article 2006 of NAFTA. The consultations failed to resolve the dispute.

19. In a letter to U.S. Trade Representative Barshefsky, dated July 24, 1998, Secretary Blanco, in accordance with NAFTA Article 2007, requested a meeting of the NAFTA Free Trade Commission "based on the refusal of the [United States] to permit (i) access to Mexican transporters [from Mexico] to the States of California, New Mexico, Arizona and Texas, and (ii) Mexican persons [to establish enterprises] with the intent to provide international trucking services between points in the territory of the [United States]."[22]

20. On August 19, 1998, a meeting of NAFTA Free Trade Commission took place. However, the Commission was unable to resolve the dispute.

21. On September 22, 1998, the Government of Mexico requested the formation of an arbitral panel to hear the dispute pursuant to NAFTA Article 2008(1).[23]

22. On December 10, 1999, the United States requested consultations with Mexico on Mexico's alleged reciprocal denial of access of United States trucking service providers to the Mexican domestic market. The United States also requested that the cross-border trucking services action brought by the United States against Mexico, if it proceeded to a panel, be combined with the present proceedings. The consultations between Mexico and the United States took place on January 7, 2000, but they failed

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[22]MIS at 58.

[23]MIS at 59.

to resolve the issue or to result in an agreement to combine the two matters before a single panel.

23. On February 2, 2000, the Panel was constituted in accordance with the relevant provisions of NAFTA by the appointments of Luis-Miguel Diaz, David A. Gantz, C. Michael Hathaway, J. Martin Hunter (Chair), and Alejandro Ogarrio as members.[24]

24. Also on February 2, 2000, the United States requested a meeting of NAFTA Free Trade Commission to discuss Mexico's alleged reciprocal denial of access and again requested a consolidation of the two cases. The United States has never officially requested the formation of a panel on this issue. Mexico contends that Mexico did indeed amend its laws and regulations to implement NAFTA, and the United States did not respond to Mexico's request to provide information supporting the U.S. complaint.[25] Since that time, neither the United States nor Mexico have communicated further with the Panel regarding this issue nor discussed it in their submissions. Mexico has also initiated a NAFTA dispute settlement proceeding against the United States regarding its refusal to authorize Mexican carriers to provide cross-border scheduled bus service. However, there has been no further discussion on that issue before the Panel. Consequently, the Panel does not consider that either of these matters are before this Panel for decision.

25. On February 14, 2000, Mexico transmitted its initial submission to the NAFTA Secretariat, U.S. Section. On February 23, 2000, the United States transmitted its counter-submission to the NAFTA Secretariat, U.S. Section.

26. In accordance with NAFTA Model Rules of Procedure for Chapter Twenty ("the Model Rules"), the Panel requested the Parties to comply with the following schedule for further proceedings:

April 3, 2000	Mexico to file a second written submission
April 24, 2000	United States to file a second written submission
April 24, 2000	Canada to file a third party submission
May 17, 2000	Hearing in Washington, D.C.

27. Canada filed its third party submission on February 22, 2000. On April 3, 2000, Mexico submitted its second written submission and on April 24, 2000, the United States submitted its second written submission.

28. In a letter dated May 16, 2000, the United States requested that the Panel establish a Scientific Review Board pursuant to Article 2015 of NAFTA.

29. The hearing was held, as scheduled, in Washington D.C. on May 17, 2000. The Parties, Canada and the Panel reviewed the issues presented in the written submissions, including the U.S. request for the appointment of a Scientific Review Board. After hearing the Parties, the Panel invited the United States to supplement its

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[24] The Panel is grateful to its legal assistants: Martin Lau, Jorge Ogarrio, Nancy Oretskin, Erica Rocush, and Elizabeth Townsend.

[25] MRS at 7, n.10; Comments of Mexico on the Initial Report of the Panel, Dec. 19, 2000, at 6-9.

request by identifying with adequate specificity the proposed terms of reference of any Scientific Review Board.

30. At the hearing, the Panel also requested that the Parties file post-hearing submissions by June 1, 2000. By letter dated May 26, 2000, the Parties informed the Panel that they had mutually agreed to extend the time limit for the delivery of post-hearing submissions to each other and the Panel until June 9, 2000, due to the late receipt of the transcript of the proceedings. On June 9, 2000, the United States and Mexico filed their respective post-hearing submissions.

31. After reviewing the submissions of the Parties, the Panel issued an order on July 10, 2000 declining to request the establishment of a Scientific Review Board.

32. The Panel met on several occasions for deliberations before completing an Initial Report which was presented to the Parties on November 29, 2000.

33. On December 13, 2000, the Parties provided the members of the Panel with their comments on the Initial Report.

34. On January 5 and January 8, 2001, in response to a request from the Secretariat on behalf of the Panel, the Parties provided responses to the comments of December 13.

III. FACTUAL BACKGROUND

35. Prior to 1980, the United States, through the Interstate Commerce Commission, granted operating authority to motor carriers for each separate, individual route, requiring economic justification for each proposed service. The United States, at that time, did not distinguish between United States, Mexican or Canadian applicants. However, the Interstate Commerce Commission severely restricted new entry into the United States domestic for-hire motor carrier transportation market.[26]

36. In 1980, the Motor Carrier Act "essentially eliminated regulatory barriers to entry, thereby making it easier for U.S., Mexican, and Canadian motor carriers to obtain operating authority from the ICC."[27] The Motor Carrier Act did not distinguish between United States and non-U.S. nationals.[28]

37. At the time the Motor Carrier Act of 1980 came into force, Canada already allowed reciprocal access for U.S. trucking operators in its domestic market, but Mexico did not offer such reciprocal access.

38. The equal treatment in the United States of U.S. and foreign applicants for operating authority came to an end with the passing of the Bus Regulatory Reform Act of 1982, which contained a provision imposing an initial two year moratorium against the issuance of new motor carrier operating authority to foreign carriers.[29]

39. This provision applied to Canada and Mexico. However, with respect to Canada, the moratorium was immediately lifted in response to Canada's Brock-Gotlieb Understanding, which confirmed that U.S. carriers would have continued access to the Canadian market. A Presidential Memorandum from September 20, 1982, lifted the moratorium with respect to Canadian trucking companies, stating, *inter alia*, that:

> In the case of Canada, our trucking industry is not now, nor has [ ] been, precluded from providing services into that country.... I believe that our national interest is best served by fair and equitable competition between the United States and Canadian trucking interests in our two markets.[30]

40. In contrast, with respect to Mexico, the September 20, 1982 Presidential Memorandum stated that:

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[26] MIS at 15.

[27] MIS at 15.

[28] MIS at 15.

[29] MIS at 15.

[30] Memorandum of the President, Sept. 20, 1982, 47 Fed Reg. 41721 (Sept. 22, 1982), as referenced in Mexican Initial Submission at 16 (suspending the moratorium with regard to Canada). *See also* Memorandum of the President, Nov. 29, 1982, 47 Fed. Reg. 54053 (Dec. 1, 1982) (completely removing the moratorium with regard to Canada).

> I regret that with respect to Mexico there has not yet been progress sufficient to justify a modification of the moratorium. A substantial disparity remains between the relatively open access afforded Mexican trucking services coming into the United States and the almost complete inability of United States trucking interests to provide service into Mexico.[31]

41. The President of the United States extended the 1982 moratorium with respect to Mexican trucking companies in 1984, 1986, 1988, 1990, 1992 and 1995.[32] Therefore, the moratorium continued uninterrupted.

42. In 1995, the responsibilities of the Interstate Commerce Commission to issue motor carrier operating authorities were transferred to the Department of Transportation, under the ICC Termination Act of 1995.[33] The 1995 Act extended the validity of any restrictions on operations of motor carriers domiciled in a foreign country or owned or controlled by persons of a foreign country imposed under the United States Regulatory Reform Act of 1982. The legislation preserved the moratorium and the President's authority to modify or remove it.[34]

43. The purpose of the moratorium was to encourage Mexico and Canada to lift their restrictions on market access for U.S. firms. Therefore, the U.S. Congress imposed a two-year initial moratorium on foreign carriers, which could be removed or modified by the President if such action was in accord with the national interest, if the foreign country began providing reciprocal access.[35]

44. Although the moratorium continued in place with regard to Mexico, there were some exceptions allowed in order to facilitate cross-border trade. Several categories of exceptions allowed Mexican carriers to continue entering into the United States: the commercial zone of border towns exception, the Mexico-Canada transit exception, the "grand-fathered" Mexican operators exception, and the US-owned Mexican truck exception. Another exception, that of Mexican carriers who lease both trucks and drivers to U.S. carriers for their use, was allowed until January 1, 2000. Mexican owned and domiciled motor carriers that transport passengers in international charter or tour bus operations are also subject to an exception that began in 1994.[36]

45. Mexican carriers have been permitted to operate in the commercial zones associated with municipalities along the United States-Mexico border since before 1982, and these operations were not affected by NAFTA.[37]

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[31] 47 Fed. Reg. at 41721.

[32] USCS at 5.

[33] USCS at 5-6.

[34] USCS at 6, citing 49 U.S.C. §13902(c)(4)(B).

[35]USCS at 4-5.

[36] MRS at 2-4.

[37] MIS at 20-21.

46. As the regulations state, "U.S. motor carriers that operate exclusively within a commercial zone are not subject to the licensing jurisdiction of the Department of Transportation."[38]

47. Commercial zones are identified by the Interstate Commerce Commission according to the size of municipalities. The more populous a border town is, the wider its commercial zone will be.[39] Although the zones are generally within a radius of two to twenty miles of the nearest U.S. border city, the ICC and Congress have expanded certain border zones beyond their previous regulatory boundaries.[40]

48. Mexican carriers are allowed to enter the commercial zones, provided they have obtained a Certificate of Registration from the Federal Motor Carrier Safety Administration.[41] "The application process for Mexican motor carriers operating in border commercial zones is less extensive than the process by which carriers obtain authority to operate in the rest of the United States."[42]

49. The application procedure consists of a form soliciting basic information on the applicant, another form identifying a U.S. legal process agent appointed by the applicant, an application fee and certification by the applicant that he has access to and will comply with Federal Motor Carrier Safety Regulations.

50. The Federal Motor Carrier Safety Administration reviews the carrier application for correctness, completeness and adequacy of information. Applicants are not required to submit proof of insurance but inside the commercial zones, the Mexican motor carrier must carry evidence of insurance on board. This can be either trip or continuing insurance.[43]

51. U.S. safety regulations apply to Mexican carriers operating in the border zones, but FMCSA does not apply its on-site compliance review requirements to carriers based in Mexico.

52. Thus, all carriers are fully subject to all U.S. safety regulations. They must also have trip insurance, carry evidence of the insurance of their trucks, and have U.S. registered agents.[44]

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[38] 49 C.F.R. §372.241, as cited in MIS at 20.

[39] 49 C.F.R. §372.241.

[40] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 4031, 112 Stat. 418 (1998); 49 C.F. R. § 372.237.

[41] As of January 1, 2000, jurisdiction over most motor carrier regulation, which was the responsibility of the Federal Highway Administration, became the responsibility of the newly-created FMCSA. USCS at 8.

[42] MIS at 22-23. *See* 49 C.F.R. Part 368 [Exhibit 30].

[43] MIS at 23; USSS at 24-25.

[44] USSS at 24. The Parties agree to the fact that trip insurance is required, but differ as to why trip insurance is required instead of continuous insurance. The United States denied that the use of trip insurance instead of continuous insurance "demonstrates that the United States has little interest in the safety of Mexican trucks operating in the commercial zones." Rather, "[a]n insurer's potential liability arising from trip insurance is just

53. It appears from the submissions of both the United States and Mexico that the vast majority of the Mexican trucks entering the border zones are used solely for drayage services, i.e a Mexican tractor pulls a trailer from the Mexican side of the border into the U.S. border zone. The trailer is then transferred to a U.S. tractor, which transports the trailer to its final U.S. destination. In the current proceedings, the United States claims that most of the trailers are U.S.-owned, but there is also a significant trans-shipment of goods between trailers owned by different carriers.[45]

54. Mexico and United States agreed that Mexican trucks used for drayage operations in the commercial zones tended to be older trucks. However, Mexico submitted that the comparatively poorer condition of the Mexican drayage trucks cannot be taken as an indicator for the condition of Mexican long-haul trucks.[46]

55. In 1999, 8,400 Mexican firms had authority to operate in the commercial zones.[47]

56. The second exception relates to Mexican operators that transit through the United States to Canada. Under the provisions of 49 U.S.C. § 13501, the Department of Transportation's jurisdiction is limited to requiring operating authorization from carriers operating between states of the United States or between a state of the United States and a foreign country. Congress has not granted the Department of Transportation the authority to require trucks transiting from Mexico to Canada to seek operating authority.

57. Mexican trucks crossing the United States in transit to Canada are unaffected by the moratorium. Therefore, the Mexican trucks are allowed to enter the United States in transit to Canada and do not require any operating authorization to do so. The only formal requirements to be complied with by Mexican trucks consist of insurance and compliance with the U.S. safety regulations.[48]

58. The United States claimed that a report on Mexican domiciled motor carriers prepared by the USDOT, Office of Inspector General, in 1999, indicated that only one Mexican trucking firm was then engaged in transit operations between Mexico and Canada through the United States.[49]

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the same as that arising from continuous insurance, and in both cases the insurer has the same incentives to reduce its potential liability." (USSS at 24, 25). Mexico does not assert that the United States is unconcerned about safety compliance, but rather that the United States is satisfied with the safety of Mexican carriers and trailers. MIS at 70-78.

[45] MIS at 21; USCS at 25-26.

[46] MRS at 6.

[47] USSS at 22.

[48] USSS at 20-21.

[49] USSS at 20.

59. "Grandfathered" Mexican trucking companies that had acquired operating authority prior to 1982, when the moratorium came into effect, are not affected. A total of five Mexican carriers are entitled to these exemptions.[50]

60. The ICC Termination Act of 1995 exempts from the operation of the moratorium US-owned Mexican-domiciled truck companies.[51]

61. U.S.-owned, Mexican-domiciled carriers total approximately 160.[52] Their equipment must be either U.S. made or imported, duty paid. These carriers are either commercial, for-hire carriers transporting certain commodities, generally food or raw materials, or private, not-for-hire carriers transporting their own goods.[53]

62. Prior to the enactment of the Motor Carrier Safety Improvement Act of 1999, Mexican carriers were able to lease out their equipment and drivers to U.S. trucking companies. The provision was intended to allow U.S. carriers to augment their fleets without making capital investments in new equipment.[54] However, it was realized that "this provision could be used to, in essence, sell U.S. carrier's operating authority to a Mexican carrier for operations beyond the commercial zone." Section 219 of the Motor Carrier Safety Improvement Act of 1999 ended the leasing exception.[55]

63. A change in the restrictions imposed on Mexican motor carriers occurred in 1994 when pursuant to an agreement between the U.S. and Mexico to provide reciprocal treatment for charter and tour bus operators, a Presidential Memorandum of January 1, 1994, was issued. This Memorandum authorized the Interstate Commerce Commission to issue operating authorities to Mexican-owned or -controlled passenger carriers for international routes between Mexico and the United States and not for travel solely between U.S. destinations. This position was preserved by Annex 1 of NAFTA, and Mexican tour operators thus continue to be allowed to provide cross-boundary services in the United States.

64. Throughout the border zone transport, goods that are transshipped through the border zone generally remain in the same trailer. The trailer is transferred between long-haul and drayage tractors, and then back to a domestic long-haul tractor, as it crosses into the border zone. The Mexican trailer then is kept on the U.S. tractor during the transport throughout the United States. Such trailers are driven throughout the United States, attached to different U.S. tractors.[56]

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[50] MRS at 2-3.

[51] MIS at 18.

[52] USSS at 21-22.

[53] USSS at 21-22.

[54] USSS at 23.

[55] The Parties disagree as to whether section 219 was instigated because of safety (U.S. contention) or to protect domestic carriers from competition (Mexican contention). The facts, however, are not in dispute. (*See* USSS at 23-24).

[56] MRS at 7.

65. The United States explains its alleged lack of concern with Mexican trailers: "In practice . . . the safety of Mexican trailer components has not been a major issue, because eighty to ninety percent of the trailers used in cross-border trade are in fact U.S.-owned."[57]

66. NAFTA came into force on January 1, 1994. Under Annex I of NAFTA, the Parties are obliged to phase-out certain reservations to Articles 1102 or 1202 (national treatment) and Articles 1103 or 1203 (most-favored-nation treatment).[58]

67. With respect to cross-border trucking service, Annex I provides that a Mexican national will be permitted to obtain operating authority to provide cross-boundary trucking services in border states three years after the signing of NAFTA, i.e., December 18, 1995, and cross-border trucking services throughout the United States six years after the date of entry into force of NAFTA, i.e., January 1, 2000.

68. With respect to investment, the phase-out deadline for the reservation was three years after the signing of NAFTA, i.e., December 18, 1995, for the establishment of enterprises providing trucking services for the transport of international cargo between points within the United States; and seven years after the date of entry into force of NAFTA, i.e., January 1, 2001, for the establishment of enterprises providing bus services between points in the United States.

69. In the month prior to the December 18, 1995 deadline, both the Mexican and the U.S. governments were engaged in efforts to prepare for the lifting of the reservations contained in Annex I.

