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Michael S. Plotkin

University of Richmond, School of Law

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WORKERS' RIGHTS: A WINDING ROAD IN THE TRUCKING DISPUTE BETWEEN THE UNITED STATES AND MEXICO

COMMENT

Michael S. Plotkin^{*}

I Introduction

As globalization continues to link diverse countries and cultures together, workers' rights receive visible focus today. The violent protests of citizens at the global trade summits in Seattle, Quebec City, and Genoa¹ combined with the horrific terrorist acts on September 11th, 2001, in New York City highlight the need for the United States to show other nations how to abide by international trade agreements.² However, numerous social, political, technological, and economic factors influence even hemispheric trade agreements between neighboring countries.³

The Free Trade Area of the Americas (FTAA) represents a framework for reducing restrictions of goods and services while increasing trade and prosperity throughout the entire American continent. One current issue that exemplifies the delicate and multifaceted relationship between workers' rights and trade is the dispute over opening the United States-Mexican border to commercial truckers. The United States blocked the time frame for opening the American market to Mexican trucks as established by the North American Free Trade Agreement (NAFTA). Many commentators have argued that public safety issues and politics have overshadowed the issues of workers' rights in this controversy.⁴ These issues are

^{*} Candidate for J.D., 2003, University of Richmond, T.C. Williams School of Law; Emory University, B.A., 1996.

¹ Anthony DePalma, *Talks (and Protests) to Begin on Trade Pact for Americas*, N.Y. TIMES, Apr. 19, 2001, at W1; see also Sherry M. Stephenson, *The Current State of the FTAA Negotiations at the Turn of the Millenium*, 6 NAFTA: L. & BUS. REV. AM. 317, 328 (Summer 2000) (stating that disturbances by non-governmental organizations (NGOs) during the WTO meeting in Seattle on December 1999 highlighted the need for civil society to have a more formal role in trade talks today).

² Pamela C. Schmidt, *NAFTA: Motor Carrier Provision on the Future of the Agreement*, 20 HASTINGS INT'L & COMP. L. REV. 505, 524 (Winter 1997) (arguing that because of the global economy, the U.S. should follow through with a good faith effort to adhere to NAFTA rules).

³ See generally THOMAS L. FRIEDMAN, *THE LEXIS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (1999) (concluding that understanding the technological revolution's economic impact is the key to demystifying the globalization phenomenon and subsequent political conundrums in countries from Thailand to Chile to the U.S. and Former Soviet Union).

⁴ See Peter J. Cazamias, *The U.S.-Mexican Trucking Dispute: A Product of Politicized Trade Agreement*, 33 TEX. INT'L L. J. 349 (Spring 1998) (arguing that Mexican leaders benefit from leveraging the U.S. anti-openness stance for trucking regulations and the U.S. government appears to be more concerned with safety issues and protecting the

further compounded by gridlock and stranded travelers at U.S. border crossings in part because Mexico has been identified by U.S. Intelligence as a potential avenue for suspected terrorist activity.⁵ However, the extra precautions at the borders against terrorist activity are proof that money and manpower are available to ensure safety regulations, which is a key concern for the entire trucking industry.

This comment analyzes the arguments by politicians and organized labor advocates favoring the delay of the NAFTA motor carrier agreements in the context of workers' rights. Despite the political rhetoric, viable solutions to the border dispute are available. For example, while the airline business has suffered since September 11, 2001, international airline partnerships have been very popular in North America and Europe.⁶ Although commercial trucking companies primarily carry cargo, these alliances operate with minimal emphasis on borders and promote common standards of safety and workers' rights. Finally, greater cooperation among federal government agencies, private insurance companies, and state government agencies would foster better adherence to safety regulations. Effective cooperation between the United States and Mexico is still tenable to resolve the disagreement over trucking regulations.

II. Background & Origins of Workers' Rights during NAFTA

A. NAALC: The Labor Side Agreement

During the implementation of NAFTA, the negotiators incorporated workers' rights and environmental protection into two "side" agreements⁷ - the North American Agreement of Labor Cooperation (NAALC) and the North American Agreement of Environmental Cooperation (NAAEC).⁸ The addition of a labor agreement to the

Teamsters union's interests); *see also* Philip Shenon, *Teamsters May Stall Bush Goals for Mexican Trucks and Trade*, N.Y. TIMES, July 30, 2001, available at <http://nytimes.com/2001/07/30/politics/30truc.html> (last visited Sept. 30, 2001) (noting that even Teamsters' critics complement the public relations strategy of turning the issue into one of safety).

⁵Associated Press, *U.S. Reshapes Face Of Open Borders*, RICH. TIMES DISPATCH, Sept. 24, 2001, at A10 (citing reported waits up to 15 hours immediately after September 11, 2001; also included the U.S.-Canada border).

⁶*See* Charles N.W. Schlangen, *Comment: Differing Views Of Competition: Antitrust Review Of International Airline Alliances*, 2000 U. CHI. LEGAL F. 413 (2000) (explaining the benefits of airline partnerships as an introduction to a review of antitrust analysis in the United States).

