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Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on U.S. Compliance Under NAFTA

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I.
INTRODUCTION

In March 2009, President Barack Obama signed legislation suspending a pilot program that allowed a limited number of Mexican trucking firms to operate within designated areas on U.S. soil. President George W. Bush enacted the program during the last year of his presidency in preparation for a larger, more inclusive US-Mexican cross-border trucking program. With trucks carrying 90 percent of the goods traded between the United States and Mexico, the border-opening program was viewed by proponents of the North American Free Trade Agreement (NAFTA) as an important step in liberalizing trade and improving relations with Mexico. Opponents of NAFTA, however, have been critical of the program on the basis that Mexican trucks and their drivers endanger motorists, threaten national security, destroy the environment and contribute to the loss of thousands of American jobs.[1]

Following the suspension of the pilot program, the Mexican government

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1. Associated Press, *Bush Plan to Allow Mexican Truckers Throughout U.S. Draws Criticism*, N.Y. TIMES, Feb. 24, 2007, *available at* http://www.nytimes.com/2007/02/24/washington/24trucks.html.

retaliated against the United States by imposing 90 tariffs ranging between 10 and 45 percent on U.S.-produced goods totaling $2.4 billion.[2] Though trucking falls within the *services* sector, Mexico has targeted its tariff hikes on specific *goods* in key states where powerful politicians have been pressuring the Obama administration to impose tighter limits on Mexican truck traffic. This method of "cross-sector retaliation" is different from the usual approach in international trade disputes whereby the injured state retaliates in the same commercial sector in which the harm occurs, also known as "same-sector retaliation." Cross-sector retaliation is permitted under international trade rules as an alternative remedy for smaller states who seek to improve compliance levels among larger states in asymmetric disputes.[3]

The purpose of this article is to examine Mexico's approach to U.S. noncompliance with NAFTA trucking regulations and assess whether strategic cross-sector retaliation is an effective tool to compel the United States to comply with its NAFTA obligations. Part II will describe the background to NAFTA and the U.S.-Mexico cross-border trucking dispute. Part III will examine U.S. policy towards Mexican trucking since the creation of NAFTA and the implications of the 2001 NAFTA arbitration decision that paved the way for Mexican retaliation against the United States today. Part IV will discuss the specifics of the 2007 pilot program and the Obama administration's reasons for suspending the program. Part V will analyze the concept of strategic cross-sector retaliation in international trade where smaller states have effectively utilized this remedy to compel larger states to comply with trade rules in asymmetric disputes. Finally, this article will discuss Mexico's current program of strategic cross-sector retaliation against the United States, its political and economic ramifications, and the likelihood that Mexico's retaliation will change U.S. policy.

II.
THE U.S.-MEXICO CROSS-BORDER TRUCKING DISPUTE AND NAFTA

A. Origins of the Cross-Border Trucking Dispute

The dispute between the United States and Mexico over cross-border trucking rights arose following the passage of the Bus Regulatory Reform Act (BRRA) in 1982.[4] Prior to the BRRA, Mexican and Canadian trucks could

2. Mica Rosenberg, *Mexico Tariffs Hit a Diverse List of U.S. Goods*, REUTERS, Mar. 18, 2009, *available at* http://www.reuters.com/article/idUSTRE52H1BQ20090318.

3. Klint W. Alexander, *Rethinking Retaliation in the WTO Dispute Settlement System: Leveling the Playing Field for Developing Countries in Asymmetric Disputes, in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 507 (Kern Alexander & Mads Andenas eds., 2008).

4. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified as amended in scattered sections of 49 U.S.C.) (1982) [hereinafter BRRA].

operate freely in the United States provided they complied with U.S. safety laws.[5]

In response to criticism from Canada, President Ronald Reagan lifted the restrictions on Canadian trucks entering the United States on the basis that Canada's truck safety standards were similar to those in the United States.[6] President Reagan declared:

> 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.[7]

Under the BRRA, Mexican trucks are permitted to operate within specified commercial zones in four U.S.-Mexico border states – Texas, California, New Mexico, and Arizona.[8] These commercial zones generally extend from 3 to 20 miles from the border, reaching up to 75 miles in some locations.[9] Upon reaching the edge of a commercial zone, a Mexican truck is required to transfer its cargo to a U.S. truck; the U.S. truck then completes the delivery to the product's final destination.[10] Delays in delivery of goods and

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5. U.S. Department of Transportation, Cross Border Truck Safety Inspection Program: Trucks Crossing the U.S.-Mexico Border, *available at* http://www.dot.gov/affairs/cbtsip/factsheet.htm. The BRRA restricted foreign motor carriers from operating in the United States, though the President could modify these restrictions at any time. The BRRA grandfathered in five Mexican carriers that were already operating without restriction within the United States, but instructed the Interstate Commerce Commission (ICC) to deny permits to all other Mexican carriers. *See* In re Cross-Border Trucking Services (Mex. v. U.S.), USA-MEX-98-2008-01 at ¶ 59 (NAFTA Arbitral Panel, Feb. 6, 2001), *available at* http://www.worldtradelaw.net/nafta20/truckingservices.pdf [hereinafter U.S.-Mexico Panel Decision]. The BRRA introduced a two-year moratorium on U.S.-issued trucking permits from Canada and Mexico. BRRA, *supra* note 4, at § 6(g)(1).

6. Memorandum from the President on the Bus Regulatory Reform Act of 1982, 18 WEEKLY COMP. PRES. DOC. 1180 (Sept. 20, 1982).

7. Determination Under the Bus Regulatory Reform Act of 1982: Memorandum of September 20, 1982, for the United States Trade Representative, 47 Fed. Reg. 41,721 (Sept. 22, 1982).

8. Mary E. Peters, Sec'y of Transp., & John H. Hill, Adm'r of the Fed. Motor Carrier Safety Admin., Statement before the Senate Appropriations Subcommittee for Transportation, Housing and Urban Development, and Related Agencies (Mar. 8, 2007) (transcript available at http://www.fmcsa.dot.gov/documents/testimony/tst-030807.pdf); *see also* 49 C.F.R. § 372.241 (2009).

9. *See* Peters & Hill, Statement before the Senate Appropriations Subcommittee for Transportation, Housing and Urban Development, and Related Agencies. Along the border from the Pacific Ocean to the Gulf of Mexico, commercial zones range from three-mile wide strips in some areas to as much as 75 mile-deep areas in others. The zones encompass nearly all urban areas in the border region and stretch as far north as the suburbs of Los Angeles in California.

10. The procedure going the other direction is similar. A U.S. trucker drives the freight or cargo to the Mexican border. At this time a "drayage" driver ferries the goods from the U.S. truck across the border to a warehouse. At the warehouse, Mexican truck drivers reload the cargo onto a Mexican truck and transport the goods deeper into Mexico to its final destination. Lowell Powell, *NAFTA Keep on Trucking: Paving the Way for Long-Haul Trucking Operations Between Mexico*

added costs associated with the transfer of goods are common.[11] These restrictions were later modified to include exceptions for direct Mexico-Canada transit and U.S.-owned Mexican trucks. While the changes did not grant Mexican truckers the same access that Canadian truckers enjoy, the United States showed that it was willing to open its border to Mexican trucks under certain conditions.

In 1995, Congress passed the Interstate Commerce Commission Termination Act (ICCTA).[12] The ICCTA authorized the President to lift the moratorium on Mexican carrier movements beyond the commercial zones if removal was deemed "consistent with the obligations of the United States under a trade agreement or with United States transportation policy."[13] The effect of the act was to give the President maximum flexibility to implement the trucking provisions under NAFTA, which entered into force on January 1, 1994.

B. NAFTA and Annex I

The North American Free Trade Agreement (NAFTA) is a trilateral agreement that addresses the trade in goods, services, and investment.[14] The major goals of the agreement are to eliminate trade barriers, promote increased investment opportunities, and facilitate cross-border movements of goods and services between the parties.[15] Among NAFTA's 900 pages of rules and regulations are provisions calling for standardization of members' truck length, weight, safety, and drivers' licensing requirements. NAFTA Chapter 12 addresses trade in services, and Article 1202 (the National Treatment Clause) requires the members to treat foreign service providers no less favorably than domestic service providers.[16] Trucking companies fall under Chapter 12 and

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and the United States, 16 TRANSNAT'L L. 467, 473 (2008); *Mexico Tariffs Test Obama*, LATIN BUS. CHRONICLE, Mar. 17, 2009, *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=3235.

11. The Department of Transportation estimates that the requirement to off-load cargo within 25 miles of the border adds $400 million in transportation and warehousing costs annually.

12. Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (codified as amended in scattered sections of 49 U.S.C) (1995).

13. 49 U.S.C. § 13902(c)(3) (2006).

14. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

15. *Id.* art. 102(1) (describing the agreement's objectives, including creating efficacious proceedings for implementing the Agreement).

16. *Id.* art. 1202. The National Treatment Clause provides:

> 1. 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.
>
> 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

are thus protected under the National Treatment Clause unless the company's activities violate local health and safety laws.[17]

Article 1203 – the Most-Favored-Nation Clause – requires the member states to treat foreign service providers from a fellow member state no less favorably than a service provider from another member state.[18] Accordingly, the manner in which Congress modified the BRRA to permit Canadian trucks, but not Mexican trucks, to travel freely throughout the United States was in violation of this provision.