70. A Land Transportation Standards Subcommittee had been formed as required by NAFTA Article 913(5)(a)(i) to implement a work program for making compatible the Parties' relevant standards-related measures for bus and truck operations. Under Annex 913.5.a-1, different deadlines, all based on the date of entry into force of NAFTA, were assigned for different tasks: (1) no later than a year-and-a-half for "non-medical standards-related measures respecting drivers, including measures relating to the age of and language used by the drivers;" (2) no later than two-and-one-half years for medical standards-related measures for drivers; (3) no later than three years for "standards-related measures respecting vehicles, including measures relating to weights and dimensions, tires, brakes, parts, and accessories, securement of cargo, maintenance and repair, inspections, and emissions and environmental pollution levels;" (4) no later than three years for standards-related measures respecting each Party's supervision of motor carriers' safety compliance, and (5) no later than three years for standards-related measures respecting road signs.[59]

71. The work program contemplated that the Parties would make their standards-related safety measures compatible after the deadline for allowing cross-border trucking

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[57] USSS at 25-26.

[58] Annex I set out each Parties' reservations with respect to existing measures from the obligations imposed by Articles 1102 and 1202 and 1103 and 1203. It also set out commitments for immediate or future liberalization. The Annex I commitments oblige each party to liberalize specific sectors by dates set in the "phase-out" section of each reservation. MIS at 29.

[59] MIS at 31-32.

services in the border states. Also, under Article 904(3), a Party cannot apply standards-related measures in a discriminatory manner.[60]

72. "Starting before the entry into force of NAFTA and since, the governments of Mexico and the United States have actively worked to improve the coordination on the regulation of motor carriers."[61]

73. These efforts included officials of the U.S. border states and Mexican border states, the Commercial Vehicle Safety Alliance and the International Association of Police Chiefs. The efforts involved training provided by the United States to Mexican officials in roadside inspections and hazardous material inspections, an education and media campaign to increase Mexican firms' awareness of U.S. safety regulations and increased federal funding to U.S. border states in order to enhance border inspection facilities.[62] On August 22, 1991, Mexico became a full member of the Commercial Vehicles Safety Alliance (together with the United States and Canada).[63] On November, 21, 1991, Mexico and the United States adopted uniform guidelines for roadside inspections and uniform standards for commercial drivers' licenses, and "for common standards on such criteria as knowledge and skills testing, disqualification, and physical requirements for drivers."[64]

74. On September 5, 1995, United States Secretary of Transportation Peña issued a press release announcing proposed measures for the "smooth, safe and efficient NAFTA transition." The press release stated, *inter alia*, that

> - a team of state officials from the four U.S. border states and federal agencies was to be established with responsibilities for issues relating to the implementation of NAFTA's transportation provisions. The team was to meet through December 17, 1995, and beyond to 'ensure that operations will be as safe and efficient as possible.'
>
> - a joint federal-state comprehensive safety compliance and enforcement strategy applicable to border states was to be implemented, designed to address problems that may arise as a result of increased number of trucks engaged in cross-border operations;
>
> - a broad educational campaign was to be launched with the objective of disseminating information on motor carrier operating requirements in the United States, Mexico and Canada.

75. On October 18, 1995, the ICC published in the Federal Register a proposed regulation entitled 'Freight Operations by Mexican Carriers - Implementation of North American Free Trade Agreement' The ICC published another notice in the Federal

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[60] MIS at 32.

[61] MIS at 33.

[62] The United States dedicated $4.75 million in fiscal year 1999 and $7.75 million in fiscal year 2000 to improving the border enforcement activities. TR at 83.

[63] MIS at 33.

[64] MIS at 33.

Register on December 13, 1995, "stating that the proposed regulations would be adopted as a final rule, to be effective on December 18, 1995,"[65] the date of implementation of NAFTA's cross-border truck service provisions.

76. The ICC regulations required Mexican, U.S. and Canadian applicants to certify that they had in place a system and an individual responsible for ensuring overall compliance with the Federal Motor Carrier Safety Regulations. To be issued operating certificates, the carriers had to comply with all USDOT safety regulations and with the ICC's insurance requirements.[66] The procedures for obtaining authority to provide service between Mexico and the border states were to be identical to those in place for applicants from the United States and Canada, except that the application form for Mexican carriers was designated OP-1MX.[67]

77. On December 4, 1995, U.S. Secretary of Transportation Peña stated at a joint U.S.-Mexico press conference that both the United States and Mexico were "ready for December 18."[68] Then on December 18, 1995, Secretary Peña issued a press release which stated that although Mexico and the United States were working to improve Mexican truck safety, because it was not yet a completed process, the United States would accept and process applications from Mexican trucking firms, but the applications would not be finalized. Therefore, no Mexican trucks have been allowed to pass out of the pre-existing commercial zones until the United States concludes consultations with the Mexican government. Through this refusal to finalize Mexican applications, the United States essentially continued the moratorium on Mexican trucks that had been in place prior to December 18, 1995.[69]

78. The United States explained its actions were based on the alleged lack of safety in Mexican trucks, and referred to two alleged incidents involving Mexican trucks, one in November 1995 and the other in Fall 1995, where spillages of hazardous material had occurred. In the latter alleged incident, 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. Mexico contends that these alleged incidents are not relevant to this dispute, because Mexico could have presented information on several incidents in which U.S. truck operators caused accidents while acting in breach of U.S. law.

79. As well, in early December 1995, the GAO, the "investigative arm" of the U.S. Congress, made available to the USDOT its report on Mexican cross-border trucking. The report was officially released on February 29, 1996. The report stated that there were significant differences between United States and Mexican truck safety regulations. It reported that a Mexican truck inspection and enforcement program had been established, but was lacking the facilities and personnel to initiate it. They also

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[65] MIS at 63.

[66] 60 Fed. Reg. 63981 (December 13, 1995).

[67] MIS at 37.

[68] MIS at 70.

[69] MIS at 40-42.

reported that a large percentage of Mexican trucks operating in the commercial zones of the four U.S. border states failed to meet U.S. truck safety standards.[70]

80. On December 12, 1995, thirty-two broad-based coalitions, including religious, labor and environmental groups sent a joint letter to President Clinton urging him to delay the implementation of NAFTA obligations which were to become effective on December 18, 1995.[71]

81. On December 15, 1995, the International Brotherhood of Teamsters, a U.S. trade union representing, *inter alia*, employees of some U.S. trucking companies, initiated a legal challenge to the ICC's proposed cross-border trucking services regulation. In late December 1995 (after the December 18 press release), the United States Court of Appeals for the District of Columbia declined to issue an emergency injunction applied for by the Teamsters on the basis of the U.S argument that no Mexican applications for operating authority would be processed in light of the Transportation Secretary's announcement. The case was briefed and argued by the parties in 1996 and then held in abeyance by the court pending a decision by the United States to implement NAFTA's cross-border trucking service provisions.

82. On December 18, 1995, the date of implementation of NAFTA's cross-border truck service provisions, the United States Secretary of Transportation issued a second press release announcing, *inter alia*, that:

> Effective today, NAFTA parties will begin accepting applications from foreign motor carriers for the purpose of operating in international commerce in the Mexican and [United States] border states.[72]

However, the Transportation Secretary stated that the final disposition of pending applications will be held until consultations between the United States and Mexico to further improve their motor carrier safety and security regimes have been completed. To date, the moratorium is still in place.

83. The press release also announced that beginning December 18, 1995, Mexican citizens would be allowed to invest in U.S. carriers engaged in international commerce.

84. Despite its assertions that Mexican citizens would be allowed to invest in U.S. carriers as of December 1995, to date the USDOT maintains a complete ban on Mexican nationals owning or controlling U.S. cargo and passenger motor carrier service providers. This ban is enforced by the application form for *new* operating authority, which requires that the applicant certify that the applicant is not a Mexican national, and the carriers are not owned or controlled by Mexican nationals. To gain

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[70] USCS at 20. Although it is undisputed that the GAO report did provide this information on the Mexican regulatory system, Mexico contends that it is not relevant to the issue to be decided. Mexico contends that its domestic regulations do not have to be harmonized with the United States domestic regulations in order to permit individual Mexican carriers to cross into the U.S. border states.

[71] USCS at 23, n.74.

[72] U.S. Dept. of Transportation News, Remarks Prepared for Delivery: U.S. Secretary of Transportation Federico Peña NAFTA Border Opening Remarks (Dec. 18, 1995), *quoted in* MIS at 42.

approval of an application to acquire an *existing* motor carrier, the USDOT also requires that the applicant indicate whether the party acquiring rights is either domiciled in Mexico or the carrier is owned or controlled by persons of that country. These restrictions essentially ban any Mexican investment in U.S. carriers, because the applications would not be approved if they indicated Mexican ownership.[73]

85. These statements pertaining to Mexican entities being involved in transactions are required under 49 C.F.R. § 1182.2(a)(10). It appears that there are no published or other formal announcements of the Department of Transportation that implement this restriction other than the application form itself. However, the operating restrictions imposed formerly by the ICC and currently by the USDOT in effect prevent new grants of operating authority to U.S. carriers owned or controlled by Mexican carriers.

86. There has been no documentation of any further U.S. public announcements of or commentary on its decision not to implement NAFTA provisions at issue in these proceedings.

87. As of July 20, 1999, the U.S. Department of Transportation had received 184 applications from Mexican persons to provide cross-border cargo service into the border states.[74]

88. The fact that differences exist in the two domestic regulatory systems is not in dispute. In their submissions, both Mexico and the United States described in detail the U.S. trucking regulatory system, and the United States compared its system to the Mexican regulatory system to illustrate the differences. Both Mexico and the United States agree that the Mexican regulatory system is not identical to that of the United States. The disagreement is therefore whether the differences in the domestic regulatory systems justify the ban of the United States of Mexican trucks entering the territory.

89. From December 31, 1995, until January 2000, the safety and economic aspects of motor carriers safety were regulated by the Federal Highway Administration ("FHWA"), which forms part of the United States Department of Transportation. Since January 1, 2000, jurisdiction over most motor carrier regulations is the responsibility of the newly created Federal Motor Carrier Safety Administration (FMCSA) within the USDOT.

90. The USDOT grants motor carrier operating authority. The application procedure for operating authorities is based on a system of self-certification: interested trucking firms must certify that they are aware of and in compliance with all relevant safety regulations. Once a motor carrier operating authority has been granted, safety regulations are enforced through roadside inspections and compliance reviews at the company's place of business.

91. The U.S. safety regulations are based on the Federal Motor Carrier Safety Regulations ("FMCSR"). The FMCSR regulate driver hour of service, driver logbooks, and other driver requirements like a minimum age, qualifications, knowledge of English, and

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[73] MIS at 26.

[74] MIS at 43.

understanding of highway traffic signs and signals. Drivers are also liable to be tested for controlled substances and alcohol. The commercial trucking equipment must include safety-related equipment and the motor carrier itself is under an obligation to inspect and maintain all commercial vehicles under its control. This obligation also includes the employment of personnel sufficiently qualified to carry out maintenance and inspection work.

92. The FMSCA carries out both roadside inspections and on-site compliance reviews of trucking companies. The latter involves a review of safety related records kept on the premises of the truck company. Trucking operators receive a safety rating on the basis of these inspections and carriers assigned an 'unsatisfactory' rating may be prohibited from operating commercial motor vehicles.

93. In order to maintain highway safety, the United States has taken a number of steps, which include putting in place 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. This system provides a high degree of assurance that the great majority of commercial trucks operating in the United States each day meets minimum U.S. safety standards.[75]

94. A separate system of hazardous materials regulations, contained in the Hazardous Materials Regulations, exists.

95. The United States explained that several of its key truck safety regulations and requirements are not incorporated in the Mexican carrier safety regulations. There is no regulation of driver hours of service, and apart from motor carriers carrying hazardous materials no requirement to maintain a driver logbook. There are no specific Mexican regulations governing the condition and maintenance of commercial truck safety equipment. Again, with the exception of vehicles transporting hazardous materials, Mexican trucks are not required to undergo periodical inspections.

96. In respect to hazardous materials, the United States stated that the Mexican regulations follow closely the United Nations Recommendations for the Transport of Dangerous Goods but nevertheless significant gaps remained.

97. The United States and Mexico therefore agree that there are substantial differences between the United States and Canadian regulatory systems and the Mexican regulatory system. For example, although Mexico does have in place some hazardous materials regulations, they do not provide detailed construction, inspection and operating requirements, such as the systems in the United States and Canada. Both Parties also agree that U.S. and Mexican transportation officials have been working together to enhance the Mexican safety regime and to develop cooperative exchanges.[76]

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[75] USCS at 47.

[76] USCS at 3, 44.

98. Moreover, the United States observes that since 1995 it has been continuously undertaking efforts to improve the inspection facilities on the U.S. side of the border with Mexico. Special funds have been allocated to U.S. border states to increase inspection activities. The number of full-time inspectors at the border has been increased by a factor of three to a total of forty. The building of inspection facilities and cooperation between various agencies responsible for truck safety and related issues has also increased.

99. Through the detailed descriptions of the domestic regulatory systems of the Parties, it was shown that there are differences in the systems, and that both Parties are working to harmonize them. However, the United States contends that these regulatory system differences justify their not allowing Mexican trucks into the U.S., while Mexico contends that internal regulatory systems are irrelevant to the operating authority of individual carriers in the United States.

100. As explained in the Introduction, the focus of the dispute is what action is required by the Parties under the national treatment and most-favored-nation obligations of NAFTA (Articles 1202 and 1203, and Articles 1102 and 1103), and what Annex I reservations permit the Parties to do. Also central to the dispute is whether or not there are any exceptions in NAFTA which could justify the actions of the United States in failing to permit the cross-border trucking services by Mexican trucks carrying international cargo into the United States.

IV. CONTENTIONS OF THE PARTIES AND CANADA

101. The arguments of the Parties and Canada were summarized in the Introduction. Now follows an in-depth description of the contentions of Mexico, the United States and Canada, as presented to the Panel in this proceeding.

A. Mexico's Contentions

102. Mexico provided an extensive discussion of the facts surrounding the dispute, including an overview of U.S. law on authorizations to provide motor carrier cargo and passenger services, a summary of NAFTA provisions relating to the cross-border trucking dispute,[77] and an account of the alleged reversal of U.S. willingness to comply with its NAFTA obligations.[78] Mexico's primary contentions are as follows:

> The United States agreed to phase out its moratorium on cross-border trucking and bus services, and on investment in enterprises established in the United States, that provide such services. This was to be accomplished through a combination of two sets of provisions: (i) the obligation to accord national treatment and most-favored-nation treatment to service providers and investors of another Party, and (ii) the elimination of reservations from the national treatment and most-favored-nation treatment obligation for trucking and bus services, and investment in providers of those services in accordance with the schedules set out in the reservations.[79]

103. Mexico asserts that Mexico's burden under Rule 33 of the Model Rules of Procedure for Chapter Twenty—of establishing that the United States measure is inconsistent with provisions of the Agreement—is met by a showing that "the U.S. Government has refused to process applications for Mexican motor carriers without proper justification."[80]

104. Mexico argues that the United States, under Rule 34 of the Model Rules, given that it is asserting the applicability of an exception under NAFTA, has the burden of establishing that the exception applies.

105. Mexico asserts that this Panel must interpret NAFTA in accordance with the requirements of Article 102(2), which provides that "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."[81] This means, in essence, the Article 102(1) objectives of

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[77] MIS at 4-31.

[78] MIS at 33-55.

[79] MIS at 61.

[80] MIS at 69.

[81] MIS at 66.

eliminating "barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties; promote conditions of fair competition in the free trade area; and increase substantially investment opportunities in the territories of the Parties, among others."[82]

106. Mexico cites with approval *Tariffs Applied by Canada to Certain United States Origin Agricultural Products* (CDA-95-2008-01), which states, *inter alia*, that "Any interpretation adopted by the Panel must, therefore, promote rather than inhibit NAFTA's objectives."[83]

107. Mexico also notes the applicability of the Vienna Convention on the Law of Treaties, in particular the Article 31 requirement that "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 light of its object and purpose." This is the "starting point of an interpretation of NAFTA."[84] Mexico further urges that the Panel observe the "principle of effectiveness" in which any "interpretation must give meaning and effect to all the terms of the treaty."[85]

108. Under Article 105 of NAFTA, "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement." Although the United States claims that it has not yet made all the necessary preparations for opening the border, which is contradicted by Transportation Secretary Peña's remarks delivered on December 4, 1995, Mexico asserts that failure to prepare is not an excuse. "Otherwise, the Parties would be free to circumvent virtually any provision of NAFTA on that basis, contrary to the principle of effectiveness."[86]

109. Mexico asserts that no NAFTA provision entitles a party to impose its own laws and regulations on the other. This would be an unacceptable interference in the sovereignty of another state, and certainly not something to which any party to NAFTA has committed.[87] Therefore, Mexico is under no obligation under NAFTA to enforce U.S. standards, despite cooperation between the United States and Mexico to make the regulatory systems compatible "from day one."[88]

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[82] MIS at 66.

[83] MIS at 67, citing *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, CDA 95-2008-01, Final Panel, para. 122 (Dec. 2, 1996).

[84] MIS at 67-69.

[85] MIS at 69.

[86] MIS at 83-84.

[87] TR at 27.

[88] MIS at 83-85.

110. However, according to Mexico, the United States has made adoption of an identical system of motor carrier regulation a condition of NAFTA implementation, even though NAFTA contemplates that harmonization would not be a condition.[89]

111. Mexico asserts that the U.S. obligations under NAFTA were undertaken while the Mexican and U.S. governments were fully aware that their respective standards for motor carrier obligations were not identical.

