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I. Introduction

The air transport world’s priorities have been significantly affected by a number of factors in recent years including the tragic September 11,
2001 World Trade Center and Pentagon events, the Iraq war, the SARs scare, macroeconomic slowdowns, and soaring fuel costs. These crises have resulted in the air transport industry having to manage declining traffic and revenues, skyrocketing costs, and ultimately significant airline consolidation, restructuring, and bankruptcies.

“Survival” and “security” have become the principal catchwords of today’s commercial air transport industry as concerns about the continuing and obvious crisis in aviation “safety” appear to have been put on the backburner. Given fixed and sometimes declining budgets, States and airlines must select priorities – if more money is spent on aviation security and airline survival, necessarily less money may be spent elsewhere, as on improving aviation safety.

A particularly striking reality is that aviation-associated deaths are disproportionately caused by safety related problems as compared to security deficiencies. This discrepancy is powerfully demonstrated in a study a few years ago prepared by the International Civil Aviation Organization (“ICAO”). In the ten year period of 1992-2001, aviation accident-related deaths due to safety problems (for example, controlled flight into terrain caused 33.77 percent of such deaths) were about ten times more likely than deaths due to security breaches (3.87 percent of deaths were caused this way—this includes passenger and crew deaths of the aircraft not only in the September 11, 2001 events but also in the inadvertent shooting down of a plane over the Ukraine in that same year). 1

National, regional, and international political and economic interventions and shocks are constantly disturbing the balance among the priorities of survival, security, and safety. Most countries are concerned with the survival of their principal carriers – whether publicly or privately owned—although with liberalization, increasingly less so. However, different priorities are attached to aviation safety and security. On one hand, most developing and less developed countries (“LDCs”) consider aviation “safety” issues of paramount importance. On the other hand, the developed countries tend to attribute more significance to aviation “security.”

On the international level, the ICAO is a United Nations specialized agency that has tried to balance both the safety and security priorities of its 188 developed and developing Member [Contracting] States. This has been done so that the ICAO may satisfy its responsibility—under the Chicago Convention of 1944 2—to insure the “safe and orderly growth of

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1. Culled from a presentation at an ICAO seminar regarding statistics accumulated by the ICAO, Accident Reporting, Air Navigation Commission Briefing 3 (June 6, 2002).
international civil aviation throughout the world.” The article focuses on the safety side of the ICAO’s challenges with respect to the process of making the International Financial Facility for Aviation Safety (“IFFAS”) an operational and effective mechanism since June 2003.

This article will examine the role of the IFFAS assisting certain LDC countries and regions that lack the financial resources to remedy aviation safety deficiencies identified by the USOAP mechanism. Our discussion will be divided into five parts.

- The problem: Non-remedied safety aviation deficiencies
- Solutions: Existing mechanisms to help solve the problem
- The IFFAS: Structure and procedures
- The IFFAS: Funding mechanisms
- The IFFAS: Nature and Scope of the assistance provided
- Conclusion

II. The Problem: Non-Remedied Aviation Safety Deficiencies

Most commentators will agree that aviation safety should remain a

named the International Civil Aviation Organization is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.” Id. at art. 43. The ICAO decision-making process includes three principal levels:

1. The Assembly may establish a policy priority by resolution. The Assembly, composed of representatives from all Contracting States, is the sovereign body of ICAO. It meets every three years, reviewing in detail the work of the Organization and setting policy for the coming years. It also votes a triennial budget. See id. at arts. 48-49.

2. The ICAO Council deliberates on and formulates the structures and/or rules based on this resolution. This is the governing body which is elected by the Assembly for a three-year term, is composed of thirty-three States. The Assembly chooses the Council Member States under three headings: States of chief importance in air transport, States which make the largest contribution to the provision of facilities for navigation, and States whose designation will ensure that all major areas of the world are represented. As the governing body, the Council gives continuing direction to the work of ICAO. It is in the Council that Standards and Recommended Practices are adopted and incorporated as Annexes to the Convention on International Civil Aviation. See id. at arts. 50, 54, 57.

3. The Secretariat supports both the Assembly and the Council through research and implementation. The Secretariat, headed by a Secretary General, is divided into five main divisions: the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Bureau, and the Bureau of Administration and Services. See International Civil Aviation Organization, About ICAO—How It Works, at http://www.icao.org/cgi/goto_m.pl?icao/en/howworks.htm.


3. Chicago Convention, supra note 2, at art. 44(a).

principal concern of responsible authorities. Most countries—developed, developing, and less developed countries—acknowledge that there is an acute need to help Less Developed Countries remedy aviation safety deficiencies since their resources, financial and otherwise, are insufficient. However, States and their domestic air transport industries disagree as to what mechanisms and procedures are preferred to meet this need. Internationally, the ICAO developed the IFFAS mechanism to address this real problem.

A. THE PROBLEM

All States—developed and developing/LDC—have two important reasons for remedying the aviation safety deficiencies of developing and LDC countries. First, passengers and third parties on the ground—irrespective of citizenship—are at risk of death or injury through aircraft accidents and crashes anywhere in the world. Accordingly, some have stated that civil aviation safety is an indivisible and global regime such that any recognized aviation safety deficiency in one country threatens the safety of the entire global civil aviation system.

Statistical evidence supports this proposition. Internationally, if the aviation accident rate is assumed to be held constant, at the 1996 level, and projected growth rates double traffic volume over the next ten to twelve years, it is projected that by 2015 there may be a serious accident every week. Regionally, one study indicates that the developed regions of North America, Western Europe, and Australia have the lowest fatal aviation accident rates, while developing countries have much higher accident rates. For example, airlines of Eastern Europe and the Commonwealth of Independent States have the highest accident rate (indeed, fifty times higher than Western Europe). Moreover, airlines from Africa, Asia, and Central/South America have accident rates at least twice as high as the world average. Thus, it is evident that passengers and third parties on the ground are at risk by developing/LDC countries’ air-

5. Interview with Taieb Cherif, Representative of Algeria on the Council of ICAO (May 10, 2002 & Jan. 14, 2003). It should be noted that Dr. Cherif assumed the position of Secretary-General of the ICAO on August 1, 2003, succeeding Mr. Renato Claudio Costa Pereira.
6. Id.
7. COMMISSION OF THE EUROPEAN COMMUNITIES, A EUROPEAN COMMUNITY CONTRIBUTION TO WORLD AVIATION SAFETY IMPROVEMENT 3 (July 16, 2001) [hereinafter EU CONTRIBUTION] (quoting David Hinson, FAA Administrator).
8. Id. at 13 (reproducing a chart from AIRCLAIMS LIMITED, SPECIAL REPORT FOR IAPA: STUDY OF FATAL ACCIDENT DATA, PASSENGER FLIGHTS FOR AND NUMBER OF FLIGHTS, FIVE YEAR ROLLING AVERAGE, WESTERN-BUILT JET AIRCRAFT 1989 TO 1998 (Feb. 4, 1999)). The period referred to here is 1994 to 1998.
9. EU CONTRIBUTION, supra note 7, at 3.
10. Id. at 13.
craft and aviation infrastructure deficiencies. Developed country aircraft operators and citizens not only fly internationally to developing/LDC country destinations, but developed country airports also receive flights from developing/LDC country aircraft operators.¹¹

A second reason for improving aviation safety in developing/LDC States is that global economic development is closely related to a vibrant transportation industry and, more specifically, a vital air transport industry, particularly. Notably, air transport permits billions of developed country tourists to travel to developing/LDC countries, thereby accelerating their economic development specifically¹² and contributing to the over $3.5 trillion USD to the travel and tourism industry, about twelve percent of the world’s Gross Domestic Product (GDP).¹³ Furthermore, global markets require fast and efficient transportation of not only perishable goods from the developing/LDC countries to the developed countries, but also finished products sent from the developed to developing countries.¹⁴ Needless to add, the air transport industry and economic development depends on the traveling public’s confidence that air travel is safe.¹⁵

B. THE USOAP IDENTIFIES THE EXTENT OF THE PROBLEM

The world has become aware of the extent of aviation safety deficiencies, particularly among certain developing and LDC countries, largely because of the Universal Safety Oversight Audit Programme ("USOAP")¹⁶ of the ICAO. This process has involved three main

¹¹ Id. at 5.
¹² Id. at 6.
¹⁴ Eu Contribution, supra note 7, at 6.
¹⁵ Id.
¹⁶ ICAO’s mandatory USOAP regime was created in November 1998. In the following three-year period, the ICAO Assembly mandated initial audits, conducted under the auspices of ICAO’s Air Navigation Bureau, that were to verify State compliance (i.e., effective implementation) of the Standards and Recommended Practices (SARPs) in three Annexes concerned largely with the aircraft itself: Annexes One (personnel licensing), Six (flight operations), and Eight (aircraft airworthiness including design, certification, and maintenance). Id. at 16. The USOAP reinforces preliminary evidence of aviation safety deficiencies provided by other programs.

The first audits/assessments were those of the United States’ Federal Aviation Administration International Aviation Safety Assessment (IASA) program initiated in 1992. By the end of the 1990s, the IASA had determined that over forty percent of the countries assessed had insufficient oversight systems. Id. at 14.

This Program continues to assess whether a non-US Civil Aviation Authority (CAA) complies with international (ICAO) standards for aviation safety oversight of the air carriers under its authority. The FAA is evaluating the safety oversight system of each country, not the safety of
elements.

First, in order to achieve the required minimum levels of aviation safety globally, ICAO has established a broad range of standards and recommended practices (SARPs),\textsuperscript{17} guidelines and procedures that it expects will be implemented by airlines, airport authorities, air navigation services, government authorities, and other concerned entities.\textsuperscript{18}

Second, the USOAP was developed as a response to concerns about gaps in worldwide compliance with these minimum international aviation safety standards and recommended practices. The ultimate objective of the USOAP is to promote global aviation safety consistent with the ICAO’s broader Global Aviation Safety Plan (GASP).\textsuperscript{19} The USOAP is its individual airlines. It assesses only whether the oversight system is adequate to ensure that ICAO minimum standards are met, not the higher standards applicable in the U.S., the European Community, and some other countries. For a more in depth explanation, see id.

A significant regional mechanism is the European Safety Assessment of Foreign Aircraft (SAFA) Program, established by the European Civil Aviation Conference (ECAC) and Europe’s Joint Aviation Authority (JAA) with support from the European Commission. Id. at 15.

The SAFA Program provides European States with a surveillance tool so that they are made aware of and can act on proven deficiencies. It is largely based on safety information gathered from all possible sources and on ramp-checks of foreign aircraft. The Program is applied to all foreign aircraft using a European Civil Aviation Conference (ECAC) country’s airports. The SAFA is neither an assessment of a State’s oversight capability nor a substitute for safety oversight assessments. Id.

17. The ICAO Council has adopted eighteen technical Annexes to the Chicago Convention, establishing Standards and Recommended Practices (SARPs) that are designed to ensure a minimum level of safety for international civil aviation through technical uniformity. In turn, each State is responsible to assure adherence to these SARPs. See Federal Aviation Admin., FAA Handbook for FAA Order 8400.10 CHG 15, Vol. 1 General Concepts, Guidance, & Definitions, Ch. 3 International Aviation, Sec. 2 ICAO and the ICAO Annexes, 1-69, available at http://www.faa.gov/avr/afs/faa/8400/8400_vol1/1_003_02.pdf (updated June 26, 2002).


One of the primary objectives of ICAO is to promote the safety of civil aviation worldwide. With 188 Contracting States, and its active involvement in global aviation safety issues, ICAO is well-positioned to assume a coordinating role with respect to the many safety initiatives under way worldwide all with the common aim of reducing the number and rate of aviation accidents. Recognizing this, in 1997 the Air Navigation Commission proposed an ICAO Global Aviation Safety Plan (GASP) to the ICAO Council. In 1998, the 32nd Session of the Assembly adopted Resolution A32-15: Global Aviation Safety Plan, which, amongst other things, urged all Contracting States to support the various elements of GASP. A progress report on GASP was submitted to the 33rd Session of the Assembly in 2001 which then adopted Resolution A33-16, containing an updated GASP and superseding Resolution A32-15.