⁷Robert F. Housman, *NAFTA at Age One: a Blueprint for Hemispheric Integration?* 10 CONN. J. INT'L L. 301, 301-12 (Spring 1995) (providing background information on the labor and environmental issues with NAFTA from 1990 to 1995, which was the first time these issues had been incorporated in a free trade agreement); *see also* Charles Tiefer, "Alongside" the Fast Track: *Environmental and Labor Issues in FTAA*, 7 MINN. J. GLOBAL TRADE 329 (Summer 1998) (discussing current political issues with the side agreements in the U.S. Congress, notably the polarizing "fast track" dispute, which would provide the president authority to bring NAFTA or other international agreements to a vote in Congress while limiting that vote without amendments).

⁸Sheryl M. Dickey, *The Free Trade Area of the Americas and Human Rights Concerns*, 8 HUM. RTS. BR. 26, 27 (Spring 2001).

broader-free trade framework was significant for workers rights' advocates for several reasons. The NAALC: 1) creates a private right of action for workers, their representatives, and other affected individuals; 2) incorporates a transparent dispute resolution process with public access; and 3) recognizes core workers' rights.⁹ The NAALC was intended to allow each participating country to enforce its own existing laws relating to workers' rights. By granting such autonomy, the stipulation provided that each country must enforce its own labor laws.¹⁰ Moreover, the Agreement operates as a general framework for protecting workers' rights.

In addition to representing a positive development for labor advocates, the side agreements are significant because they encourage countries to work together to maintain and improve labor standards. By analyzing the language of the core principles of the NAALC, the pervasive theme of the accord is to: "promote principles," "encourage cooperation," and "pursue cooperative labor-related activities."¹¹ As we will see in section III of this comment, cooperation between nations and labor advocates became politically driven. Criticism may best be directed at the nature of the political process, rather than the NAALC's workers' rights provisions. NAFTA's deference to each nation's sovereignty will provide an escape for nations who fail to comply with workers' rights standards. Hence, when trucking regulations are disputed by Mexico and the United States, organized labor groups may convincingly argue the need to protect their own special interests or use political agendas as pretext in their own countries. Without a basic framework for workers' rights, the alternative could be a forceful imposition of the standards of one country on another, which would directly contravene NAFTA's goal of self-determination.¹²

The NAALC addition provides substantial rights for the workers. In the NAALC, NAFTA recognizes all five of the "internationally accepted" labor rights: (1) the right of association; (2) the right to organize and bargain collectively; (3) prohibitions on the use of forced or compulsory labor; (4) a minimum age for employment; and (5) acceptable conditions of work, including minimum wages and hours as well as occupational safety and health.¹³ An illustrative example of a benefit derived from the NAALC's language is that truck drivers may form their own union by the right of association; however, the explicit rights established by the NAALC are interpreted by the laws of each country. Therefore, a truck driver union seeking a pay raise in Mexico would be interpreted by Mexican law, while a similar truck driver union in the United States would need to follow American laws. American labor unions are not allowed to organize in Mexico. The NAALC

⁹ *Id.*

¹⁰ Housman, *supra* note 8, at 308.

¹¹ North American Agreement on Labor Cooperation, *Overview of Operations*, at http://www.naalc.org/english/publications/review_part3.htm (last visited Feb. 9, 2002)

¹² *Id.* (noting criticism of the NAALC for its reliance on domestic law rather than international standards because it allows governments to lower their domestic standards by statutory change; alternatively, NAALC does nothing to force governments to raise their standards to a common level).

¹³ 19 USCS § 2467 (2001).

sanctions and procedures that address grievances are limited to alleged violations of a country's own specific standards, namely occupational safety and health, child labor, or minimum wage standards.¹⁴ Despite the broad language of NAALC's guiding principles, the enforcement of NAFTA and the FTAA is a crucial and often dynamic factor in the struggle to protect workers' rights.

Critics claim that the labor agreement remains largely ineffective because the dispute resolution process provides neither adequate nor timely remedies.¹⁵ Without an effective procedure for addressing grievances, there is no incentive for all trading partners to cooperate without an effective deterrent against future violations. Creating a framework for hemispheric standards and cooperation is advantageous in many ways, but the remedy process addressing workers' rights is by no means immediate. The two agreements that provide a long-term blueprint for hemispheric growth, NAFTA and the FTAA, are discussed from an economic angle below.

B. NAFTA, the FTAA, and Economics: the General Effect on Workers' Rights

Currently, the FTAA negotiators are looking at NAFTA as a model for the FTAA to help extend free trade ideals to other nations throughout the Americas.¹⁶ While NAFTA and the FTAA both support free trade, the FTAA tenet that each nation must operate within the boundaries of its own legislation and procedures to implement the agreements relating to free trade and human rights.¹⁷

A general criticism of NAFTA is that while it may be an effective model for promoting certain corporate interests, the Agreement has failed as a means to strengthen and enforce workers' rights in North America.¹⁸ For example, one argument is that free trade encourages multinational companies to move their operations to nations with weaker labor protections.¹⁹ The exploitation of cheap labor at the hands of larger multinational corporations (MNCs) is one of the chief concerns.²⁰ Corporations seeking lower labor costs, larger markets, new capital, and

¹⁴ Jack I. Garvey, *A New Evolution For Fast-Tracking Trade Agreements: Managing Environmental and Labor Standards Through Extraterritorial Regulation*, 5 *UCLA J. INT'L L. & FOR. AFF.* 1, 16 (2000). See generally Bobbi-Lee Meloro, *Balancing the Goals of Free Trade With Workers' Rights in a Hemispheric Economy*, 30 *U. MIAMI INTER-AM. L. REV.* 433, 454 (Winter 1999).