NAFTA Annex I set forth a two-step schedule for liberalizing cross-border trucking between the United States and Mexico.[19] The first step required the United States to provide Mexican trucks with complete access to its roadways in the four border states – Texas, California, New Mexico, and Arizona – by December 18, 1995.[20] The second step called for Mexican trucks to be able to travel freely throughout the United States by January 1, 2000.[21] At the time NAFTA was signed, the United States was committed to implementing both steps of the program on time. However, the Canadian plan was the only plan to progress on schedule. The Teamsters and other groups in the United States were opposed to the plan because of safety and other political concerns.[22]

On December 15, 1995, President Clinton ordered that the U.S. border remain closed to Mexican carriers beyond the designated commercial zones.[23] According to one White House official, "[a]ll we need is one big environmental disaster, or one of these trucks plowing into a school bus, and all of a sudden NAFTA is going to look like a pretty disastrous idea."[24] Teamsters president James P. Hoffa hailed the decision, exclaiming, "[n]o longer will companies be allowed to use NAFTA to take our jobs and endanger our health and security."[25] Mexican officials denounced the decision and initiated a Chapter 20 arbitration

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17. *Id.* art. 1201. Further, Article 904 permits a member state to impose legitimate safety requirements. *Id.* art. 904.

18. *Id.* art. 1203. The Most-Favored-Nation Clause provides that "[e]ach 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."

19. *Id.* Annex I.

20. *Id.*

21. *Id.*

22. Dana T. Blackmore, *Continuing to Put the Brakes on Mexican Truckers: Will the U.S. Ever Implement NAFTA Annex I?*, 9 LAW & BUS. REV. AM. 699 (2003).

23. David E. Sanger, *U.S. and Mexico Postpone NAFTA on Truck Crossings*, N.Y. TIMES, Dec. 19, 1995, at B10, *available at* http://www.nytimes.com/1995/12/19/us/us-and-mexico-postpone-nafta-on-truck-crossings.html?pagewanted=1.

24. David E. Sanger, *Dilemma for Clinton on NAFTA Truck Rule*, N.Y. TIMES, Dec. 17, 1995, at 136 of NY Edition, *available at* http://www.nytimes.com/1995/12/17/us/dilemma-for-clinton-on-nafta-truck-rule.html?pagewanted=1.

25. Steven Greenhouse, *U.S. Delays Opening Border to Trucks from Mexico*, N.Y. TIMES, Jan. 8, 2000, at A10, *available at* http://www.nytimes.com/2000/01/08/us/us-delays-opening-border-to-trucks-from-mexico.html?pagewanted=1.

proceeding against the United States under NAFTA.[26] The Clinton administration asserted that when the problems associated with U.S. safety concerns were resolved, the NAFTA provisions could be implemented.[27]

III.
THE 2001 NAFTA ARBITRATION DECISION AND ITS AFTERMATH

Between 1995 and 2001, Mexico enjoyed only limited access to the U.S. trucking market. In turn, Mexico closed its border to U.S. trucks pending the outcome of its arbitration proceeding against the United States.[28] In the proceeding, Mexico claimed that the United States had breached its obligations under NAFTA to phase out restrictions on cross-border trucking by the requisite deadlines as prescribed in Annex 1.[29] Specifically, Mexico alleged that the United States had violated Articles 1202 (the National Treatment Clause) and 1203 (the Most Favored Nation Clause) by preventing Mexican trucking firms from operating within the United States while giving Canadian trucking firms unfettered access to U.S. roadways.[30] According to the arbitration panel:

> The objectives of this Agreement [NAFTA], as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation 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; and (b) promote conditions of fair competition in the free trade area.[31]

U.S. restrictions on Mexican trucking allegedly violated these principles and rules.

The U.S. government claimed that its delayed compliance with Annex 1 was due to safety, homeland security, and economic concerns.[32] The crux of its argument was that Mexican trucks and drivers could not comply with certain U.S. safety regulations governing hours-of-service limits, truck condition standards, and alcohol and drug testing requirements.[33] However, concern was pervasive in Washington that opening the border to Mexican trucking would

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26. Mexico initially requested consultations with the United States as required under NAFTA Article 2006 at a meeting with the NAFTA Free Trade Commission pursuant to NAFTA Article 2007. After these consultations failed, Mexico requested an arbitration panel to hear the dispute.

27. Sanger, *supra* note 24.

28. U.S.-Mexico Panel Decision, *supra* note 5, ¶ 22.

29. *Id.* ¶ 2.

30. *Id.* ¶ 3.

31. *Id.* ¶ 217.

32. Paul Blustein, *U.S. Seeks Compromise on NAFTA Truck Rules; Mexican Border Travel Raises Safety Concerns*, WASH. POST, Dec. 18, 1995.

33. US-Mexico Panel Decision, *supra* note 5, ¶¶ 91, 95. Mexican trucks often fail to meet safety standards and their drivers often work more hours than those set for American drivers. Moreover, many trucks carry hazardous materials, including pesticides, corrosive chemicals, toxic waste, fuel and other flammable substances.

permit the transport of illegal or dangerous materials, including drugs and arms, into the United States, and result in lost jobs and depressed wages for U.S. workers.[34] Mexico claimed that United States' concern for Mexican safety regulations was a red herring, and the U.S. government was simply bowing to internal political pressure from labor unions.[35]

In defense of its decision to allow Canadian trucking firms into the United States, the U.S. government claimed that Canadian safety standards were "equivalent" to that of the United States.[36] Moreover, the United States took the position that its policy in regard to Canada could not be in violation of NAFTA because Canada's regulatory system for trucks – as opposed to Mexico's – is "in like circumstances" with that of the United States, in compliance with NAFTA's National Treatment and Most-Favored-Nation clauses.[37]

On February 6, 2001, the NAFTA arbitration panel ruled in favor of Mexico, stating that the failure of the United States to comply with Annex 1 violated NAFTA.[38] In its opinion, the panel concluded that the U.S. interpretation of the phrase "in like circumstances" under Articles 1202 and 1203 was too broad and thus frustrated NAFTA's objectives.[39] According to the panel, the United States was permitted to impose different regulatory requirements on Mexican truckers than Canadian truckers.[40] The United States needed to make that decision, however, "in good faith with respect to a legitimate safety concern" and implement it in a way that fully conforms with NAFTA.[41] The panel recommended that the United States take all "appropriate steps" to bring its cross-border trucking practices into compliance with NAFTA.[42] If it refused to do so, NAFTA Article 2019 permits Mexico to impose sanctions against the United States.[43]

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34. *Id.*

35. *Id.* ¶¶ 6, 149.

36. *Id.* ¶ 7.

37. *Id.* ¶ 242.

38. US-Mexico Panel Decision, *supra* note 5, ¶ 295.

39. *Id.* ¶ 259.

40. *Id.* ¶ 301.

41. *Id.*

42. *Id.* ¶ 299.

43. Article 2019 provides:

> Such complaining party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute...
>
> 2. In considering what benefits to suspend pursuant to paragraph 1:
>
> (a) a complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 2004; and
>
> (b) a complaining Party that considers it is not practicable or effective to suspend

Though the panel decided in Mexico's favor, it also specified that the United States had the right to standardize safety regulations for those operating motor vehicles within its borders. According to the panel, "[i]t 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."[44] Thus, although the United States could not deny Mexican trucking companies the right to apply for cross-border trucking permits, it could regulate the safety standards imposed upon Mexican trucking firms pursuant to NAFTA Article 1210. Article 1210 provides that such measures (a) are based on objective and transparent criteria, (b) are not more burdensome than necessary to ensure the quality of a service, and (c) do not constitute a disguised restriction on the cross-border provision of a service.[45] The panel's decision was a major victory for NAFTA's weakest member, but it could not guarantee that the United States would comply with the ruling in an expeditious manner.

The Bush administration initially vowed to comply with the panel's ruling stating that "[W]e intend to live up to our NAFTA obligations to open the U.S.-Mexico border to trucking [and] [d]iscussions are under way on how to implement the recent NAFTA panel decision in a safe and orderly fashion."[46] Over the next several years, however, Congress pursued a policy of "constructive delay" with Mexico to avoid having to comply with its NAFTA Annex 1 obligations. In May 2001, Congress adopted more restrictive legislation requiring that each Mexican carrier seeking to operate within the commercial zones certify that its drivers have the requisite qualifications and insurance levels, and that they comply with U.S. hours-of-service limits, truck condition standards, and alcohol and drug testing requirements.[47] The law further mandated upgrades in emissions controls and called for a greater number of inspectors to monitor Mexican trucks at the border.[48] Mexican trucking firms that satisfied the tough new requirements would receive temporary permits

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benefits in the same sector or sectors may suspend benefits in other sectors.

NAFTA, *supra* note 14, art. 2019; *see also* Blackmore, *supra* note 22, at 721.

44. U.S.-Mexico Panel Decision, *supra* note 5, ¶ 298.

45. NAFTA, *supra* note 14, art. 1210.

46. Remarks by Undersecretary Alan Larson Before the 54th Mexico-U.S. Business Community, Outlining the Potential for Expanded U.S.-Mexico Trade, Mar. 7, 2001, *available at* http://statelists.state.gov/scripts/wa.exe?A2=ind0103a&L=dossdo&P=833.

47. Department of Transportation and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-87, 115 Stat. 833 (2001). The legislation requires Mexican drivers to have the equivalent of a U.S. commercial driver's license, and to prevent fatigue, they will be required to maintain hours-of-service logs showing that they are well-rested. *See* Hale Sheppard, *The NAFTA Trucking Dispute: Pretexts for Non-Compliance and Policy Justifications for U.S. facilitation of Cross-Border Services*, 11 MINN. J. GLOBAL TRADE 235, 241 (2002).

48. Under the legislation, the number of truck inspectors on the border was increased from 58 to 274. Steven Greenhouse, *Mexican Trucks Allowed to Haul All Over the U.S.*, N.Y. TIMES, Nov. 28, 2002, *available at* http://www.nytimes.com/2002/11/28/us/mexican-trucks-allowed-to-haul-all-over-us.html?pagewanted=1.

subject to reevaluation within eighteen months.[49] President Bush signed the legislation.