The GASP serves to focus the safety-related activities within ICAO on those safety initiatives, either planned or in progress, which offer the best safety dividend in terms of reducing accident numbers and rates worldwide. See Upali Wickrama & Ruwantissa Abeyratne, New
mandatory and applies to all Member States in a systematic and regular way.\textsuperscript{20}

Third, the USOAP was created to reconcile a discrepancy between State legal obligations and lack of action to satisfy these obligations.\textsuperscript{21} On one hand, the \textit{Chicago Convention} and its Annexes impose a duty on individual States to assure aviation safety. If these obligations are not fully respected by States, air safety deficiencies arise and States have an obligation under Article 38 of the \textit{Chicago Convention} to notify the ICAO of any differences between their national regulations and practices and the international standards contained in the Annexes.\textsuperscript{22} On the other hand, despite these legal obligations, many contracting States have been discovered to not properly satisfy their duty by not applying and/or misinterpreting relevant SARPs.\textsuperscript{23}

It should be understood that the ICAO uses such instruments as the USOAP to help “national aviation authorities in reducing the number of accidents and fatalities worldwide, while placing emphasis on regions where occurrences remain high.”\textsuperscript{24}

The ICAO has been very successful with the USOAP, with 180 Contracting States and five territories having been audited by ICAO teams between January 1, 1999 and December 31, 2002.\textsuperscript{25} The results of these initial audits have been analyzed and submitted to the audited States. As expected, there were many cases of aviation safety deficiencies resulting from State non-compliance with the SARPs including: improper and insufficient inspections by State authorities before the certification of air operators; maintenance organizations and aviation training schools; licenses and certificates improperly issued, validated, and renewed without due process; procedures and documents improperly approved; failure to identify safety concerns; and failure to follow-up on identified safety defi-


\textsuperscript{20} EU \textit{Contribution}, \textit{supra} note 7, at 16. The USOAP rectifies the failings of its predecessor, the ICAO Aviation Safety Oversight Programme (SOP), created by the ICAO Assembly in October 1995. The SOP was plagued by not only the lack of financing since contributions were voluntary, but also by the fact that audits were voluntary and were only carried out when requested by the Member State, thus the SOP could not always be applied where the need was greatest. See \textit{id}.


\textsuperscript{22} \textit{Chicago Convention}, \textit{supra} note 2, at art. 38.

\textsuperscript{23} Belai, \textit{supra} note 21, at 19. This discrepancy became a prominent issue when disclosed by the ICAO at a November 1997 conference of Directors-General of Civil Aviation.

\textsuperscript{24} \textit{IFFAS Bulletin}, \textit{supra} note 18, at cl. 1.

ciencies and take remedial action to resolve such concerns.26

The USOAP audits and follow-up procedures27 indicated that, while many States have remedied their non-compliance after the audits, many States still fail to remedy aviation safety deficiencies, often due to a lack of will, means, and/or ability to do so.28 Serious difficulties in fulfilling safety oversight obligations apply to specific States and regions disproportionately. Indeed, in many regions, audit findings show a direct relationship between two factors: the higher the non-compliance to SARPs, the higher the aviation accident and incident rates in that region.29

Developed and certain developing countries have the means and the ability, and therefore, do remedy deficiencies. However, many developing/LDC States have not committed adequate resources to the task.30 There are four major reasons why such audited States may lack the will, means, and/or ability to remedy their safety deficiencies:

1. Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers).31

2. Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties.32

3. Human resources in many States may be plagued by a lack of appropriate expertise largely due to inadequate funding and training (and trained staff may leave government jobs for better-paying jobs in the aviation


27. The USOAP provides that the ICAO, with the agreement and participation of the State concerned, can proceed to the establishment of an Approved Action Plan. This plan is intended to assist States to take the necessary recovery actions to remedy the deficiencies identified by the safety audit so that they may fully comply with the ICAO Annexes.

28. See Progress of the ICAO Universal Safety Oversight Audit Programme, at 3, ICAO Working Paper C-WP/11815 (Apr. 18, 2002). The ICAO Air Navigation Commission (ANC) has a “follow-up” audit program “to validate the implementation of States corrective action plans, to identify any problems encountered by States in such implementation, and to determine the need for external assistance to resolve safety concerns identified in the course of the audits.” Id. at 2.

Indeed, the ICAO has conducted an analysis of a sample of thirty-four States that compares their rate of non-compliance with specific critical elements of safety oversight in the initial and follow-up (a few years later) audits. While in the initial audit there was 21.8% non-compliance, in the audit follow-up a few years later, non-compliance dropped to only 7.2%. See id. at app. B. It should be noted that these follow-up statistics reveal two important trends: positively, many cases of aviation safety deficiencies have been remedied; but negatively, “some of the States visited have not been able to implement their corrective action plan and require assistance to do so.” Id. at 3. To the end of 2002, sixty-seven Contracting States had received an audit follow-up mission. See Annual Report 2002, supra note 25, at 11.


30. EU Contribution, supra note 7, at 4.

31. Id.

32. Id.
industry).\textsuperscript{33}

4. Financial resources allocated to civil aviation safety are insufficient since many developing/LDC countries do not consider this a high priority compared to other demands such as health care, education, irrigation, and poverty.\textsuperscript{34}

The most important of the four challenges just mentioned, however, is that certain countries lack sufficient financial resources to comply with these ICAO requirements.\textsuperscript{35} ICAO has long recognized that whenever particular countries and regions do not remedy the safety deficiencies in their aviation systems, this may jeopardize aviation safety globally. Thus, the ICAO has sought to find and/or establish less onerous and rigid mechanisms than normal financial markets to help the needy developing/LDC States fund the remedy of the audited aviation safety deficiencies.

III. SOLUTIONS: EXISTING MECHANISMS TO HELP SOLVE THE PROBLEM

Today, it is clear that there is a crisis of non-remedied aviation safety deficiencies in particular States and regions of the world. While the ICAO has been performing the safety audits of most countries, a question has arisen as to the purpose of these safety audits.

Some critics of the slow process in remedying safety aviation deficiencies have asked questions with respect to the objective of USOAP audits. Is it negative, such that audit results information is used as a way to blacklist certain States, airlines, and airports for safety deficiencies? Is it positive, such that audit results information may be used as a tool to improve international aviation safety?

Let us turn to existing approaches (technical and financial) that may help remedy aviation safety deficiencies in the developing/LDC countries. It must be recognized that assuring that all States fully comply with minimum aviation safety standards is a much more expensive and demanding undertaking than the auditing/assessment process.

A. TECHNICAL ASSISTANCE

To help needy developing/LDC States remedy aviation safety deficiencies, they are often directed to apply to existing and/or evolving technical cooperation and assistance institutions and programs at the international, regional, bilateral, multilateral, and plurilateral levels.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\textsuperscript{35} IFFAS BULLETIN, supra note 18, at cl. 1.
1. International Technical Assistance

The development of international civil aviation since World War II has resulted in a decrease in aviation safety deficiencies in developing/LDC countries. They have gradually acquired equipment, facilities, and services so as to comply with ICAO’s minimum international standards, SARPs, primarily through the work of the ICAO’s Technical Co-operation Bureau ("TCB")\textsuperscript{36} and Technical Co-operation Programme ("TCP").\textsuperscript{37}

This progress can significantly be attributed to the funding of the TCB through the United Nations Development Programme ("UNDP"),\textsuperscript{38} that for many years approved financing to assist in remediing aviation safety deficiencies of developing countries.\textsuperscript{39} However, over the last ten years, UNDP funding priorities have changed to reallocate funding from a lower priority item, like civil aviation, in favor of health, education, agriculture, water purification, and poverty reduction. Thus, civil aviation projects are expected to be self-financed through a variety of public and private funding sources, but no longer the UNDP, with the ultimate goal being that commercial revenues provide cost recovery.

Despite a lack of UNDP funding, the ICAO Council has approved the TCB funding project feasibility studies for appropriate aviation infra-

\textsuperscript{36} See International Civil Aviation Organization, TCB, The Technical Co-Operation Bureau of ICAO, at http://www.icao.int/icao/en/tcb/TCBgreeting.html (last visited Dec. 12, 2004). The Technical Cooperation Bureau (TCB) of the ICAO provides advice and technical assistance to developing and LDC countries for civil aviation. The TCB receives administrative fees to fund itself by carrying out civil aviation projects in developing/LDC countries with three main funding sources: (1) the United Nations Development Programme (UNDP) (this is a declining source); (2) Developing countries' self-funding sources; and (3) other financing institutions. Id.

\textsuperscript{37} See James Ott, Civil Aviation Directors to Explore Expanded Safety Role for ICAO, AVIATION WK. & SPACE TECH., Aug. 18, 1997, at 41. The Technical Cooperation Programme (TCP) of the ICAO focuses on aeronautical training. Again, there has been a decline in funding by the UNDP. However, this reduction has been partly compensated by governments that increasingly provide partial financing for their own civil aviation projects through cost-sharing, and/or trust funds provided by third parties such as other governments. See James Ott, ICAO Faces Daunting Issues, AVIATION WK. & SPACE TECH., Oct. 3, 1994, at 55 [hereinafter Daunting Issues].

\textsuperscript{38} Daunting Issues, supra note 37, at 55. The United Nations Development Programme (UNDP) is the United Nations' largest provider of grants for "sustainable human development." The UNDP grants assistance only at the request of governments and in response to their priority needs that must be incorporated into national and regional plans. The funds are primarily spent to secure international and national expertise, technical services, and equipment. In the mid-1990s, the UNDP often gave over $30 million USD annually for projects that the ICAO implemented. However, the ICAO has progressively received less money from this source. For example, in the case of the ICAO, "UNDP core funding in 2002 amounted to [only] $752,000 . . . ICAO project expenditures under the UNDP programme, which was mostly cost sharing and included projects for which ICAO acted as Implementing Agency, were $26.6 million in 2002, compared with $52.4 million in 2001." See ANNUAL REPORT 2002, supra note 25, at 38-39.

\textsuperscript{39} Daunting Issues, supra note 37, at 55.
structure safety-related projects (e.g., traffic forecasts, radar installation) in developing/LDC countries. While the ICAO, through the TCB, provides some technical assistance to needy countries by preparing feasibility studies, the TCB can only prepare limited studies that are less than the complete and more detailed project reports than the financing institutions want.

2. Regional Technical Cooperation

Several different regional technical cooperation/self-help approaches are being tried that many developed countries support. One approach involves certain countries organizing themselves regionally for a common aviation purpose with a view of rationalizing their costs and the regional employment of the needed resources. For example, while six countries may not be able to afford to hire four safety oversight inspectors each, they may be able to pool their resources and maybe hire ten inspectors for their region. This concept has been applied regionally by six Central American Member States in the Central American Corporation for Air Navigation Services: Corporacion Centroamericana de Servicios de Navigacion Aerea ("COCESNA") regional association respecting their oversight/monitoring and upgrading of their aviation infrastructure. The mechanisms to collect whatever charges or taxes are necessary to finance these activities are regionally developed and applied. A second approach involves groups of more economically developed developing countries (for example, North Africa) helping neighboring regions of poorer developing/LDC countries (for example, sub-Saharan Africa) to finance and implement aviation infrastructure upgrades.

40. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002). It should be noted that since the time of the interview, Ambassador Singh has become the Director of the Bureau of Administration and Services of ICAO. These studies are presently funded by two methods: (1) by voluntary contributions of a generous third country that wants to help a particular country and its project; or (2) a few hundred thousand dollars transferred annually to the TCB from a small internal ICAO trust fund (this fund was established by the ICAO to hold dues paid in arrears and to be spent for ICAO-related purposes) for the purpose of the preparation of project documents for remedial action in countries, generally. (The TCB has decided to direct part of these funds to country-specific feasibility studies). Id. See also International Civil Aviation Organization, Annual Report of the Council – 2001 45 (2001).

