Mexico-U.S. Transborder Transportation and the Resolution Of the 2001 Arbitral Panel

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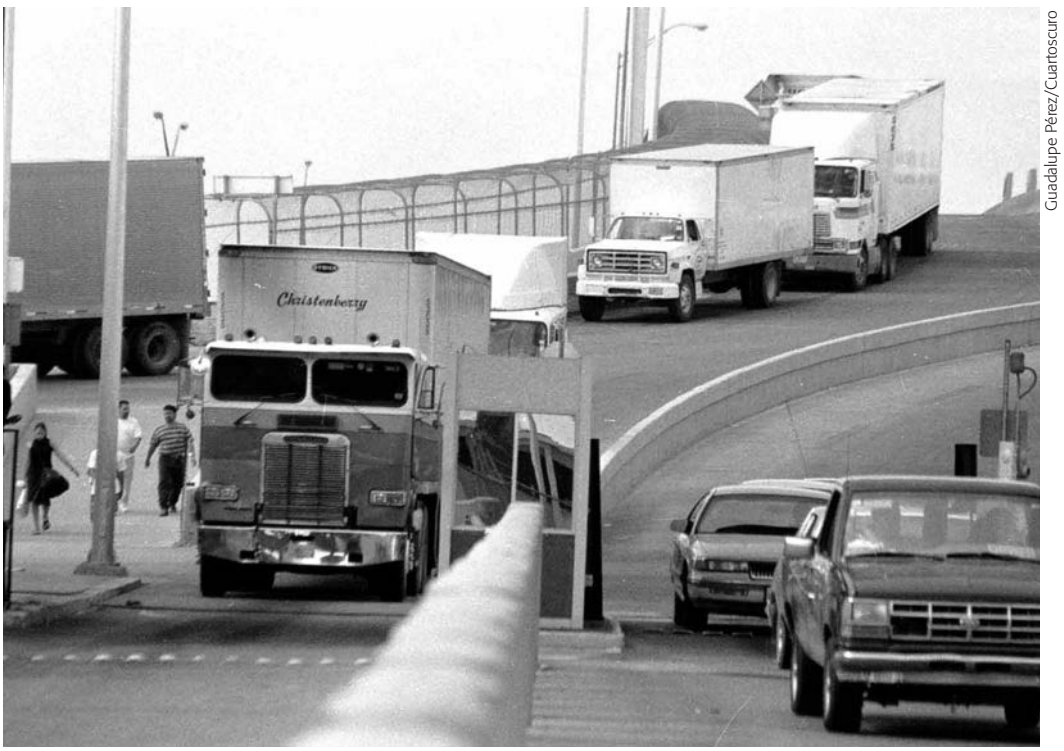

Guadalupe Pérez/Cuartoscuro

Freight traffic at a Mexico-U.S. border crossing.

Since 1995, Mexican truckers have the right to enter the United States to haul freight there, according to the North American Free Trade Agreement (NAFTA). Even though Mexico won a favorable decision by an arbitral panel under the treaty's Chapter 20, which deals with this right, until the time of this writing, the United States has not fulfilled its commitment to Mexico. This is an obstacle to free trade between the two countries, with the resulting economic losses for Mexico.

BACKGROUND

Before 1980, the United States granted entry to truckers without distinguishing between applicants from the United States, Canada, or Mexico. They only required economic justification for every proposed run. Later, the Bus Regulatory

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Reform Act of 1982 eliminated equal treatment for foreign and national applicants in granting authorization, imposing an initial two-year moratorium on new authorizations to operate foreign motor vehicles in U.S. territory. It is important to point out that in the case of Canada, the moratorium was lifted immediately by the Brock-Godliech Accord, since before 1980, Canada had already reciprocally permitted the access of U.S. truck operators.

In Mexico's case, the 1982 moratorium was renewed in 1984, 1986, 1988, 1990, 1992, and 1995. However, in order to facilitate cross-border trade, an exception was made to allow Mexican companies to continue entering U.S. territory, but only as far as the towns within the border trade area; if they were in transit from Mexico to Canada (applicable for Mexican operators in business before the 1982 legislation); if they were Mexican trucking companies, but owned by Americans;[1] if they were Mexican trucking companies that rented units to U.S. firms (until January 2000); and starting in 1994, if they were Mexican-owned companies headquartered in Mexico that transported passengers on international charter buses or tour bus operations.