¹⁵ Tiefer, *supra* note 8, at 330.

¹⁶ Dickey, *supra* note 9, at 27.

¹⁷ *Summit of the Americas: Declaration of Principles and Plan of Action*, 34 *I.L.M.* 808, 821 (1995).

¹⁸ See Dickey, *supra* note 9, at 27 (arguing that Mexican maquiladora plants, used primarily for export processing, are synonymous with sweatshops and merely exploit low standards of less industrialized nations).

¹⁹ *Id.*

²⁰ Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord After Five Years Of Operation and Suggested Improvements*, 16 *LABOR LAW* 319, 326 (Winter/Spring 2001).

new technology have been moving their operations more often than in the past.²¹ Furthermore, free trade facilitates the movement of corporations from high-wage countries to low-wage countries.²² Proponents of free trade agreements counter that more jobs are being created in countries that need an economic boost.²³ In response to the global shift of corporate operations, governments of developing nations are consequently pressured into lowering or maintaining weak labor standards in hopes of attracting and keeping foreign investment.²⁴ Unfortunately, the competition for cheap labor often provides governments and corporations with an incentive to either dissolve unions or otherwise prevent workers from advocating for wage increases and improved conditions.²⁵ Continuing economic disparities and free trade policies have polarized the debate between free trade and workers' rights groups.²⁶ Perhaps the quality of new jobs and productivity is more important than the number of jobs created or lost.

C. The Political Backdrop

The issue of open-trucking borders in the context of workers' rights is significant for two primary reasons. First, many countries are involved and recognize the potential gains on a hemispheric scale.²⁷ At the first Summit of the Americas in December 1994, thirty-four heads of state pledged to make trade and the environment mutually supportive and to "further secure the observance and promotion of workers' rights as defined by appropriate international conventions."²⁸ Second, the issues of global trade and the liberalization of the motor carrier provisions embody the debate surrounding the politicization of workers' rights.²⁹ Linkage³⁰ is a key part of the trade agenda and most likely inclusive for all future trade agreements involving the United States, since politicians throughout the

²¹ Linda A. Mabry, *Multinational Corporations And U.S. Technology Policy: Rethinking The Concept Of Corporate Nationality*, 87 GEO L.J. 563, 565 (Feb. 1999) (arguing that an increasing awareness of conflict between globalization and nationalism and technology policy have changed the concept of the corporation).

²² See Dickey, *supra* note 9, at 26 (arguing that NGOs should be given more open access to free trade negotiations which would allow a better integration between workers rights protections and free trade agreements).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Richard W. Fisher, Address at the Richmond Journal of Global Law & Business Fall Symposium, *The Changing Labor Markets of the Western Hemisphere: Labor Issues Relating to the Free Trade Area of the Americas (FTAA)* (Oct. 5, 2001).

²⁷ *Id.*

²⁸ *Summit of the Americas: Declaration of Principles and Plan of Action*, 34 I.L.M. 808, 821 (1995).

²⁹ See Cazamias, *supra* note 4 (arguing that Mexican leaders benefit from leveraging the U.S. anti-open border stance for trucking regulations, and the U.S. government appears to be more concerned with safety issues and protecting organized labor interests); see also, Shenon, *supra* note 4.

³⁰ See Garvey, *supra* note 15, at 10 (explaining that linkage is the premise that labor and environmental concerns should be included in free trade agreements).

world are concerned about the impact of trade liberalization on labor.³¹ As early as the 1990's, former President Clinton realized that some form of concession to organized labor would be necessary to counter the response by environmental and labor supporters worldwide.³²

Officials from Mexico and the United States have been working together for years to solve trade disputes.³³ In 1994, both nations agreed to standardize safety operations regarding hazardous materials and to set up an electronic communication system to exchange information about commercial drivers.³⁴ While pre-NAFTA rules limited Mexican trucks to a twenty-mile radius across the border, by December 18, 1995, the United States was supposed to allow Mexican trucks access to the four border states: Texas, Arizona, New Mexico, and California.³⁵ However, citing safety reasons and the lack of mutually acceptable standards, the Clinton administration delayed the first phase of the NAFTA-mandated trucking provisions.³⁶ Accordingly, negotiations between the U.S. and Mexico continued to establish acceptable safety standards. Three years after the Phase I date, if Mexican drivers followed American insurance and safety regulations properly, access to the entire United States would be granted.³⁷ However, this was not the case.³⁸ Instead, in 1996, the United States froze the Mexican truck permit license process.³⁹