41. Interview with A.P. Singh, Representative of India on the Council of ICAO (May 15, 2002).

42. Interview with Daniel Galibert, Former President of the Air Navigation Commission of ICAO (May 7, 2002).

43. Id.

44. Id.

45. Id.

46. Id.
3. **Bilateral, Multilateral and Plurilateral Technical Assistance**

Developed donor States often prefer to provide assistance to developing/LDC countries in civil aviation safety projects through bilateral, multilateral, or plurilateral mechanisms. However, there are two limitations to this approach that are shared with the international assistance framework: first, recipient developing/LDC countries frequently channel resources to priorities like health, education, agriculture, water purification, and poverty reduction rather than civil aviation; and second, most developed donor States insist that civil aviation projects be largely self-financed through public and private funding sources with an ultimate objective of revenues assuring cost recovery.

a. **Bilateral Technical Assistance**

Some developed donor States prefer that their limited technical assistance money help particular regions, sub-regions or individual countries, using a bilateral and directed approach, rather than international mechanisms, for three main reasons. First, such an approach may assure that the money is spent in the area that the donor State desires. Second, this approach often provides more transparency, accountability, and effective auditing, than international assistance mechanisms. Countries like the United States may already have mechanisms (e.g., the FAA) to achieve these goals. Third, developed countries may want to help by using a "bottom up" bilateral and regional approach, rather than the "top down" use of international mechanisms, since funds are channeled to recipient neighbor countries and regions benefiting the donor's political and economic interests. For example, Canada and the United States are involved in such projects with Inter-American Development Bank cooperation. Suggestions have been made that more developed countries in East Asia, like Japan and Korea, might do something similar to help their Asian neighbors.

Bilateral assistance assumes a special character when donor States are members of a regional group like the European Union. European Union ("EU") States individually—and, possibly in the future, through a variety of European Union mechanisms—are already channeling some technical assistance to those countries regionally close to them in Eastern

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47. Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (July 29, 2002).
49. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).
50. *Id.*
Europe and Africa. France’s civil aviation regulatory authority ("DGAC") is helping former colonies, Cambodia and Vietnam, to develop and upgrade their civil aviation codes to be consistent with Europe’s Joint Aviation Requirements ("JARs").

b. Multilateral Technical Assistance

Multilateral technical assistance is best illustrated by the EU and its Commission that encourages EU initiatives to improve aviation safety globally. Thus, the European Commission has proposed initiatives including cooperation with Europe’s Joint Aviation Authority ("JAA") and EUROCONTROL to assist future EU members from Central and Eastern Europe and to finance safety recovery programs. Moreover, discussions continue with respect to not only the joint and complementary goals and priorities of EU Member States, but also to the need to establish a co-ordination mechanism for actions taken by EU Member States to avoid duplication of governmental spending.

c. Plurilateral Technical Assistance

A developing concept, structure, and process of technical assistance is plurilateralism, which expands associates to include not only recipient and donor States bilaterally, multilaterally, and/or internationally but also "the efforts, experience and . . . resources of international [e.g., ICAO, IATA] and regional organizations, aviation manufacturers, financial and other funding institutions. . . ."

The concept of plurilateral group can be traced back to the 1995 precedent of the Asia-Pacific Economic Community ("APEC") Transportation Ministers that convened a Group of Experts on Aviation Security, Safety and Assistance ("GEASA") to review and recommend the best ways to improve safety and provide assistance in their region. This approach continues today in the Asia-Pacific region. ICAO rendered this

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53. EU CONTRIBUTION, supra note 7, at 11.
54. See id. at 11-12.
55. GASP Resolution, supra note 19, at 11-19. This explanation of the GEASA (Group of Experts on Aviation Security, Safety and Assistance) concept was formalized within the ICAO framework in its Resolution A33-16 Global Aviation Safety Plan (2001). The Assembly provided the quoted phraseology to resolve clause 14 of the Resolution. Id.
57. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).
mechanism as an internationally recognized approach when it established its Global Aviation Safety Plan ("GASP") in 2001 and during the 33rd Assembly of September/October 2001 acknowledged the existence and desirability of the mechanism of a "plurilateral" group of senior aviation experts being empowered to study their region's aviation safety problems and make recommendations.

Some countries are applying this framework in their own regions. For example, Canada and the United States participated, in the period of April 4-5, 2002, at a GEASA with experts from seven South/Central American and Caribbean countries, the ICAO, the Inter-American Development Bank ("IDB"), and the Central American Oversight Agency ("ACSA"). The EU is studying this approach, particularly in reference to technical assistance to Eastern Europe and Africa.

B. **FINANCIAL ASSISTANCE**

Financial assistance is clearly a second important approach for developing/LDC countries to remedy their USOAP audited aviation safety deficiencies including borrowing from: (1) commercial banks; (2) regional development banks and funds; (3) international banks and other institutions; and (4) export credit agencies and bilateral development institutions.

1. **Commercial banks**

Commercial banks are reluctant to lend money to developing/LDC countries. Both the aviation industry generally and the type of clients, LDCs, are considered too high risk given the small return on investment in the aviation industry.

2. **Regional Development Banks and Funds**

A promising source of financing to assist countries is regional development banks and affiliated funds. The main such banks include the Islamic Development Bank ("IDB"), African Development Bank

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58. GASP Resolution, supra note 19, at II-19.
59. Id.
60. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002); Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002).
61. Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26, 2002).
The availability and extent of the financial assistance provided by these banks and funds suffer from three principal constraints:

- These mechanisms generally attach little priority to the improvement of aviation infrastructure and services, preferring to channel funds to such objectives such as reducing poverty.\textsuperscript{66} The Inter-American Development Bank is a special case since it expands its loan priorities to include not only poverty reduction but also sector reform and modernization.\textsuperscript{67} Indeed, the upgrading of the aviation sector might be interpreted as within the IDB’s priorities, as illustrated in late 2001 by the IDB’s Multilateral Investment Fund (MIF), which created a $10 million line of activity to help Latin American and Caribbean countries improve airport security in the aftermath of the September 11th World Trade Centre tragedy.\textsuperscript{68} For example, recently the MIF approved almost one half million dollars as a grant to Nicaragua to support a project to strengthen security at Managua’s international airport.\textsuperscript{69}

- The lending policies and practices of such banks and funds apply such demanding criteria that loans tend to be limited to creditworthy countries; therefore, this effectively excludes the more needy but credit risky developing/LDC countries.\textsuperscript{70}

- There is no mechanism to help the potential financial assistance recipients to professionally prepare project proposals and satisfy project management requirements and documentation procedures when they apply to regional development banks.\textsuperscript{71}

Regional development banks sometimes partner with a donor and recipient State. For example, in recent years the Netherlands (i.e., its Ministry of Transport, through its Aviation Technical Assistance Programme) and the European Investment Bank jointly provided seed

\begin{itemize}
\item \textsuperscript{63} Id. at app. B-1.
\item \textsuperscript{64} Id. at app. B-2, 3.
\item \textsuperscript{65} Id. at app. B-1.
\item \textsuperscript{66} Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002). At the time of the interview, Ambassador Singh indicated that these banks follow a procedure that effectively excludes loans to LDCs for remedying aviation safety deficiencies. These banks stipulate to the applicant LDC that there is a fixed amount available for the country’s development with “soft”/concessional loans; however, these banks stipulate a number of priorities, such as programs for poverty alleviation, education, water supply purification, health care, and rural road infrastructure that do not include aviation infrastructure improvement. Id.
\item \textsuperscript{67} IFFAS Working Paper, supra note 62, at app. B-1.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).
\item \textsuperscript{71} Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (Apr. 30, 2002).
\end{itemize}
money, expertise, and/or equipment to aviation-related projects in Tanzania.\textsuperscript{72}

3. \textit{International Banks and Other Institutions}

Current international mechanisms are not very helpful in financing aviation safety deficiency projects. First, the United Nations Development Programme ("UNDP") has dramatically reduced its financing of aviation infrastructure, training, and the like. Second, other international financing mechanisms are sector specific and do not generally extend loans or other assistance in the aviation sector (for example, the United Nation’s Food and Agriculture Organization ("FAO") restricts its efforts to the agricultural sector). Third, the World Bank is not presently involved in the aviation sector.

4. \textit{Export Credit Agencies and Bilateral Development Institutions}

Export credit agencies exist in many developed countries to assist and/or subsidize the domestic production and provision of aviation infrastructure and equipment. These institutions may eventually be used to help finance safety-related aviation infrastructure equipment and projects. A key limitation, however, is that these exports must be creditworthy—a requirement that certain aviation safety improvements in the developing/LDC countries do not meet. Export credit agencies include the Export Development Corporation ("EDC") (Canada), \textit{Compagnie Française d'Assurance pour le Commerce Extérieur} ("COFACE") (France), \textit{Hermes} (Germany), Export Credits Guarantee Department ("ECGD") (United Kingdom), and Export-Import Bank ("Ex-Im Bank") (USA).\textsuperscript{73}

Bilateral development agencies operate in some developed countries. In principle, these agencies may get involved in particular cases to remedy aviation safety deficiencies of LDCs; however, in practice they generally do not. Such agencies include Canadian International Development Agency ("CIDA") (Canada), \textit{Agence Française de Développement} ("AFD") (France), Department for International Development ("DFID") (United Kingdom), and United States Agency for Interna-

\textsuperscript{72} Interview with Bert Kraan, Senior Project Manager, Safety and Security, Department of Civil Aviation of the Netherlands (May 28, 2002). One project involves an estimated $10 million USD to provide air navigation and communications equipment; another project requires an estimated $13 million USD to install a back-up power supply in Tanzanian airports for the emergency cases when power goes down due to inclement weather. \textit{Id}.

tional Development ("USAID").

IV. THE IFFAS: STRUCTURES AND PROCEDURES

The objective of ICAO's Global Aviation Safety Plan and many national aviation safety policies is to reduce the number of accidents and fatalities irrespective of the volume of air traffic. Moreover, the emphasis in corrective action is in those regions where the number of accidents and fatalities are high. As this paper has demonstrated, certain states, particularly LDCs, do not themselves have sufficient resources to comply with the international safety standards. Moreover, existing technical and financial mechanisms are inadequate in helping such states fund the remedy of their USOAP aviation safety deficiencies.

The search for a mechanism to finance aviation safety projects started formally in 1995 as the 31st Session of the ICAO Assembly deliberated on a proposal by eight States, the members of the Latin American Civil Aviation Commission ["LACAC"], on the need, appropriateness, and usefulness of establishing an International Aeronautical Monetary Fund ["IAMF"] as a funding mechanism for aviation safety projects in countries lacking the necessary resources. Subsequently, an extensive 1998 Secretariat study demonstrated that not only was there a need to finance aviation safety-related projects in certain developing/LDC countries, but also there were no funding mechanisms within the existing aviation system to provide financing for these needs.

In 2001, the 33rd Session of the Assembly adopted Resolution A33-10, entitled Establishment of an International Financial Facility for Aviation Safety (IFFAS). This Resolution endorsed the IFFAS concept and requested that the ICAO Council pursue the establishment of an IFFAS as "a matter of priority early in the 2002-2004 triennium. . . ." as well as

74. Id.
76. Id.
77. See Executive Committee, Agenda Item 22: Strategic Action Plan, at 2, ICAO Executive Committee Working Paper A31-WP/73 EX/26 (1995) (on file with ICAO archived files). This study was based on a recognition that many States had problems financing investments in airports, air navigation services infrastructure, and the like, necessitating a search for less onerous and rigid mechanisms than normal financial markets.
80. Id. at cl. 3.
assure appropriate management, administrative, and legal strategies for the IFFAS.81

Accordingly, on December 4, 2002, during its 167th Session, the ICAO Council studied, approved, and adopted the proposed Administrative Charter of the IFFAS. Thus, the IFFAS was officially established after lengthy deliberations and a "consensus" being achieved among deeply divided positions.82

The primary purpose for creating the IFFAS is to provide financial assistance for aviation safety-related projects to those Contracting States, primarily LDCs, that have difficulty securing necessary funding through existing financing mechanisms and procedures when they seek to remedy aviation safety deficiencies principally discovered by the USOAP.83 The IFFAS is oriented to provide access to such funding under conditions that are "more flexible and less onerous than those usually available in financial markets."84 In this context, Dr. Assad Kotaite, President of the Council, stated:

Aviation safety is global in nature. For the entire system to be safe, all elements must be equally safe. IFFAS is yet another tool at the disposal of Contracting States in their on-going efforts to ensure that every citizen of the planet can fly safely to and from any destination in the world.85

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81. See id. at cl. 3(b)-(d).