Also, as stipulated in NAFTA, the three countries agreed to apply the principle of "national treatment" (Article 1202) and "most favored nation" treatment (Article 1203) for cross-border services, including freight transport in the following terms:

> a. Article 1202. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, *in like circumstances*, to its own service providers….
> b. Article 1203: Most-Favored-Nation Treatment [in Services]. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, *in like circumstances*, to service providers of any other Party or of a non-Party.[2]

The United States drew up a list of "Reservations for Existing Measures and Liberalization Commitments" that included "national treatment" and "most-favored-nation treatment" for land freight transport, as well as the gradual reduction of those reservations. Thus, it committed to authorizing Mexicans to provide services in U.S. border states three years after NAFTA was signed, that is December 18, 1995, and to provide services throughout U.S. territory six years after NAFTA came into effect, that is January 1, 2000, in accordance with the treaty's Annex 1.

In November 1995, one month before the deadline, the governments of Mexico and the United States set up the Land Transportation Standards Subcommittee, which implemented a work program to facilitate eliminating the reservations contained in Annex 1, as well as the process for making compatible the standards-related measures linked to the operation of buses and trucks.[3] To this end, every one to three years authorities would check drivers' health, age, and language skills; weights and dimensions, tires, brakes, parts and accessories, maintenance and repair, inspections, and emissions and environmental pollution levels; and each party's supervision of motor carriers' safety compliance and road signs.[4] As NAFTA Articles 904.1 and 904.3 stipulate, the parties have the right to adopt measures for normalization, but they cannot be applied in a discriminatory manner.

On September 5, 1995, the U.S. Secretary of Transportation issued a press release announcing the measures proposed for a "smooth, safe and efficient NAFTA transition" and the creation of a team of officials from four border states and federal offices to "ensure that operations will be as safe and efficient as possible" and to implement an educational campaign to disseminate the prerequisites for operating land transport vehicles in the United States, Mexico, and Canada.

Later, the U.S. Interstate Commerce Commission (ICC) announced a project for normalization called "Freight Operations by Mexican Carriers-Implementation of North American Free Trade Agreement" and that the proposal would become definitive after December 18, 1995. These were published, respectively, in the October 18, 1995 and December 13, 1995 *Federal Register*.

By December 12 of that year, 32 coalitions of religious, labor, and environmental groups asked President Bill Clinton to suspend NAFTA operations regarding land transportation services. Three days later, the International Brotherhood of Teamsters presented a complaint against the ICC's proposed norms on cross-border land transportation, thus halting the processing of Mexican requests for authorization to be

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On December 18, 1995, the date when the NAFTA cross-border land transportation services regulations were to take effect, the U.S. Secretary of Transportation issued a second press release announcing that from that day forward, foreign (Mexican) motor carriers would be able to apply to operate in international trade between the Mexican and U.S. border states. However, up until today, U.S. officials continue to reject all Mexican applications arguing that Mexico does not have legislation matching that of the U.S. ensuring that trucking companies can guarantee safety on U.S. highways.

The Controversy

Mexico argued that the United States' refusal to individually process Mexican applications was incompatible with NAFTA stipulations. The Mexican government maintained that the United States had violated the treaty by not initiating the programmed reduction of its restrictions regarding cross-border transport services, starting in December 1995 in the border states and, from 2000, on in the rest of its territory, as the treaty itself had stated.

The United States argued that Mexican legislation in this area was not the same as its own, and for that reason did not comply with safety standards established in local legislation, and that Mexican freight transportation endangered the safety of its highways. As a result, since circumstances were not the same, the principles of "national treatment" and "most-favored-nation" treatment were not being violated given that Canadian legislation was similar to the United States'.

Mexico pointed out that NAFTA does not specify that Mexican legislation on land freight transport had to be the same as U.S. law. Every Mexican truck that goes through U.S. territory must comply with its norms. However, they must be evaluated individually, just like U.S. and Canadian truckers, so that every Mexican trucker has the full opportunity to challenge a rejected permit for operating in the U.S. Mexico argued that the fulfillment of the obligations by all the parties was not conditioned to Mexico adopting a normative framework identical to that of the United States and approved by the U.S. government.

The U.S. refusal violates the principles of "national treatment" and "most-favored-nation treatment" by not dealing individually with applications for authorization by U.S. and Canadian truckers to operate in U.S. territory, but answering all Mexican truckers' applications as a group. In fact, it will not even process them, arguing that Mexican legislation on motor carriers does not guarantee the fulfillment of U.S. safety requirements.

U.S. non-compliance is clearly protectionist. Not only does it affect competition and the competitiveness of both countries, but of the region as a whole, and it has an impact on many other sectors of production given that it makes transport more expensive and causes delays in delivery times. For every operation, three trucks are required instead of one, since when the Mexican truck loaded with freight gets to the border, it has to dismount the container and mount it on a second truck called a transfer. This will transport the merchandise 30 kilometers and then transfer it to a third, U.S.-owned truck which will ship the freight to its final destination. It should be pointed out that in 2009 alone, almost 70 percent of the merchandise traded between the United States and Mexico was transported by highway.