In 1998, Mexican and American officials engaged in a new series of discussions to resolve the safety issues.⁴⁰ Mexico publicly stated that it intended to undertake the final dispute settlement panel mandated under Chapter 20 of NAFTA because they never received clear safety demands from the United States.⁴¹ In addition, the Democrats' standing reputation as supporters of organized labor and the Teamsters' campaign backing of Presidential hopeful Al Gore in 2000

³¹ *Id.*

³² *Id.*; see also David E. Sanger, *Dilemma for Clinton on NAFTA Truck Rule*, N.Y. TIMES, Dec 17, 1995, at A36 (noting that the Clinton administration announced its decision to delay implementation of the motor carrier provisions before a hearing could be held in the Teamsters suit; evidence uncovered in a Senate report on campaign fundraising shows high level meetings between Administration and Teamsters officials on the trucking issue; and many argue that the Administration received significant man-hours in campaign work and financial contributions as a result of the NAFTA trucking decision).

³³ See generally Cazamias, *supra* note 4, at 352.

³⁴ *Id.*

³⁵ See Michael Skahan, *The Nafta Trucking Dispute With Mexico: Problem? What Problem?*, 5 NAFTA: L. & BUS. REV. AM. 603, 606 (Fall 1999) (arguing that both sides benefit from political leverage of the problem and concluding that no solution is likely in the near future).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See generally Shenon, *supra* note 4.

³⁹ Cazamias, *supra* note 4, at 357.

⁴⁰ U.S., *Mexico to Make New Stab at Solving NAFTA Trucking Dispute*, AM. TRADE, Feb. 5, 1998, at 1-2.

⁴¹ Skahan, *supra* note 37, at 619.

contributed to the delay of trade liberalization and NAFTA guidelines.⁴² While economic labor theories are one part of trade negotiations, politics play just as large a role, if not larger.⁴³ In the U.S. House of Representatives, a vote passed requiring Mexican trucks to meet U.S. safety standards before the government would open borders.⁴⁴ In the U.S. Senate, 19 republicans crossed party lines to end a filibuster designed to prevent a bill amendment to increase restrictions on Mexican trucks entering the United States.⁴⁵

Statistics play a large role in fueling the political debates as well. For example, opponents of NAFTA, such as the AFL-CIO, estimate that between 300,000 and 400,000 American jobs have gone to Mexico since 1994.⁴⁶ In contrast, the U.S.-Mexico Chamber of Commerce claims that 1.7 million export-related jobs have been created in the United States since 1993.⁴⁷ The political struggle between workers' rights and organized labor continues today in the congressional debates over trucking regulations.

D. Basic Differences in the Legal System of Mexico and the United States

A basic comparison of the approaches to labor and employment law explores how workers' rights may be developed and protected differently. While both Mexico and the United States have a system of federal laws to establish rules and procedures,⁴⁸ the judicial interpretation for enforcement of those laws is remarkably varied. First, neither the Mexican federal courts nor the Mexican Supreme Court are nearly as powerful as their U.S. counterparts.⁴⁹ Second, instead of relying on case precedent (*stare decisis*) as U.S. courts do, a Mexican high court

⁴² Shenon, *supra* note 4 (providing political history behind Clinton and Gore's reasoning for blocking Mexican truck access to the U.S.); *see also* Skahan, *supra* note 37, at 606 (discussing former U.S. Transportation Secretary Federico Pena's sudden policy switch over opening border restrictions with Mexico in 1996).

⁴³ Jonathan B. Wight, Address at the Richmond Journal of Global Law & Business Fall Symposium, *The Changing Labor Markets of the Western Hemisphere: Labor Issues Relating to the Free Trade Area of the Americas (FTAA)* (Oct. 5, 2001).

⁴⁴ Labor Research Association, *Teamsters Deliver a Blow to Bush's Trade Agenda on Mexican Trucks*, at http://www.laborresearch.org/dis.shtml?nafta_trucks.txt (last visited Sept. 30, 2001).

⁴⁵ *Id.* (noting that the vote was 70-30 vote on July 26, 2001).

⁴⁶ *See* Adolfo Garza, *Five Years Into NAFTA, Pact's Merits Still Debated*, NEW ORLEANS TIMES-PICAYUNE, Jan. 3, 1999, at 23A.

⁴⁷ Alfredo Corchado & Laurence Iliff, *NAFTA Stirs Up Internal Troubles, Some Industries Flourishing, Others Ailing Under Trade Pact, Series: Five Years of NAFTA: Mexico's Mixed Results*, DALLAS MORN. NEWS, Jan. 3, 1999, at 1A.

⁴⁸ Labor Relations Law in North America, available at <http://www.naalc.org/english/pdf/mexico.pdf> (noting that in Mexico, the key federal legal sources are the *Political Constitution of the United Mexican States*, the *Federal Labor Law*, and international treaties approved by the federal Senate and signed into law by the President).