82. Culled from discussions at the 167th Session of the ICAO Council on Dec. 4, 2002. "Consensus" is a tool that the President of the ICAO Council, Dr. Assad Kotaite, uses to avoid confrontational votes and to eventually arrive at decisions in Council proceedings.

At the 167th Session of the ICAO Council on December 4, 2002, the Council passed a Resolution related to the establishment of the IFFAS that states:

Considering that the ICAO Assembly, in Resolution A33-10, requested the Council to pursue the establishment of IFFAS as a matter of priority early in the 2002-2004 triennium on the basis, inter alia, of an administrative charter;

THE COUNCIL:

1. Approves and adopts the Administrative Charter of the International Financial Facility for Aviation Safety establishing IFFAS as set out in the Attachment hereto; and
2. Urges Contracting States, international organizations and public and private parties associated with international civil aviation to make voluntary contributions to IFFAS.


84. IFFAS BULLETIN, supra note 18, at cl. 2. At the same time, the Council adopted a Resolution relating to transitional arrangements for the implementation of the IFFAS during the transitional period between December 4, 2002 and June 13, 2003. The transitional rules and their implementation are outside the scope of this paper. For more details on these rules, see Report of the Council Working Group—Establishment of an International Financial Facility for Aviation Safety (IFFAS), at cls. 2.16 - 2.21 & app. A, ICAO Council Working Paper C-WP/11907 (Nov. 22, 2002) [hereinafter Establishment Working Paper] (on file with ICAO).

The IFFAS became functional on June 18, 2003, with the appointment of the Governing Body by Dr. Kotaite, by the authority delegated to him by the ICAO Council. 86

A. The Principal Objective and Function of the IFFAS

The overriding objective of the IFFAS is to function as a “not for profit fund” to help finance projects that “remedy or mitigate safety-related deficiencies” 87 “for which States cannot otherwise provide or obtain the necessary financial resources.” 88

To achieve this primary objective of financially assisting countries in improving aviation safety, the IFFAS follows two key guidelines: first, the IFFAS will only financially facilitate needy projects and countries, notably LDCs, that lack the resources to remedy aviation safety deficiencies; 89 and second, the Universal Safety Oversight Audit Programme (“USOAP”), as an element of ICAO’s Global Aviation Safety Plan (“GASP”), is considered the preferred instrument to help the IFFAS identify the greatest needs in choosing and prioritizing projects to be funded. 90

86. Id. See infra text accompanying notes 112-25 for a discussion of the actual states appointed to the Governing Body.


IFFAS shall be a not for profit fund, embodying a mechanism to provide financial assistance for safety-related projects for which States cannot otherwise provide or obtain the necessary financial resources. The principal area of application of assistance shall be to remedy or mitigate safety-related deficiencies identified through the ICAO Universal Safety Oversight Audit Programme (USOAP) as an element of the Global Aviation Safety Plan (GASP).

Id.

88. IFFAS Resolution, supra note 79, at cl. 2(a).

89. Id.

90. Id. In addition to the principles established in Resolution A33-10, aviation safety is one of the most important factors in civil aviation, and it is recognized by the ICAO Strategic Action Plan as being a major element of consideration within the ICAO. In clause 2 of Assembly Resolution A33-9, resolving deficiencies identified by the Universal Safety Oversight Audit Programme and encouraging quality assurance for technical cooperation projects, it urges the Secretary General to ensure that the ICAO provides, when requested, reasonable assistance within available resources, to help States to obtain the necessary financial resources to fund assistance projects by Contracting States, industry organizations, or independent consultants. Id. Unlike the broader mandate of the 1998 ICAO Assembly, today’s IFFAS is no longer to be concerned with financially assisting either the components of CNS/ATM systems or the improvement and expansion of airport and air navigation services infrastructure.
B. IFFAS is an Autonomous Fund

IFFAS is independent of the control of States and their governments, individually, or collectively.91 Furthermore, consistent with the Assembly guidelines provided in Resolution A33-10, the IFFAS Administrative Charter provides that the ICAO and IFFAS operate as distinctive entities. Legally, the IFFAS “shall keep ICAO harmless with regard to all claims, demands, or legal actions by third parties arising from or relating to the operation of IFFAS.”92 Financially, the IFFAS is to be funded completely independent of the ICAO Program Budget.93

The IFFAS does experience, however, some overlap with ICAO. First, any services provided by the ICAO are to be “only upon request of participating States and on a cost-recovery basis.”94 Second, IFFAS is “driven by a management strategy developed on the principles of, and in conformity with the existing ICAO legal regime.”95

Nevertheless, there are important outstanding issues of the relationship of the IFFAS with the ICAO as well as governance. Is the IFFAS under the ICAO’s control or is it really a distinct and independent entity? It is expected that a “muddling through” experience will eventually settle these issues. Pragmatically, to simplify and expedite the process, on December 4, 2002, the ICAO Council adopted the working group’s recommended approach of creating the IFFAS within the ICAO, without a separate legal status.96 This approach was a compromise between two conflicting positions on the long-run status of the IFFAS in relationship to the ICAO.97

On one hand, some have argued that, from birth, the IFFAS should have been established as an entity independent and distinct from the

91. IFFAS Bulletin, supra note 18, at cl. 3.
92. Administrative Charter, supra note 87, at art. 3.3.
93. IFFAS Resolution, supra note 79, at cl. 2(b)(4); see also Administrative Charter, supra note 87, at art. 3.3 (“IFFAS shall operate with complete independence from ICAO’s Regular Budget.”).
94. IFFAS Resolution, supra note 79, at cl. 2(b)(5).
96. Establishment Working Paper, supra note 84, at cl. 2.4.
97. Id. at 2.8. The Council accepted reconciling both positions, reiterating the working group view that the Assembly Resolution A33-10 has some ambivalence. On the one hand, an IFFAS is to have “complete independence from ICAO’s Programme Budget” and “any administrative or other services” are to be provided “only upon request by participating States and on a cost recovery basis.” On the other hand, the Assembly Resolution makes only one reference to the “existing ICAO legal regime” in the context of creating a management strategy so that the IFFAS structure conforms to that regime, although it may not necessarily fall within that regime. Id.
ICAO with transparency and accountability not linked to the ICAO in most respects. This view is legalistic, focusing on Assembly Resolution A33-10’s requirement that IFFAS funding must have “complete independence from ICAO’s Programme Budget” and “any administrative or other services” are to be provided “only upon request by participating States and on a cost-recovery basis.” On the other hand, others have suggested that while in the short-run the IFFAS may start under the ICAO’s control, in the long-run, the IFFAS may pick up momentum and eventually be spun out of the ICAO as an autonomous and distinct entity, just as “a baby must be nurtured before it goes out on its own.”

A challenge remains to distinguish and clearly identify the IFFAS from the rest of the ICAO since the IFFAS is operating not only under the ICAO legal regime without a separate legal status but also independently of the ICAO’s Program Budget. Thus, the IFFAS Governing Body’s accountability to the ICAO is clearly stated. However, although the ICAO Council may delegate certain functions to the IFFAS Governing Body, the Council and the ICAO Member States remain responsible for everything done by or in the name of the IFFAS, as long as it is part of the ICAO. Accordingly, some intriguing legal questions arise as to the ICAO’s potential legal liabilities for IFFAS activities including non-performing loans extended by the IFFAS to client States. In recognition that a poor strategy for IFFAS could have devastating financial effects on the ICAO, the IFFAS Governing Body has been mandated by the ICAO Council, responsible for approving the proposals, to study various options, including insurance and contingency funds to cover risks.

It is generally agreed that whatever the IFFAS may ultimately do, it is important that steps be taken to ensure that it does not become a liability to the ICAO or the ICAO Program Budget.

Overall, the IFFAS is a quasi-independent and self-financed entity, outside of the ICAO’s budget. There are two important benefits of the

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98. *IFFAS Resolution, supra* note 79, at cl. 2(b)(4)-(5); see also *Establishment Working Paper, supra* note 84, at cl. 2.8.

99. It is suggested that this approach is legally consistent with the provisions of Assembly Resolution 33-10. One reference provides that the “management strategy” of the IFFAS should be “developed on the principles of, and in conformity with, the existing ICAO legal regime. . . .” *IFFAS Resolution, supra* note 79, at cl. 3(c) (emphasis added).

100. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).


102. *Id.* at cl. 2.9.

103. *Id.* at cls. 2.10 - 2.11. There is no doubt that whatever liability protection is undertaken should be proportionate to the risk, recognizing that the risks to IFFAS and ICAO presently are minimal.

104. Interview with Jonathan Aleck, Former Representative of Australia on the Council of ICAO (Dec. 18, 2002).
IFFAS being under the ICAO’s supervisory umbrella, at least for the first few years of its existence

First, the IFFAS provides an ICAO solution to an ICAO objective. The ICAO supervises the IFFAS in assuring that a State’s aviation safety deficiencies identified through the ICAO’s auditing process [i.e., the USOAP] are remedied.  

Second, the ICAO provides administrative and technical service support to the IFFAS to minimize IFFAS costs on a cost-recovery basis. Some possible support functions by ICAO include ICAO Secretariat processes that may be used to procure client State aviation goods and services, as well as to assure their delivery at quality standards. For example, ICAO’s Technical Cooperation Bureau (“TCB”) may not only help procure the client State’s aviation goods and services, but may also finally certify their delivery at quality assured standards. Moreover, ICAO Secretariat technical experts and lawyers may be used to minimize the costs accrued by the LDC’s in preparing detailed project reports. Indeed, in the early stages of the IFFAS of today, “the first objective has been to minimize the administrative costs [of IFFAS] by using, on a cost recovery basis, the internal resources of ICAO to the extent possible. . . .” — this applies to the secretariat functions and to the membership of the Expert Panel.  

Needless to add, if the IFFAS disburses its money through the ICAO, the work will probably, but not necessarily, return to ICAO mechanisms such as to the TCB. 

C. Membership and Participation

Consistent with the Assembly mandate, the Administrative Charter draws some distinctions among “members,” “contributors,” “participants,” and possible “beneficiaries.” The IFFAS membership, as well as contributors, is voluntary and broad-based to include not only ICAO Contracting States but also public and private international aviation-related organizations, airlines, airports, air navigation service suppliers, manufacturers of airframes, engines and avionics, other members of the aerospace industry, and civil society. Moreover, States voluntarily both

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105. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).
106. Assembly Working Paper, supra note 95, at cl. 3.1.
107. Interview with A.P. Singh, Former Representative of India on the Council of ICAO (May 15, 2002).
108. See Establishment Working Paper, supra note 84, at cl. 2.5.
109. See id. at cls. 2.5 – 2.6. See also IFFAS Resolution, supra note 79, at cl. 6; Administrative Charter, supra note 87, at art. 3.4. Article 3.4 of this Administrative Charter provides: Subject to Article V, IFFAS shall derive its resources from voluntary contributions made by ICAO Contracting States, international organizations (public and private) working in the field of international aviation or associated with it, airlines, airports, air
participate in the IFFAS and benefit from IFFAS assistance.\footnote{110}

D. \textbf{Key Structures}

The IFFAS operates with two main constituent institutions: the Governing Body and a Secretariat.