In 2002, some progress was made in U.S.-Mexico trucking relations when President Bush signed legislation easing the twenty-year moratorium on Mexican trucking activity beyond the designated commercial zones.[50] Under the new policy, Mexican truckers and buses hauling cargo and passengers, respectively, could drive throughout the United States after entering the country at one of twenty-seven possible check points along the border.[51] The policy still required that Mexican trucks and drivers comply with U.S. safety standards and refused to allow Mexican trucks to provide service between points in the United States.[52] Nevertheless, it prompted the review and approval of more than a hundred applications from Mexican trucking companies that were seeking to haul freight in the United States.[53]

In response to the new legislation, a coalition of labor, consumer and environmental groups filed suit in the U.S. Court of Appeals for the Ninth Circuit seeking to enjoin the new policy on the basis that it violated the National Environmental Policy Act (NEPA) and the Clean Air Act.[54] The lawsuit claimed that the new rules failed to require an examination of the air quality and health effects of increased emissions and congestion from open-border trucking, and, therefore, were not in compliance with federal law.[55] The Ninth Circuit ordered the Bush administration to conduct a full environmental review before opening the border.[56] The Supreme Court, however, reversed the Ninth Circuit a year later, ruling that the Federal Motor Carrier Safety Administration (FMCSA) did not have to perform a detailed environmental impact study because the agency's issuance of regulations was not a legally relevant cause of the environmental effect.[57]

The lawsuit and the 2004 presidential election campaign ultimately forced the Bush administration to rethink its position on expanding cross-border access to Mexican trucks. Hence, the administration and the Mexican government resumed negotiations to develop an acceptable, long-term framework for cross-border trucking.[58]

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1009 (9th Cir. 2003).

55. *Id.* at 1024.

56. *See id.* at 1032; *Court Blocks Bush Implementation of NAFTA Truck Panel*, INSIDE U.S. TRADE, Jan. 24, 2003, http://www.insidetrade.com/secure/display.asp?dn=INSIDETRADE-21-4-16&f=wto2001.ask.

57. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004).

58. In 2005, the U.S. Department of Transportation issued a report stating that the FMCSA

IV.
THE 2007 CROSS-BORDER TRUCKING DEMONSTRATION (PILOT) PROGRAM

A. The Push to Comply with NAFTA Annex 1

In February 2007, the Bush administration inched closer to complying with NAFTA Annex 1 when it announced a Cross-Border Trucking Demonstration (Pilot) Program with Mexico.[59] The pilot program allowed 100 Mexican trucks to haul non-hazardous international cargo throughout the United States for one year as long as the truck drivers were properly licensed, insured and could speak and read English.[60] The purpose of the program was to demonstrate the effectiveness of the safety programs adopted by Mexico-domiciled motor carriers and the monitoring and enforcement systems developed by the U.S. Department of Transportation.[61] In return for granting market access to a limited number of Mexican trucks, Mexico agreed to grant 100 U.S.-domiciled trucks access to its roadways for the same one-year period. "This program," announced Transportation Secretary Mary E. Peters, "will make trade with Mexico easier and keep our roads safe at the same time."[62]

The FMCSA initiated the demonstration project on September 6, 2007 for one year, and later extended the project for two additional years on August 6, 2008.[63] The pilot program came under attack from organized labor, environmental groups and Democrats in Congress. The Teamsters, the Sierra Club, and other organizations criticized the Bush administration for opening the door to "serious safety, environmental, smuggling and security concerns."[64]

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cannot "grant long-haul operating authority to any Mexican motor carrier" until an agreement "related to on-site safety reviews is reached with Mexico." OFFICE OF INSPECTOR GEN, U.S. DEP'T OF TRANSP, OIG REP. NO. MH-2005-032, FOLLOW-UP AUDIT OF THE IMPLEMENTATION OF THE NORTH AMERICAN FREE TRADE AGREEMENT'S CROSS-BORDER TRUCKING PROVISIONS (2005). By 2007, the United States and Mexico were still negotiating over safety inspection procedures.

59. In response to the Bush Administration's announcement, Congress passed the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 (2007) [hereinafter Pilot Program]. In that 2007 Act, Congress specifically addressed the limited circumstances under which FMCSA would be permitted to grant operating authority to Mexico-domiciled trucks to operate beyond the border zone. Most significantly, a grant of authority must be "first tested as part of a pilot program." *Id.* §6901(a)(1).

60. Associated Press, *supra* note 1. Under the program, freight can move directly from origin to destination beyond the 20 mile commercial zones along the border. Inspectors are permitted to examine the condition of the trucks, interview drivers to ensure that they have a valid commercial license and can read and speak English, and verify that their employers are insured by companies licensed in the United States. *Id.*

61. Notice, 72 Fed. Reg. 46263, 46264 (Aug. 17, 2007).

62. Associated Press, *supra* note 1.

63. John Fritelli, *North America Free Trade Agreement (NAFTA) Implementation: The Future of Commercial Trucking Across the Mexican Border*, Congressional Research Service, Feb. 1, 2010, *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/703.

64. Gretel C. Kovach, *For Mexican Trucks, a Road Into the U.S.*, N.Y. TIMES, Sept. 9, 2007,

Teamsters president James T. Hoffa said that the administration was "playing a game of Russian roulette on America's highways."[65]

On Capitol Hill, the most vocal critic of the pilot program was Senator Byron L. Dorgan (D-North Dakota). In 2008, he led the charge to insert a provision into the fiscal year 2009 Omnibus Appropriations Bill to kill the pilot program.[66] Dorgan's crusade against the program threatened to drive a wedge between the more moderate, pro-business wing of the Democratic party and organized labor during the waning days of the 2008 presidential election campaign. Foreshadowing what was ahead under a new Democratic administration, Dorgan argued that "[b]oth President-elect Obama and Vice-President-elect Biden voted to end the program in 2007, and it is expected that the new administration will uphold the intent of Congress and shut down the program in 2009."[67]

In February 2009, the FMCSA released a report evaluating the pilot program's effectiveness.[68] In general, the report concluded that the FMCSA had taken the required steps to ensure the program's safe implementation and its compliance with the new safety measures imposed by Congress.[69] The report also showed that Mexican carriers participating in the program had no reportable crashes and collectively had out-of-service rates lower than U.S. carriers.[70] Moreover, the report stated that the Mexican drivers participating in the program had safety performance scores comparable to or better than American drivers, partially undermining the argument set forth by organized labor that U.S.

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available at http://www.nytimes.com/2007/09/09/us/09truck.html.

65. Associated Press, *supra* note 1. The Teamsters, in particular, have led the charge against the Pilot Program over the past two years. As discussed by one legal scholar, the focus of their attack is two-pronged: (1) safety and (2) national security. In regard to safety, the Teamsters allege that Mexican trucks seriously threaten America's roadways and the U.S. citizens who drive on them. Mexican trucks, they contend, are old, unreliable and dangerous to those sharing the road. With respect to national security, they argue that the contents of Mexican trucks often contain illicit drugs as well as illegal and dangerous materials. Moreover, they contend that American economic security is at risk as Mexican truck drivers steal jobs and depress wages. *See* Erica Richman, Comment, *The NAFTA Trucking Provisions and the Teamsters: Why They Need Each Other*, 29 NW. J. INT'L LAW & BUS. 555, 557-58 (2009).

66. Despite Congressional efforts to cut funding for the pilot program, the Bush Administration was able to find funding for the program from other parts of the transportation budget. *See* Associated Press, *U.S. Moves Ahead with Mexican Truck Program*, MSNBC.COM, Jan. 4, 2008, http://www.msnbc.msn.com/id/22507319.

67. Ari Natter, *Senator Dorgan Sees End for Cross Border Program*, TRAFFIC WORLD ONLINE, Nov. 14, 2008, *available at* www.freerepublic.com/focus/f-news/2143264.

68. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF TRANSP., OIG REP. NO. MH-2009-034, STATUS REPORT ON NAFTA CROSS-BORDER TRUCKING DEMONSTRATION PROJECT (2009), *available at* http://www.oig.dot.gov/sites/dot/files/pdfdocs/NAFTA_final_report_signed.pdf.

69. *Id.*

70. During the first year of the pilot program, Mexican carriers had a driver out-of-service rate of 0.46 percent and a vehicle out-of-service rate of 8.29 percent. In contrast, U.S. carriers had a driver out-of-service rate of 6.94 percent and a vehicle out-of-service rate of 21.72 percent. *Id.* at 4.

restrictions on Mexican trucking are based on legitimate safety concerns.[71] This conclusion is tempered by the fact that that Mexican carrier participation during the first year of the pilot project was too low to make accurate statistical projections.[72] As such, disagreement persists about whether there is a safety and performance differential between Mexican and U.S. truckers.

B. Obama's First Trade War

Strategic ambiguity is one way to describe the Obama administration's position on NAFTA and the cross-border trucking dispute.[73] Upon taking office in January 2009, President Obama softened his tough rhetoric on free trade, warning repeatedly against tit-for-tat protectionism in the midst of an economic crisis. However, in March 2009, he signed the FY 2009 Omnibus Spending Bill into law, which cut off funding for the pilot program that allows Mexican long-haul trucks to deliver goods into the United States.[74] According to the White House, President Obama wanted to create a new trucking project that would meet the "legitimate concerns" of Congress as well as U.S. commitments under NAFTA.[75] The Obama administration asked the U.S. Trade Representative's office to work with Congress, the Department of Transportation, and the State Department to accomplish this task.[76]

In response to the suspension of the pilot program, Mexican officials pursued an aggressive strategy against the United States. The Mexican government, acting under NAFTA Article 2019, imposed $2.4 billion in import duties ranging from 10 to 45 percent on 90 products from the United States.[77] According to Mexico's Economy Secretary Gerardo Ruiz Mateos, "the retaliatory measures are the cost the United States is going to have to pay for failing to fulfill its obligations under NAFTA."[78] More specifically, Mexico

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71. *See id.* at 15-16.

72. The report concluded that project participation was too low to make statistical projections given the fact that other Mexican carriers are likely to seek long-haul authority in the future. *Id.* at 15.

73. *See Obama and Trade: Low Expectations Exceeded*, THE ECONOMIST, May 2, 2009, at 73.