112. Mexico states that implementation of the market access commitments for truck and bus services was not made contingent upon completion of the standards-compatibility work program. While a work program was adopted with the aim of making standards related measures compatible,

> implementation of the market access commitments for land transportation services was not made contingent upon completion of the standards-compatibility work program. . . . Rather, the governments contemplated that motor carriers would have to comply fully with the standards of the country in which they were providing service. In other words, 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].[90]

113. Given this situation, "there is no valid justification for the refusal to allow cross-border service on the basis that Mexico has not adopted a domestic motor carrier safety regulation system compatible to that of the United States."[91]

114. In its post-hearing submission, Mexico emphasized that "no official study was ever undertaken to provide support for the U.S. measures, and no steps were taken under U.S. domestic legal procedures to adopt a safety-based regulation for Mexican carriers."[92]

115. Mexico contends that the U.S. government, through its actions and laws, has demonstrated that it does not believe that Mexican carriers, Mexican trucks or Mexican drivers are inherently unsafe or otherwise unsuitable to operate within U.S. territory. Rather, in 1995, the United States singled out one category of authorizations–those for the international cross-border service specifically authorized by NAFTA–and refused to implement it as a gesture of support to certain domestic political interests.[93]

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[89] MIS at 64.

[90] MIS at 74-75.

[91] MIS at 75.

[92] MPHS at 1.

[93] MRS at 1-5.

116. Mexico, in discussing the state of drayage operations near the border, contends that while the United States does not regulate border zone carriers in the same way as interior carriers, the United States is perfectly free to do so but has chosen not to. The fact that the United States is satisfied with the safety compliance of Mexican carriers is confirmed, according to Mexico, by the fact that the United States has made no effort to regulate the transfer of Mexican trailers to U.S. tractors.[94] Moreover, "even if the U.S. government actually were motivated by concerns over safety and security, it has not proceeded in the appropriate manner."[95]

117. Mexico believes that the U.S. "flagging" action, which determines "that Mexican motor carriers, as a class, are too dangerous to allow in the United States" is not only factually incorrect, but the "flagging" action is a denial of national treatment. U.S. carriers, unlike Mexican carriers, "are entitled under U.S. law to both (i) consideration on their individual merits and (ii) a full opportunity to contest the denial of operating authority. Both of these rights have been denied to Mexican carriers in violation of the NAFTA."[96]

118. Mexico notes the ICC's decision on November 30, 1995, not to impose on Mexican applicants requirements that are substantially different from those imposed on other motor carrier obligations. According to Mexico, the ICC acted in light of the NAFTA national treatment requirements, despite pressure not to do so from the Teamsters' Union, basing its conclusion in part on the "absence of evidence that Mexican applicants are more likely than domestic carriers to ignore or misapprehend the detailed verifications on the application form or to submit untruthful certifications. . ."[97]

119. Mexico also asserts denial of most-favored-nation treatment as required under NAFTA Article 1203, in that "The U.S. Government accords national treatment to Canadian motor carriers, with none of the restrictions imposed on Mexican carriers." The U.S. basis for such differential treatment–that Canadian domestic regulation of motor carriers is "compatible" with that of the United States under an April 1994 mutual recognition agreement–is disingenuous. Actually, the United States accorded national treatment to Canada as early as 1960, long before the 1994 Memorandum of Understanding.[98]

120. In discussing the phrase "in like circumstances," Mexico indicates its disagreement with the United States over the scope of the term. According to Mexico, the U.S. Counter-Submission suggests that the term "in like

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[94] MRS at 5-7.

[95] MIS at 64; *see* para. 124, *infra*.

[96] MIS at 75.

[97] MIS at 76-77, citing *Brief for U.S. Department of Justice and U.S. Department of Transportation* at 19-23, filed in *International Brotherhood of Teamsters v. Secretary of Transportation*, No. 96-1603.

[98] MIS at 79.

circumstances" somehow should be interpreted as creating a blanket exemption from the obligation of national treatment when a Party asserts it is protecting health and safety. Mexico believes, however, that the negotiating history of NAFTA does not support this interpretation.[99]

121. Mexican carriers are seeking to provide long-haul truck service–the exact same type of service provided by U.S. and Canadian carriers. Especially given the negotiating history of NAFTA, which shows that the Parties agreed that the term "service providers . . . in like circumstances" was intended to have the same meaning as "like services and service providers," there can be no question that individual Mexican carriers are "in like circumstances" with U.S. and Canadian carriers.

122. According to Mexico, the source of the "in like circumstances" language was the United States-Canada Free Trade Agreement ("FTA"), Article 1402.[100] This language, according to Mexico, "did not authorize a Party to withhold national treatment on the grounds of protecting health and safety." Rather, "the term 'in like circumstances' was intended to serve a function analogous to the role of the term 'like product' in matters involving trade in goods– that is, to ensure that comparisons are made of the regulation of reasonably similar services and companies."[101]

123. If the fact that Mexican carriers are domiciled in Mexico required some adjustments in the application process or the oversight system, Mexico believes that the United States could have made those adjustments. "In other words, even if Mexican carriers were somehow not exactly 'like' U.S. and Canadian carriers, it was within the power of the United States to impose requirements that would make them 'like.' The United States did not adopt any such requirements, but instead arbitrarily refused to allow Mexican carriers from doing business in the United States (and even then, only in circumstances where they might compete directly with U.S. carriers)."[102]

124. 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 obligation would have no meaning.[103]

125. Mexico further argues that national and most-favored-nation ("MFN") treatment may not be made conditional "on adoption by another Party of laws and regulations that the first Party deems desirable." The United States, in this respect, has failed to demonstrate "why Mexican regulation of service

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[99] MRS at 10.

[100] MRS at 11, citing FTA Article 1402.

[101] MRS at 11.

[102] MRS at 13.

[103] MRS at 14-15.

providers in Mexico– the vast majority of whom will never enter the United States– should be considered relevant to its treatment of the small number of Mexican carriers seeking authorization to provide service within U.S. territory." Nor has the United States offered any explanation as to how these NAFTA obligations could be considered "conditional on the adoption of identical or equivalent regulatory systems."[104]

126. Mexico, apparently anticipating possible reliance by the United States on Chapter Nine (which did not occur), argued that should the Panel conclude that the U.S. moratorium is in fact

> a [safety] measure, based on a special safety standard for Mexican carriers, or to enforce that safety standard, it would have to conclude that the U.S. actions were a violation of NAFTA, . . . [as] the U.S. Government did not comply with the procedural requirements of NAFTA Chapter Nine; it did not conduct an assessment of risk of any kind to support its purported safety standard as required by NAFTA Article 907, and it never published the standard or solicited public comments in compliance with Article 909.[105]

127. According to Mexico, the United States has "prohibited Mexican applicants from completing the approval procedures through its refusal to process any applications." U.S. conduct has effectively precluded Mexican carriers from "any possibility of compliance with standards-related measures."[106] Also, "the purported standard is subjective and arbitrary . . . and therefore violates NAFTA Article 904."[107] According to Mexico, under Chapter Nine (standards-related measures), a complete ban on Mexican carriers is a violation of Article 904(3) and is not otherwise permitted by NAFTA, because it fails to give Mexican carriers an opportunity to comply with U.S. standards.[108]

128. Nor, Mexico asserts, is the exception provided in Article 904(2), which permits each Party, "in pursuing its legitimate objectives of safety or the protection of human, animal or plant life or health, the environment or consumers," to "establish the level of protection that it considers appropriate" relevant here. U.S. government actions were not in fact taken "in pursuit of 'legitimate objectives of safety.' The United States has failed to establish a 'level of protection' but instead has simply prohibited Mexican motor carriers

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[104] MRS at 15-16.

[105] MPHS at 3.

[106] MIS at 82.

[107] MIS at 82-83.

[108] MRS at 14-15.

from engaging in operations that might lead to competition with domestic motor carriers."[109]

129. Mexico charges that "the United States has been applying a different standard than the one it applies to U.S. and Canadian applicants," in that "U.S. and Canadian applicants are permitted to self-certify compliance, are considered individually on their own merits, and are given the right to appeal the denial of their applications. In contrast, all Mexican applicants have been labeled as unreliable and unsuitable, pursuant to an unknown evaluation methodology that has never been formally adopted."[110] This is a violation of Article 904(2) (governing the establishing of levels of protection) and Article 907 (requiring a risk assessment) that was put in place to avoid "arbitrary or unjustifiable distinctions between similar goods and services."[111]

130. Consequently, Mexico concludes that "even if the United States could be deemed to be applying a safety standard, that standard was not adopted in accordance with the procedural requirements of NAFTA Chapter Nine. Consequently, enforcement of that standard directly violates the NAFTA."[112]

131. Mexico believes that the United States cannot use Article 2101 as justification for its inaction. With regard to the general exceptions, Mexico observes that Article 2101(2) provides in pertinent part:

> Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption or enforcement by a 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.

132. Mexico notes that Article 2101(2) permits NAFTA-inconsistent measures only "if the laws or regulations with which compliance is being secured are themselves not inconsistent with the Agreement."[113]

133. Mexico also asserts that the scope of Article 2101(2) should be interpreted in light of long-standing GATT (General Agreement on Tariffs and Trade) practice, analogous to the GATT Article XX(d) general exceptions. In addition to the requirement that the "laws or regulations" not be inconsistent

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[109] MIS at 82.

[110] MPHS at 9.

[111] MPHS at 10, *quoting* from Article 907(2).

[112] MPHS at 12.

[113] MIS at 87-90.

with the agreement, the measures must be "necessary to secure compliance" and not be applied in a manner that would result in unjustifiable discrimination or a disguised restriction on international trade.[114]

134. Article 2101(2) could not be relevant unless the Party generally allows the cross-border service, but seeks to adopt or enforce other measures that may be inconsistent with NAFTA, in order to secure compliance with the principal law or regulation. In other words, Article 2101(2) only covers measures designed to prevent actions that would be illegal under the principal law or regulation. The refusal to process applications by Mexican persons cannot be justified under Article 2101 because the U.S. government is not acting to secure compliance with any law or regulation. In addition, the U.S. measure is an arbitrary and unjustifiable discrimination against persons from Mexico and a disguised restriction on trade.[115]

135. Mexico notes that there has been no agreement between the United States and Mexico to negotiate an amendment to NAFTA that would authorize U.S. delays in implementing the cross-border trucking provisions. Participation by Mexico in unsuccessful settlement discussions constitutes no waiver of Mexico's rights under NAFTA.[116]

136. Mexico further asserts that NAFTA language "provided that such [exceptional] measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties" and are "necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement" is indicative of the Parties' intent "that NAFTA Article 2101(2) be interpreted in the same manner as GATT Article XX(d)."[117] Under these circumstances, "GATT and WTO jurisprudence on the interpretation of GATT Article XX(d) should be considered highly probative of the meaning of NAFTA Article 2101(2) including *Canada – Certain Measures Concerning Periodicals*,[118] *U.S. – Standards for Reformulated and Conventional Gasoline*[119] and *U.S. – Import Prohibition on Certain Shrimp and Shrimp Products.*"[120]

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[114] MIS at 89, *quoting* from *United States - Section 337 of the Tariff Act of 1930*, [GATT] Panel Report adopted Nov. 7, 1989, BISD/34S [hereinafter *Section 337*].

[115] MIS at 90.

[116] MIS at 90-91.

[117] MPHS at 12.

[118] *Canada – Certain Measures Concerning Periodicals*, [WTO] Panel Report adopted Mar. 14, 1957, WT/DS31/R [hereinafter *Periodicals*].

[119] *United States - Standards for Reformulated and Conventional Gasoline*, WTO Appellate Body (WT/DS/9, May 20, 1996) [hereinafter *Reformulated Gasoline*].

[120] MPHS at 12-13; *US- Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Appellate Body (WT/DS58/AB/R, Oct. 12, 1998) [hereinafter *Shrimp*].

137. Mexico notes that the United States invoked the "necessary" language in *Reformulated Gasoline* and *United States - Section 337 of the Tariff Act of 1930*[121] in contesting Canada in *Periodicals*, although the Panel in *Periodicals* did not reach the issue in its decision.[122] After reviewing the Panel and Appellate Body decisions in *Reformulated Gasoline*, Mexico notes:

> [thus, the Appellate Body] held that the requirement that a Party adopt measures reasonably available to it that were the least inconsistent with the GATT derived from the obligation in the introductory clause to Article XX that GATT-inconsistent measures not constitute unjustifiable discrimination or a disguised restriction on trade. It also found that the failure of a government to adequately pursue the possibility of inter-governmental cooperative arrangements for enforcement was conclusive evidence that the government had not adopted measures reasonably available to it that were the least inconsistent with the GATT.[123]

138. Finally, citing *Shrimp*, Mexico notes that the Appellate Body "held that the 'rigidity and inflexibility' of the U.S. measure, in requiring that foreign countries adopt a regulatory program 'essentially the same' as that of the United States, constituted arbitrary discrimination within the meaning of Article XX's introductory clause."[124]

139. In terms of the instant case, Mexico argues that *Reformulated Gasoline* and *Periodicals* demonstrate 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.[125]

140. According to Mexico, the U.S. moratorium does not meet these criteria.[126]

141. Mexico notes that the relevant provisions of Annex I deal with existing non-conforming measures and their liberalization. Indeed, consistent with the objectives of NAFTA, liberalization, whether contained in the Phase-Out or Description element, is the fundamental aspect of the reservations, and it takes precedence over every other element, including the measure itself. "The Phase-Out elements of the U.S. reservations for motor carrier services do not

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[121] *Section 337.*

[122] MPHS at 15-16.

[123] MPHS at 19.

[124] MPHS at 20-22.

[125] MPHS at 22-23, emphasis supplied.

[126] MPHS at 23-25.

contemplate any other type of exceptions. They took effect on the dates specified therein, and on those dates created binding obligations."[127]

142. Mexico contends that no exception in NAFTA applies to the U.S. inaction. Articles 1206 (services) and 1108 (investment) provide for specific reservations, including Articles 1102 and 1202 (national treatment) and Articles 1103 and 1203 (most-favored-nation treatment), as limited by the introductory note to Annex I.

143. Mexico does not believe that the Panel should "reach the issue of whether the United States has committed a non-violation nullification or impairment of benefits Mexico reasonably expected to accrue from NAFTA, because Mexico has already identified several direct violations." Should the Panel nevertheless do so, "Mexico believes that aspects of the *Procurement* case decision are useful in evaluating how the pertinent terms of NAFTA should be interpreted in this case." *Korea - Measures Affecting Government Procurement* is relevant because it confirms the application of the principle of *pacta sunt servanda* in Article 26 of the Vienna Convention on the Law of Treaties to "the interpretation of the WTO agreements and to the process of treaty formation under the WTO."[128] Notably, *Procurement*, "by highlighting the requirement of good faith performance of treaties, helps to illustrate a fundamental problem with the U.S. position in this dispute." Mexico believes that the United States regrets that it made concessions on cross-border truck service.[129]

144. Mexico, observing the unconditional nature of Annex I, notes that in the Land Standards Committee under NAFTA, "the Parties did not expect to make their standards compatible until after the date by which the United States was to begin allowing additional cross-border truck service. . . . NAFTA does not contemplate that Mexico would have to adopt domestic regulations identical or equivalent to those of the United States before its motor carriers would be allowed to provide cross-border service."[130]

145. The combination of Annex I, the Land Standards Committee's understanding, Chapter Nine, Article 2101 and the apparent U.S. belief "that it was obligated to allow additional Mexican carriers to provide cross-border service as of December 1995," lead Mexico to conclude that:

> the "ordinary meaning" of NAFTA, as understood not only by Mexico but also by the United States, 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 service in the border states as of

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[127] MIS at 86.

[128] MPHS at 31-33.

[129] MPHS at 32.

[130] MPHS at 34.

> three years after the date of signature of NAFTA, and throughout the United States as of six years after the entry into force of NAFTA. 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.[131]

146. Mexico contends that the United States has breached its Annex I and national treatment obligations to permit investment in the U.S. motor carrier industry, precluding Mexican nationals from establishing an enterprise or investing in existing U.S. enterprises that are currently operating in international commerce. Mexico believes this is also a denial of MFN treatment, because there is no such restriction on Canadian persons' ability to invest in U.S. motor carriers.[132] Despite the requirement to phase out the existing U.S. restrictions, the U.S. Government has not yet eliminated the requirement that an applicant seeking to acquire an existing U.S. trucking company certify that it is not domiciled in Mexico or controlled by a person of Mexico.[133]

147. Mexico notes that "the United States expressly acknowledged that the ban on Mexican investment was not based on concerns about safety" but, rather, quoting the U.S. agent, "arose from the moratorium, it's part of the moratorium that is still in place."[134] Thus, although the United States argued in its written submissions that Mexico must identify a specific Mexican national who is interested in investing, at the hearing it stated that even if Mexico could identify a potential investor, this would not be sufficient for the United States to concede a NAFTA violation. The United States declined to provide an explanation for this position. Under these circumstances, Mexico submits that the U.S. violation of Articles 1102 and 1103 has been clearly established.[135]

148. Mexico notes that U.S. law continues to require an applicant for new motor carrier authority in the United States to certify that it is not a Mexican national or controlled by Mexican nationals, submitting a statement to that effect. The same applies to transfers of existing operating authority. "Under these circumstances, it would be unreasonable to expect that Mexican carriers would attempt to seek approval to establish a U.S. carrier or to acquire an

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[131] MPHS at 36.

[132] MIS at 80-81.

[133] MIS at 79-81.

[134] MPHS at 4.