1. \textit{The Governing Body:} Conforming to the Assembly requirements, the IFFAS includes a Governing Body, appointed by the ICAO Council, whose members are nominated by participating States and other participating parties.\footnote{111} They receive no remuneration.\footnote{112} Furthermore, the administrative charter provides that the ICAO President of the Council and the Secretary General have a right to participate in the meetings of the Governing Body without a voting right.\footnote{113}

On a general level, the Governing Body is responsible for the implementation of IFFAS policies and oversight of the organization’s activities. The IFFAS decides what projects to fund and on what terms,\footnote{114} but with obvious accountability to the ICAO in general and the ICAO Council in particular.\footnote{115} Moreover, it both promotes IFFAS and negotiates with potential project participants.\footnote{116}

The Governing Body’s mandate and functions are specifically stipulated in the Administrative Charter where it is stated that the Governing Body shall:

\begin{itemize}
\item[a)] formulate the policy or polices for the activities of IFFAS;
\item[b)] approve the annual work programme and budget of IFFAS after consultations with the Council;
\item[c)] receive, examine and approve the financial statements of IFFAS;
\item[d)] monitor and evaluate the activities of IFFAS and review and report on them on an annual basis to the ICAO Council, participating States and other participating parties;
\item[e)] actively promote participation in IFFAS by Contracting States and other participating parties;
\item[f)] negotiate arrangements with the parties referred to in e) above regarding participation in IFFAS;
\item[g)] propose to the ICAO Council from time to time ways and means of enhancing the financial resources of IFFAS, with a view to ensuring the effectiveness and continuity of its operation; and
\end{itemize}

\footnotesize\textit{navigation services providers, manufacturers of airframes, engines, avionics and other aircraft components, other members of the aerospace industry, and civil society.}\ldots

\footnote{110. \textit{IFFAS Resolution, supra} note 79, at cls. 2(b)(1), 5(b).}
\footnote{111. \textit{Administrative Charter, supra} note 87, at arts. 6.1 - 6.2.}
\footnote{112. \textit{IFFAS Bulletin, supra} note 18, at cl. 3.}
\footnote{113. \textit{Administrative Charter, supra} note 87, at art. 6.4 (conforming to Resolution A33-10); see \textit{IFFAS Resolution, supra} note 79, at cl. 3(b).}
\footnote{114. \textit{Establishment Working Paper, supra} note 84, at cl. 2.5.}
\footnote{115. \textit{Id.} at cl. 6.7(d).}
\footnote{116. \textit{Id.} at cl. 6.7.}
The Governing Body is assisted by an Expert Panel for the selection and prioritization of projects needing IFFAS help. This Expert Panel provides technical, economic and financial advice to the Governing Body on particular projects. It is the Expert Panel that initially reviews all applications for funding and then refers its recommendations to the Governing Body. Furthermore, the Expert Panel plays an important role in “quality control” during and after the selection and implementation of any projects financed through IFFAS.

As mentioned above, the IFFAS became functional on June 18, 2003, when the President of the Council, Dr. Assad Kotaite, by authority delegated to him by the Council, appointed eight Contracting States to the Governing Body of the IFFAS – Argentina, Chile, Egypt, France, India, Netherlands, Nigeria, and Pakistan. Thus, since the Administrative Charter allows for a minimum of eight and a maximum of eleven members, there are presently three vacant seats that could be filled by representatives by representatives of international or regional organizations. The IFFAS Governing Body sat for its first meeting on November 24, 2003. This has been followed by two other meetings in January 14, 2004 and May 17, 2004.

2. The Secretariat: The IFFAS Secretariat structure is and will remain lean in order to avoid imposing a heavy financial burden on IFFAS assets. Indeed, the Governing Body operates under a paramount princi-

117. Administrative Charter, supra note 87, at art. 6.7.
118. IFFAS BULLETIN, supra note 18, at cl. 6.
119. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).
121. Id.
122. Governing Body, supra note 85, at 1.
123. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).
124. Assembly Working Paper, supra note 95, at cl. 2.5.
125. Id. 1st Meeting: November 24, 2003: The Governing Body elected its Chairman and Vice-Chairman, and appointed its Secretary. It established the Expert Panel, appointed its Members and its Secretary, and adopted its terms of reference. Moreover, the Governing Body referred to the Expert Panel five applications already received for funding projects under IFFAS and asked the Expert Panel to report on prioritization for selection of these projects. Id.
2nd Meeting: January 15, 2004: The Governing Body, on the basis of the First Report of the Expert Panel, agreed that one project be selected as a “pilot project” for IFFAS assistance. This project will be discussed infra in Section IV. Id.
3rd Meeting: May 17, 2004: The Governing Body reviewed the IFFAS Financial Statements for 2003 and estimates for 2004. Id. The other decisions will be addressed infra in the text accompanying notes 155-59.
ple of avoiding undue overhead burden on the IFFAS. An interesting example of this "lean" operation attitude is that the Secretary of the IFFAS, Mr. Jean-Claude Bugnet, only discharges this role on a part-time basis since he is also, *inter alia*, the Chief, Joint Financing Section, of ICAO's Air Transport Bureau.

V. THE FUNDING MECHANISMS OF THE IFFAS

Assembly Resolution A33-10 assured that the establishment of the IFFAS does not constitute another mandatory foreign aid instrument transferring funds from developed countries to needy developing/LDC countries. Moreover, reiterating certain points already discussed, this Resolution, and pursuant Council actions, provided three requirements for IFFAS funding:

1. IFFAS is to be developed, established, and operated with "complete independence from ICAO's Programme Budget." However, the IFFAS mechanism is complementary to existing ICAO funding mechanisms.
2. IFFAS will be assisted by ICAO with the provision of any administrative or other services only upon request of participating States on a cost-recovery basis.
3. IFFAS is "funded by voluntary contributions from Contracting States, international organizations, as well as public and private parties associated with international civil aviation."

Let us briefly review the last two elements of funding mentioned.

A. IFFAS WILL BE Assisted BY ICAO

The Administrative Charter incorporates limited ICAO "staffing to support [the IFFAS] and to cover daily executive and administrative functions." First,

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127. *Id.*
128. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15, 2004).
129. *IFFAS Resolution, supra* note 79, at cl. 2(b)(4).
130. Assembly Working Paper, *supra* note 95, at cl. 2.2(c).
131. *Id.* at 2.2(d).
132. *Id.* at 2.2(b).
133. *IFFAS Resolution, supra* note 79, at art. 3(b)(2). One opinion on the nature of the staff servicing of the IFFAS argues that Assembly Resolution A33-10 provides for a management structure within the ICAO legal regime. Thus, according to Article 54(h) of the *Chicago Convention*, any staff benefiting from ICAO status is under the authority of the ICAO's chief executive officer, appointed by the Council, for example, the Secretary General. Moreover, such staff shall be subject to rules established by Council, per Article 58 of the Convention, Staff Regulations. An example may be taken in this regard from the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC), where staff are officially ICAO staff and have contracts signed by the Secre-
In consultation with the Governing Body and the President of the Council of ICAO, the Secretary General of ICAO shall appoint [to IFFAS]: (a) an ICAO official to act as Secretary to the Governing Body of IFFAS; and (b) an ICAO official to act as Secretary to the [Expert Panel advisory group].

The first and present appointment to both tasks is Jean-Claude Bugnet, Chief, Joint Financing Section, Air Transport Bureau. Second, “in consultation with the Governing Body and the President of the Council of ICAO, and in response to a request from the [IFFAS] Governing Body, the Secretary General of ICAO may . . . provide IFFAS with administrative assistance in addition to the appointments” just mentioned, all on a full-time or part-time, and “on a full cost-recovery basis.”

Beyond this, the Administrative Charter incorporates certain operational policies and procedures for the IFFAS that reflect the Assembly’s guidelines. It is agreed that IFFAS governance and its management principles are to be based on:

- transparency, sound, simple management,
- accountability with administrative and financial guidelines to be stipulated and followed.

B. Voluntary Contributions

In respect to the third element, the Administrative Charter provides that contributions to the IFFAS are voluntary for both funding projects in States and for operating the IFFAS itself. The primary funding sources are more specifically stipulated as follows:

137. Id. at art. 8.3.
138. IFFAS Resolution, supra note 79, at cl. 3(d).
139. Id. at cl. 3(d)(1)-(2). There will be “clear criteria and procedures for the granting of loans and conducting any other financial transactions” using ICAO standards, policies, and procedures. Id. at cl. 3(d)(3). Moreover, there are to be safeguards to ensure the proper, effective, and efficient application of funds from participating States. Id. at cl. 3(d)(4). This suggests that there will have to be a clear distinction and identification of funds used for the administration of the IFFAS and for financial assistance provided toward safety-related projects. Counsel Questions & Answers, supra note 133, at cl. 2.10. Moreover, there are to be “measures to assure quality control and to assess effectiveness and efficiency at all levels” and adequate “provisions for the auditing of accounts.” IFFAS Resolution, supra note 79, at art. 3(d)(5)-(6).
140. Administrative Charter, supra note 87, at art. 9.2.
a) voluntary contributions from Contracting States and other contributing parties;
  
b) interest earned on loans;
  
c) miscellaneous income from bank deposits and investments;
  
d) contributions resulting from the crediting of any amount of Contracting States' shares of any distributable surplus from the ICAO Regular Budget; or
  
e) other voluntary contributions by way of pledge, loans from banks for reinvestment in projects based on the line of credit from international, regional and sub-regional development banks and financial institutions.¹⁴¹

There are presently three main sources of "voluntary contributions." First, IFFAS voluntary contributions by States in 2002 amounted to $222,709 US dollars.¹⁴² This amount is largely accounted for by States having been encouraged to contribute to the IFFAS by annually crediting their share of any distributable surplus, that is held in trust by the ICAO, from the ICAO Program Budget to the IFFAS account.¹⁴³ Contributions by individual states amounted to $304,991 US dollars during 2003 and another $120,000 US dollars for 2004 as of June 15, 2004.¹⁴⁴

A second source of funding is the special allocation by the Council to IFFAS pursuant to the 34th Session [Extraordinary] of the ICAO Assembly in Montreal from March 31 to April 1, 2003.¹⁴⁵ This Assembly decided, inter alia, to channel to IFFAS certain funds on a non-recurrent basis – these funds were arrears of three full years or more that ICAO had received from Contracting States and held under a special long-standing arrears account.¹⁴⁶ The portion transferred to IFFAS in 2003 was $1,055,190 US dollars, including accrued interest.¹⁴⁷

A third funding source is other interested parties who are en-

¹⁴¹ Id. at art. 9.1.
¹⁴² Assembly Working Paper, supra note 95, at app. B.
¹⁴³ IFFAS Resolution, supra note 79, at art. 5(a), (c). The first and earliest commitments, around the time that the Administrative Charter was adopted in December 2002, was that forty-seven ICAO Member States had contributed $222,709 USD to the IFFAS project, as part of their share of the ICAO program budgetary surplus with the average contribution of $4,745 USD, and over one-third of these contributions coming from France $90,700 USD. Culled from discussions at the 167th Session of the ICAO Council (Dec. 4, 2002).
¹⁴⁴ Assembly Working Paper, supra note 95, at app. B.
¹⁴⁵ Id. at cl. 2.3.
¹⁴⁶ Id.
¹⁴⁷ See id. at app. B. The Council, seeking guidance on how to allocate the over $3 million USD in surplus contributions among IFFAS, aviation security and other purposes, submitted the question to the 34th Session of the ICAO Assembly. The Assembly deliberations decided that the surplus of contributions should be split three ways equally among IFFAS, aviation security purposes [AVSEC] and safety oversight. Financing of Aviation Security Activities and IFFAS in Relation to Assembly Resolutions A33-10 and A33-27, ICAO Assembly 34th Session (Extraordinary), at cl. 2.2, ICAO Doc. A33-WP/3 (Dec. 2, 2003).
couraged to make voluntary contributions. A few such entities have already made or promised contributions. The Agence Intergouvernementale de la Francophonie actually contributed $105,900 US dollars in March, 2004, to finance the hiring of an associate expert dedicated to the Secretariat of the IFFAS. The European Commission has promised, but to date not contributed, $200,000 (approximately $245,000 US dollars) for 2004. However, consistent with the Assembly’s expectations, it is hoped that the interested parties will expand to include private and public international aviation-related organizations, airlines, airports, air navigation service suppliers, aircraft/engine/avionics manufacturers and civil society, such that they are all encouraged to make voluntary contributions in the future.