74. *Id.*; *see also* Mark Stevenson, *Mexico Imposes Tariffs on U.S. Goods*, WASH. POST, Mar. 17, 2009, at D06, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/16/AR2009031602901.html; Ioan Grillo, *Obama's Trade War: No Truck with Mexico*, TIME, Mar. 25, 2009, *available at* http://www.time.com/time/world/article/0,8599,1887494,00.html.

75. Associated Press, *Obama to Revisit Restrictions on Access of Mexican Trucks*, WASH. TIMES, Mar. 12, 2009, *available at* http://www.washingtontimes.com/news/2009/mar/12/mexico-truck-ban-to-get-new-look/.

76. *Id.*

77. Grillo, *supra* note 74.

78. Mark Stevenson, *Mexico Retaliates with Tariffs on 90 U.S. Products*, USA TODAY, Mar. 16, 2009, *available at* http://www.usatoday.com/news/world/latinamerica/2009-03-16-3456830028_x.htm.

opted to cross-retaliate against the United States pursuant to Article 2019(2) (b). Under this provision, Mexico has imposed rotating tariff hikes on a cross-section of goods in order to affect the greatest potential impact on U.S. trade and production. The typical sanctions approach under NAFTA is for the injured state to impose fixed countermeasures on a limited number of products or services in the same sector as that in which the harm has occurred. Here, the strategy is to apply pressure on industry groups, other than trucking services, in key states to mobilize political pressure on the Obama administration to alter its policy. This cross-sector approach is unprecedented under NAFTA.

The suspension of the pilot program also triggered a negative response from Mexico's private trucking industry. Mexico's National Cargo Transportation Association (CANACAR) – a private trade group representing 4500 trucking companies – filed a lawsuit under NAFTA seeking $6 billion in compensation for losses they allegedly have suffered since the U.S. government first imposed restrictions on Mexican trucks.[79] According to CANACAR's attorney, Pedro Ojeda, the lawsuit's purpose was to "demand equal treatment and reciprocity because our industry is suffering."[80] CANACAR's request for compensation is the largest made by a private actor against a state party in NAFTA's history.[81]

Mexico's actions fueled criticism of the White House among various industry and consumer groups, whose economic interests are threatened by the imposition of Mexican tariffs. Mexico is the third largest trading partner of the United States after Canada and China, and the new tariffs potentially jeopardize over 12,000 agricultural and 14,000 manufacturing jobs.[82] In a joint letter to President Obama, General Electric, Wal-Mart, and 148 other businesses warned that "retaliation is already impacting the ability of a broad range of U.S. goods to compete in the Mexican market, from potatoes and sunscreen to paper and dishwashers."[83] They called for the White House to take immediate action to resolve the trade dispute with Mexico.

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79. *See* Associated Press, *Mexican Truckers Sue U.S. Government Over Ban*, ABC NEWS, June 1, 2009, *http://abcnews.go.com/International/wireStory?id=7740307. See also* Jose de Cordoba, *Mexican Truckers File $6 Billion Claim Against U.S. in NAFTA Spat*, WALL ST. JOURNAL, June 2, 2009, at A4, *available at* http://online.wsj.com/article/SB124390544386374905.html.

80. Associated Press, *supra* note 79.

81. Cordoba, *supra* note 79.

82. *See* Doug Palmer, *LaHood Sends Obama Advice on Ending Trucking Dispute*, REUTERS, Apr. 14, 2009, http://www.reuters.com/article/idUSTRE53C68F20090414. In 2008, the United States and Mexico had $368 billion in total trade. U.S. Census Bureau Foreign Trade Statistics: Top Trading Partners, http://www.census.gov/foreign-trade/top/index.html#2009 (last visited March 19, 2010); *see also Obama Pressured to Let Mexican Truckers Through*, THE FARMER-STOCKMAN Apr. 8, 2009, *available at* http://thefarmer-stockman.com/story.aspx/obama/pressured/to/let/mexican/truckers/through/8/22825.

83. William Booth & Scott Wilson, *Obama Prepares for Mexico Talks on Drug Trade*, WASH. POST, Apr. 15, 2009, at A06, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403224.html.

For the Obama administration, safety is a major concern in the trucking dispute.[84] Reports show that Mexican drivers drive old, unreliable trucks, work extremely long hours, and endure fatigue in order to keep their jobs.[85] This results in preventable highway deaths in border areas where underpaid, overworked drivers are concentrated. Mexico's ambassador to the United States, Arturo Sarukhan, contends that ending the program has nothing to do with safety, but is rather a protectionist move.[86] U.S. Transportation Secretary Ray LaHood has been working with members of Congress, industry officials and union representatives to craft a new program that would satisfy safety concerns and reopen U.S. roads to Mexican trucks.[87] The dispute has been dubbed "Obama's first trade war."

V.
THE RETALIATION REMEDY AS A TOOL TO AVOID TRADE WARS

A. Theory and Purpose of Retaliation

Since the end of World War II, the retaliation remedy has proved to be one of the more successful tools to promote state compliance with international trade rules. Retaliation involves the authorized suspension of concessions or other obligations by one party against another in a trade dispute; usually in the form of a complaining party imposing, or threatening to impose, higher tariff rates on a list of exports from the offending party to induce the latter to remove an illegal measure. The theory behind retaliation is rooted in the principle of reciprocity and self-interest, whereby an injured party is permitted to seize the offensive in a trade dispute by imposing countermeasures against the offending state.[88] The goal is to compel compliance with trade rules by imposing costs on export groups who can bring maximum pressure to bear upon political leaders to

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84. Nicholas Johnston & Jens Erik Gould, *Obama Promises Solution to U.S. – Mexico Trucking Spat*, BLOOMBERG, Aug. 10, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601070&sid=aiVLrrhUWbiU.

85. Long-haul truck drivers who bring freight to the shipping terminals at the U.S. border describe their runs as "working on the blade of a knife" because of the dangers of Mexican highways. *See* Jesse Katz, *Working on the Blade of a Knife*, LA TIMES, Mar. 18, 1996, *available at* http://articles.latimes.com/1996-03-18/news/mn-48410_1_el-reverendo.

86. Dana Gabriel, *Ending NAFTA Inspired Trucking Program Could Spark Retaliation*, BORDERFIRE REPORT, Mar. 11, 2009, *available at* http://www.borderfirereport.net/dana-gabriel/ending-nafta-inspired-trucking-program-could-spark-retaliation.php.

87. Cordoba, *supra* note 79. *See also* Lois Romano, *Voices of Power: Interview of Ray LaHood, Secretary of Transportation*, WASH. POST, Apr. 24, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042401623.html.

88. *See* Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES IN L. 215 (2005); Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 4 (2003).

remedy the violation. Faced with higher tariffs, exporters are forced to lobby their government for the removal of the offending measure that led to the retaliation in the first place.

The effectiveness of retaliation usually depends upon a variety of factors: the amount of harm caused by the offense; the discrepancy in strength between the injured and offending parties' economies; and the degree of influence injured import groups have with the complaining government and targeted export groups have with the offending government. In trade disputes between large countries, the threat of retaliation in the same sector usually creates sufficient anxiety among targeted export groups to trigger a lobbying effort to remove the illegal restriction. At the same time, the injured state runs the risk of igniting a trade war should countermeasures provoke a hostile reaction within the offending state. Through the lens of game theory analysis, political leaders on both sides of a dispute must weigh the costs and benefits of retaliation before going down this road.

To mitigate the possibility of a trade war, there are strict guidelines for retaliation contained within the rules and procedures governing the settlement of disputes before the World Trade Organization (WTO) and NAFTA.[89] For instance, under both WTO and NAFTA rules, only a complaining party who has been injured can retaliate against the offending party.[90] This rule excludes Canada from being able to impose countermeasures against the United States for violating NAFTA's trucking regulations in the U.S.-Mexico cross-border trucking dispute. Moreover, countermeasures, if authorized, must be "equivalent" to the injury caused by the illegal measure and "related to" the same economic sector as the illegal measure.[91] For example, if State X violates a trade commitment to State Y by raising tariffs on $20 million worth of widgets (goods) from State Y, State Y may seek a judgment and authorization from a dispute settlement panel to impose approximately $20 million of retaliatory tariffs in the same sector (goods) against State X. This form of retaliation – same-sector retaliation – is the most frequently used remedy to resolve trade disputes.[92]

The procedure for implementing a WTO or NAFTA panel ruling is fairly straight-forward. Once a dispute is decided, the offending party has three options. First, it can ignore the ruling. Second, it can remove the offending

89. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [hereinafter DSU]. *See also* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1126 [hereinafter GATT]; *see also* NAFTA, *supra* note 14, art. 2019.

90. GATT, *supra* note 89, art. 22; *see also* NAFTA, *supra* note 14, art. 2019.

91. GATT, *supra* note 89, art. 22; *see also* NAFTA, *supra* note 14, art. 2019.

92. R.V. Anuradha, *WTO Gamble on Market Rights*, *WSJ*, LIVEMINT.com, Feb. 12, 2008, *available at* http://www.livemint.com/2008/02/12001523/WTO-gamble-on-market-rights.html.

restriction. Third, it can continue the violation while compensating the complainant.[93] If the offending party chooses the first option, the injured party may request enforcement authority – i.e., countermeasures. Typically, once countermeasures have been authorized, the injured state announces a list of potential products to be targeted from the offending state. The goal of retaliation is not to make the injured party whole, but to induce the offending party to remove the offending measure.[94]

During the past fifteen years, hundreds of trade disputes have been lodged with the WTO and NAFTA but only a few have reached the stage of authorized retaliation.[95] Generally, an offending party will withdraw, or modify, the restrictive measure before the dispute reaches this final stage. A major reason for the high level of compliance has been the heavy-handed nature of the retaliation remedy. The mere threat of retaliation by the injured state forces the offending government to consider the interests of those targeted by the retaliation and the political costs associated with both compliance and noncompliance. In most cases, the offending state will remove the restrictive measure aimed at protecting certain import groups if the cost of maintaining the measure will be felt by domestic export interests.