[135] MPHS at 5.

existing U.S. carrier."[136] Mexico asserts that under well-established GATT and WTO principles,

> where a measure is inconsistent with a Party's obligations, it is unnecessary to demonstrate that the measure has had an impact on trade. . . . Where there have been direct violations of NAFTA, as in this case, there is no requirement for the Panel to make a finding that benefits have been nullified or impaired; it is sufficient to find that the U.S. measures are inconsistent with NAFTA.[137]

149. One of Mexico's core arguments is that, notwithstanding U.S. assertions that postponement of implementation of the truck services provisions was based on safety concerns, the real U.S. motivation was political considerations rather than safety. In support of this contention, Mexico cites pre-December 18, 1995 statements by Transportation Secretary Peña and various state government officials as to U.S. readiness for implementation. Mexico also cites, with disapproval, press accounts of Teamsters' Union influence on the U.S. Government decision to postpone implementation initially, and on political considerations that have led to further postponements.[138]

150. Mexico again argues that the U.S. motivation is relevant, at least to issues arising under Article 904, but agrees that it is not relevant under provisions such as 2101(2), as "a measure can fail to meet NAFTA's requirements even when a government in good faith intended that safety be the primary purpose of the measure."[139]

151. Mexico argues that the U.S. ban on issuing operating authority to additional Mexican carriers to provide long-haul service within the United States is not a safety measure, but rather an "economic embargo."[140]

152. As part of NAFTA, the United States agreed to lift the moratorium so that additional Mexican carriers could provide cross-border long-haul truck service. "But . . . [n]o steps have ever been taken under U.S. domestic law to convert the economic embargo into another type of regulation. . . . In fact, the Department of Transportation never rescinded the regulations it had finalized in late 1995 that would have allowed Mexican carriers to apply for authority under the same procedures and standards applicable to U.S. and Canadian carriers. Thus, under U.S. domestic law, the continuing moratorium on

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[136] MRS at 8.

[137] MRS at 9-10.

[138] MIS at 70-74.

[139] MPHS at 8-9.

[140] MPHS at 6-7.

allowing Mexican carriers to apply for operating authority officially remains an economic embargo."[141]

B. The United States' Contentions

153. According to the United States:

> [t]he Mexican safety regime lacks core components, such as comprehensive truck equipment standards and fully functioning roadside inspection or on-site review systems. In light of these important differences in circumstances, and given the experience to-date with the safety compliance record of Mexican trucks operating in the U.S. border zone, the United States decision to delay processing Mexican carriers' applications for operating authority until further progress is made on cooperative safety efforts is both prudent and consistent with U.S. obligations under the NAFTA.[142]

154. 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.[143] The United States asserts "that NAFTA contains no such requirement. To the contrary, under NAFTA's national treatment and most-favored-nation obligations, a NAFTA Party may treat service providers differently in order to address a legitimate regulatory objective."[144]

155. According to the United States, Mexican carrier safety cannot be assured on a case by case basis: "A carrier-by-carrier approach, however, cannot effectively ensure safety compliance by Mexican motor carriers operating in the United States. Rather, as the United States has explained, highway safety can only be assured through a comprehensive, integrated safety regime. It is for this reason that the United States is working with Mexican officials to develop comparable motor carrier safety systems."[145] Nor can the United States, as a practical matter, inspect every truck as it crosses the border.[146]

156. The United States notes the deficiencies of the Mexican oversight system:

> The Government of Mexico cannot identify its carriers and drivers so that unsafe conduct can be properly assigned and reviewed. While we understand that the Government of Mexico is engaged in an extensive effort to register all of its

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[141] MPHS at 6-7.

[142] USPHS at 2-3.

[143] USCS at 2.

[144] USCS at 2.

[145] USPHS at 3.

[146] USPHS at 4.

> motor carriers and place them in a database that would facilitate the assignment of safety data, that database does not contain any safety data. Therefore, Mexico cannot track the safety fitness of its carriers and drivers. . . . Without such carrier safety performance history, the United States cannot conduct a meaningful safety fitness review of Mexican carriers at the application stage. [147]

157. The United States also contends that it would be futile to try to perform inspections of Mexican carriers in Mexico because "Mexican carriers are not required to keep the types of records that are typically reviewed in these inspections." Even if an effort were made, it "could not be corroborated until the Government of Mexico develops and implements information systems to collect and make available that information."[148] Nor has there been any U.S. verification experience in Mexico: "The United States has never performed a compliance review or any other type of carrier or truck inspection in Mexico or issued any 'qualification or approval' to a Mexican carrier based on a visit to a carrier's offices."[149]

158. The United States also disagrees with Mexico's reliance on Article 105. According to the United States,"the intent of Article 105 is simply to clarify that each NAFTA Party is responsible for ensuring that its state and provincial governments are in compliance with NAFTA obligations." Moreover, "Nothing in Article 105 suggests that measures entailing cooperation between NAFTA Parties are somehow forbidden or excluded."[150]

159. The United States (and Canadian) truck safety programs are the key to providing like circumstances in which trucks operate: they "provide a high degree of assurance that U.S. and Canadian trucks operating on U.S. highways each day meet minimum safety standards." The principal elements of the U.S. truck safety program include:

> a comprehensive system of rigorous vehicle and operator safety standards; enforcement through road side inspections and on-site compliance reviews; strict record-keeping rules; electronic databases that promptly provide inspectors in the field with safety-related data on drivers and motor carriers; and a

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[147] USPHS at 5.

[148] USPHS at 6.

[149] USPHS at 7. Although the United States asserts that it has never been able to perform compliance reviews in Mexico, Mexico disputes this fact. In its initial submission, Mexico observed that in 1997, USDOT officials, accompanied by Mexican officials, did indeed make visits to several Mexican motor carriers. According to Mexico, these U.S. officials were satisfied with the conditions they found during these inspections. MIS at 44-45.

[150] USSS at 19-20.

> substantial commitment of enforcement resources and personnel.[151]

160. According to the United States,"Adequate assurances of safety also require that Mexico, as Canada has done, adopt safety controls within its own borders. The United States has been engaged in extensive cooperative efforts with Mexico to assist in the development of the Mexican safety system. Although Mexico has made substantial progress, work remains undone." Under these factual circumstances, "NAFTA's national treatment and most-favored-nation obligations do not, as Mexico argues, require the United States to treat Mexican trucking firms in the same manner as U.S. and Canadian firms."[152]

161. In particular, NAFTA does not obligate:

> the United States 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.[153]

162. Moreover, the United States contends that under Rule 33 of the Chapter Twenty Rules of Procedure, the burden of proving violations of Article 1202 and 1203, is on Mexico, "including the burden of proving relevant regulatory circumstances and demonstrating that those circumstances are 'like'."[154]

163. The United States suggests that:

> to prove that a particular measure adopted or maintained by another NAFTA Party is inconsistent with Articles 1202 and 1203, the complaining Party must demonstrate each of the material elements of those [a]rticles. Those include showing: 1) the existence of one or more measures adopted or maintained by a Party; 2) that the measure(s) relate to cross-border trade in services; 3) the treatment accorded by the measure(s); 4) the extent to which that treatment may favor domestic, or certain foreign, service providers over the providers of the complaining Party; 5) the relevant "circumstances" under which that treatment is accorded; and 6) whether those circumstances are "like".[155]

164. Mexico is faulted for failing to address all of these elements:

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[151] USCS at 2.

[152] USCS at 2-3.

[153] USCS at 35.

[154] USCS at 42.

[155] USCS at 39.

> Most importantly, it has failed to describe the "circumstances" under which the United States is treating Mexican Firms for safety purposes. Moreover, Mexico has also neglected to demonstrate that those circumstances are "like" the circumstances that pertain to the regulation of U.S. and Canadian trucking companies.[156]

165. The inclusion of the qualifying "like circumstances" language "permits NAFTA Parties to accord differential, and even less favorable, treatment where appropriate to meet legitimate regulatory objectives."[157] The United States quotes with approval from Mexico's opening submission, "even if Mexican carriers were somehow not exactly 'like' U.S. and Canadian carriers, it was within the power of the United States to impose requirements that would make them 'like.'"[158] However, the United States differs with Mexico on the fundamental issue of whether "Mexican carriers are 'like' U.S. and Canadian carriers for purposes of applying NAFTA's national treatment and MFN provisions."[159]

166. The United States reviews the use of the term "like circumstances" in U.S. bilateral investment treaties, arguing that NAFTA language is derived from them, even though the BIT language is "in like situations."[160] Here and in the FTA, national treatment does not mean that a particular measure must in every case accord exactly the same treatment to U.S. and Canadian Service providers. Under paragraph three of FTA Article 1402, covered service providers from the two countries may be treated differently to the extent necessary for prudential, fiduciary, health and safety, or consumer protection reasons, as long as the treatment is equivalent in effect to that accorded to domestic service providers and the party adopting the measure provides advance notice to the other in conformity with Article 1803.[161]

167. According to the United States, NAFTA negotiating history confirms this earlier approach to the "in like circumstances" language, adopting "in like circumstances" on the understanding that it had similar meaning to "like services and services providers," as preferred originally by Canada and Mexico.[162]

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[156] USCS at 39.

[157] USCS at 39.

[158] MRS at 13.

[159] USSS at 6.

[160] USSS at 6-7.

[161] USSS at 9-10, citation omitted.

[162] USSS at 11-12.

168. Further support for the U.S. position is found in the U.S. Statement of Administration Action, which provides in pertinent part that "Foreign service providers can be treated differently if circumstances warrant. For example, 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."[163] Similarly, the Canadian Statement of Implementation provides that " a Party may impose different legal requirements on other NAFTA service providers to ensure that domestic consumers are protected to the same degree as they are in respect of domestic firms."[164] Thus, "the 'like circumstances' language of Articles 1202 and 1203 makes clear that the United States may make and apply legitimate regulatory distinctions for purposes of ensuring the safety of U.S. roadways."[165]

169. The United States also contends that "The regulatory environment in which U.S., Canadian, and Mexican trucking firms operate is a critical 'circumstance' relevant to U.S. treatment of those firms because it helps to establish industry safety practices in the three countries. As elaborated in the Statement of Facts [of the U.S. submission], Mexican carriers in fact operate within a less stringent regulatory regime than that in place in either Canada or the United States."[166] The problem areas include driver hours of service: "U.S. and Canadian safety rules strictly limit drivers' hours of service. Mexican truck drivers are only governed by the more general rules of Mexican labor laws, with no safety regulation directly applicable to the time a driver may spend behind the wheel."[167]

170. Also, "U.S. and Canadian safety regulations require drivers to keep logbooks, the only practicable way to enforce hours of service regulations. Other than for hazardous materials, Mexico has no logbook requirements."[168] Moreover, "U.S. and Canadian safety regulations include exhaustive equipment regulations address to truck safety. Mexico, however, lacks specific regulations governing the condition and maintenance of CMV safety equipment."[169] Other problematic aspects of Mexico's motor carrier regulatory system relate to inspections by the motor carrier itself and government safety inspections.[170]

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[163] USCS at 40-41, emphasis supplied by U.S.

[164] USCS at 41.

[165] USCS at 42.

[166] USCS at 43.

[167] USCS at 43.

[168] USCS at 44.

[169] USCS at 44.

[170] USCS at 44.

171. The United States observes that "[a]nother circumstance relevant to the treatment of U.S., Canadian, and Mexican trucking firms is the ability of U.S. transportation safety authorities to enforce U.S. safety regulations with respect to those carriers."[171] While the "maintenance of government databases of accident and safety records, with respect to both firms and drivers, is an important element of safety regulation in the United States (and Canada) . . . the United States has no access to similar data for Mexican firms or drivers."[172] Moreover, "U.S. highway safety regulators rely in part on their ability to conduct on-site audits and inspections of U.S. firms and, where appropriate, to impose civil or criminal penalties." However, "U.S. regulators have no right to conduct inspections or audits in Mexico, only limited and recent experience with Mexico on joint inspections (by contrast with a long track record with Canada), and limited ability to impose and collect civil or criminal penalties with respect to Mexican firms that might ignore U.S. safety regulations."[173]

172. A further major U.S. concern regarding "treatment of U.S., Canadian, and Mexican carriers is available evidence regarding the comparative safety records of firms operating in the United States. . . . Mexican trucks operating in the United States have a significantly higher incidence of being placed out of service for safety problems uncovered in random inspections. In particular, the available data show that the out-of-service rate for Mexican carriers is over 50 percent higher than the rate for U.S. carriers."[174]

173. In contrast to Mexico's system, the United States notes that "Canada's truck safety rules and regulations are highly compatible with those of the United States."[175] Thus, "when Canadian-based commercial trucks cross into the United States, federal and state transportation authorities can have a high level of confidence that those trucks comply with U.S. standards and requirements at least to the same degree as U.S.-based trucks. That confidence level is bolstered by a fully functioning, computerized bilateral data exchange program."[176] Under these circumstances, "when Mexican trucks cross into the United States, there is no assurance that, based on the regulatory regime in place in Mexico, those trucks already meet U.S. highway safety standards."[177]

174. Given all of these considerations, the "United States has . . . concluded that the 'circumstances' relevant to the treatment of Mexican-based trucking firms for

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[171] USCS at 45.

[172] USCS at 45.

[173] USCS at 45.

[174] USCS at 45-46.

[175] USCS at 47.

[176] USCS at 47-48.

[177] USCS at 48.

safety purposes are not 'like' those applicable to the treatment of Canadian and U.S. carriers."[178] Accordingly, "the United States may apply more favorable treatment to U.S. and Canadian trucking firms than to their Mexican counterparts without running afoul of Chapter Twelve's national treatment or most-favored-nation rules."[179]

175. The United States further notes that Mexico has presented no data on truck safety enforcement in Mexico, and states that although "Mexico does allege that 'it was within the power of the United States to impose requirements' that make Mexican carriers 'like' U.S. and Canadian carriers," Mexico has failed to explain "what those requirements might be nor how such requirements would be practicable or effective."[180] According to the United States, "this absence of contrary evidence reinforces that the United States, in delaying the processing of Mexican applications until truck safety can be ensured, is acting reasonably, appropriately, and consistently with its NAFTA obligations."[181]

176. With regard to the question of whether high out-of-service rates for Mexican drayage trucks in the border zone are relevant to long-haul experience, the United States contends that "In terms of safety, the service provided by drayage trucks is no different from that provided by long-haul trucks–they haul goods on the same roads, through the same cities and towns through which long-haul trucks operate."[182] In any event, Mexico has not demonstrated that their long-haul trucks are safer. Issuance by the United States of long-haul authority to Mexican trucks "would not, standing alone, prevent a defective drayage truck from operating in the United States beyond the border commercial zone."[183]

177. The United States explains certain carriers are permitted to "transit" U.S. territory from Mexico to Canada because

> the Congress has not granted the U.S. Department of Transportation ("DOT" or "Department") the authority to require such transit carriers to seek operating authority. Therefore, transit operations are unaffected by the moratorium on the issuance of operating authority to Mexican motor carriers for operations outside the commercial zone. All firms operating in the United States, however, regardless of whether

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[178] USCS at 49.

[179] USCS at 49.

[180] USSS at 3-4.

[181] USSS at 4.

[182] USPHS at 7.

[183] USPHS at 8.

> they are subject to such registration requirements, are subject to DOT's safety jurisdiction.[184]

U.S.-owned, Mexican-domiciled carriers and "grandfathered" carriers are unaffected by the statutory moratorium and thus are also permitted to transport goods from Mexico to the United States beyond the border zone.[185]

178. However, the United States does not believe that the exemption of these groups from the moratorium "demonstrates that the United States does not have authentic safety concerns about Mexican carriers."[186] "The number of carriers entitled to these exemptions represents only a small fraction–about two percent–of Mexican firms engaged in cross-border operations. Specifically, 8,400 Mexican firms have authority to operate in the commercial zones, while a total of only 168 Mexican carriers are entitled to the above-discussed exemptions."[187]

179. Mexican motor carriers operating in the border commercial zones are required to obtain special certificates of registration. These carriers are fully subject to all U.S. safety regulations. They must also have trip insurance, must carry evidence of the insurance in their trucks, and must have U.S. registered agents.[188] The United States denies that the use of trip insurance instead of continuous insurance reflects any lack of concern over differences in the safety of U.S. and Mexican carriers operating in the commercial zones. Rather, "[a]n insurer's potential liability arising from trip insurance is just the same as that arising from continuous insurance, and in both cases the insurer has the same incentives to reduce its potential liability."[189]

180. The United States also explains its alleged lack of concern with trailers: "In practice, however, the safety of Mexican trailer components has not been a major issue, because eighty to ninety percent of the trailers used in cross-border trade are in fact U.S.-owned."[190]

181. With regard to national treatment and most-favored-nation obligations, according to the United States,

> the relevant issue is whether the U.S. actions are consistent with its Chapter Twelve national treatment and MFN obligations in light of the different circumstances applicable to

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[184] USSS at 20-21.

[185] USSS at 21-22, citations omitted.

[186] USSS at 22.

[187] USSS at 22.

[188] USSS at 24.

[189] USSS at 24-25.

[190] USSS at 25-26.

> 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. Applying NAFTA's national treatment and MFN obligations to this set of facts turns on a close analysis of highway safety issues, not abstract arguments regarding "conditionality".[191]

182. According to the United States, Mexico has failed to meet its burden of proof regarding denial of investment benefits, "because Mexico had not shown that any Mexican national meets the definition of 'investor' in Chapter Eleven."[192] In this respect, the United States disagrees with Mexican reliance on WTO doctrines under which a complaining Party does not have to show trade impact. Moreover, the United States believes under WTO principles "complaining parties bear the burden of proving an alleged violation by a WTO Member of its WTO obligations."[193]

183. The United States, which emphasizes that it has not raised Chapter Nine as a defense,[194] also expresses its disagreement with Mexico's relating of the "in like circumstances" language to Chapter Nine. A NAFTA Party, according to the United States, does not need any NAFTA provision to serve as a "vehicle for" (which, presumably, Mexico means "to authorize") any particular governmental regulation. In applying governmental regulations, NAFTA only comes into play when a particular NAFTA obligation is relevant to the regulation at issue. Chapter Nine imposes certain obligations (such as MFN and national treatment obligations) with respect to standards-related measures, but Chapter Nine is not "the vehicle for application" of standards.