The relatively small amount of money presently committed to the IFFAS mechanism, approximately $1.6 million US dollars by the end of 2003, given its mandate, brings us to the questions suggested at the time the IFFAS was established. A number of states expressed reservations on the issue of “where is the money going to come from” to manage and develop the IFFAS. On one hand, IFFAS proponents suggested that the small initial seed money was a great start and that once the IFFAS actively solicits contributions, the funds would pour in. On the other hand, IFFAS skeptics argued that the paltry contributions reflected a lack of strong support for the IFFAS mechanism. Thus, a risk exists that the under-funded IFFAS accounts could be drained with a long-run risk of the IFFAS possibly withering away. Moreover, many of the usual major contributors to ICAO initiatives have still not made any significant contributions.

A positive development is that the Governing Body of the IFFAS has placed a significant priority to the “mobilization of funds,” including considering an Action Plan for this purpose in its May 17, 2004, meet-

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148. IFFAS Resolution, supra note 79, at cl. 6.
149. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 27, 2004).
150. Assembly Working Paper, supra note 95, at app. B. The amount stipulated is based on the exchange rate as of August 1, 2004.
151. IFFAS Resolution, supra note 79, at cl. 6. See also Administrative Charter, supra note 87, at art. 3.4.
152. Interview with Jonathan Alick, former Representative of Australia on the Council of ICAO (July 29, 2002); Interview with Edward W. Stimpson, Representative of the United States on the Council of ICAO (May 14, 2002); Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).
153. Cullled from discussions at the 166th Session of the ICAO Council (June 6 & 10, 2002), and 167th Session (Dec. 4, 2002).
154. Id.
ing.\textsuperscript{155} Consistent with the proposals of this meeting, on June 30, 2004, a State Letter specifically dedicated to IFFAS was sent to all Contracting States and international organizations interested in IFFAS.\textsuperscript{156} This letter included a reminder of the provisions of Assembly Resolution A33-10 encouraging participation in IFFAS as well as an attachment including the IFFAS Information Bulletin.\textsuperscript{157} Moreover, to "get the message out" the Governing Body agreed that regional IFFAS focal points should be designated to help sensitize states to the usefulness of IFFAS in the improvement of aviation safety worldwide.\textsuperscript{158} It has also been suggested that the purview of these regional focal points might be broadened for day-to-day contacts with applicants and potential donors as well as to maintain a list of organizations visited or to be visited.\textsuperscript{159}

The reality that IFFAS funding is based on the principle of voluntary contributions has two principal limitations. First, legal reservations have been put forward respecting the question of whether sub-national entities can legally contribute to a fund, like IFFAS, that is created by an international treaty mandated institution like the ICAO.\textsuperscript{160} Second, since the membership, participation, and funding of the IFFAS are based on the concept of voluntarism, IFFAS revenues might fluctuate wildly, such that the vagaries of contributor whims will possibly affect the quantity and quality of projects in which the IFFAS can and will assist.

In the long-run, the sources of funding for the IFFAS – and if voluntary only, the generosity of the funding sources – will ultimately affect the capacity of the IFFAS to assist needy developing/LDC client States to finance projects to remedy safety deficiencies. This issue will remain a paramount concern of IFFAS. In the end, for the IFFAS to be successful, a solution must be developed to increase its sources and amount of funding such that there are funding mechanisms to complement voluntary contributions,\textsuperscript{161} however, such a discussion is outside the scope of this paper.


\textsuperscript{156} State Letter June 2004, supra note 75, at 1.

\textsuperscript{157} Governing Body Decisions, supra note 155, at cl. 10; see also State Letter June 2004, supra note 75, at 2.

\textsuperscript{158} Governing Body Decisions, supra note 155, at cl. 10.

\textsuperscript{159} Id. at cl. 11. This idea was proposed by Mr. Tom Kok from the Directorate General of Civil Aviation of the Netherlands in a presentation to the IFFAS Governing Body in its May 17, 2004 meeting. Id.

\textsuperscript{160} Interview with Lionel Alain Dupuis, Permanent Representative of Canada on the Council of ICAO (Apr. 26 & Aug. 15, 2002).

\textsuperscript{161} See Worldwide Safe Flight, supra note 4, at 576-77 for details.
VI. THE NATURE AND SCOPE OF THE ASSISTANCE PROVIDED BY THE IFFAS

A. NATURE OF IFFAS SUPPORT

IFFAS has three distinct levels of possible support. First, it will usually offer loans. Second, in some cases, it will offer a combined loan and subsidy/grant. Third, in exceptional needy cases, IFFAS may consider offering grants. The recovery of loans is ensured through a guarantee offered by a State or a reputable financial institution.

At this stage, it is important to emphasize that IFFAS does not restrict its mandate to the actual provision of funds. “In addition to its essential function of directly funding projects, in whole or in part within the limits of its own financial resources, IFFAS also acts as a catalyst and a facilitator, helping States or groups of States obtain funding from other sources for safety-related projects.” This paper returns to this point, infra in the Conclusion, as an IFFAS with restricted funding sources increasingly might have to assume a catalyst and facilitator role of third party financial assistance since IFFAS lacks funds itself.

B. SELECTION OF PROJECTS

All applications are assessed by the Expert Panel that is composed of recognized experts in the technical, financial and economic fields.

The IFFAS attaches priority to in selecting projects on the basis of three criteria:

a) The project must be safety-related [normally the deficiency identified through the USOAP]

b) The projects should be submitted by Least Developed Countries

c) The project should be on a regional or sub-regional basis.

The third criterion incorporates the Council requirement that the IFFAS’ operational policies and procedures apply globally “a framework of common guidelines and operating rules . . . with flexibility for implementation” regionally. This is consistent with the policy of the ICAO Coun-

162. IFFAS BULLETIN, supra note 18, at cl. 5.
163. Id.
164. Id.
165. Id.
166. Assembly Working Paper, supra note 95, at cl. 3.2 (emphasis added).
167. IFFAS BULLETIN, supra note 18, at cl. 6.
168. Id.; see also Assembly Working Paper, supra note 95, at cl. 2.6.
169. IFFAS Resolution, supra note 79, at cl. 2(b)(3). It has been suggested that the regional applicability of the IFFAS will be in cooperation with regional financial institutions and such regional bodies as the African Civil Aviation Commission (AFCAC), the European Civil Aviation Conference (ECAC), and the Latin American Civil Aviation Commission (LACAC). Counsel Questions & Answers, supra note 133, at cl. 2.14.
cilar that has favored the idea of the global application of principles on a
regional basis—a view promoted by the Assembly. Indeed, during the
34th (Extraordinary) Session of the Assembly, Assembly Resolution
A34-1 specified that the arrears allocated to the IFFAS could be used “to
finance pilot projects, in whole or in part, which are to be carried out
under the auspices of IFFAS for the benefit of a specified group or
groups of States at the regional or sub-regional level, but in no case to be
made available to any single State as a sole borrower or grantee under
IFFAS.”170

On a practical and technical level, the IFFAS has developed a syn-
ergy with the USOAP Unit and Technical Cooperation Bureau in the
evaluation and selection of projects proposed for IFFAS assistance—this
includes the identification of specific elements that could be financed by
IFFAS.171

On an administrative and procedural level, the IFFAS Governing
Body has approved a standard application form for assistance from IF-
FAS that is accessible on the Internet. This form should improve acces-
sibility to IFFAS by assisting potential applicants with comprehensive
information; therefore, the IFFAS will be able to expedite its processing
of information and the evaluation of prospective projects.172

It is interesting that the IFFAS is paying particular attention to “fol-
low-through procedures” to ensure that expected benefits are not only
achieved but also maintained.173

C. A PILOT PROJECT

The IFFAS Governing Body, at its second meeting on January 15,
2004, on the basis of the first report of the Expert Panel, agreed to one
particular project to be selected as a “pilot project” to be assisted by the
IFFAS.174 To date, there have been five applications for project author-
ization, but this constitutes the first and only acceptance.175 This project is
sub-regional based and satisfies most of the established criteria of eligi-
bility.176 The project is the Cooperative Development of Operational Safety
and Continuing Airworthiness Programme (“COSCAP”) presented by the
West African Economic and Monetary Union (“UEMOA”) on behalf

170. Assembly Working Paper, supra note 95, at cl. 2.3 (emphasis added).
171. Id. at cl. 2.6.
173. Id.
174. Executive Committee, Agenda Item 18: International Financial Facility for Aviation
Safety (IFFAS), at cl. 2.5, ICAO Executive Committee Working Paper A35-WP/54 EX/17 (June
25, 2004).
175. Id.
176. Id.
of its eight member states – seven of these countries are Least Developed Countries. The proposed assistance was in the nature of a combined loan and grant with a specific commitment that the money be used to hire three experts.

It should be highlighted that this project is consistent with the IFFAS objective of helping needy states remedy aviation safety deficiencies that have been identified through the USOAP. Moreover, the Technical Cooperation Bureau has been significantly involved in this project as foreseen at the time of the creation of the IFFAS. In addition to other funding entities, notably France and the European Commission, the World Bank and African Development Bank may have a future role in this project.

VII. Conclusion

This paper suggests that there is a generally acknowledged need to remedy aviation safety deficiencies identified through the USOAP in certain States and regions. Although the Chicago Convention imposes a duty on the State to remedy any such divergences from the SARPs requirements, the ICAO has some discretionary power to assist needy developing/LDC States to remedy their identified aviation safety deficiencies as the ICAO pursues its broad objective of global aviation safety under the GASP. The IFFAS, as a quasi-independent entity, appears to have the potential of helping ICAO discharge its responsibilities in this area. Nevertheless, the IFFAS, as it appears to be presently doing, must operate under tight management principles that provide transparency, accountability, effectiveness, and quality control.

There are certain issues that remain to be clarified. One question is whether the IFFAS is a “mechanism,” some other corporate body, a bank, or a fund. The IFFAS clearly presently is a skeleton organization with minimal funds and sources of funding. The IFFAS is certainly far less than a full-fledged bank. However, it appears to be developing as an umbrella organization. Developing/LDC countries are beginning to benefit from the IFFAS not only as a facilitator and catalyst for third party funding but also complementary instrument to existing mechanisms of tech-

177. Id.
179. Interview with Jean-Claude Bugnet, Secretary of the Governing Body of IFFAS (July 15 & 27, 2004).
181. The author originally stated this recommendation in Worldwide Safe Flight, supra note 4, at 579. This aspect of the author’s position appears to be advocated by certain Council representatives in various ways, see Interview with Sanat Kaul, Representative of India on the Council of ICAO (June 1, 2004).
technical assistance, at the international, regional, bilateral, multilateral, and plurilateral levels, and financial assistance, including regional development and international banks and funds, export credit agencies, and bilateral development institutions. As mentioned above, given the IFFAS' limited funding sources, it can be expected that it will increasingly discharge a catalyst and facilitator role as opposed to being the actual funding provider in most cases.

A second important issue centers on finding a good source of funding and membership beyond the voluntarism principle since the IFFAS, as presently constituted, has not only a voluntary membership and participation, but also is funded through voluntary contributions.182

In the short-term, it can be expected that by the next plenary session of the ICAO Assembly in September/October 2004, Contracting States, whether members, participants, and/or financial supporters of the IFFAS, will be able to review at least one pilot project where financial assistance has been channeled to remedy certain aviation safety deficiencies identified by the ICAO's USOAP. Furthermore, while presently there is a commitment toward a regional implementation of the IFFAS's objectives, we can expect that increasingly a role may be played by ICAO regional offices in implementing IFFAS objectives.