One of the most notable cases involving "same-sector" retaliation was the WTO dispute between the European Union (EU) and the United States over the U.S. imposition of steel tariffs in 2002. At the time, the U.S. steel industry had been lobbying the Bush administration for an increase in steel tariffs to protect it from foreign competition and provide it time to restructure its domestic operations. Hoping to shore up support in steel producing swing states such as Pennsylvania, Ohio, and West Virginia, the Bush administration announced tariffs up to 30 percent on imported steel for three years.[96] The EU, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil filed actions with the WTO seeking the removal of the tariffs on various legal grounds, including violations of the Agreement on Safeguards and Article XIX:1 of GATT 1994.[97]

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93. NAFTA Chapter II deals with investment disputes between the members. Article 1110 provides compensation as a remedy to expropriation. NAFTA, *supra* note 14, art. 1110.

94. Alexander, *supra* note 3, at 487.

95. *See generally* Alexander, *supra* note 3.

96. The U.S. imposed 30% tariffs on most flat-rolled steel products and 15% tariffs on rebar and stainless steel. *See* Presidential Proclamation No. 7529, 67 Fed. Reg. 10,553 (Mar. 7, 2002); *see also Bush Slaps Tariffs on Steel*, THE VICTORIAN ADVOCATE, Mar. 6 2002,16A. President Bush had followed the International Trade Commission's recommendation from 2001 to impose significant tariffs of between 20% and 40% on 17 steel products for three years in order to remedy the steel crisis in the US. M. Gyorffi, European Parliament: Common Policies, Steel Industry (Sept. 2006), *available at* http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=en&id=74&ftuId=FTU_4.8.2.html. Under WTO rules, countries can impose temporary increases in tariffs, known as safeguards, to give time for a domestic industry to restructure to improve competitiveness.

97. Summary of Dispute, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm

On July 11, 2003, a WTO panel found that the U.S. safeguard measures at issue were inconsistent with WTO rules and requested the U.S. to bring its measures into conformity with its obligations under the agreement.[98] On appeal, the WTO Appellate Body upheld the panel's decision and the EU threatened to retaliate if the United States did not comply with its WTO obligations by December 5, 2003.[99] The EU had drawn up a list of U.S. products targeted with higher import duties and submitted that list to the White House.[100] The day before the deadline arrived, the United States withdrew the tariffs.[101]

The EU's carefully targeted sanctions approach was the main reason the Bush administration decided to withdraw the steel tariffs. Rather than hit a wide range of products, the EU had focused on a discrete set of industry groups from political swing states who could potentially mobilize quickly during an election year.[102] For example, the EU list included 100% tariffs on fruit juices from Florida, t-shirts from South Carolina, and apples from Washington, all of which were critical swing states during the 2004 presidential election.[103] The EU's objective was to mobilize specific export groups to lobby the Bush administration for the removal of the steel tariffs.[104] The Bush administration capitulated because the political cost of losing support in these states one year before the presidential election was far greater than maintaining the restrictive measures on behalf of the steel industry. Though retaliation had never been authorized in this case, the EU's mere threat to seek that authorization and impose sanctions proved just as effective.

[hereinafter Steel Dispute Summary] (last updated Feb. 24, 2010).

98. Panel Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products - Final Reports of the Panel*, WT/DS248/R (July 11, 2003).

99. Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products* - AB-203-3 - Report of the Appellate Body, WT/DS248/AB/R (Nov. 10, 2003). The EU threatened to retaliate against $2.2 billion worth of U.S. goods unless the U.S. withdrew the steel tariffs by 5 December 2003. *See* Joel Roberts, *Bush Drops Steel Tariffs: U.S. Steelmakers Denounce Move; EU Ends Threat of Sanctions*, CBSNEWS.COM, Dec. 4, 2003, *available at* http://www.cbsnews.com/stories/2003/12/04/politics/main586980.shtml?tag=mncol;lst;4.

100. As a response to the US tariffs, a Resolution of the ECSC Consultative Committee was adopted unanimously in April 2002. The Consultative Committee, whilst recognizing that the US steel industry is faced with economic, social and regional problems, firmly contested that these problems were caused by imports. Council Regulation (EC) No 1031/2002 established additional customs duties on imports of certain products originating in the U.S. Additional duties of 100% were imposed on certain products such as dried vegetables, fruits, juices and clothing. Gyorffi, *supra* note 96.

101. *See* Steel Dispute Summary, *supra* note 97.

102. *See* Council Regulation 1031/2002 of 13 June 2002 Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America, 2002 O.J. (L 157) 8.

103. *Id.*

104. *See* Roberts, *supra* note 99.

The effectiveness of the retaliation remedy in the U.S.-EU steel dispute can be attributed to the role that domestic interest groups play in the political process. Business- conflict theorists argue that the most important domestic groups affecting government policy in the trade realm are multinational corporations who tend to be outward-looking/export-oriented in nature.[105] The goal of retaliation is for the injured state to inflict sufficient harm on the offending state's key export groups so that they, in turn, will pressure their government to remove the offending restriction supported by import-oriented groups. This is precisely what the EU did to compel U.S. compliance with WTO rules in the steel dispute. By strategically targeting products in politically sensitive states, the EU was able to create pressure on the Bush administration to change its policy. But what if the injured state is much weaker than the offending state, and, therefore, incapable of effectively imposing same-sector retaliatory tariffs to bring about a change in policy?

B. Cross-Sector Retaliation as an Alternative Remedy

A criticism of the current dispute settlement system under the WTO is that "same-sector retaliation" is less effective in resolving asymmetric disputes between unequal states – the classic case of David v. Goliath.[106] According to the argument, compliance is less likely to occur if an injured state cannot bring

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105. For perspectives on business conflict or interest group models, *see generally* HELEN MILNER, RESISTING PROTECTIONISM: GLOBAL INDUSTRIES AND THE POLITICS OF INTERNATIONAL TRADE (1998); Jennifer Sterling-Folker, *Realist Environment, Liberal Process and Domestic-Level Variables*, 41 INT'l. STUD. Q. 1 (1997); ROBERT BALDWIN, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY (1996); David Skidmore, *The Business of International Politics*, 39 MERSHO STUD. REV. 246 (1995).

106. Joseph Stiglitz and Andrew Charlton point out that developing countries are at a disadvantage in the WTO dispute settlement system because they cannot afford the cost of complex legal proceedings and are less likely to be able to impose 100 percent ad valorem tariffs, or other countermeasures, on products from from a large offending state. JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT 84 (2005); *see also* Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L. L. & COM. REG. 515, 526-27 (2005); Douglas Ierley, *Defining the Factors That Influence Developing Country Compliance and Participation in the WTO Dispute Settlement System: Another Look at the Dispute Over Bananas*, 33 LAW & POL'Y INT'L. BUS. 615, 616-17 (2002); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L. L. 792, 792, 832 (2001); Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 134 (2001); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules - Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000); Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL'Y INT'L. BUS. 709, 712-13, 729 (2000); Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L. L. REV. 1223, 1226 (1999); Kofi Oteng Kufuor, *From GATT to the WTO: The Developing Countries and the Reform Procedures for the Settlement of International Trade Disputes*, 31 J. WORLD TRADE 117, 132-40 (1997).

sufficient pressure to bear on key export groups in the same sector to effectuate a change in policy. Thus, to promote compliance, the injured state should be allowed to engage in cross-sector sector retaliation if particular export-oriented groups in another sector are better able to persuade their government to remove an offending restriction. Cross-sector retaliation helps to level the playing field between large and small states by giving small complainants the flexibility to apply pressure in areas that might inflict more harm on a large state, thus improving the chances of compliance.[107] Today, there is a growing list of cross-sector retaliation cases in international economic relations, the latest being Mexico's decision to employ this remedy against the United States in the cross-border trucking dispute.

1. The Bananas Case (Ecuador v. EU)

The EU Banana Import Regime was the first test case for cross-sector retaliation. The EU had been discriminating against banana imports from Central America while providing ex-colonies in Africa, the Caribbean and the Pacific with preferential access to EU markets for their banana exports.[108] In 1996, the United States, Ecuador, Honduras, Guatemala and Mexico filed a joint complaint in the WTO challenging the legality of the EU banana import policy.[109] A dispute settlement panel and the WTO Appellate Body ruled that the EU banana regime violated WTO rules and ordered the EU to modify the regime or face retaliation from the complainants.[110] Following a stand-off between the parties, the WTO eventually authorized the United States and Ecuador to impose retaliatory tariffs against EU products in the amount of $191.4 million and $201.6 million per year, respectively.[111]

Following the ruling, Ecuador requested authorization to suspend trade concessions in different sectors of the EU economy, including goods, services, and intellectual property.[112] This was the first time that a developing country had requested cross-sector retaliation as a remedy under the WTO dispute

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107. Alexander, *supra* note 3, at 506-07.

108. The EU's tariff quota system granted selected import licenses to preferred former colonies in Africa, the Caribbean, and the Pacific ("ACP countries") and restricted imports of bananas from Central America. U.S. banana distributors, such as Chiquita Brands International, Inc., lobbied for the removal of the quota system following a loss of profits resulting from the exclusion of Central American bananas from the EU market.

109. Summary of Dispute, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27, *available at* http://www.wto.org/english/tratop_E/dispu_e/cases_e/ds27_e.htm [hereinafter Bananas Dispute] (last updated Feb. 24, 2010).