⁴⁹ Jorge A. Vargas, *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* 51 (1998).

decision is only binding if five decisions in a row are decided similarly.⁵⁰ Third, a very unique feature of Mexican law mandates that individuals have the right to sue an authority of Mexican government for violations of individual rights, but the result is limited to the particular plaintiff only and provides no general protection.⁵¹ Finally, in 1995, then President Zedillo enacted sweeping restructuring of the Mexican courts to try to improve effectiveness.⁵² Thus, while the laws of both the United States and Mexico safeguard basic constitutional rights of freedoms such as assembly and petition, the relative power of judicial review compared to the executive branch represents a stark contrast.⁵³

Similarities do exist between the United States and Mexico in the codification of laws. Both the Mexican Constitution and the Federal Labor Act of 1970⁵⁴ provide for workers' rights, while in the United States, the First Amendment of the Constitution protects the rights of assembly, speech, and petition.⁵⁵ In Mexico, Article 9 of the Constitution protects the general right of association,⁵⁶ and Article 123 establishes a long list of workers rights, such as the right to form trade unions and the salary rules prohibiting age or sex discrimination.⁵⁷ However, Mexico has adequate labor standards in place, but its weak judicial branch lacks appropriate mechanisms to enforce the labor laws for all workers, and the NAALC has been very slow to facilitate such enforcement.⁵⁸

III. Standards compared: Mexican vs. U.S. workers: A look behind the posturing

The most relevant arguments against opening the Mexican border include:

- 1) Mexican trucks are unsafe and 2) infrastructure problems exist at the border.⁵⁹

⁵⁰ *Id.* at 58 (explaining *Jurisprudencia* in that Mexico is a civil law country and rejects the principle of precedent; *Jurisprudencia* represents an exception to the rule in Mexico and highlights the diminished role of Mexican courts to provide effective and timely redress of wrongs).

⁵¹ *Id.* at 60-61 (noting that this element of Mexican law is called *Amparo* and corporations or larger institutions inundate the court system with these "individual" suits to create gridlock).

⁵² *Id.* at 52.

⁵³ See Wight, *supra* note 45 (arguing that the economics underlying the judicial system are also fundamentally different. 5% of the landowners own 75% of the land; while it is unknown how much it takes to bribe a judge in the U.S.; the difficulty is much less in Mexico).

⁵⁴ Vargas, *supra* note 51, at 58 (noting that the FLA governs collective labor relations- all unions are subject to the politically controlled Confederation of Mexican Laborers (CTM)).

⁵⁵ U.S. CONST. amend. I.

⁵⁶ CONST. Art. IX (1917).

⁵⁷ CONST. Art. 123 (1917).

⁵⁸ Lasala, *supra* note 22, at 320.

⁵⁹ See Skahan, *supra* note 37, at 611-19 (noting that drug trade will be treated in this comment as an enforcement issue); see also Cazamias, *supra* note 4, at 352-55.

A. Current Process and Regulations

Trucking industry analysts would agree that the process of cross-border trucking today is cumbersome. For example, one shipment from Mexico to the United States requires three drivers and three different vehicles to haul a single freight shipment.⁶⁰ A typical interline "partnership" consists of a Mexican carrier, a U.S. carrier, and a "middleman." The middleman's job is to transport goods between temporary warehouse sites on opposite sides of the border.⁶¹ This three-step process will be simplified when the border becomes fully open to Mexican trucks.

Realizing these inefficiencies and other procedural concerns, both American and Mexican officials have met for informal consultations since 1996 to develop the idea of a "joint review board" to assess license requests for trucks from Mexico.⁶² Despite these government efforts, safety standards differ and include commercial drivers' license issuance, hours of service requirements, and regulations on truck sizes and weights.⁶³ Concerning commercial drivers' license regulations, Mexico's minimum age requirement is eighteen, while the U.S. minimum is twenty-one.⁶⁴ Additionally, no foreign language requirement exists, and some truckers who are unable to converse with the general public or read highway signs may increase the risk of danger.⁶⁵ Regarding maximum driving hours behind the wheel, Mexican law has no limit, while the U.S. limit is ten hours and must be recorded in the drivers' logbook.⁶⁶ For truck weights, Mexican law allows a maximum gross weight of 170,000 pounds, while the U.S. limit is far less at 80,000 pounds.⁶⁷ Mexico has also joined the Commercial Vehicle Safety Alliance to ensure consistent roadside inspection procedures between the United States and Canadian localities and has cooperated by providing training sessions for Mexican drivers.⁶⁸ While these differences appear significant, freezing the application process will not necessarily protect U.S. citizens from all of the potential safety dangers.

B. Mexican Labor Arguments

Mexican labor opposition to the border dispute is complex. One argument is that Mexican trucking companies, fearing that open competition with larger American trucking companies will cause their businesses to suffer, lobbied for

⁶⁰ Duane W. Acklie, Address to The House Highways and Transit Subcommittee of the House Transportation and Infrastructure Committee (July 18, 2001) *available at* http://www.truckline.com/insideata/comments/071801_statement_acklie1.html (last visited Oct. 7, 2001) (stating the ATA position for NAFTA favors high safety standards through U.S. insurance carriers while ensuring equitable restrictions in line with current U.S. and Canadian standards).