This article is intended to present a balanced perspective to political leaders and their citizens on the problem of and solutions to assisting certain developing/LDC countries that lack the will, ability, and/or means to remedy their USOAP identified aviation safety deficiencies. Irrespective of whether the IFFAS and/or other mechanisms are preferred to address this issue, it is evident that a real safety deficiency exists, threatening lives, property, and economic interests worldwide.183

The issue of assuring the "survival" of a viable air transport industry should remain a paramount priority of decision-makers. However, an unfortunate and unnecessary gap exists today between developed and developing/LDC country perceptions of the crises in aviation "security" and "safety." On one hand, particular developed countries consider the pursuit of improved international aviation "security" to be an unquestioned principal objective. Indeed, they recognize an "ability-to-pay" principle respecting aviation security such that wealthier States may financially assist poorer States with security deficiencies. Ironically, many of these same countries tend to advocate a "user pay" concept concerning aviation safety such that the costs to help in correcting safety deficiencies, for example, through an IFFAS mechanism, should be defrayed by the user

182. As mentioned above, the Assembly mandated that the IFFAS is not to burden the regular program budget of the ICAO. See, e.g., Assembly Working Paper, supra note 95, at cl. 2.2.
183. The author originally stated this recommendation in Worldwide Safe Flight, supra note 4, at 580.
country even if it may not have the required resources—financial, technical and/or human. On the other hand, many developing/LDC countries argue that the pursuit of global aviation “safety” is so vital that the “ability-to-pay” principle applies to permit the equitable transfer of resources from the developed states to those countries experiencing deficiencies in safety. These same developing states suggest that security system upgrade costs, including some of those in the developing countries, should be paid for by the user countries, the developed countries, because they have a much higher risk of security breaches.\textsuperscript{184}

Politically determined priorities and the economic limitation of scarce resources should not discourage international decision-makers from fairly balancing the channeling of resources to civil aviation “security” and “safety.” Both civil aviation security and safety constitute a global and indivisible system such that if civil aviation security and/or safety are jeopardized in one State or region, security and/or safety are threatened worldwide. The interests of the sovereign State and world community require a respect for both priorities to assure the development of the air transport industry and protect passenger lives and property. Indeed, in the area of global safety, the IFFAS is a worthwhile attempt at working toward safe flight.

To conclude: the citizens of our world have a right to expect that adequate resources will be allocated to both goals—safety and security. They should hope for no more; but expect nothing less.

\textsuperscript{184} \textit{Id.} at 580-81.
Does the Rails-to-Trails Act Effect a Taking of Property?

Richard A. Allen*

In 1983, Congress enacted legislation, commonly known as the Rails-to-Trails Act,\(^1\) which has resulted in the creation of more than 11,000 miles of recreational trails throughout the United States.\(^2\) These trails are enjoyed by millions of people, and they would not exist today but for that legislation.\(^3\) Twenty years after its enactment, however, the cost of the legislation to the taxpayer is unknown, because a basic legal issue still has not been definitively resolved, although it is pending in many cases:

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whether the Rails-to-Trails Act effected a "taking" of property, and therefore, whether the United States must compensate the previous owners for the fair value of that property.

In 1990, the Supreme Court held that the Rails-to-Trails Act was constitutional, but it did not decide the takings question because, it held, if the Act does effect a taking, property owners may recover just compensation in suits against the United States under the Tucker Act. The lower courts are divided on the takings question. The Second Circuit held the Act does not effect a taking. The Federal Circuit, in a plurality opinion, and a number of district courts have held that the Act can effect a taking in certain circumstances, depending on the claimant's property interests under state law.

The takings question is a conceptually difficult one, because it is not easy to identify the property interests at stake and how various federal statutes over the years have affected those interests. For that reason, courts and commentators have had difficulty in finding their way through what the Federal Circuit aptly called a "legal morass," and in articulating a coherent analysis of the takings question.

It is the thesis of this paper that the Federal Circuit and the courts following its lead are wrong in holding that the Rails-to-Trails Act can sometimes affect a taking and are wrong that the takings issue turns on issues of state property law. Even in circumstances in which the claimant's state law property interests are most favorable to a takings claim, the Act does not effect a taking of those interests under the federal law of takings in view of the nature of the claimant's interests, the very substantial restrictions that federal law has placed on the property rights of such a claimant with respect to railroad rights-of-way since at least 1920 and the fairly modest change to that legal regime effected by the 1983 Act.

I. Background

The Rails-to-Trails Act provides a means by which railroad rights-of-way that are no longer needed for railroad operations may be used as recreational trails for hikers and bikers pending possible future reactiva-

8. Preseault II, 100 F.3d at 1538.
tion for rail use. The Act does so by abolishing whatever rights adjacent landowners might have under state law to possess the rights-of-way upon the cessation of rail operations. To analyze properly whether the abolition of such rights amounts to a taking of property for which the Constitution requires compensation, it is necessary first to understand (1) the nature of the property interests railroads have in their rights-of-way; (2) the pre-Rails-to-Trail Act federal law governing the rights of railroads to use and dispose of their rights-of-way; and (3) the changes in federal law effected by the Rails-To-Trails Act.

A. Property Interests in Railroad Rights-of-Way

Railroads' rights-of-way vary in size, but are typically 100 feet wide. Historically, railroads in the United States have acquired their rights-of-way in one of four ways: by negotiated purchase, by grants from federal or state governments, by condemnation pursuant to state statutes granting eminent domain power to railroads and by prescription (e.g., adverse possession).

The kinds of interests railroads have acquired in their rights-of-way vary widely. At one end of the spectrum are rights-of-way acquired by the railroad in fee simple. Rights-of-way in which railroads acquired fee simple interests present no takings issue when such rights-of-way are dedicated to trail use under the Rails-To-Trail Act. Because, as will be explained further below, the Act does not require railroads to dedicate rights-of-way to trail use under the Act and all such dedications are agreed to by the railroad, no one can claim that his property has been taken when a railroad agrees to dedicate its own fee simple property to trail use under the Act.

At the other end of the spectrum are cases in which the railroad did not acquire a fee interest in the right-of-way but acquired only a limited easement from the fee owner of the underlying property – that is, only acquired a right to use the right-of-way for railroad transportation purposes. Rights-of-way in which railroads acquired only an easement limited to railroad transportation present the most difficult takings issue.

13. See id.
14. See id.
15. See id.
when they are dedicated to trail use under the Rails-To-Trails Act.\textsuperscript{16}

Between the two ends of the spectrum fall other kinds of interests. An illustrative example is the right-of-way involved in \textit{Chevy Chase Land Co. v. United States}.\textsuperscript{17} In that case, the railroad acquired a right-of-way in 1911 for $4000 from the Chevy Chase Land Company pursuant to a deed which conveyed to the railroad “a free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated . . . .”\textsuperscript{18} The Maryland Court of Appeals, in construing the deed, rejected the argument of the United States that the deed conveyed a fee simple interest in the right-of-way to the railroad, and the court accepted the argument of the land company that it conveyed only an easement - a right of passage – over the land company’s property.\textsuperscript{19} The court, however, rejected the land company’s argument that it had conveyed an easement that only authorized railroad operations by the grantee and its heirs and assigns.\textsuperscript{20} Because the deed contained no language limiting the use to which the right-of-way could be put, the court concluded that the easement broadly authorized use by the public for other transit purposes, including hiking and biking.\textsuperscript{21}

In cases in which railroads acquired their rights-of-way by deed, as is almost always true when the acquisition is by negotiated purchase, the scope of the railroad’s property interest will depend on the language of the deed, as in the \textit{Chevy Chase Land Company} case.\textsuperscript{22} Where the rights-of-way were acquired by land grant or by eminent domain, the scope of the interest acquired will depend on the terms of the grant or the authorizing statute.\textsuperscript{23} Most state statutes by which railroads have acquired rights-of-way by eminent domain have been construed to grant the railroad only an easement limited to railroad transportation uses.\textsuperscript{24}

When rights-of-way are acquired by deed from private parties or pursuant to state grants or state eminent domain power, the scope of the railroad’s property interest is a matter of state law, although there are federal regulatory statutes which govern the way the property may be

\begin{itemize}
\item \textsuperscript{16} See id.
\item \textsuperscript{17} 733 A.2d 1055 (Md. 1999).
\item \textsuperscript{18} \textit{Id.} at 1065.
\item \textsuperscript{19} \textit{Id.} at 1059.
\item \textsuperscript{20} \textit{Id.} at 1073.
\item \textsuperscript{21} Id. at 1073-80. Based on this interpretation of the railroad’s property interest, the Federal Circuit found that dedication of the right-of-way to trail use under the Rails-To-Trail Act was within the scope of the railroad’s property interest, and therefore resulted in no taking of any property interest of the land company, Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 1998), \textit{cert. denied}, 531 U.S. 957 (2000).
\item \textsuperscript{22} Chevy Chase Land Co. v. United States, 733 A.2d 1055, 1065 (Md. 1999).
\item \textsuperscript{23} See \textit{Wright}, \textit{supra} note 12, at 423-29.
\item \textsuperscript{24} See, e.g., Lillich v. Lowery, 320 N.W.2d 463, 464 (Neb. 1982).
\end{itemize}
used and disposed of.\textsuperscript{25} When they are acquired by federal land grant or federal eminent domain authority, the scope of the interest is created and defined by federal law.\textsuperscript{26}

In the situation where the railroad's interest in a right-of-way is only an easement for railroad purposes,\textsuperscript{27} it seems to be universally recognized by all state and federal courts that the easement is of a very special kind. It is not simply a non-exclusive right of passage, as an individual might have across a neighbor's property to access his own. A railroad easement grants the railroad exclusive use and possession of the right-of-way, with the right to exclude all others from the property, including the grantor.\textsuperscript{28} Furthermore, it grants the railroad permanent and perpetual use of the right-of-way for railroad operations, without limiting such things as frequency, amount, or type of cargo.\textsuperscript{29} As the Supreme Court said in *Western Union Telegraph v. Pennsylvania Railroad*:\textsuperscript{30}

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.* . . . We there said that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property."\textsuperscript{31}

As a matter of state property law, railroad easements, like other easements, terminate when the holder of the easement, sometimes referred to as "the servient owner," terminates the use for which the easement was granted and to which it was limited.\textsuperscript{32} The term most often used for the termination of use that results in the extinction of the easement is "abandonment" of the easement.\textsuperscript{33} It is generally held that mere cessation of use of the easement for some temporary period of time will not, without more, effect an abandonment of the easement.\textsuperscript{34} Rather, there

\begin{itemize}
\item \textsuperscript{25} *See* Villa, *supra* note 9, at 492-93.
\item \textsuperscript{26} *See* Mauler v. Bayfield County, \textit{309 F.3d} 997 (7th Cir. 2002) (discussing the pertinent federal statutes and holds that the United States, not adjacent landowners, owns all reversionary rights with respect to federally-granted rights-of-way that are subsequently abandoned).
\item \textsuperscript{27} For ease of reference, easements that are limited to railroad operations only will be referred to hereafter as "railroad easements", although, as the Chevy Chase Land Co. case shows, there are also easements that permit railroad operations but are not limited to such operations. *Chevy Chase Land Co.*, \textit{733 A.2d} at 1076.
\item \textsuperscript{28} *See* W. Union Tel. v. Pennsylvania R.R. Co., \textit{195 U.S.} 540, 570 (1904).
\item \textsuperscript{29} *Id.*
\item \textsuperscript{30} \textit{195 U.S.} 540 (1904).
\item \textsuperscript{31} *Id.* at 570 (internal citations omitted).
\item \textsuperscript{32} *See*, e.g., *Lillich*, \textit{320 N.W.2d} at 465.
\item \textsuperscript{33} *Restatement of Prop.* § 504 (1944).
\item \textsuperscript{34} Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Centuries*, \textit{27 Ecology L.Q.} 351, 434-35 (2000).
\end{itemize}
must be evidence that the holder of the easement intends permanently to cease using the easement for the purpose to which it was limited. Courts and the Surface Transportation Board have held that railroads have not abandoned their railroad easements even in cases where there have been no rail operations for a number of years and where the railroads have removed the rail, ties and other track structures.