110. *Id.*

111. *Id.*

112. In November of 1999, Ecuador requested authorization to retaliate against the EU in the amount of $450 million per year. Frances Williams, *Ecuador seeks to retaliate in banana dispute*, FIN. TIMES, Nov. 20, 1999, at 7.

settlement system.[113] As the world's largest producer of bananas, Ecuador was the injured party most affected by the EU's discriminatory import policy. The WTO agreed with Ecuador's position that the EU policy violated both the General Agreement on Tariffs and Trade (GATT) and the WTO Agreement on Import Licensing.[114]

In an unprecedented decision, the arbitrators granted Ecuador the right to cross-retaliate against $201.6 million in EU goods, services, and intellectual property per year pursuant to the GATT, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).[115] The decision acknowledged the fact that Ecuador was a small trading partner of the EU, and therefore would be limited in its capacity to obtain EU compliance through the imposition of tariffs in the goods sector alone. For the EU, countermeasures in the service sector, where seven out of ten Europeans are employed, were bound to stir up controversy. Thus, by the time Ecuador and the U.S. had prepared their sanctions list, the EU had agreed to reform its banana import regime.[116]

The outcome in the *Bananas* case is inconsistent with the conventional wisdom concerning the powerlessness of developing countries in asymmetric trade disputes. The EU, faced with authorized sanctions in more than one sector, agreed to reform its banana import policy rather than risk a backlash from affected service sector export interests back home. Until the *Bananas* case, weaker WTO members had been reluctant to request authorization to retaliate against a more powerful member. These weaker members were concerned that sanctions would have little impact or cause the stronger members to cut off aid or suspend certain preferential trading arrangements.[117] By allowing Ecuador to retaliate against the EU under GATS and TRIPs, the WTO granted this weaker nation the means to effectively pressure the world's largest regional trade bloc to comply with its WTO obligations.

The United States also acted on its authority to retaliate against the EU in the *Bananas* case, imposing $191.4 million worth of sanctions on a variety of EU products.[118] U.S. import duties were strategically targeted toward key

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113. *Id.*

114. For dispute settlement panel report, see Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Complaint by Ecuador*, WT/DS27/R/ECU (May 22, 1997). For Appellate Body Report, see Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

115. Frances Williams & Edward Alden, *Ecuador sanctions plea backed*, FIN. TIMES, Mar. 18, 2000, at 2.

116. *See* Movsesian, *supra* note 88, at 15; *see also* The EU Banana Regime, text from the UK Government Briefing (DEFRA) on Agriculture and Rural Development Committee, Nov. 30, 2001, *available at* http://www.erylmcnallymep.org.uk/eu_banana_regime.htm.

117. *See* Liz Harper, *Challenges for Poorer Nations at the WTO*, online newsletter, Sept. 2003, *available at* http://www.pbs.org/newshour/bb/international/wto/case_study.html.

118. *Id.*; *see also* Brimeyer, *supra* note 106, at 152-53.

export groups who could bring maximum pressure to bear on Brussels to modify the EU banana import regime. Under a newly enacted "carousel" provision, the U.S. government imposed tariffs on a rotating basis against a discrete set of EU industries every six months.[119] One of these industries was the Scottish cashmere industry.[120] Another targeted group was the Italian handbag industry.[121] Eventually, the EU agreed to bring its banana import regime into compliance with WTO rules.[122] Thus, the *Bananas* case illustrates the effectiveness of the retaliation remedy and demonstrates how the strategic targeting of countermeasures by an injured party against a cross-section of interest groups can bring about compliance with the law.

2. *The Online Gambling Dispute (Antigua v. U.S.)*

Another example of cross-sector retaliation in an asymmetric dispute was the online gambling case between the United States and Antigua. In 2003, Antigua, with a population of 70,000 and a Gross Domestic Product (GDP) of under $1 billion, filed a WTO complaint[123] against the United States over the U.S. prohibition of foreign-based online casinos.[124] Antigua alleged that the United States violated its obligations under GATS by allowing domestic companies to offer online gambling service to its own citizens while shutting its border to overseas Internet gambling services.[125] In particular, the provisions at issue were GATS Articles II, VI, VIII, XI, XVI, and XVII, as well as the U.S. Schedule of Specific Commitments annexed to the GATS.

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119. The Trade and Development Act of 2000 (the "Carousel Legislation Act") requires U.S. trade officials to revise the list of products subject to retaliation periodically. Congress enacted it in order to pressure foreign governments to remove offending trade measures and comply with WTO rules. 2000 § 407(2), 19 U.S.C. § 2416(b)(2)(B) (2000).

120. *See* Press Release 99-17, U.S. Trade Representative, United States Takes Customs Actions on European Imports (Mar. 3, 1999), *available at* www.ustr.gov/releases/1999/03/99-60.pdf.

121. *See* James Blitz & Frances Williams, *Italians urge EU to retreat in bananas dispute with the U.S.*, FIN. TIMES, Jan. 27, 1990, at 6; *see also* Nzilibe, *supra* note 88, at 226.

122. *See* Bananas Dispute, *supra* note 109.

123. Summary of Dispute, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Jan. 21, 2009) [hereinafter Online Gambling Dispute]. The complaint was filed in the wake of the conviction of a U.S. citizen, Jay Cohen, who was convicted and sentenced to jail for operating an online gambling website based in Antigua. *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001).

124. Off-shore gaming enterprises claim that their industry creates jobs for residents of poor islands in the Caribbean, supposedly offsetting the negative effects of gambling addiction, tax evasion and money laundering associated with the economies of the Caribbean. *See* Gene Koprowski, *U.S. Misses Deadline in Online Gaming Dispute with Antigua*, CARIBBEAN NET NEWS, Apr. 20, 2006, *available at* http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000013/001317.htm.

125. The United States allowed several domestic gambling companies to offer online gambling to Americans (otherwise known as legal gaming operations) such as Native American casinos and riverboat gambling. *See* Emily Flynn Vencat, *The Caribbean Hold'Em*, NEWSWEEK, Oct. 1, 2007, *available at* http://www.newsweek.com/id/41719.

The WTO found in favor of Antigua at both the panel and the appellate levels.[126] First, it was determined that U.S. federal laws prohibiting online gambling violated the "market access" rules in GATS Article XVI.[127] Second, the WTO found that the United States had not demonstrated that its laws were applied consistently with the *chapeau* of Article XIV, which requires that measures found necessary to protect public morals not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services."[128] The WTO ordered the United States to bring its laws into conformity with the GATS or face the prospect of retaliatory sanctions. The U.S. refused to do so mainly because Antigua did not possess the economic muscle to impose meaningful sanctions against it in the same sector – services.[129]

The asymmetric nature of the U.S.-Antigua relationship prompted Antigua to pursue cross-retaliation as a remedy to compel U.S. compliance with its WTO obligations. On June 21, 2007, Antigua requested authorization from the WTO to cross-retaliate against the United States pursuant to Article 22.2 of the Dispute Settlement Understanding.[130] Specifically, Antigua sought to suspend its obligations under the WTO TRIPS Agreement on the basis that the United States is one of the leading producers of pharmaceuticals, movies, music and software technology. According to one Antiguan official, "selling legally pirated copies of Microsoft software and Disney movies — would get the attention of Hollywood and Silicon Valley."[131] The WTO agreed with Antigua that it had no effective remedy against the United States in the area of services, and therefore authorized Antigua to impose sanctions in the amount of $21 million under the TRIPS Agreement.[132] Antigua became known as the "Pirate of the Caribbean," setting aside domestic rules aimed at protecting patented products and copyrights produced by corporate giants like Eli Lilly and the Motion Picture Association of America.[133] According to one of the lawyers

126. Online Gambling Dispute, *supra* note 123; *see also* Shamnad Basheer, *Turning TRIPS on Its Head: An "IP Cross Retaliation Model"* Express O (2009), *available at* http://works.bepress.com/shamnad_basheer/1/.

127. Online Gambling Dispute, *supra* note 123.

128. *Id.*

129. In 2007, U.S. total GDP was $14.11 trillion and its per capita GDP was $46,800 compared to Antigua's total GDP of $1.57 billion and per capita GDP of $18,900, respectively. Central Intelligence Agency, *Antigua/Barbuda*, WORLD FACT BOOK (2009), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html.

130. Online Gambling Dispute, *supra* note 123.

131. Vencat, *supra* note 125.

132. James Kanter & Gary Rivlin, *In Trade Ruling, Antigua Wins a Right to Piracy*, N.Y. TIMES, Dec. 22, 2007, *available at* http://www.nytimes.com/2007/12/22/business/worldbusiness/22gambling.html?pagewanted=print.

133. Simon Lester, *WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments*, 12 ASIL INSIGHTS, Issue 5, Apr. 8, 2008, *available at*

representing Antigua, "[t]his is a landmark victory for Antigua as the first, and smallest, WTO member to defeat the United States, the largest member, in this well-respected international trade court."[134] The United States responded to the decision by invoking GATS Article XXI to withdraw its commitments on gambling services within the WTO framework.[135] The withdrawal of commitments prompted protests and accusations of bad faith within the WTO.[136]

Though the United States failed to relax its laws restricting overseas-based Internet gambling within its borders, the WTO decision was a significant victory for developing countries. It showed that a more flexible application of the retaliation remedy can give a smaller state power to strike back against a larger state in an asymmetric dispute. In the words of one former senior U.S. trade official, "[i]ntellectual property is the perfect sanction item because it gives small countries like Antigua absolute leverage."[137] Since the decision, the Motion Picture Association of America has been pressuring the U.S. Trade Representative to negotiate with Antigua to prevent bootlegging.[138] Moreover, the United States has entered into settlement agreements with the EU, Australia, Japan, Canada, India, Costa Rica, and Macau over its discriminatory online gambling policy.[139] Thus, like the *Bananas* case, the WTO recognized the imbalance of economic strength between the parties in the online gambling case and allowed the injured party to cross-retaliate in an industry sector where the larger state would feel the punch.

VI.
THE CROSS-BORDER TRUCKING DISPUTE AND STRATEGIC CROSS-SECTOR RETALIATION UNDER NAFTA

The NAFTA provisions governing retaliation are similar to the WTO's

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http://www.asil.org/insights080408.cfm; *see generally*, Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT'L ECON. L. 313 (2008).