⁶¹ *Id.*

⁶² Cazamias, *supra* note 4, at 354-55.

⁶³ *Id.* at 357.

⁶⁴ *Id.* at 353.

⁶⁵ *Id.*

⁶⁶ *Id.* at 357.

⁶⁷ *Id.*

⁶⁸ Helene Cooper, *Shift Into Reverse: Ban on Mexican Trucks in U.S. Interior Shows Rise of Protectionism*, WALL ST. J., Feb 5, 1996, at A10.

delaying the implementation of the new rules.⁶⁹ Canacar, the largest Mexican trucking industry trade group,⁷⁰ has lobbied the Mexican government to void the NAFTA trucking provision.⁷¹ Despite the assumption that Mexican companies would welcome access to the larger market, the many routes in the United States, and possible creation of more jobs, the Mexican reaction to U.S. opposition appears politically motivated.⁷² Mexico is concerned that other U.S. businesses use the opening of borders as leverage to gain access to Mexican markets.⁷³ For example, the Mexican government restricts U.S. small package deliveries and U.S. bus service companies.⁷⁴ Thus, protectionism clouds free trade issues for Mexican as well as U.S. companies. Based on assumptions, politics, and general uncertainty about economic impact, Mexican trucking companies will be reluctant to opening borders without guarantees of financial security.⁷⁵ Meanwhile, both the U.S. and Mexican governments may not be doing enough to alleviate those fears.

C. United States' Labor Arguments

The International Brotherhood of Teamsters (Teamsters) has lobbied against the border opening since NAFTA's passage and has also filed suit in federal court to block the border opening.⁷⁶ The Teamsters have 1.4 million members, but reportedly union numbers are decreasing.⁷⁷ Traditionally, one of the main concerns for U.S. labor unions is the proverbial "race to the bottom."⁷⁸ On one hand, opponents of free trade say that with less industrialized trading partners, industry and jobs migrate to the countries with lower standards, and lower costs.⁷⁹ The result is that standards *worldwide* are pushed downward which leads to the disparity among the standards of workers' rights.⁸⁰ However, compelling economic factors indicate that this fear could be more aptly called the "race to the top."⁸¹

The argument for protecting workers' rights may overlap with an argument about representation of those rights. For instance, as part of the U.S. talks with Mexican President Vicente Fox, Teamster President Jimmy Hoffa was scheduled to

⁶⁹ See Chris Kraul, *NAFTA May Deliver Blow to Mexican Truckers*, L.A. TIMES, Aug. 15, 2001, at A1; see also Sanger, *supra* note 34, at 617.

⁷⁰ *Id.* (citing sources that Canacar represents 78% of Mexican commercial rigs).

⁷¹ *Id.*

⁷² See Cazamias, *supra* note 4, at 353 (noting that Mexico would have violated its own law if it had not made a decision on the U.S. trucking application).

⁷³ Skahan, *supra* note 37, at 618 & nn.144-145.

⁷⁴ *Id.* n.147.

⁷⁵ See Kraul, *supra* note 71.

⁷⁶ Cooper, *supra* note 70.

⁷⁷ See Shenon, *supra* note 4.

⁷⁸ Garvey, *supra* note 15, at 7.

⁷⁹ *Id.*

⁸⁰ *Id.* at 7-8.

⁸¹ See generally Fisher, *supra* note 28 (citing statistics showing trade, goods, and services have increased to 26% of GDP in U.S.).

discuss the right of U.S. labor unions to compete in Mexico.⁸² Currently, Mexican law prohibits foreign labor organizations from operating in the country, so Mexican workers could possibly gain greater protection if U.S. labor organizations were allowed to operate in Mexico, as U.S. unions are allowed in Canada. This discovery is crucial because it points to politics as overreaching and at times overshadowing the general protection of workers' rights.

In response to safety concerns voiced by the Teamsters, the International Chamber of Commerce (ICC) said that the national treatment requirements of NAFTA mandate that the United States not impose substantially different standards on Mexican drivers than American drivers.⁸³ Thus, an equal protection guarantee is provided under NAFTA. Furthermore, Mexican carriers would be required to meet U.S. insurance requirements and reciprocal access provisions.⁸⁴ U.S. insurance coverage should be a key component to allowing foreign commercial vehicle entry into the United States and ensuring vehicle safety. The American Trucking Association (ATA) supports NAFTA and the opening of borders to Mexican trucks.⁸⁵ Similarly, the ATA believes that safety standards may be maintained at the same level for American, Mexican, and Canadian trucks.⁸⁶ The ATA also advocates timely insurance inspections to ensure minimum safety requirements.⁸⁷ The Federal Motor Carrier Safety Administration could oversee the insurance regulations, just as it currently improves trucking companies' awareness of security for hazardous material carriers.⁸⁸

In 1999, a U.S. safety study indicated that the failure rate of American trucks was twenty-five percent (25%), while the failure rate for Mexican trucks was forty-four percent (44%).⁸⁹ However, this study was criticized because the types of trucks were limited to Mexican drayage equipment, not long-distance haulers, which are typically older and in worse condition.⁹⁰ These drayage rigs are used to transport freight between import lots on both sides of the border for short distances.⁹¹ In fact, the United States has no data about the safety of Mexican long-

⁸² See Francis X. Donnelly, *Mexico's Fox, Union Chiefs To Talk*, DETROIT NEWS, July 13, 2001, available at <http://detnews.com/2001/autos/0107/15/a01-247026.htm> (last visited Oct. 2, 2001).