184. According to the United States, if Mexico's argument is predicated on the theory that only NAFTA Chapter Nine could "permit" differential treatment between domestic and foreign service providers, the argument is both circular and inconsistent with the plain text of the agreement.

185. Also, the United States contends that the Parties could not, as Mexico suggests, have intended Chapter Nine to serve as the exclusive "vehicle" for applying standards-related measures because the scope of Chapter Nine is limited to goods and only two services sectors: telecommunications and land transportation services. Chapter Nine does not apply to measures affecting any other services nor to measures affecting investment. Mexico's

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[191] USSS at 17.

[192] USSS at 26.

[193] USSS at 26-27, quotation and citation omitted.

[194] Comments of the United States on the Initial Report of the Panel, December 19, 2000, at 2.

interpretation would lead to the untenable result that the Parties neglected to provide any "vehicle" for the application of standards-related measures applicable to most services covered by NAFTA and to all investments covered by NAFTA.[195]

186. The United States contends that its position is confirmed by Article 2101, one of the general exceptions, which provides:

> that '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.'[196]

187. Similarly, in the Preamble to NAFTA, the Parties explicitly state their resolve under NAFTA to "preserve their flexibility to safeguard the public welfare."[197] "These provisions illustrate that NAFTA Parties contemplated that their regulatory authorities would retain their ability to make regulatory distinctions with regard to cross-border services trade necessary to protect human health and safety in their territories."[198]

188. The United States also contests Mexico's assertion that a government may not "condition[] . . . market access of its goods and services on the exporting country's adoption of the rules and laws of the importing country."[199] The United States disclaims the applicability of the unadopted GATT Panel report in *Tuna*,[200] and argues that the controlling case is the Appellate Body Report in United States - *Import Prohibition of Certain Shrimp and Shrimp Products.* It appears to the United States, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX of GATT 1994.[201]

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[195] USSS at 14-16, citations omitted.

[196] NAFTA Article 2101(2).

[197] USCS at 40.

[198] USCS at 40.

[199] USPHS at 17, *quoting* Mexico.

[200] *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* (Report of the Panel adopted on Feb. 22, 1982, L/5198-29S/91 [hereinafter *Tuna*].

[201] USPHS at 17-18.

189. The United States concludes, "Mexico has no support for its proposition that some general principle of international law prohibits the United States from taking account of the exporting Party's regulatory regime."[202]

190. The United States also asserts that Mexico has made no case for nullification or impairment under NAFTA Annex 2004, noting some similarity to the *Korean Procurement* case in the WTO.[203] According to the United States, Mexico has the burden of showing nullification or impairment and has made no such argument. Also, the United States declares that under NAFTA, a nullification or impairment claim may not be made if it

> would be subject to an Article 2101 exception. As the United States has shown, differential treatment for Mexican carriers is warranted by safety concerns, and is thus consistent with the U.S. obligations under the national treatment and MFN provisions of Chapter Twelve. For the very same reasons, (and in the event that the Panel had needed to examine this issue in response to a nullification or impairment claim), the U.S. measure would fall squarely within the scope of Article 2101(2).[204]

191. The United States asserts that the "subjective" motivation for the alleged U.S. violations–as argued by Mexico–should not be the basis for the Panel's analysis. WTO Appellate Body decisions support the position of the United States that the pertinent issue here is whether safety concerns warrant the differential treatment provided to Mexican carriers, and not–as Mexico claims–the subjective motivations of U.S. decision-makers in December 1995.[205]

192. The United States cites to *Japan - Alcoholic Beverages*,[206] where the Appellate Body determined that "This is not an issue of intent" and determined "an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products."[207]

193. Also, in *Chile - Alcoholic Beverages*,[208] the Appellate Body noted that

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[202] USPHS at 18.

[203] USPHS at 10-11.

[204] USPHS at 13.

[205] USPHS at 14-17.

[206] *Japan - Taxes on Alcoholic Beverages*, Panel Report adopted Oct. 4, 1996, WT/DS8/AB/R.

[207] *Id.* at 28-29, as cited in USPHS at 16.

[208] *Chile- Taxes on Alcoholic Beverages*, Panel Report adopted Dec. 13, 1999, WT/DS87/AB/R.

> The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives–that is, the purpose or objectives of a Member's legislature and government as a whole–to the extent that they are given *objective* expression in the statute itself, are not pertinent.[209]

194. Consequently, the Panel in this case should "likewise examine U.S. compliance with national treatment obligations based on a fact-specific analysis of the U.S. measure and all of the relevant circumstances, and not–as the Appellate Body wrote–on the 'subjective intentions inhabiting the minds of individual . . . regulators.'"[210]

C. Canada's Contentions

195. Canada, exercising its right to participate in the Panel proceeding under Article 2013, avoids comment on the specific facts of the case.[211]

196. Canada contends that the key issue in interpreting the requirements of Article 1202 (national treatment for cross-border services) is "a comparison between a service provider providing services cross-border, and a service provider providing services locally." Under those circumstances, Canada submits:

> A blanket refusal to permit a person of Mexico to obtain operating authority to provide cross-border truck services . . . would, on its face, be less favorable than the treatment accorded to United States truck service providers in like circumstances.[212]

Canada takes a similar position with respect to Article 1102 (national treatment for investment).[213]

197. Canada also challenges the U.S. refusal to allow Mexican investors to invest in the U.S. trucking market. Canada contends that under Article 1102:

> 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

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[209] *Id.* at para. 62, as cited in USPHS at 16, emphasis in original.

[210] USPHS at 17.

[211] CS at 2.

[212] CS at 3.

[213] CS at 3.

less favorable treatment to a Mexican investor than to a like [United States] investor.[214]

198. Anticipating that the United States would rely on Chapter Nine (standards), Canada argues that Article 904(2), which permits a Party to "establish the levels of protection that it considers appropriate" applies only to the other provisions of Chapter Nine. These limits cannot be applied to any of the other chapters, such as Chapter Eleven.

199. With regard to Chapter Twelve, Canada contends that despite the requirement in Article 904(3) that each Party in regard to standards related measures accord national treatment in accordance with Article 1202, this requirement permits a Party only to establish a legitimate level of protection. It does not "excuse a discriminatory measure purporting to achieve the appropriate level of protection."[215]

V. THE UNITED STATES' REQUEST FOR A SCIENTIFIC REVIEW BOARD

200. In a submission dated May 16, 2000, the **United States** proposed "that the Panel request a written report of a scientific review board on the factual truck safety issues raised by the United States in this dispute."[216] The United States also suggested, "The inclusion of Article 2015 in the NAFTA reflects the view of the NAFTA Parties that in cases involving health or safety issues, the informed opinions of independent technical experts can provide invaluable assistance to the dispute settlement Panel."

201. The United States asserted that "the disputing Parties appear to have conflicting views on a number of factual truck safety issues" unlikely to be clarified by the hearing.[217] The United States referred to the following matters:

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[214] TR at 133.

[215] CS at 4.

[216] SRB Request at 1.

[217] SRB Request at 2.

- the differences between the U.S. and Canadian truck safety regulatory regimes, on the one hand, and the Mexican regime, on the other;
- the role that safety enforcement in a carrier's home country plays in ensuring truck safety in other countries where a carrier operates;
- the practicability and effectiveness of using border inspections as the primary means of ensuring the safety of Mexican-domiciled carriers; and
- the significance of available data on out-of-service rates for Mexican domiciled trucking firms.[218]

202. The United States also asserted that "[s]uch issues involve technical and complex questions concerning the real-life operation of trucking firms and the effectiveness of various types of governmental safety regulation" and suggested that "[t]he Panel's establishment of a scientific review board would also have the benefit of promoting the credibility and public acceptance of NAFTA dispute settlement system."[219]

203. At the hearing on May 17, 2000, after listening to both Parties on the U.S. request, the Panel invited the United States to submit a detailed and comprehensive list of the matters that it suggested might usefully be the subject of the terms of reference of a scientific review board ("SRB").[220]

204. In a letter dated May 24, 2000, the United States filed a more detailed list of factual issues which it suggests be submitted to a scientific review board:

a) the differences between U.S. and Canadian government oversight of truck safety on the one hand, and the Mexican government oversight of truck safety, on the other;

b) the importance of Mexican government oversight of truck safety in promoting safety for carriers operating both within Mexico and within the United States;

c) in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced through border inspections;

d) in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced through operating-authority application procedures for Mexican carriers;

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[218] SRB Request at 2.

[219] SRB Request at 3.

[220] TR at 250.

e) the significance of available data on out-of-service rates for Mexican motor carriers . . . [and] . . . whether it is significant to classify carriers as short-haul versus long-haul carriers;

f) the role of intergovernmental cooperative programs, such as complete, real-time, interoperable databases, in effectively enforcing safety regulations with respect to trucks, drivers and carriers; and

g) whether U.S. governmental safety regulations can be practicably or effectively enforced with respect to drivers, carriers, and trucks not subject to comprehensive, integrated safety oversight systems under their domestic laws.[221]

205. In its post-hearing submission, the United States reiterated its view that "the [P]anel would find the advice of an SRB to be of substantial assistance in reaching a final decision in this case, and that the [P]anel should proceed with the SRB process."[222] The United States believed that Mexico had mis-characterized the factual issues and that the main issues are not, according to the United States "features of the motor carrier regulatory regimes in the United States, Mexico and Canada."[223]

206. The United States rejected Mexico's criticism of the timing of the request for a SRB, pointing out that the request fell within the deadline specified by the Model Rules and reflects the absence of prior practice; any delays in the Panel proceeding resulting from the appointment of a SRB were negotiated by NAFTA Parties "with the full understanding that those procedures would entail additional time."[224] Moreover, "establishing the SRB after the hearing promotes efficiency, because the hearing can help to identify and sharpen the factual issues in dispute."[225]

207. The United States argued that, as this was at the time only the third NAFTA Chapter Twenty panel convened and the first relating to safety issues, the Panel's report would be important for all of NAFTA Parties, and for the public at large. The fact that a SRB proceeding would entail a "few more weeks" of time should not, and must not, play any role in the Panel's decision on whether or not to establish an SRB. Rather, the Panel's decision should be based solely on whether the views of an SRB would assist the Panel in preparing the best possible final report.[226]

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[221] Letter at 1-2.

[222] USPHS at 19.

[223] USPHS at 19, *quoting* Mexico.

[224] USPHS at 20-21.

[225] USPHS at 20.

[226] USPHS at 21.

208. In a separate submission dated May 31, 2000, **Mexico** opposed the U.S. proposal for the appointment of a Scientific Review Board. Mexico's opposition was based on the following considerations:

a) the essential facts on which the United States was seeking a report . . . "were not issues in dispute;"

b) "[i]t was extraordinary that the United States should make its request at such a late date [May 16, 2000], after giving no hint in its prior written submissions that it believed the Panel had any need for advice from an SRB;"

c) "the United States itself has never undertaken the type of evaluation it was seeking from an SRB, and its decision not to implement NAFTA therefore could not have been based on such an evaluation;" and

d) "NAFTA's deadlines for this dispute settlement procedure have already been exceeded, and creation of an SRB would lead to further extensive delays."[227]

209. Mexico further argued that the principal topics that would be studied, according to the U.S. proposal, relate either to information that is readily available, not available at all, or are inappropriately broad.[228]

210. After reviewing the various time limits specified in Rules 38-48 of the Model Rules, Mexico submitted that convening a SRB would "lead to a further delay of at least seventy-nine days and probably longer."[229] Nor, according to Mexico, has the United States identified any reason why "[the United States] could not have made its request earlier in the proceedings– especially in this case, in which the factual and legal issues have already been exhaustively addressed in the written submissions of the Parties."[230]

211. Finally, Mexico observed that none of the U.S. topics for a SRB proposed by the United States relates to the investment issue, arguing that the United States conceded at the hearing that "its continuing restriction on Mexican investment in U.S. carriers was not based on safety concerns."[231]

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[227] MSRB.

[228] MSRB at 5-6.

[229] MSRB at 8-9.

[230] MSRB at 9.

[231] MSRB at 9.

212. After deliberation, the Panel has concluded that the relatively minor differences in the relevant facts as viewed by the two Parties were not material, since they affected neither the likely outcome of the matter nor the reasons for the Panel's Findings, Determinations or Recommendations. Further, the primary factual assertion upon which the United States relied was that Mexican laws and regulations relating to truck and driver safety were less comprehensive and much less effectively enforced in Mexico than similar safety laws and regulations in the United States. For purposes of its evaluation, the Panel assumed that this factual analysis was correct, without making findings on the issue.

213. Accordingly, the Panel determined that it was not necessary to establish a Scientific Review Board and, on July 10, 2000, issued the following procedural order:

> Upon consideration of the request by the United States for a Scientific Review Board and Mexico's response to that request, the Panel determines that there shall be no Scientific Review Board constituted at this stage.

There have been no developments in the proceeding since July 10, 2000 that have caused the Panel to reconsider its decision.

VI. ANALYSIS OF THE ISSUES

214. In this analysis, the Panel declines to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking services and investment; it confines its analysis to the consistency or inconsistency of that action with NAFTA. The Panel notes that this approach is fully consistent with the practice of the WTO Appellate Body, which in *Japan - Taxes on Alcoholic Beverages*, at 28, and in *Chile - Taxes on Alcoholic Beverages*, para. 62, has declined to inquire into the subjective motivations of government decision-makers, or examine their intent. As the Appellate Body observed in analogous circumstances, in *Chile-Alcoholic Beverages*, "The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters."[232]

215. It should be also noted that the Panel has duly considered all of the arguments raised by the Parties and Canada in the various submissions, including the Parties' comments on the Initial Report, even if some such arguments are not explicitly addressed in this Final Report.

A. Interpretation of NAFTA

216. The Panel sets out in this section the general legal framework for the interpretation of the Parties' claims. In the following sections, the Panel analyzes and interprets provisions on land transportation in NAFTA concerning Reservations for existing Measures and Liberalization Commitments (Section VII), Services (Section VIII) and Investment (Section IX).

217. The objectives of NAFTA are proclaimed in Article 102(1):

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation [sic] treatment and transparency, are to:
>
> 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;

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[232] *See also* HERSH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 52 (1958) ("Interpretation as a juristic process is concerned with the sense of the word used, and not with the will to use that particular word."); CHARLES C. HYDE, INTERNATIONAL LAW 531 (1945) ("The final purpose of seeking the intention of the contracting states is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, rather than the volition of the parties.").

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.

218. Article 102(2) provides a mandatory standard for the interpretation of the detailed provisions of NAFTA: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

219. The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia,* to "create an expanded and secure market for the goods and services produced in their territories."[233] Given these clearly stated objectives and the language of the Preamble, the Panel must recognize this trade liberalization background. As the Panel in *Dairy Products* observed:

> [A]s a free trade agreement, NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favored-nation treatment, and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit NAFTA's objectives. Exceptions to obligations of trade liberalization must perforce be viewed with caution.[234]

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[233] International tribunals have not hesitated to resort to the preamble of a treaty in order to discover the principal object of the treaty, as is contemplated in Article 31 of the Vienna Convention, discussed *infra*, note 231, 235. *See also The Lotus*, P.C.I.J., (1927) Ser.A, No.10, 17; *Free Zones of Upper Savoy and the District of Gex* (Order) (1929), P.C.I.J., Ser. A, No. 22, 12; *Asylum (Colombia, Perú),* I.C.J, (1950) Rep. 266 at 276, 282. *Rights of U.S. Nationals* at 196; D.P. O'CONNELL, INTERNATIONAL LAW 260 (2d ed. 1970).

[234] *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products.* CDA 95-2008-01, Final Panel, para. 122 (Dec. 2, 1996). The principle that exceptions to general obligations are to be construed narrowly is well accepted in the interpretation of the GATT and WTO. *See Tuna* (Report of the Panel adopted on Feb. 22, 1982, L/5198-29S/91); *Reformulated Gasoline*, WTO Appellate Body (WT/DS/9, May 20, 1996); *Shrimp* WTO Appellate Body (WT/DS58/AB/R, Oct. 12, 1998); *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel adopted on Nov. 7, 1990 (DS10/R-37S/200), at 87.

The Panel also notes, however, that the Preamble of NAFTA reflects a recognition that the Parties intended to "preserve their flexibility to safeguard the public welfare."

220. In identifying the rules of interpretation of international law referred to in Article 102(2), the Panel need go no further than the 1969 Vienna Convention on the Law of Treaties.[235] Both Parties agree that the Vienna Convention is appropriate for this purpose,[236] as NAFTA Parties have agreed in the past.[237] The guiding rule of the Vienna Convention is Article 31(1), which provides in pertinent part, "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."