134. *U.S. and Antigua Dispute WTO Ruling*, BBC NEWS Apr. 7, 2005, *available at* http://news.bbc.co.uk/2/hi/business/4422457.stm.

135. Under Article XXI, a Member may withdraw specific commitments, but must negotiate with "affected Members" over "compensation" for the withdrawn commitments. This procedure has only been invoked once before in a case involving EU GATS commitments in relation to EU enlargement. *See* Lester, *supra* note 133.

136. *See id.*

137. Vencat, *supra* note 125.

138. Bob Hartman, *Hollywood Urges US to Stop Internet Gambling Prohibition*, CASINO GAMBLING WEB, Sept. 16, 2007, *available at* http://www.casinogamblingweb.com/gambling-news/gambling-law/hollywood_urges_us_to_stop_internet_gambling_prohibition_46939.html; Vencat, *supra* note 125.

139. *See* Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, JOURNAL OF INTERNATIONAL COMMERCE AND ECONOMICS, U.S Trade Comm., July 2009, *available at* http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf.

provisions. NAFTA Article 2019(1) provides that a party "may suspend benefits of equivalent effect until such time as [the parties] have reached agreement on a resolution of the dispute."[140] In considering what benefits to suspend, an injured party should first "seek to suspend benefits in the same sector" as that affected by the restrictive measure.[141] If it is not practicable or effective to suspend benefits in the same sector, the injured party "may suspend benefits in other sectors."[142] The agreement further states that

> [o]n the written request of any disputing Party delivered to the other Parties and its Section of the Secretariat, the Commission shall establish a panel to determine whether the level of benefits suspended by a Party pursuant to paragraph 1 is manifestly excessive.[143]

A. Mexico's Use of Strategic Cross-Sector Retaliation Against the United States

Following the Obama administration's decision to suspend the 2007 pilot program, Mexico announced that it planned to cross-retaliate against the United States in the goods-sector alone to the tune of $2.4 billion.[144] Mexican officials claim that the tariffs are only imposed on products that have been shipped under the pilot program and hence fall within the same sector.[145] Some of the U.S. product groups facing import duties of 10-20 percent include Christmas trees, onions, pears, cherries potatoes, soy sauce, soup, mineral water, sunflower seeds, strawberries, wine, shampoo, toothpaste, deodorants, notebooks, coffee makers, sunglasses, almonds, beer, and batteries.[146] According to the U.S.

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140. NAFTA, *supra* note 14, art. 2019(1).

141. *Id.* art. 2019(2)(a).

142. *Id.* art. 2019(2)(b).

143. *Id.* art. 2019(3).

144. Similar to the disparity in the size of the parties' economies in the U.S.-Antigua Internet gambling dispute, the asymmetric nature of the U.S.-Mexico relationship has prompted Mexico to pursue cross-retaliation as a remedy to compel U.S. compliance with its NAFTA obligations. In 2007, Mexico's total GDP was $893 billion and its per capita GDP was $12,400. Central Intelligence Agency, *The United States*, WORLD FACTBOOK (2009), *available at* https://www.cia.gov/library/publications/the-worldfactbook/print/us.html. *Obama Criticized for Mexico, Brazil Sanctions*, REUTERS, Mar. 9, 2010, http://www.reuters.com/article/idUSTRE6283NR20100309; Ken Ellingwood, *Mexico levies higher tariffs on U.S. imports*, LA TIMES, Mar. 19, 2009, *available at* http://articles.latimes.com/2009/mar/19/world/fg-mexico-tariffs19.

145. Fruits and vegetables are the most common items on the list of 90 products targeted with tariffs.Thomas Black and Grayton Harrison, *Mexico Puts Tariffs on U.S. Goods in Truck Dispute*, BLOOMBERG.COM, Mar. 18, 2010, http://www.bloomberg.com/apps/news?pid=20601082&sid=aNMnPuyYFV5I&refer=canada.

146. Christopher Conkey, Jose de Cordoba & Jim Carlton, *Mexico Issues Tariff List in U.S. Trucking Dispute*, WALL ST. J., Mar. 19, 2009, at A7, *available at* http://online.wsj.com/article/SB123739445919172781.html; *see also* United States Dept. of Commerce, Int'l Trade Admin., *Mexico Retaliation List* (Mar. 16, 2009), *available at* http://www.ita.doc.gov/td/industry/otea/301alert/mx_ret.html [hereinafter Mexico Retaliation List];

Department of Commerce, the retaliatory tariffs "represent the lost income roughly equal to the losses Mexican officials claim to have suffered with the end of the demonstration program."[147] The Obama administration has repeatedly urged Mexico to hold off on the new tariffs, but to no avail.

The selection of a limited group of U.S. products reflects a calculated move by Mexican officials that this first round of retaliatory tariffs will spur U.S. business leaders to lobby Congress to restart the trucking program.[148] Moreover, officials claim to have targeted only specific exports from states whose political leaders have been opposed to the pilot program.[149] The selection of a limited group of U.S. products reflects a calculated move by the Mexican government to exert pressure on powerful Democratic lawmakers in key states who have influence with the White House.

In California, grape exporters have been hit under the Mexican Tariff List with a 45 percent tariff hike, by far the highest.[150] Currently, there are more than 550 grape producers based in California, and grape exports from this state have increased 36 percent in the last ten years.[151] California is also home to Senator Diane Feinstein, Senator Barbara Boxer and Speaker of the U.S. House of Representatives Nancy Pelosi. These three lawmakers helped to push through the FY 2009 omnibus spending measure, which cut funding for the pilot program.[152] Additionally, every California Democrat in the U.S. House and some House Republicans voted in favor of the omnibus spending bill. The Mexican tariffs are aimed at causing damage to California's wine producers who are now at a competitive disadvantage to other foreign producers for Mexican market share. "If you are a California wine producer, and you're competing against Chilean wine that's coming in duty free, you're screwed," said University of Arizona professor James E. Rogers. "Clearly, this was designed to bring about some specific pain."[153]

Diaro Oficial De La Federaciaon [D.O.], Tomo DCLXVI, No. 15, Mar. 18, 2009, p. 50-52 (in Spanish)[hereinafter DIARO OFICIAL].

147. U.S. Chamber of Commerce, North American Free Trade Agreement: *Mexico Cross-Border Trucking Fact Sheet*, *available at* http://www.uschamber.com/international/policy/nafta.htm.

148. Mexico has indicated that it might increase the number of products it has "slapped tariffs" on if this first retaliatory round does not produce results. Conkey, *supra* note 146.

149. *Id.*

150. Mexico Retaliation List, *supra* note 146.

151. *Grapes from California,* California Table Grape Commission, 2008, *available at* http://www.freshcaliforniagrapes.com/overview.php; *see also* Fresh Plaza: Global Fresh Produce and Banana News, International Promotions Increase California Grape Sales (Mar. 27, 2009), *available at* http://www.freshplaza.com/news_detail.asp?id=40765.

152. Both Senators Feinstein and Boxer voted for the 2009 omnibus-spending bill, and Speaker Pelosi had calendar authority to bring the bill to the House floor for a vote. *See U.S. Senate Roll Call Votes 111th Congress - 1st Session*, United States Senate, Mar. 10, 2009, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00096 [hereinafter Senate Roll Call Vote].

153. Brian J. Pedersen, *Mexican Tariffs Hit Southern Arizona Exporters*, ARIZ. DAILY STAR,

The state of Oregon, too, has been hit with Mexican import duties on a large scale. In 2008, Mexican consumers purchased approximately $748 million worth of goods from Oregon.[154] Mexico has targeted Oregon Christmas trees, pears, frozen potatoes, and cherries with 20 percent tariff hikes. It has also imposed a 10 percent levy on onions from the state.[155] U.S. Senators Jeff Merkey (D-Oregon) and Ron Wyden (D-Oregon) voted for the 2009 omnibus spending measure.[156] Moreover, in the House, all four Democrats from Oregon voted in favor of the bill.[157] Congressman Peter DeFazio (D-Oregon), a leading opponent to the 2007 pilot program, remarked:

> Virtually every member of Congress..., both Democrat and Republican, expressed serious concerns about this pilot program and the potential for compromised safety on our U.S. highways. I have always opposed NAFTA, and have long been alarmed at the prospect of Mexico-domiciled motor carriers operating beyond the current 20-mile commercial zone at our southern border. I am not confident that Mexican-owned trucking companies will meet U.S. safety and environmental standards.[158]

In an open letter to President Obama, Congressman DeFazio described Mexico's policy of cross-sector retaliation as "illegal" and "nothing more than political gamesmanship."[159]

Ohio is another strategically important state targeted by Mexican import duties. In 2006, 317,000 Ohio jobs were export-related, accounting for 6.7 percent of the state's private sector employment. [160] Some of the largest exports from the state are jellies and jams manufactured by Smucker's, Inc., and household products such as deodorants, shampoos, and other products manufactured by Proctor & Gamble Co.[161] The Mexican government has

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Mar. 19, 2009.

154. Robbie DeMesio, Mexico's new tariffs could cost Oregon millions, THE OREGONIAN, Mar. 18, 2009, *available at* http://www.oregonlive.com/business/index.ssf/2009/03/mexican_tariffs_will_cost_oreg.html.

155. *Id.*

156. Senate Roll Call Vote, *supra* note 152.

157. Office of the Clerk, Final Results for Roll Call 86, *available at* http://clerk.house.gov/evs/2009/roll086.xml (last visited Mar. 17, 2010); *see also* GovTrak, House Vote on Passage H.R. 1105 Omnibus Appropriations Act, 2009, http://www.govtrack.us/congress/vote.xpd?vote=h2009-86 (last visited Mar. 17, 2010) [hereinafter Final Results for Roll Call 86].

158. *DeFazio Examines Cross-Border Trucking in Hearing Today*, Press Release, U.S. Representative Peter DeFazio, Mar. 13, 2007, *available at* http://www.defazio.house.gov/index.php?option=content&task=view&id=274.