⁸³ Skahan, *supra* note 37, at 611 (citing 10 I.C.C. 2d 854 (Nov. 30, 1995)); see also Acklie, *supra* note 62.

⁸⁴ Skahan, *supra* note 37, at 611.

⁸⁵ Acklie, *supra* note 62.

⁸⁶ *Id.* (noting an argument that Canadian truck drivers currently lack substance abuse testing requirements, but Mexican truck drivers would be required to do so).

⁸⁷ *Id.*

⁸⁸ *FMSCA Commences Educational Visits to Hazardous Material Carriers*, at http://www.truckline.com/insideata/truckon/092601_fmcsa_hazardous_materials.html (Sept. 26, 2001).

⁸⁹ Scott Bowles, *Audit: Mexican Trucks Pose Safety Hazard*, USA TODAY, Jan 11, 1999, at 3A.

⁹⁰ Caziarnas, *supra* note 4, at 360 (explaining that drayage is an industry term relating to the type of truck).

⁹¹ *Id.*

distance freight trucks.⁹² Finally, this misleading statistic hides the reality that many Mexican trucking companies have fleets in condition as safe as those of American truck companies.

Another important argument relating to delays at border crossings is information technology.⁹³ For example, inspection requirements, traffic management problems, and cargo clearance procedures contribute to the amount of time it takes for a truck to clear the border.⁹⁴ Increased staffing could possibly alleviate some of the delays, but in the current budgetary environment, allocating costs will be difficult.⁹⁵ While expensive, automated customs clearing centers could streamline the border crossing process.⁹⁶ This automated system, known as the North American Trade Automation Protocol (NATAP), standardizes all import-export information needed for trade and then uses electronic methods to convey pertinent information on the truck, driver, and cargo to the border inspector.⁹⁷ NATAP has been implemented successfully at certain border cities.⁹⁸ However, Teamsters and most Democrats prefer the current *de facto* border delays despite knowing that they violate the NAFTA time frame and that technology exists to improve cargo inspections.

IV. Enforcement & Effects

A. Business

The largest infrastructure obstacle to physically crossing the border is the long wait that truckers face.⁹⁹ Some industry analysts estimate the extra expenses associated with squeezing the vast amount of trade through border choke points at \$2.5 billion per year.¹⁰⁰ Proponents of increased infrastructure spending claim that there are not enough bridges, rails, or docks to handle the goods and that existing facilities are often poorly located.¹⁰¹

Logistically, the border restrictions are cumbersome for other industries as well. Because of the ban, trailers from each truck must be unhitched near the border and reconnected to an American truck.¹⁰² Manufacturers, such as automobile part-

⁹² *Id.*

⁹³ Skahan, *supra* note 37, at 608.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Bill May, *Trade Highway System Tests Face Delays*, THE J. REC., Feb. 11, 1997, available at 1997 WL 14385275.

⁹⁸ See Bonnie Pfister, *Short-Circuiting Short-Haulers: Electronic Cargo Monitoring System*, SAN ANTONIO EXPRESS NEWS, Aug. 1, 1997, at 3H, available at 1997 WL13202654 (noting that border cities include: Otay Mesa, California; Nogales, Arizona; El Paso, Texas; Detroit, Michigan; Buffalo, New York; and Laredo, Texas).

⁹⁹ Skahan, *supra* note 37, at 607.

¹⁰⁰ See Anna W. Mathews, *NAFTA Reality Check: Trucks, Trains, Ships Face Costly Delays*, WALL ST. J., June 3, 1998, at A1 (quoting James Giermanski, Texas A&M International University).

¹⁰¹ Skahan, *supra* note 37, at 608.

¹⁰² Donnelly, *supra* note 84; see also Labor Research Association, *Union Organizing Gains in 2000 Were Outpaced by Layoffs and Retirements*, at <http://www.laborresearch>.

makers like Delphi Automotive Systems Corp., are reportedly losing business because of the delays at the border.¹⁰³ The volume of trade, coupled with complex inspection requirements, traffic management problems, and cargo clearance procedures contribute to the amount of time required for a truck to clear the border.¹⁰⁴

B. Drug Trade

The drug trade argument is important to understand the issues in light of Mexican and American politics. Immediately after September 11, 2001, narcotics smuggling decreased considerably due to stricter security measures at border crossings.¹⁰⁵ While it is unclear how much longer the deterrence will limit drug trade, evidence suggests that border security enhancements have a beneficial effect. If U.S. agencies are able to maintain security levels sufficiently, safety issues may be adequately addressed for the long term.