221. Thus, in addition to the ordinary meaning of the terms, interpretation must take into account the context, object and purpose of the treaty.[238] The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty.[239] If necessary, there shall be taken into account, together with the context, any subsequent practice and any relevant rules of international law applicable in the relations between the parties.[240]

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[235] "International tribunals have not hesitated to resort to the preamble of a treaty in order to discover the principal objectives of a treaty, and Article 31 of the Vienna Convention treats the preamble as part of the 'context' for purpose of interpretation." For documentation and summary sessions of the Vienna Conference, *see* A/CONF.39/11. For official documents, *see* A/CONF.39/11/Add.2. Text of the Vienna Convention can be found at www.un.org/law/ilc/texts/treaties.htm.

[236] "The United States considers the Vienna Convention on the Law of Treaties 1969 to be a valid source of law for this purpose of [interpreting NAFTA]." USCS at 37, note 92; "[T]his Panel should apply the rules for interpretation of public international law as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties." MIS at 67.

[237] *Dairy Products*, at paras. 118-121 (applying NAFTA Article 102(2) and Articles 31 and 32 of the Vienna Convention).

[238] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden) I.C.J. Rep., 1958, 55 at 67.

[239] Article 31:2 provides:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[240] Article 31:3 provides:

> There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

Article 31:4 states: "A special meaning shall be given to a term if it is established that the parties so intended."

222. If these criteria are insufficient, there may then be recourse to supplementary means of interpretation, as provided under Article 32 of the Vienna Convention.[241] The Panel must therefore commence with the identification of the plain and ordinary meaning of the words, in the context in which the words appear and considering them in the light of the object and purpose of the treaty. [242] Only if the ordinary meaning of the words established through the study and analysis of the context, seems to contradict the object and purpose of the treaty, may other international rules on interpretation be resorted to for the interpretation of the provision. [243] In this proceeding, the Panel has found it unnecessary to go beyond the dictates of Article 31 of the Vienna Convention.

223. Article 31, like other provisions of the Convention, must be applied in conjunction with Article 26, which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," i.e., *Pacta sunt servanda*. The Panel must interpret the treaty provisions in dispute with the understanding that the Parties accept the binding nature of NAFTA and that its obligations shall be performed in good faith.

224. Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." [244] This provision directs the Panel not to examine national

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[241] Article 32 provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable."

[242] "It is impossible to say that an article is clear before its object and end is determined. Only when the object is established can one ascertain that the natural sense of the terms used remains within or exceeds the intention as disclosed." Judge Anzilotti in *Interpretation of the Convention of 1919 Concerning the Employment of Women during the Night,* P.C.I.J., Ser. A/B, No. 50 (1932). *Ambatielos Case*, I.C.J. Rep., 1952, 28 at 60. "Hence the idea that there is a natural meaning to words is delusive". D.P. O'Connell, op.cit., 254. *Anglo-Iranian Oil Case*, I.C.J. Rep., 1952, 104. Lord McNair, *The Law of Treaties*, 1961, 364. HERBERT W. BRIGGS, THE LAW OF NATIONS 877-899 (2d ed.); CHARLES G. FENWICK, INTERNATIONAL LAW 535-540 (4th ed.).

[243] This approach has been clearly endorsed by the International Court of Justice:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, March 1950, I.C.J. Rep., 4 at 8.

[244] The proposition contained in this Article has been affirmed since the *Alabama Arbitration*, MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 653 (vol. 1 1898); Wimbledon, P.C.I.J. Rep., Ser., A. No. 1 *Greco-Bulgarian Communities,* P.C.I.J. Rep. Ser., B, No. 17.

laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA.[245] To do so would be to apply an inappropriate legal framework.[246]

B. Reservations for Existing Measures and Liberalization Commitments - Annex I

1. Positions of the Parties

225. In its initial submission, **Mexico** presented its view that "the Phase-out elements of the U.S. reservations override the reservations themselves.[247] In that section, Mexico concluded, "The Phase-Out elements of the U.S. reservations for motor carrier services do not contemplate any other type of exceptions."[248] During the Oral Hearing, in responding to a Panelist's question concerning the legal interpretation of Annex I, the Mexican representative stated that "We have already included reference on interpretation of Annex I. In fact, in light of the introductory note that describes the various components and how the relationship between one and the other should be interpreted, in effect, it states that the phase-out calendar does have a preponderance over the other elements or components."[249] In its Post-Hearing Submission, Mexico stated that: "Annex I contains no qualifications of these commitments."[250]

226. During the Oral Hearing, a Panelist said to the representative of the **United States**, "I'm wondering about what you said, that your interpretation of Annex I doesn't establish an obligation, is what I understood."[251] To this remark, the representative of the United States responded, "correct,"[252] and added, "I think

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Polish Nationals, Treatment in Danzig, P.C.I.J. Rep., Ser., A/B, No. 44. The International Court of Justice adopted the same view in *Reparation for Injuries suffered in the Service of the United Nations,* I.C.J. Reports 1949, 180.

[245] The Panel does not intend to suggest that issues of "internal" law are necessarily irrelevant to international law since national law may be relevant in a variety of ways, including as a fact in an international tribunal. *ELSI Case (U.S. v. Italy),* I.C.J. Reports 1989, 15.

[246] International precedents and authorities supporting this proposition may be found in Roberto Ago, *Third Report on State Responsibility,* 89-105 (A/CN.4/246, 1971).

[247] MIS at 85-86.

[248] MIS at 86.

[249] TR at 175.

[250] MPHS at 33-34.

[251] TR at 230.

[252] TR at 230.

I said there's a legal view. 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."[253]

227. In **Canada**'s Submission, under the heading of "The Obligations of the United States," Canada asserted:

> The United States reservation from certain obligations in Chapters 11 and 12 for non-conforming measures in the land transportation sub-sector, set out in NAFTA Annex I at pages I-U-18 to I-U-20, provides for a phase-out of these non-conforming measures. . . . At the end of the phase-out period, the obligations reserved against apply to the United States, subject only to any reservations that have not yet been phased out or any other applicable exceptions.[254]

2. The Panel's Analysis

228. The Panel begins its inquiry by looking at the interpretative Note ("the Note") that precedes the Parties' Schedules at pages I-1, I-2 and I-3 of Annex I. The drafters provided the interpretative Note of Annex I to assist in the reading and understanding of the Reservations contained in Annex I. Specifically, the Note provides rules and otherwise acts as guidance for the Panel in interpreting the Annex I Schedules of Canada, Mexico and the United States, including the reservations and phase-out provisions applicable to cross-border trucking services and investment.

229. The text of the Note is set out below:

> 1. The Schedule of a Party sets out, pursuant to Articles 1108(1) (Investment), 1206(1) (Cross-Border Trade in Services) and 1409(4) (Financial Services), the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by:
> (a) Article 1102, 1202 or 1405 (National Treatment),
> (b) Article 1103, 1203 or 1406 (Most-Favored-Nation Treatment),
> (c) Article 1205 (Local Presence),
> (d) Article 1106 (Performance Requirements), or
> (e) Article 1107 (Senior Management and Boards of Directors),

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[253] TR at 230-231.

[254] CS at 2.

and, in certain cases, sets out commitments for immediate or future liberalization.

2. Each reservation sets out the following elements:
(a) Sector refers to the general sector in which the reservation is taken;
(b) Sub-Sector refers to the specific sector in which the reservation is taken;
(c) Industry Classification refers, where applicable, to the activity covered by the reservation according to domestic industry classification codes;
(d) Type of Reservation specifies the obligation referred to in paragraph 1 for which a reservation is taken;
(e) Level of Government indicates the level of government maintaining the measure for which a reservation is taken;
(f) Measures identify the laws, regulations or other measures, as qualified, where indicated, by the Description element, for which the reservation is taken. A measure cited in the Measures element (i) means the measure as amended, continued or renewed as of the date of entry into force of this Agreement, and (ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure;
(g) Description sets out commitments, if any, for liberalization on the date of entry into force of this Agreement, and the remaining non-conforming aspects of the existing measures for which the reservation is taken; and
(h) Phase-Out sets out commitments, if any, for liberalization after the date of entry into force of this Agreement.

3. In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of the Chapters against which the reservation is taken. 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;[255] and

[255] Emphasis supplied.

(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.

4. Where a Party maintains a measure that requires that a service provider be a citizen, permanent resident or resident of its territory as a condition to the provision of a service in its territory, a reservation for that measure taken with respect to Article 1202, 1203 or 1205 or Article 1404, 1405 or 1406 shall operate as a reservation with respect to Article 1102, 1103 or 1106 to the extent of that measure.

230. Significantly, the Note indicates that in interpreting liberalization commitments regarding Phase-Out elements in Annex I, the elements of the reservation must be considered in the light of the relevant provisions of the Chapters against which the reservation is taken,[256] and that the Phase-Out element of a reservation shall prevail over all other elements of the reservation.[257]

231. Because of its importance to this case, the reservation at issue in the Schedule of the United States Sector: Transportation, Sub-Sector: Land Transportation, Phase-Out: Cross-Border Services, Investment, pages I-U-18 to I-U-20 is quoted in full:

Sector: Transportation
Sub-Sector: Land Transportation
Industry Classification: SIC 4213 Trucking, except Local
SIC 4215 Courier Services, Except by Air
SIC 4131 Intercity and Rural Bus Transportation
SIC 4142 Bus Charter Service, Except Local
SIC 4151 School Buses (limited to interstate transportation not related to school activity)

Type of Reservation: National Treatment (Articles 1102, 1202) Most-Favored-Nation Treatment (Articles 1103, 1203) Local Presence (Article 1205)

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[256] Head of Paragraph 3.

[257] Paragraph 3.a

Level of Government: Federal

Measures: 49 U.S.C.§10922(l)(1) and (2); 49 U.S.C.§10530(3); 49 U.S.C.§§ 10329,10330 and 1170519; 19 U.S.C. §1202; 49 C.F.R. § 1044
Memorandum of Understanding Between the United States of America and the United Mexican States on Facilitation of Charter/Tour Bus Service, December 3, 1990
As qualified by paragraph 2 of the Description element

Description: ***Cross-Border Services***

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 place on new grants of operating authority for persons of Mexico.

2. The moratorium does not apply to the provision of Cross-Border charter or tour bus services.

3. Under the moratorium, persons of Mexico without operating authority may operate only within ICC Border Commercial Zones, for which ICC operating authority is not required. Persons of Mexico providing truck services, including for hire, private, and exempt services, without operating authority are required to obtain a certificate of registration from the ICC to enter the United States and operate to or from the ICC Border Commercial Zones. Persons of Mexico providing bus services are not required to obtain an ICC certificate of registration to provide these services to or from the 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.

Investment

5.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.

Phase-out: **Cross-Border Services**

A person of Mexico will be permitted to obtain operating authority to provide:
(a) three years after the date of signature of this Agreement, cross-border truck services to or from border states (California, Arizona, New Mexico and Texas), and such persons will be permitted to enter and depart the territory of United States through different ports of entry;
(b) three years after the date of entry into force of this Agreement, cross-border scheduled bus services; and
(c) six years after the date of entry into force of this Agreement, cross-border truck services.

Investment

A person of Mexico will be permitted to establish an enterprise in the United States to provide:
(a) three years after the date of signature of this Agreement, truck services for the transportation of international cargo between points in the United States; and
(b) seven years after the date of entry into force of this Agreement, bus services between points in the United States.

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.

232. According to Annex I, the relevant Chapter provisions against which the Reservations were taken are Articles 1102 (national treatment in investment), 1202 (national treatment in cross-border trade in services), 1103 (most-favored-nation treatment in investment), 1203 (most-favored-nation treatment in cross-border trade in services) and 1205 (local presence in cross-border trade in services).

233. The Panel emphasizes that the very texts of Articles 1108(1) (investment), and 1206(1) (cross-border trade in services) explicitly allow the Parties to make Reservations respectively in investment and in cross-border services in Annex I. The Note explicitly confirms that the Reservations in Annex I constitute existing measures that do not conform to obligations imposed by: (a) Article 1102 and 1202 (national treatment), or to (b) Article 1103 and 1203 (most-

favored-nation treatment). In addition, the Note also permits the Parties in Annex I to set out commitments for immediate or future liberalization.[258]

234. The Note stipulates that in Annex I, the "Measures" element identifies the laws, regulations or other measures, as qualified, where indicated, by the "Description" element, for which the reservation is taken. Most significantly, the Note explicitly develops a hierarchy of rules for the interpretation of the agreed reservations. Paragraph 3 (b) states that if 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.[259]

235. In light of the Note, the text of the Phase-Out elements in Annex I concerning both the liberalization of cross-border truck services and the investment in truck services is unambiguous, based on the ordinary meaning of the words. The relevant clauses establish specific dates in Annex I for the Party to liberalize barriers to services (December 18, 1995) and investment (December 18, 1995) in land transportation cross-border trade services. The Phase-Out clauses and their context in the Annex I do not suggest that the commitment to phase-out reservations on December 18, 1995 is dependent upon any other element of the Reservation or the Note. The Panel is unaware of any agreement related to NAFTA, or any subsequent practice or legal principle, that could accommodate the perception that there is a conditional element for the execution of the liberalization commitments. Thus, it follows that the liberalization commitments were unconditional within Annex I. Any other interpretation would be contrary to what is written in NAFTA.

236. Furthermore, the negotiators of NAFTA apparently considered very carefully the character, purpose, mode of preparation and adoption of reservations and their Phase-Out liberalization commitments. The very title of Annex I conveys the will of the Parties: "Reservations for Existing Measures and Liberalization Commitments." The Reservations under analysis included a Sector, Sub-Sector, Industry Classification, Type of Reservation, Level of Government, Measures, Description, Phase-Out.[260] There are no ambiguities. 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.

237. Moreover, the Panel is aware that the reservations in Land Transportation included in Annex I are contrary to the principal objective of NAFTA as established in its Preamble, and are also obstacles to achieving the concrete objectives agreed upon in Article 102(1). Presumably, such reservations were

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[258] Paragraph 2.h

[259] Section (c) sets forth other rules if the Measures element is not so qualified, but is not controlling here.

[260] *See* complete text in paragraph 230.

intended as a necessary structural element that was essential to assist in establishing a Free Trade Area, the ultimate goal of NAFTA.[261] In this context, the Panel recalls an old legal principle expressed in Latin as *exceptio est strictissimae applicationis* that has been utilized to signify that reservations to treaty obligations are to be construed restrictively.[262]

238. The Panel recognizes that the Phase-Out provisions concerning the reservations must be given full legal force over all other elements of Annex I. This legal rule is firmly grounded in international law. The Permanent Court of International Justice declared that a treaty provision must take precedence over a general rule of international law.[263] More recently, this principle has been adopted by the WTO Appellate Body, which upheld the Panel's decision that the precautionary principle could not be used to override the explicit wording of treaty obligations.[264]

239. Thus, the Panel finds that implementation of the very concrete Phase-Out provisions of the Reservations in this case is not conditioned by any other element.[265] If the Parties had wished to establish any mode of subsequent acceptance or condition to the liberalization commitments agreed on in the Phase-Out elements of Annex I, they would have or could have used other wording. It is the opinion of the Panel that the Phase-Out provisions in Annex I must prevail over all other elements of Annex I. The United States has failed to demonstrate the existence of any valid legal ground for its non-compliance with NAFTA Liberalization Commitments regarding Land Transportation Services and Investment in Annex I.

240. Under these circumstances, the phase-out obligations of the United States under Annex I with regard to cross-border trucking services and investment prevail unless there is some other provision of NAFTA that could supersede these obligations. It is to those other provisions that the Panel now turns.

C. Services

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[261] NAFTA Article 101 provides: The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area.

[262] *See* Interpretation of Article 79 of the 1947 Peace Treaty (French/Italian Conciliation Commission) XIII, UNRIAA 397*; Case Concerning Certain German Interests in Upper Silesia* PCIJ, Series A, No. 7, 56 and *Free City of Danzig case,* PCIJ Series A/B, No. 65, 71.

[263] *Wimbledon* (1923), P.C.I.J. Rep., Ser. A, No.1.

[264] *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Appellate Body AB-1997-4, WT/DS26/AB/R/WT/DS48/AB/R, at 253 (January 16, 1998).

[265] "Conditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty." McNair, op.cit. 436.

241. The key issue in services, in the view of the Panel, is 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. Given the expiration on December 17, 1995 of the Annex I reservation that the United States took to allowing cross-border trucking, the maintenance of the moratorium must be justified either under the language of Articles 1202 and 1203, or by some other provision of NAFTA, such as those found in Chapter Nine (standards) or by Article 2101 (general exceptions). As neither Party asserts that Annex I itself contains an exception that would otherwise justify U.S. actions, and as the United States has declined to rely on Chapter Nine as a defense, as stated earlier, the Parties rest their positions in large part on their interpretation of Articles 1202, 1203 and 2101.

1. Positions of the Parties

242. **The United States** argues that Mexico's truck transportation regulatory system does not maintain the same rigorous standards as the systems in the United States and Canada, and that therefore the "in like circumstances" language in Article 1202 means that "service providers [in Mexico] may be treated differently in order to address a legitimate regulatory objective."[266] Further, since the Canadian regulatory system is "equivalent" to that of the United States, it is not a violation of most-favored-nation treatment under Article 1203 for the United States to treat Canadian trucking firms which are "in like circumstances" vis-a-vis U.S. trucking firms in a more favorable manner than Mexican trucking firms.[267] The United States also suggests the applicability of Article 2101, which provides a general exception to other NAFTA obligations and may be invoked for "measures necessary to secure compliance with laws or regulations . . . relating to health and safety and consumer protection."[268] The United States has not sought to justify its actions under Chapter Nine, but both Mexico and Canada have raised issues under that Chapter, which as a result is addressed briefly, *infra*.