159. Eric Adams & Wayne Havrelly, *DeFazio Protests Mexican Tariffs on Oregon Products*, KGW.COM NEWSCHANNEL 8 PORTLAND, Aug. 15, 2009, *available at* http://www.kgw.com/news/national/59491417.html.

160. U.S. Dept. of Commerce, International Trade Administration: Industry Trade Data and Analysis, Employment Related to Manufactured Exports (2006), *available at* http://www.trade.gov/td/industry/otea/jobs/Reports/2006/jobs_by_state.html.

161. *Id.*

imposed a 20 percent tariff on preserved fruit, which is a key ingredient of Ohio-produced jellies and jams, and a 15 percent duty on household products.[162] Exports of paper products, including self-copy paper, notebook paper, and bathroom tissue also have been targeted with a 10 percent tariff increase, affecting major producers such as Ohio-based Chillicothe Paper Products, which has annual sales of $338 million.[163] Senator Sherrod Brown (D-Ohio), a longtime opponent of NAFTA, voted in favor of the 2009 omnibus spending measure.[164]

To the surprise of many officials, products from North Dakota also were included on the Mexican Tariff List. North Dakota has very little trade with Mexico compared to other states, and its exports of sunflower seeds, oil, and soy products account for fewer jobs than other products targeted under the Mexican Tariff List. Nevertheless, Mexico has levied a 20 percent tariff on soy products and 15 percent duties on sunflower seeds and oilcake residue.[165] North Dakota was targeted because its entire Democratic delegation – Senator Kent Conrad, Senator Byron Dorgan, and Congressman Earl Pomeroy – voted for the 2009 omnibus spending measure.[166] As discussed above, Senator Dorgan has led the charge against the pilot program since its inception. Shortly after voting for the 2009 omnibus spending measure, he declared:

> Tonight's vote is a victory for safety. It also represents a turning of the tide on the senseless, headlong rush this country has been engaged in for some time, to dismantle safety standards and a quality of life it took generations to achieve. It also rejects the Administration's action to push a program many of us believe would compromise the safety of American drivers. Tonight, commerce - for a change - did not trump safety. Because my amendment is identical to language already included in the House-passed version of this bill, I expect this provision will not be altered in the House-Senate conference committee and that we have, effectively, stopped this pilot program. I thank every Senator who voted tonight to stand up for the safety of American drivers on America's roadways.[167]

The *Wall Street Journal* later questioned a Mexican official about Senator Dorgan's remarks after the release of the Mexican Tariff List, and that official explained "[t]here was no way for us to be tougher on his state without hurting Mexican consumers."[168]

Other states with powerful Democratic lawmakers have been targeted as well. In Illinois, home to President Obama, shampoo and sunglasses have been

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162. Mexico Retaliation List, *supra* note 146.

163. Jonathan Riskind, *Mexico vs. Brown*?, TRADE OBSERVATORY, Mar. 30, 2009, *available at* http://www.tradeobservatory.org/headlines.cfm?RefID=105616.

164. Senate Roll Call Vote, *supra* note 152.

165. Mexico Retaliation List, *supra* note 146.

166. Senate Roll Call Vote, *supra* note 152; Final Results for Roll Call 86, *supra* note 157.

167. Press Release, Byron Dorgan, Statement by U.S. Senator Byron Dorgan on Vote to Stop Mexican Truck Pilot Program (Sept. 11, 2007), *available at* http://dorgan.senate.gov/newsroom/record.cfm?id=282361.

168. Conkey, *supra* note 146.

hit with 15 percent duties.[169] Printed books from New York (home to Secretary of State Hillary Clinton) and bowling equipment from Nevada (home to Senate Majority Leader Harry Reid) have been targeted with tariff hikes.[170] In Connecticut, Duracell - one of America's premier battery companies - has been targeted with a 20 percent import duty on primary batteries, electric storage batteries, spent primary batteries, and spent electric storage batteries.[171] Most of the Congressional delegation from Connecticut voted in favor of the 2009 omnibus spending measure, including Democratic Steering Committee Chairwoman Rosa DeLauro.[172] These officials play an important role in shaping U.S. foreign policy towards Mexico. Ricardo Alday, spokesman for the Mexican Embassy in Washington, D.C., stated that pressuring key U.S. lawmakers "is one of the main considerations, but it is not the only one."[173]

Mexican officials have been cautious not to allow the trucking dispute to exacerbate problems in areas affected by the global economic downturn. Specifically, Mexico left untouched the largest U.S. exports to Mexico, such as auto parts and appliances which could have caused further damage to troubled companies such as Ford and Whirlpool from Michigan. In addition, they have avoided placing duties on food products most vital to Mexican consumers such as chicken, pork, and beef.[174] Mexican officials would prefer that Congress restart the trucking program without a trade war that could prove costly to Mexico as well.[175] Jorge Montano, former Mexican ambassador to the United States, declared that "[g]oing to commercial war is a ridiculous thing which hurts both sides."[176]

B. Strategic Cross-Sector Retaliation and U.S. Compliance with NAFTA

In the limited number of cases in which strategic cross-sector-retaliation has been applied by an injured party, the offending party has either withdrawn or modified the offending restriction rather than risk incurring the pain of targeted sanctions. The disputes over steel, bananas, and off-shore Internet gambling have shown that no matter how weak the injured party may be, a powerful player in the international system can be forced to alter its protectionist policies if economic sanctions are pinpointed to inflict maximum harm. Cross-sector

169. *Id.*

170. *Id.*

171. *Id.*

172. GovTrack, House Vote On Passage: H. Res. 184: Providing for consideration of the bill (H.R. 1105) making omnibus appropriations for the fiscal year ending September 30, 2009 and for other purposes (Feb. 25, 2009), *available at* http://www.govtrack.us/congress/vote.xpd?vote=h2009-85.

173. Conkey, *supra* note 146.

174. *Id.*

175. *Id.*

176. *Id.*

retaliation's record of success in the WTO is at the heart of Mexico's decision to utilize this remedy to pressure the United States to comply with its NAFTA obligations. Thus far, this approach has had some impact on the political climate in Washington, D.C., prompting calls from Republican members of Congress for an immediate solution to the problem.

There are signs that the Obama administration would prefer to reopen the border to Mexican trucking rather than risk incurring further sanctions from Mexico and alienating powerful lawmakers on Capitol Hill.[177] During a recent "Three Amigos" summit between the United States, Mexico and Canada in Guadalajara, President Obama told Mexico's president Felipe Calderon that he is committed to resolving the trucking dispute and would work "to try to move forward" with a new trucking program.[178] However, no specific plan or time frame was discussed. In addition, Transportation Secretary Ray LaHood has been meeting with members of Congress in an effort to craft legislation that would reopen the border to Mexican trucking.[179] The administration has urged Mexican officials to hold off on the new tariffs until this new legislation is put in place.

It has been a long and difficult road for the U.S.-Mexican relationship on the issue of cross-border trucking rights, but it appears that this road is coming to an end. Based on recent statements by President Obama and members of his Cabinet, it is only a matter of time until the United States brings its cross-border trucking policy in line with NAFTA. Eventually, both sides will claim victory once the dispute is resolved. But the reason for the change in U.S. policy should be attributed to the power of strategic cross-sector retaliation as a tool to promote compliance with international trade agreements.

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177. *See Low Expectations Exceeded, supra* note 73.

178. CBS/AP, *Obama, Calderon Meet in Mexico*, CBSNEWS, Aug. 9, 2009, *available at* http://www.cbsnews.com/stories/2009/08/09/world/main5228536.shtml. *See also* Nicholas Johnston & Jens Erik Gould, *Obama Promises Solution to U.S.-Mexico Trucking Spat*, *supra* note 84. The summit was overshadowed by larger security issues, including mounting drug violence along the border, the outbreak of H1N1 influenza and the poor state of the U.S. and Mexican economies. Mexico is floundering in its attempt to deal with its violent drug war, which has claimed more than 6,000 lives. There have been numerous Congressional hearings in Washington, D.C. over how to prevent the spread of violence across the border into Texas, Arizona, California and New Mexico. Texas Governor Rick Perry has been urging President Obama to deploy U.S. troops to the border. *See Taking on the Narcos, and Their American Guns*, THE ECONOMIST, Apr. 4, 2009, at 42-43. Moreover, Obama, Calderon and Canadian Prime Minister Stephen Harper have pledged further cooperation to handle an expected new wave of swine flu cases this fall. *See Calderon's Hatful of Troubles*, THE ECONOMIST, July 11, 2009, 37-38, *available at* http://www.highbeam.com/doc/1G1-203294142.html; Steve Holland & Patricia Zengerle, *"Three Amigos" Talk Trade, H1N1 and Drugs in Mexico*, REUTERS, Aug. 10, 2009, *available at* http://www.reuters.com/article/idUSN10470175.

179. *See Obama Promises Solution to U.S.-Mexico Trucking Spat, supra* note 84.

VII.
CONCLUSION

Mexico's recent decision to employ strategic cross-sector retaliation against the United States in response to the U.S. suspension of the 2007 Cross-Border Trucking Development (Pilot) Program is a significant development in NAFTA relations. Never before has a NAFTA member imposed sanctions in this way to pressure a fellow member to comply with its NAFTA obligations. To date, this remedy has been utilized only in two WTO cases – the EU-Ecuador Bananas case and the U.S.-Antigua online gambling case - to promote compliance with international trade rules. In both of these asymmetric disputes, the larger state either withdrew the offending trade measure or modified its commitments to avoid the political fallout of targeted sanctions back home in unrelated industry sectors. The WTO's record of success at this final stage of dispute resolution underpins the Mexican government's decision to utilize this remedy under NAFTA. Mexico's hope is that targeted import duties on selected goods in key Democratic states will result in sufficient pressure on Congress and the White House to restart the trucking program without igniting a trade war. This is a risky move, but all signs indicate that the U.S. government is moving closer to bringing its cross-border trucking policy in line with NAFTA.