V. Despite Potholes in the Road, Better Harmony between NAFTA, Bush, and Labor in 2002?

A. Political Compromise

Contrary to the political approach of the Clinton administration, President George W. Bush publicly expressed America's willingness to obey the NAFTA rules for implementing the border schedule.¹⁰⁶ His first step was to address the concern among critics that the United States was succumbing to international pressure, namely the NAFTA arbitration panel's decision on February 4, 2001 that the United States had violated its side of the Agreement.¹⁰⁷ However, Bush agreed to honor the arbitration ruling while adamantly requiring that Mexican trucks must meet the same safety and operating standards for U.S. and Canadian trucks.¹⁰⁸ Thus, future safety plans would level the playing field for Mexican and U.S. trucks.¹⁰⁹ President Bush has also warned Congress that he would veto any bill delaying a timely opening of the borders.¹¹⁰ Furthermore, the U.S. Department of

org/union_stats/2000_memb.html (Jan. 25, 2001) (noting that following a gain in 1999, the number of members fell by 219,000 in 2000, according to data tracked by the U.S. Labor Department).

¹⁰³ Donnelly, *supra* note 84.

¹⁰⁴ Skahan, *supra* note 37, at 608.

¹⁰⁵ See, e.g., Chris Kraul, *After Attacks, Traffic of All Kinds Slows at U.S.-Mexico Border*, L.A. TIMES, Oct. 3, 2001, at A19.

¹⁰⁶ See generally LaSala, *supra* note 22.

¹⁰⁷ Robert Collier, *U.S. Proposes Delaying Checks of Mexican Trucks: They'd Duck Border Scrutiny up to 1 1/2 Years*, S.F. CHRON., May 2, 2001, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2001/05/02/mn46804.dtl> (last visited Nov. 21, 2001).

¹⁰⁸ Norman Y. Mineta, Address at the University of Texas, Edinburg Pan-American U.S.-Mexico Border Summit (Aug. 22, 2001) available at <http://www.dotgov/affairs/082201sp.htm> (presenting a federal government plan on behalf of President Bush to address safety concerns in the trucking dispute).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (noting that the schedule calls for open borders by January 1, 2002).

Transportation will mandate close coordination between both state and national government officials and truck and bus company officials.¹¹¹

B. International Airline Alliances

One additional solution would be to follow the basic guidelines implemented by the airline industry's international alliances. Despite the absence of strict regulatory control by the Federal Aviation Association and an open skies agreement,¹¹² an alliance system could emerge similar to "SkyTeam (Delta Airlines, AeroMexico, Allitalia, and Qantas), "OneWorld" (American Airlines, British Airways, Aer Lingus, LanChile, Cathay Pacific), and "Star" (United Airlines and Lufthansa). Airlines have chosen to enter into codeshare agreements for the following reasons: customer satisfaction improves through a more seamless travel experience and an expanded choice of destinations, baggage travels directly to the destination, frequent-flier miles accumulate, and reservations/ticketing systems combine to yield back-end technology savings.¹¹³ Other benefits to the airline companies include new or additional access to more markets, increased business, and cost benefits.¹¹⁴ Granted, these benefits may not be realized by all airlines due to myriad business factors.¹¹⁵

As long as antitrust laws are followed, a bilateral business partnership of Mexican and American trucking companies could then concentrate on maintaining safety standards, maximizing resources, and eventually increasing productivity. Interestingly, a Mexican-American partnership exists within the ATA; however, the need for a middleman makes the operation horribly inefficient.¹¹⁶ In addition, by allowing trucking unions the ability to contract or form partnerships with Mexican trucking companies, this competition would encourage Mexican trucking companies to maximize efficiency. Finally, allowing American insurance companies to establish financial incentives for Mexican truck companies to comply with safety standards could alleviate public safety fears.

¹¹¹ *Id.*

¹¹² See Schlagen, *supra* note 7, at 425.

¹¹³ *Id.* at 416-417.

¹¹⁴ Statement of United States International Air Transportation Policy, 60 FR 21841, 21842 (May 3, 1995).

¹¹⁵ Cary, Susan, *Crash Of Flight 587 Further Strains Airlines*, WALL ST. J., Nov. 13, 2001 at A3 (explaining that U.S. airlines are posting unprecedented financial losses following the disastrous terrorist attacks on September 11, 2001 and that after the accidental crash of American Airlines flight 587 on November 12, U.S. carriers are expected to lose at least \$7 billion this year according to the Air Transport Association); see also <http://www.washingtonpost.com/wp-dyn/articles/A63108-2001Oct3.html> (last visited Nov. 14, 2001) (noting that Sabena SA, the national airline of Belgium, announced it will seek bankruptcy protection on October 3, 2001; SwissAir grounded its fleet after it lacked the money necessary to operate following September 11 attacks; airline alliances were not intended to provide financial security against tragedies like terrorist attacks).

¹¹⁶ See Acklie, *supra* note 62 (arguing that the cross-border middleman is the one that uses older trucks and one shipment requires three drivers and three trucks).