243. **Mexico** vigorously contests the U.S. interpretation of Articles 1202 and 1203, without contending that the Mexican regulatory system is equivalent to that of the United States and Canada.[269] According to Mexico, Mexican trucking firms are entitled to the same rights as U.S. carriers under U.S. law, that is "consideration on their individual merits and a full opportunity to contest the

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[266] USCS at 2.

[267] USCS at 2-3.

[268] USCS at 40.

[269] Mexico also argues that adoption of an identical motor carrier regulatory system cannot properly be made a condition of NAFTA implementation. MIS at 64.

denial of operating authority."[270] Any other approach is a violation of Articles 1202 and 1203. During NAFTA negotiations, both governments understood that motor carriers would have to comply fully with the standards *of the country in which they were providing service*. However, the obligations of the Parties were not made contingent upon completion of the standards-capability work program[271] or the adoption of an identical regulatory system in Mexico.[272] Anticipating a U.S. defense that did not materialize, Mexico explained that the United States cannot rely on Chapter Nine, because the United States failed to justify its moratorium under the procedural requirements of that chapter.[273] Nor can the United States rely on Article 2101, because the Article 2101 exception applies only to measures that are necessary to secure compliance with laws or regulations that are otherwise consistent with NAFTA, and no such laws or regulations exist here.[274] Thus, the blanket denial of access is not justified under any provision of NAFTA.

244. **Canada**, which exercised its right to participate in accordance with Article 2013, essentially agrees with Mexico, insisting that the major issue in interpreting Article 1202 is 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. Canada also contends that a "blanket" refusal by the United States to permit Mexican carriers to obtain operating authority to provide cross-border truck services would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances.[275] Canada also asserts that the United States is precluded from relying on Chapter Nine because levels of protection established under Chapter Nine must still be consistent with the national treatment requirements of Article 1202 and other NAFTA provisions.[276]

245. The Panel notes that despite suggestions to the contrary,[277] no significant disagreement exists as to the facts as they relate to the truck regulatory systems in the United States, Canada and Mexico. The United States has

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[270] MIS at 75.

[271] MIS at 74-75; emphasis added.

[272] MIS at 64.

[273] MPHS at 3, 9-12.

[274] MIS at 87-89.

[275] CS at 3.

[276] CS at 4.

[277] On May 16, 2000, the United States requested the Panel to seek the written report of a scientific review board under NAFTA, Article 2015. After providing both Parties an opportunity to submit additional comments, the Panel, on July 10, 2000, declined to request a scientific review board.

spent a considerable portion of its submissions explaining the nature of the U.S. regulatory system, the similarities of the Canadian regulatory system, and the differences (and perceived deficiencies) in the Mexican system.[278] The United States argues that the Mexican regulatory system is far less effective in assuring safe drivers and equipment through mandatory inspections, driver licensing, logbooks and other procedures, than the systems currently in use in the United States and Canada: "adequate procedures are not yet in place [in Mexico] to ensure U.S. highway safety."[279] However, the Parties differ regarding the implications of the differences in regulatory standards. The United States and Mexico have engaged in extensive consultations concerning truck transportation services and compliance with regulatory objectives. This fact is amply demonstrated in the record of this case.[280] This, of course, is not the issue. The issue is 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.

2. The Panel's Analysis

246. Article 1202 provides in pertinent part: "1. Each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers."[281] Similarly, Article 1203 states: "Each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to service providers of any other Party or of a non-Party."[282]

247. Articles 1202 and 1203 represent the obligations of national treatment (equality of treatment between foreigners and nationals) and most-favored-nation treatment (equality of treatment among foreign nationals of different states). The United States and Mexico do not question the legal force of these obligations. In its most succinct terms, the disagreement between the United States on the one hand, and Mexico and Canada on the other, is over 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 meets U.S. approval. Alternatively, the issue can be stated as whether 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

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[278] USCS at 8-19.

[279] USCS at 2.

[280] MIS at 33-38.

[281] Emphasis supplied.

[282] Emphasis supplied.

each individual applicant meets (or fails to meet) the standards for carriers operating in the United States. This disagreement in turn rests on the interpretation and scope of the "in like circumstances" language, that is, whether the comparison may be applied to "service providers" on a blanket country-by-country basis or instead must be applied to individual service provider applicants.

248. Article 1202 requires each Party to accord to service providers of another Party treatment that is no less favorable than it accords, in like circumstances, to its own service providers. Given that under U.S. law the United States treats operating authority applications received from U.S. (and Canadian) - owned and -domiciled carriers on an individual basis, the blanket refusal of the United States to review applications for operating authority from Mexican trucking service providers on an individual basis suggests inconsistency with the U.S. national treatment obligation (and from most-favored-nation treatment, given that Canadian carriers are also treated on an individual basis).

249. The Panel, in interpreting the phrase "in like circumstances" in Articles 1202 and 1203, has sought guidance in other agreements that use similar language. The Parties do not dispute that the use of the phrase "in like circumstances" was intended to have a meaning that was similar to the phrase "like services and service providers," as proposed by Canada and Mexico during NAFTA negotiations.[283] Also, the United States contends, and Mexico does not dispute, that the phrase "in like circumstances" is not substantively different from the phrase "in like situations," as used in bilateral investment treaties.[284] Most significantly, no Party asserts that the use of the phrase "in like circumstances" in NAFTA Chapter Twelve was intended to have a different meaning than it did in the United States-Canada Free Trade Agreement (FTA). Mexico notes that the "immediate source" of the "in like circumstances" language in Articles 1202 and 1203 of NAFTA was the FTA.[285] The United States has referred to elaborating language in the FTA on the national treatment obligation to support the interpretation of the phrase used in NAFTA to permit differential treatment where appropriate to meet legitimate regulatory objectives.[286] Again, the Parties do not differ on the general principle that differential treatment may be appropriate and consistent with a Party's national treatment obligations.

250. FTA Article 1402 is thus instructive. It provides a more detailed elaboration of the national treatment requirement for services than is found in NAFTA:

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[283] MRS at 12.

[284] USSS at 6-8.

[285] MRS at 10.

[286] USSS at 9-10.

> 1. Subject to paragraph 3, each Party shall accord to persons of the other Party treatment no less favourable [sic] than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter [services, investment and temporary entry].
> . . .
> 3. Notwithstanding paragraphs 1 and 2, the treatment a Party accords to persons of the other Party may be different from the treatment the Party accords its persons provided that:
>
> > a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
> >
> > b) such different treatment is equivalent in effect to the treatment accorded by the Party to its persons for such reasons; and
> >
> > c) prior notification of the proposed treatment has been given in accordance with Article 1803.

The provision in the FTA also imposed the burden of establishing the consistency of the differential treatment with the above requirements on the party proposing or according different treatment.[287]

251. The Panel notes that the FTA language provides a more detailed and specific limitation on any Party's right to depart from its national treatment obligations than is found in the shorter text of Article 1202. However, the Panel observes that similar national treatment obligations have been interpreted, in the GATT *Section 337* case, to permit the imposition of some requirements concerning imports that are different from those imposed on domestic products;[288] identical treatment is not necessarily required with regard to treatment of intellectual property violations relative to imported goods compared to domestically produced goods. Yet, the Panel in *Section 337* also recognized

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[287] FTA, Art. 1402.4.

[288] *U.S. - Section 337 of the Tariff Act of 1930*, L/6439 - 36S/345 (Nov. 7, 1989) (Panel Report), para. 5.31.

that formally identical requirements for imports may in fact provide less favorable treatment in specific circumstances.[289]

252. The Panel next examined the applicable legal provisions of NAFTA to determine, with respect to the provisions governing cross-border truck transportation services from Mexico into the United States, what constitutes the service providers of Mexico, on the one hand, and the service providers of the United States providing trucking services in the United States, on the other. Article 1213 defines a service provider of a Party to be a person of a Party that seeks to provide or provides a service. Article 201 defines a person of a Party to be a national or an enterprise of a Party, and defines an enterprise of a Party to be an entity constituted or organized under applicable law. Given these definitions, the Panel considered the undisputed facts in the record that the essential service in question involves the commercial transportation of goods from Mexico to points in the United States by service providers of Mexico.

253. 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. Additionally, the relevant trucking services also include the transit of Mexican trucks from Mexico through the United States to Canada. Those who provide or seek to provide such services are the relevant "service providers." The service providers of the United States are U.S. owned or domiciled trucking firms. The treatment of these U.S. domestic trucking service providers by U.S. regulatory authorities is the basis of comparison with the treatment by the United States of Mexican trucking service providers seeking operating authority in the United States, in determining whether the United States is providing national treatment.

254. It is not disputed that the United States prohibits consideration of applications from most Mexican service providers to supply truck transportation services from Mexico to points in the United States outside the border commercial zone.[290] Yet, the obligation of NAFTA Article 1202 is to provide no less favorable treatment to service providers of Mexico. It appears from uncontested facts that the United States is not doing so. The United States has permitted roughly 150 Mexican-domiciled carriers who claim U.S. majority ownership, five Mexican-domiciled, Mexican owned carriers grand-fathered under U.S. law, and one Mexican-domiciled, Mexican owned carrier transiting the United States to reach Canada, to operate freely in the United States

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[289] *Id.*, para. 5.11.

[290] MIS at 1-4; USCS at 20.

despite alleged deficiencies in the Mexican truck regulatory system.[291] Similarly, until 1999, four years after restrictions on cross-border trucking were to be lifted under Annex I, the United States permitted U.S. motor carriers to lease Mexican trucks and drivers for operations in the United States.[292] Certain Mexican drayage carriers are permitted to provide services only within the narrow border commercial zones, and are wholly prohibited from providing service to other points in the United States. These carriers are subjected to differential treatment, for commercial reasons and because of U.S. safety concerns.[293]

255. However, in all other circumstances comprising Mexican trucking service providers–presumably hundreds or even thousands of firms–those Mexican service providers have been denied access to the U.S. border states since December 17, 1995, despite the requirements of Annex I and Articles 1202 and 1203.

256. Thus, the provision of no less favorable treatment to these very limited Mexican service providers fails to satisfy the obligation to provide no less favorable treatment to other trucking service providers of Mexico, who remain subject to the moratorium. The U.S. blanket refusal to review requests for operating authority from other Mexican trucking firms, because of safety concerns, is inconsistent with these prior exceptions to the moratorium, as well as with U.S. treatment of U.S. domestic trucking service providers.

257. Therefore, absent other justification, the moratorium imposed by the United States on the processing of applications since December 17, 1995, would constitute a *de jure* violation of the national treatment obligation in Article 1202. However, the United States asserts justification under the terms "like circumstances," and the proposed interpretation to include differential treatment for legitimate regulatory objectives related to safety.

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[291] MRS at 1-5. The United States argues that those apparent exceptions to USDOT policy are permitted because they are based on non-safety related reasons and because USDOT lacks the legal authority to halt them. USSS at 20-22. However, there is no evidence in the record suggesting that the President made any effort to obtain legislation to halt these long standing-practices, with the exception of closing the loophole which permitted U.S. trucking firms to lease Mexican trucks and drivers for service in the United States.

[292] This so-called "loophole" was closed by Section 219 of the Motor Carrier Safety Improvement Act of 1999. Mexico argues that this was for anti-competitive reasons. MRS at 4-5. The United States contends it was for safety reasons. USSS at 23-24. However, for whatever reason, the practice was used until very recently, and the United States has not provided the Panel with any evidence of specific safety problems arising out of the practice.

[293] The United States has argued that the safety record of Mexican drayage haulers is seriously deficient compared to U.S. trucks operating nationwide. USCS at 19-24. Mexico has admitted that the drayage haulers have used equipment in relatively poor condition. MIS at 21. However, Mexico argues that a comparison between Mexican drayage haulers and U.S. long-haul trucking firm safety records is misleading because the short distance drayage haulers do not have a self-interest in maintaining the quality of equipment that they would have if engaged in long-haul freight operations. MRS at 6. Neither argument is overly persuasive, nor directly pertinent to the Panel's analysis of the law.

258. The Panel has noted that the phrase "like circumstances" may properly include differential treatment under the conditions specified in the FTA Article 1402, as discussed earlier. However, the Panel is also aware of Chapter One, Article 102. Article 102(2) of NAFTA clearly states that "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law." The first of NAFTA's listed objectives is to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties."[294] These objectives are elaborated more specifically through the principles and rules in NAFTA, including national treatment. Further, the provisions of the Agreement are required to be interpreted in light of the objectives and applicable rules of international law. Given these requirements, and the use of the same term in the FTA, the Panel is of the view 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. With regard to objectives, it seems unlikely to the Panel that the "in like circumstances" language in Articles 1202 and 1203 could be expected to permit maintenance of a very significant barrier to NAFTA trade, namely a prohibition on cross-border trucking services.

259. Similarly, the Panel is mindful that a broad interpretation of the "in like circumstances" language could render Articles 1202 and 1203 meaningless. If, for example, the regulatory systems in two NAFTA countries must be substantially identical before national treatment is granted, relatively few service industry providers could ultimately qualify. Accordingly, the Panel concludes that the U.S. position that the "in like circumstances" language permits continuation of the moratorium on accepting applications for operating authority in the United States from Mexican owned and domiciled carriers is an overly-broad reading of that clause.

260. The United States also suggests that Article 2101 allows the United States to refuse to accept applications from Mexican trucking service providers because of safety concerns. The Panel's view that the "in like circumstances" language, as an exception, should be interpreted narrowly, applies equally to Article 2101. Here, the GATT/WTO history, liberally cited by the Parties, and the FTA language, noted earlier, are both instructive. Although there is no explicit language in Chapter Twelve that sets out limitations on the scope of the "in like circumstances" language, the general exception in Article 2101:2 invoked by the United States closely tracks the GATT Article XX language, and is similar to the FTA proviso limiting exceptions to national treatment to situations where "the difference in treatment is no greater than necessary for ... health and safety or consumer protection reasons."[295]

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[294] NAFTA, Art. 102(1)(a).

[295] USCFTA, Art. 1403.3(a).

261. Thus, Article 2101:2 provides in pertinent part:

> 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 [international] trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption of 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.

262. Under Article 2101, therefore, safety measures adopted by a Party—such as the moratorium on accepting applications for U.S. operating authority from Mexican trucking service providers—may be justified only to the extent they are "necessary to secure compliance" with laws or regulations that are otherwise consistent with NAFTA. Here again, the GATT/WTO jurisprudence proves helpful in determining what "necessary" means.

263. The "necessary to secure compliance" language in GATT Article XX has been interpreted strictly in numerous GATT/WTO decisions, including United States - *Section 337 of the Tariff Act of 1930,*[296] *Canada - Certain Measures Concerning Periodicals,*[297] *United States - Standards for Reformulated and Conventional Gasoline,*[298] and *United States - Import Prohibition on Certain Shrimp and Shrimp Products.*[299] Mexico notes that the United States invoked the "necessary" language in *Reformulated Gasoline* and *Section 337* in contesting Canada in *Periodicals*, even though the Panel in *Periodicals* did not reach that issue.[300] Mexico thus suggests that the United States is among those nations supporting a narrow interpretation of the exceptions.

264. In *Periodicals,* Canada had contended that its import ban on certain periodicals was justified under the GATT Article XX(d) "chapeau" (heading) as a measure "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement." Canada had argued that this restriction was an important aspect of a government policy

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[296] [GATT] Panel Report adopted Nov. 7, 1989, BISD/345.

[297] [WTO] Panel Report adopted Mar. 14, 1997, WT/DS31/R.

[298] [WTO] Panel Report adopted May 20, 1996, WT/DS2/R.

[299] [WTO] Panel Report adopted Oct. 12, 1998, WT/DS58/AB/R.

[300] MPHS at 15-16.

that sought to ensure that magazines with editorial content prepared for the Canadian market would be rewarded with an increase in their revenues from advertising. A parallel component of the policy was a tax deduction for advertising directed at the Canadian market, which would be defeated if periodicals could be imported. The WTO Panel rejected this interpretation and found for the United States. The Panel determined that the Canadian measure was not a measure that sought compliance with another law, and thus was not justified by GATT Article XX(d).[301]

265. In *Reformulated Gasoline,* the WTO's Appellate Body determined that the chapeau of Article XX, prohibiting GATT-inconsistent measures from being unjustifiable discrimination or a disguised restriction on trade, required that a Party adopt measures reasonably available to it that were the least inconsistent with the GATT. Instead of imposing less favorable regulatory structures on foreign refiners exporting gasoline to the United States, the United States might have pursued cooperative agreements with the governments of Venezuela and Brazil.[302]

266. This suggests, by analogy, that the United States did not, in the actions it took prior to December 17, 1995, make a sufficient effort to find a less trade-restrictive measure than continuation of the moratorium to address its safety concerns.

267. In *Shrimp*, the WTO Appellate Body rejected the rigid standard through which U.S. officials determined whether certain other countries would be certified as having sea turtle protective fishing methods, effectively granting or refusing other countries' right to export shrimp to the United States. According to the Appellate Body, "it 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."[303] 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. In the instant case, Mexico objects to the U.S. moratorium and legal position as implying that only adoption by Mexico of a truck regulatory regime fully compatible with that of the United States would require the United States to lift the moratorium.[304]

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[301] *Periodicals,* paras. 5.8-5.11. The Panel did not comment on other U.S. arguments regarding Article XX(d) and the Appellate Body did not address these issues. Appellate Body Report, Jun. 30, 2000, WT/DS31/AB/R.

[302] *Reformulated Gasoline*, Part IV, at 24-28.

[303] *Shrimp,* para. 164, emphasis in original.

[304] MIS at 74-75.