Given the U.S. refusal to allow Mexican transportation services inside its territory, on January 19, 1996, at the request of the Mexican government, consultations were effected between the two countries' governments before arbitration began, but the controversy was not resolved. On December 22, 1998, Mexico requested the arbitral panel be set up under Chapter 20 of NAFTA to resolve the controversy. This panel issued its final report on February 5, 2001; the decision favored Mexico, recommending that the United States carry out the actions necessary to comply with its commitments since its practices did indeed violate the principles of "national treatment" and "most-favored-nation treatment" with regard to cross-border freight transport.

Canada, for its part, exercised its right to participate in the arbitration process as a Third Party, and pointed out that the central issue for interpreting the principle of "national treatment" is the comparison between a foreign (Mexican) service provider and a U.S. service provider. Canada also main-

tained that a "generalized" refusal by the United States to allow Mexican truckers to provide cross-border land transport would necessarily put them in a less favorable position than that of U.S. truckers under similar circumstances. The United States cannot base its arguments on normalization-related measures because even protection levels for normalization must be consistent with "national treatment" stipulations.

Once the panel's final report was made public, Mexico and the United States should have agreed on a solution to the controversy within the following 30 days, but if the United States and Mexico did not come to an agreement, Mexico had the right to suspend benefits, taking measures that would have effects equivalent to the damage caused by its counterpart's refusal, until such time that both countries came to an agreement on how to solve the controversy. This action, commonly known as a "reprisal," can be taken *vis-à-vis* the same sector or others if Mexico considered it would either not be feasible or effective to suspend benefits in the same sector.

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Since the panel issued its report, both countries have sought to develop a strategy that would open the border up to Mexican trucking, initially trying a demonstration project as the first step toward fulfilling the commitments.

In September 2007, both governments began implementing this project that would last a year. In August 2008, they agreed to extend it for two more years because of the good performance of the companies involved. However, on March 11, 2009, when the United States designed its yearly budget, it canceled the project by not earmarking resources for its operations. It used the same argument presented to the panel: Mexican trucks do not fulfill its safety rules, despite the fact that during the time the demonstration project was applied, more than 46 000 crossings took place with no important incidents.

In this context, and for the first time, on March 18, 2009, the Mexican government levied retaliatory measures against the United States: it increased tariffs on 89 U.S. industrial and agricultural products that had originally had free access; thus, Mexico stopped being passive in the face of its trade partner's constant non-compliance of international commitments.[5]

On August 18, 2010, the Ministry of the Economy changed the list of U.S. products subject to trade reprisals since March 2009.[6] On March 3, 2011, an agreement was announced on cross-border transport between Mexico and its neighbor to the north that will supposedly allow for opening the northern border to Mexican trucks. On July 6, both governments signed a memorandum to open the U.S. border to Mexican freight trucking; therefore, Mexican trucks will have to fulfill the same requirements as U.S. trucks, and will be able to acquire a provisional 18-month permit, and later be evaluated to receive a permanent one.

For its part, Mexico committed to reducing by 50 percent the tariffs it had levied on 99 U.S. products starting July 7, and to eliminate the other 50 percent when the first Mexican truck crosses the U.S. border, slated for October 2011.

Officials are confident that this time the U.S. government will not cave in to pressure groups' demands and will permanently fulfill its commitment to allow Mexican freight motor vehicles access to its territory.

This dispute is one of the most important in Mexico's trade relationship with its neighbor. The liberalization of land transportation is key to our country's being able to take full advantage of its geographical proximity to the United States. VM

NOTES

[1] In 1999, only one Mexican trucking company had runs from Mexico to Canada, according to the USDOT Inspector General's Office. A total of five Mexican companies had the right to this exemption because they had been authorized to operate before 1982. Approximately 160 trucking firms headquartered in Mexico are owned by Americans.

[2] http://www.sice.oas.org/trade/nafta/chap-12.asp#A1202, emphasis added.

[3] Before NAFTA came into force, the governments of Mexico and the United States joined the Commercial Vehicle Safety Alliance to coordinate the norms applicable to transportation motor vehicles, particularly in relation to U.S. training of Mexican officials for highway inspections and handling dangerous materials, and also to improve Mexican companies' knowledge about U.S. security norms.

[4] As established in NAFTA Article 913.5.a.1 and Annex 913.a-1.

[5] See *Diario oficial de la federación,* March 18, 2009, http://dof.gob.mx/nota_detalle.php?codigo=5084119&fecha=18/03/2009. [Editor's Note.]

[6] See *Diario oficial de la federación,* August 18, 2010, http://dof.gob.mx/nota_detalle.php?codigo=5155736&fecha=18/08/2010. [Editor's Note.]