268. Here also, there 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.

269. The Panel is generally in agreement with Mexico that, consistent with the GATT/WTO history and the text of Article 2101, in order for the U.S. moratorium on processing of Mexican applications for operating authority to be NAFTA-legal, any 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.[305]

270. Also, if under the GATT/WTO jurisprudence a Party is "bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other . . . provisions,"[306] in this NAFTA case, the United States has failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements than the moratorium. In fact, the application and use of exceptions would appear to demonstrate the existence of less-restrictive alternatives.

271. The provisions of Chapter Nine are relevant to this proceeding largely because Chapter Nine was addressed by Mexico and Canada. The United States did not rely on Chapter Nine as a defense.[307] Nor, the Panel notes, do any of the Parties question the right of Parties to NAFTA in pursuing "legitimate objectives of safety" or the protection of human life or health to establish levels of protection that they consider appropriate.[308] This right is established in Part Three - Technical Barriers to Trade, of which Chapter Nine is a part. Chapter Nine is explicitly made applicable to services, and includes specific obligations concerning a Land Transportation Standards Committee. Thus, under Article 904, the United States has the right to set a level of protection relating to safety concerns, through the adoption of standards-related measures, notwithstanding any other provision of this Chapter, and provided only that this is done consistently with Article 907.2, which establishes a permissive (i.e., not mandatory) assessment of risk, and encourages Parties to avoid arbitrary or unjustifiable distinctions between similar goods or services, in the level of protection a Party considers.

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[305] MPHS at 23; *see Section 337,* para. 6.31.

[306] MPHS at 25, *quoting Section 337*, para. 5.26.

[307] Comments of the United States on the Initial Report of the Panel, Dec. 19, 2000, at 4.

[308] MIS at 81-82; USCS at 39-40.

272. However, it is important to stress that actions taken by a Party under Article 904 must be "in accordance with this Agreement," including the national treatment provisions of Article 1202 and the most-favored-nation requirements of Article 1203.[309]

273. With regard to Annex I, the Panel finds unpersuasive various arguments as to the difficulties and possible safety concerns which the United States raises as obstacles to implementation of its Annex I obligations to permit cross-border trucking into the U.S. border states as of December 17, 1995.[310] First, Annex I does not incorporate any exceptions or conditions, other than the phase-out date.[311] Second, under Article 105, "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement." The fact that the United States may not have available, for budgetary or other reasons, "safety investigators" to travel to Mexico, is not an excuse to fail to comply with U.S. obligations under the Agreement, particularly given the fact that Mexican regulatory conditions were well-known to the United States at least since September 1992, when NAFTA negotiations were completed.

274. It also is clear from the record before the Panel that the United States was well aware during NAFTA negotiations that the Mexican truck regulatory system was deficient in many respects in the U.S. view, and that many changes would be required to improve it significantly. The United States and Mexico have undertaken a cooperative program aimed at improving Mexico's truck and driver regulatory system. While the United States contends that insufficient progress has been made to lift the moratorium,[312] the U.S. obligations under Annex I are not conditioned on a certain level of progress by Mexico in improving Mexico's truck safety regulatory system.

275. 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.[313] In December 1995, it was evident that many officials, including the Secretary of Transportation, were convinced that the necessary controls were in place, because regulations had been

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[309] NAFTA, Art. 904(3)(a) & (b). The Panel observes that Article 904.4 also contains a limitation that no Party may prepare, adopt, maintain or apply any standards-related measure with the effect of creating an unnecessary obstacle to trade. This obligation should be considered in conjunction with Article 906.4, which contains a requirement that where an exporting country maintains a technical regulation, and the exporting country, in cooperation with the importing Party, demonstrates to the satisfaction of the importing Party that its technical regulation adequately fulfils the importing Party's legitimate objectives, the importing Party must treat such a technical regulation as equivalent.

[310] USCS at 42-46.

[311] *See* discussion of Annex I, *supra*.

[312] USCS at 25-28.

[313] USSS at 17.

announced and other steps taken for the anticipated lifting of the moratorium in 1995, even though the United States ultimately did not lift the moratorium.[314] For whatever reasons, a contrary decision was taken. In this regard, the Panel believes it unlikely, in view of U.S. obligations under Articles 1202, 1203 and Annex I, that all Mexican providers of trucking services not subject to an exception to the moratorium can properly be subject to a blanket U.S. determination not to process applications.

276. With regard to most-favored-nation treatment under Article 1203, essentially the same considerations are relevant as with national treatment under Article 1202, discussed in detail above. If the "in like circumstances" language means that the foreign regulatory system must be equivalent or identical to the U.S. system, and the United States has concluded that the Canadian system meets this criterion,[315] the United States would be justified in discriminating in favor of Canadian trucking firms. However, if "in like circumstances" does not permit this treatment, Article 1203 is violated as well as Article 1202, since U.S. and Canadian carriers are treated in the same manner (individually) while Mexican carriers are treated differently. This is true with regard to any possible departures from most-favored-nation treatment based on other provisions of NAFTA, such as Article 2101, again as discussed earlier.

277. Finally, the Panel concludes that language in the Preamble of NAFTA, which states that the Parties "resolve to . . . preserve their flexibility to safeguard the public welfare" cannot be relied upon by the United States as an independent basis for failing to comply with its obligations under the various provisions found in the NAFTA text and Annex I. Under Article 31 of the Vienna Convention, as mentioned earlier, the preamble is part of the "context" to be considered in interpreting the treaty. However, there is no suggestion in NAFTA that the preambular language was intended to override the textual obligations. Rather, the language used in the Preamble —"resolve" rather than "agree to," "shall," or "must"—indicate that the Preamble is aspirational and horatory. 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.

278. Based on these considerations, and noting the previously discussed objectives of NAFTA in facilitating increased trade in services, the Panel is of the view that the U.S. refusal to consider applications is not consistent with the obligation to provide national treatment. Thus, 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

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[314] MIS at 33-40; USCS at 19-20.

[315] USCS at 19.

circumstances" as permitting a blanket moratorium on all Mexican trucking firms. Nor is the departure from national treatment and most-favored-nation treatment under these Articles justified under Article 2101.

D. Investment

279. The issue before this Panel with regard to investment is to determine 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, which provide:

> **Article 1102: National Treatment**
> 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 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. . . .
>
> **Article 1103: Most-Favored-Nation Treatment**
> 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.
>
> **Article 1104: Standard of Treatment**
> Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

280. The U.S. reservations with respect to existing measures from obligations imposed by Articles 1102 (national treatment in investment, services and related matters) and

1103 (most-favored-nation treatment in investment, services and related matters) are contained in Annex I, which in the case of investments establishes that: "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." The phase-out element of the reservation states that:

> A person of Mexico will be permitted to establish an enterprise in the United States to provide:
> (a) three years after the date of signature of this Agreement [December 18, 1995], truck services for the transportation of international cargo between points in the United States; and
> (b) seven years after the date of entry into force of this Agreement [January 1, 2001], bus services between points in the United States.
>
> 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.

1. Positions of the Parties

281. **Mexico** argued that, in implementing the moratorium, the United States has distinguished between carriers based on the nationality of their ownership or control, denying Mexican owned carriers national treatment (compared to U.S.-owned carriers) and most-favored-nation treatment (as Canadian carriers are subject to no such restrictions). U.S. law and regulations, as applied by the United States, authorize motor carriers and motor private carriers domiciled in Mexico, but owned or controlled by persons of the United States (or persons of Canada), to be granted operating authority to provide interstate transportation of property.[316] The above regulatory framework remains in place nearly five years after the phase-out date provided in Annex I.[317]

282. The **United States** argued that Mexico has failed to establish a *prima facie* violation of Chapter Eleven investment obligations. The United States contends that it was the United States, not Mexico, that sought the removal of investment restrictions during NAFTA negotiations. U.S. trucking firms had, and continue to have, the capital necessary to engage in cross-border investments. By contrast, Mexican firms have expressed concern regarding competition from the better capitalized U.S. firms. The

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[316] MIS at 81. 49 U.S.C. § 10922 (m)(2)(b)(iv) and (v) provided that: "if the person to be issued the certificate of registration during the moratorium is a foreign motor carrier (or a foreign motor private carrier) domiciled in the foreign country or political subdivision and owned or controlled by persons of the United States, such certificate may only authorize such carrier to provide interstate transportation of property (including exempt items) by motor vehicle."

[317] MIS at 3.

United States claims that Mexico does not even allege that there is any interest on behalf of Mexican nationals to invest in U.S. trucking firms.[318]

283. The United States also argued that Mexico has not shown that any Mexican national meets the definition of "investor" in Chapter Eleven and thus Mexico has failed to establish a *prima facie* case of violation by the United States of its Chapter Eleven investment obligations. Since Mexico has not alleged the existence of any Mexican national or enterprise that seeks to make, is making or has made an investment in a U.S. trucking firm, as defined by Article 1139, Mexico has not met its burden of proof.[319]

284. However, the United States has not denied the existence of a continuing regulatory framework that permits the Department of Transportation to refuse to process applications from Mexican motor carriers. Nor has the United States denied the contention that it has failed to modify its truck regulatory framework so as to permit Mexican nationals to establish enterprises to engage in point-to-point truck transportation of international cargo within the United States, which NAFTA required to be implemented by December 18, 1995. Morever, United States has conceded that:

> operating restrictions imposed formerly by the ICC and now by the USDOT in effect disallow new grants of operating authority to U.S. carriers owned or controlled by Mexican carriers. In order for the United States to obtain investment rights in Mexico, the United States agreed to take a comparable step by committing to modify the moratorium to permit Mexican nationals to own or control companies established in the United States to transport international cargo between points in the United States.[320]

Nor has the United States argued that different circumstances exist which would justify differential treatment in connection with investments by Mexican investors in U.S. domiciled companies.

2. The Panel's Analysis

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[318] USCS at 55.

[319] USCS at 55-56.

[320] USCS at 7-8. United States regulations, specifically 49 C.F.R. § 1182.2(a)(10), state that with regard to the purchase or acquisition of control over an existing motor carrier, the Department of Transportation regulations require, as part of the application for approval of the transaction: "a statement indicating whether any party acquiring any operating rights through the transaction is either domiciled in Mexico or owned or controlled by persons of that country." With regard to a transfer of existing operating authority, 49 C.F.R. § 365.405(b)(1)(ix) requires an applicant for transfer approval to provide: "certification by the transferee that it is not domiciled in Mexico nor owned or controlled by persons of that country."

285. The Panel notes that under the Model Rules, Rules 33 and 34: "A Party asserting that a measure of another Party is inconsistent with the provisions of the Agreement shall have the burden of establishing such inconsistency," and "A Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception *applies*."[321] 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.

286. Here, Mexico has asserted and the United States has conceded that U.S. laws and regulations authorize the Department of Transportation to deny a newly created U.S.-domiciled carrier with Mexican investment the opportunity to obtain operating authority. Current U.S. regulatory policy also prohibits the acquisition of an existing U.S. carrier that already had operating authority, because of the requirement for the applicant to certify that the applicant is not a Mexican national, nor owned or controlled by Mexican nationals. Under these circumstances, an application filed by a Mexican carrier would be futile.

287. The United States has made no significant effort to defend its position on investment on the merits. At the Oral Hearing, the representative of the United States stated the U.S. position as follows:

> On safety, the base defense goes to the services. We have a separate statement and position on the investments. What we said on investment is Mexico brought this case, [therefore] it's up to Mexico to prove its point.
>
> This is not a safety case with that. The situation, I think, is quite forthright and clear enough. The investment restriction arose from the moratorium, it's part of the moratorium that is still in place.
>
> When the safety issues are resolved, we would modify the moratorium to handle the investment issues. In our view, the investments has been a side show. . . .
>
> Mexican firms generally don't have capital investment in the United States. They haven't been pressing the United States on that. The services case is the core of this, and when the services case is resolved, the investment case will be resolved. What we said, is [that] our brief simply says Mexico has to prove its violation.[322]

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[321] MIS at 69, emphasis added.

[322] TR at 193-194, emphasis supplied.

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.

288. When a Panelist asked, "But what you're saying is, that until a Mexican company requests the opportunity, say, to buy a U.S. carrier and is denied that opportunity, . . . there's no case, even if you have a rule that says if they apply they are going to be turned down?," the representative of the United States responded, "That's almost it. It's a little more subtle than that."[323]

289. 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. For example, GATT Article III (requiring national treatment of goods) is interpreted to protect expectations regarding competitive opportunities between imported and domestic products and is applicable even if there have been no imports.[324] 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.[325]

290. Furthermore, Article 2004 of NAFTA allows the Parties to initiate the dispute settlement procedures with "respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of [the treaty], or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of [the treaty]." The Panel is not faced with a case brought in the context of NAFTA Annex 2004, which authorizes a Party to have recourse to the dispute settlement procedure where it considers that benefits

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[323] TR at 194.

[324] For example, a GATT Working Party Report on Brazilian Internal Taxes noted: "[the majority of the members of the Working Party] took the view that the provisions of the first sentence of Article III, paragraph 2, were equally applicable, whether imports from other contracting parties were substantial, small or non-existent." *See* WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 128 (6th ed. 1995). *See also Japan - Taxes on Alcoholic Beverages*, AB-1996-2 (Appellate Body) (4 Oct. 1996) at Section F. "[T]he purpose of Article III [which requires national treatment of goods] "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'." Toward this end, Article III obliges Members . . . to provide equality of competitive conditions for imported products in relation to domestic products. . . . [I]t is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."

[325] *See, e.g., United States - Taxes on Petroleum and Certain Imported Substances,* in which the Panel stated: "The general prohibition of quantitative restrictions under Article XI . . . and the national treatment obligation of Article III . . . have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both Articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade." 34S/136 (adopted June 17, 1987), at 160, para. 5.5.5, *reprinted in* Analytical Index at 133.

one Party could reasonably have expected to accrue to it have been nullified or impaired by a measure that is not inconsistent with NAFTA.[326]

291. The Panel finds that Mexico has met the requirement of Rule 33 of the Model Rules by establishing a *prima facie* case of inconsistency with NAFTA. The deprivation of the right to obtain operating authority to U.S. companies owned or controlled by Mexican nationals and the prohibition on allowing Mexican investors to acquire U.S. companies that already have operating authority, on its face, violates the straight-forward provisions of NAFTA Articles 1102 and 1103.

292. Because the United States expressly prohibits the above mentioned investment, this Panel finds such prohibitions as 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. Where there have been direct violations of NAFTA, as in this case, there is no requirement for the Panel to make a finding that benefits have been nullified or impaired; it is sufficient to find that the U.S. measures are inconsistent with NAFTA.

293. The applicability of Chapter Nine of NAFTA to this proceeding has been discussed in the Services section, *supra*. It is sufficient to note here that Chapter Nine does not apply to measures affecting investment,[327] and there is no provision of Chapter Nine that could be read as either incorporating or overriding the national treatment obligation for investment. Similarly, the general exceptions contained in Article 2101(2) apply only to trade in goods (Part Two), technical barriers to trade (Part Three), cross-border trade in services (Chapter Twelve) and telecommunications (Chapter Thirteen), and thus cannot affect the U.S. obligations under Chapter Eleven.

294. Accordingly, the Panel determines that in connection with investments by Mexican nationals in U.S. companies established to provide trucking services for the transportation of international cargo between points in the United States, no circumstances exist that would justify differential treatment from U.S. (or Canadian) investors and investments under NAFTA's Chapter Eleven national treatment and most-favored-nation obligations.

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[326] Annex 2004, emphasis added. Annex 2004 was intended to mirror the GATT practice of allowing claims for "non-violation nullification or impairment" of benefits.

[327] NAFTA, Article 901. - *Limited scope of Chapter Nine to measures affecting trade in goods and certain services.* NAFTA, Article 915 limits the scope of the service coverage to land transportation and telecommunications services.

VII. FINDINGS, DETERMINATIONS AND RECOMMENDATIONS

A. Findings and Determinations

295. On the basis of the analysis set out above, the Panel unanimously determines 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 under Annex I (reservations for existing measures and liberalization commitments), Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored-nation treatment for cross-border services) of NAFTA. An exception to these obligations is not authorized by the "in like circumstances" language in Articles 1202 and 1203, or by the exceptions set out in Chapter Nine or under Article 2101.

296. The Panel unanimously determines that the inadequacies of the Mexican regulatory system provide an insufficient legal basis for the United States to maintain a moratorium on the consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled trucking service providers.

297. The Panel further unanimously determines that the United States was and remains in breach of its obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States.

298. It is important to note what the Panel is not determining. It is not making a determination 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. Furthermore, since the issue before the Panel concerns the so-called "blanket" ban, 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, as to which the Panel did not receive any submissions or evidence.

B. Recommendations

299. The Panel recommends that the United States take appropriate steps to bring its practices with respect to cross-border trucking services and investment into compliance with its obligations under the applicable provisions of NAFTA.

300. The Panel notes that compliance by the United States with its NAFTA obligations would not necessarily require providing favorable consideration to all or to any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S.

trucking regulations when operating in the United States. Nor does it require that all Mexican-domiciled firms currently providing trucking services in the United States be allowed to continue to do so, if and when they fail to comply with U.S. safety regulations. The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis. U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican.

301. Similarly, it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement different procedures with respect to such service providers. Thus, to 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.

302. These considerations are inapplicable with regard to the U.S. refusal to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States, since both Mexico and the United States have agreed that such investment does not raise issues of safety.

Signed in the original by:

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J. Martin Hunter, Chair

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Luis Miguel Diaz

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David A. Gantz

_____
C. Michael Hathaway

_____
Alejandro Ogarrio

Dated: _____