When a railroad easement has been abandoned, the easement terminates and the owner of the underlying property, sometimes referred to as the “dominant owner,” becomes entitled to full and exclusive use of the property. Plaintiffs in takings cases contend that the Rails-to-Trails Act operates to prevent their right to full and exclusive use of former railroad rights-of-way in situations which would otherwise amount to abandonment of the right-of-way under state law and operates instead to require that the right-of-way be used by the general public for recreational purposes.

To determine whether those consequences of the Rails-Trail-Act amount to a “taking” of the plaintiff’s property requires a consideration of the pre-Act legal constraints on the use and disposition of railroad rights-of-way. That is so because the Supreme Court has held that whether or not a challenged governmental action amounts to a taking rather than a permissible regulation will depend on a number of factors, including “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.” And, in determining a landowner’s property rights and whether they have been “taken” by governmental action, courts must consider “existing rules or understandings that stem from an independent source such as state law” and other “relevant background principles.” The cases indi-

35. See, e.g., Chevy Chase Land Co., 733 A.2d at 1082; Illinois Cent. Gulf R.R. Co.—Abandonment—DeWitt & Piatt Counties, IL, 5 I.C.C.2d 1054, 1061 (1988). To reduce uncertainties about whether abandonment of a railroad easement has occurred, the Surface Transportation Board in 1996 promulgated a rule which requires railroads, within one year of obtaining permission to abandon a rail line, to notify the Board in writing when it consummates the abandonment. If no notice is filed within that year, the authority to abandon lapses, and the railroad must apply anew for such authority when it wishes to exercise it. 49 C.F.R. § 1152.29(e)(2) (2004).


37. See Birt, 90 F.3d at 581-82. Courts frequently refer to such situations as a “reversion” of the property to the owner, but it seems more accurate to say that the owner becomes entitled to full and exclusive possession of the property.

38. See, e.g., Presseault 1, 494 U.S. at 9.


cate that the "background principles" that define the scope of a claimant's property interests include federal and well as state law.\textsuperscript{41}

As we shall see, since at least 1920, federal law has very substantially limited the residual rights of landowners with respect to railroad rights-of-way. The real issue in the takings cases is whether the Rails-To-Trails Act in 1983 added enough incremental limitations on those rights to amount to a taking.

B. Federal Law Governing the Use and Abandonment of Railroad Rights of Way Before the Rails-to-Trail Act

Substantial federal involvement in and regulation of railroad rights of way goes back to the dawn of railroads in the 1830s.\textsuperscript{42} Much of the nation's western railroads were created by land grants by the federal government in the 1860s and 1870s.\textsuperscript{43}

For present purposes, the most significant federal legislation was the Transportation Act of 1920.\textsuperscript{44} Before 1920, railroads were generally free to terminate operations on particular lines and to dismantle those lines.\textsuperscript{45} Before 1920, if a railroad holding only an easement in its right of way took actions amounting to an "abandonment" of the easement as a matter of state law, the easement would generally terminate, and the owner of the underlying fee interest could evict the railroad and regain exclusive possession of the property.\textsuperscript{46}

The Transportation Act of 1920 radically changed all that. That Act provided that a railroad could discontinue rail service and/or abandon its rail lines only if the Interstate Commerce Commission ("ICC") -- now the Surface Transportation Board ("STB")\textsuperscript{47} -- found that the public convenience and necessity permitted such discontinuance or abandonment.\textsuperscript{48}


\textsuperscript{42} See Act of July 7, 1838, ch. 172, 5 Stat. 271; Act of Mar. 3, 1853, ch. 146, 10 Stat. 255; Act of June 8, 1872, ch. 335, 17 Stat. 283 (declaring railroads within the United States to be post routes or roads).

\textsuperscript{43} Massa, supra note 11, at 289-91.

\textsuperscript{44} Transportation Act of 1920, ch. 91, 41 Stat. 456.

\textsuperscript{45} Wright & Hester, supra note 34, at 434-35.

\textsuperscript{46} Id.

\textsuperscript{47} Congress abolished the ICC effective January 1, 1996 and replaced it with the STB. Interstate Commerce Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. The STB exercises all the powers and functions of the former ICC that are relevant to the issues in this case. Id. at § 10501.

\textsuperscript{48} 49 U.S.C. § 10903(d) (2004). As the Supreme Court explained, there is a well recognized distinction between "abandonment of a rail line and the discontinuance of service." Preseault I, 194 U.S. at 5-6 n.3. If the agency authorizes abandonment and the railroad consummates the abandonment, the federal agency's jurisdiction over the line ends and the railroad may
The Act further provided that the ICC could "attach to the issuance of the certificate [authorizing abandonment] such . . . conditions as in its judgment the public convenience and necessity may require."\(^{49}\)

Since 1920, state law has played no role in determining when and whether a railroad can discontinue service or abandon lines or when and whether a railroad can be required to do so.\(^{50}\) State law, including the rights of persons under contracts and deeds, has been completely preempted by federal law.\(^{51}\) For example, if events occur that, as a matter of state law, would extinguish a railroad's easement and entitle the fee owner to reoccupy the property, or would give someone a contractual right to demand that the railroad cease operations, those rights under state law could not be enforced if the ICC, now the STB, has not issued a certificate of discontinuance or abandonment.\(^{52}\)

Nor, since 1920, have people been able to enforce rights under state law that would conflict with conditions imposed by the ICC or STB in the dispossession of the property any way it wishes or is permitted to by state law. *Id.* If the agency only authorizes discontinuance of service, however, that authority, as the Court explained, "allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Id.*

\(^{49}\) See Transportation Act of 1920, ch. 91, § 20, 41 Stat. 456. ICC and STB orders authorizing railroads to abandon their lines or discontinue service are permissive, not mandatory. The railroad obtaining such authority is not required to exercise it, and to effect an abandonment, it must do something in addition to obtaining the order authorizing abandonment to evince its intent permanently to terminate rail operations and thus to consummate the abandonment. This situation has given rise to a number of cases where railroads have obtained abandonment authority from the ICC and STB but it is uncertain, and is disputed, whether the railroad has consummated the authorized abandonment. See *supra* note 35. The STB has attempted to reduce that uncertainty by promulgating a rule requiring railroads to file with the STB a written notice when they have consummated the abandonment within one year of obtaining the authority, and, if they do not, the abandonment authority automatically lapses. See cases cited *supra* note 36; 49 C.F.R. § 1152.29(e)(2).


\(^{51}\) See, e.g., *Colorado*, 271 U.S. at 165-66.

\(^{52}\) See, e.g., Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 146-47 (1946) (explaining that person cannot enforce contractual right to terminate a railroad's operations if ICC has not authorized discontinuance); Louisiana & Arkansas Ry. Co. v. Bickham, 602 F. Supp. 383, 384 (M.D. La.), aff'd, 775 F.2d 300 (5th Cir. 1985) (explaining that state law cannot cause a railroad right of way to revert in the absence of a ICC certificate unconditionally granting abandonment authority). Similarly, if a railroad, without ICC authority, took actions that would amount to an abandonment of its line under state law (for example, ceased service and removed its track), its action would violate federal law, and it could be required by the ICC to restore the track and resume service, regardless of whatever reversionary rights the railroad's action might have otherwise triggered under state law. Without ICC or STB authority, the occurrence of an "abandonment" under state law simply has no legal effect. See Wright, *supra* note 12, at 434-35.
certificate of abandonment.\textsuperscript{53} The federal agency’s conditioning authority under the 1920 Transportation Act has been extraordinarily broad and has always included the power to require that the right of way be dedicated to various public uses, both rail and non-rail, following the abandonment. For example, as early as 1927, the ICC conditioned its issuance of an abandonment certificate on the requirement that the railroad had to sell the line or any portion of it “to any person or persons desiring to purchase the same for continued operation and offering to pay therefor not less than its fair net salvage value.”\textsuperscript{54} In \textit{Norfolk \& Western Railway Co. Abandonment},\textsuperscript{55} the ICC conditioned an abandonment certificate on the requirement that the railroad would donate a portion of the right of way to a county, which wanted to use it to improve a highway.\textsuperscript{56}

Particularly pertinent to the takings question presented by the Rails-to-Trail Act is the case of \textit{Reed v. Merves}.\textsuperscript{57} In that case, the ICC authorized abandonment of a line used for interstate freight operations on condition that it be resold “to any responsible person for the purpose of continued operation,” and a federal district court enforced the condition by ordering 8.5 miles of the line sold to a party who wanted to use it to operate an intrastate tourist train.\textsuperscript{58} The First Circuit rejected the abandoning railroad’s claim that the condition exceeded the ICC’s authority and upheld the condition specifically on the ground that it served to preserve priceless rights-of-way for future interstate rail use.\textsuperscript{59} The court said:

To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.\textsuperscript{60}

The Railroad Revitalization and Regulatory Reform Act of 1976\textsuperscript{61} codified the ICC’s practice of imposing conditions on abandonment cer-

\textsuperscript{54} See Abandonment of Part of Branch By Pennsylvania Railroad Company, 131 I.C.C. 547, 556 (1927). See also Rutland Ry.–Abandonment of Entire Line, 317 I.C.C. at 425.
\textsuperscript{55} 193 I.C.C. 363 (1933).
\textsuperscript{56} Id. at 368.
\textsuperscript{57} 487 F.2d 646 (1st Cir. 1973).
\textsuperscript{58} Id. at 646-47.
\textsuperscript{59} Id. at 646-50.
\textsuperscript{60} Id. at 649-50.
\textsuperscript{61} Railroad Revitalization and Regulatory Reform Act, Pub. L. 94-210, § 809(c), 90 Stat. 146 (1976).
tificates for public purposes and required the agency to consider imposing such conditions in every abandonment case. Section 10905 specifically directs the agency, before authorizing abandonment or discontinuance, to determine "whether the rail properties . . . are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." If it so finds, section 10905 further provides that the "properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board." As will now be discussed, the 1983 Rails-to-Trail Act did not enlarge the broad pre-existing power of the ICC to condition the post-abandonment disposition of railroad rights-of-way. That Act merely directed the ICC, and now the STB, to exercise that power in certain ways in certain circumstances.

C. The Rails-to-Trail Act

Congress enacted the Rails-to-Trail Act in 1983 in a further effort to preserve railroad corridors for possible future rail use. As the Supreme Court noted in Preseault I, experts had predicted that some 3000 miles of railroad rights of way would be abandoned annually through the year 2000. These are transportation resources that would be extraordinarily difficult to reassemble if they are ever needed for railroad operations in the future. To help preserve these transportation resources, section 8(d) of the Act, established a mechanism, often referred to as "railbanking" whereby railroads wishing to cease operations on particular lines would be encouraged, but not required, to convey those lines to States, local governments, or qualified private organizations, which would manage and operate the rights of way as recreational trails in the interim, pending "future reactivation of rail service." Under the statute as implemented by ICC and STB regulations, if a railroad seeking abandonment authorization notifies the agency of its willingness to negotiate an agreement with a State, political subdivision, or qualified private organization for railbanking and interim trail use, the agency will issue a Certificate of Interim Trail Use ("CITU"). If no agreement is reached within 180 days

63. Id.
64. Id.
66. Preseault I, 494 U.S. at 5.
69. 49 C.F.R. § 1152.29(b)(1)(ii) (2003). The Federal Circuit has ruled that, for purposes of the six-year statute of limitations for filing takings claims against the United States under 28
after the trail use condition is issued, the CITU provides that the railroad may fully abandon the line.\textsuperscript{70} If an agreement is reached, however, the CITU provides that the right of way will be transferred to the trail operator for interim trail use, "subject to future restoration of rail service."\textsuperscript{71}

Under the Rails-to-Trails Act, the STB has no discretion. If the railroad wishes to transfer the right-of-way to a qualified organization for railbanking and interim trail use and the organization is willing to "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use. . . ."\textsuperscript{72} then the agency must permit the transfer for such use\textsuperscript{73} and "shall not permit abandonment or discontinuance inconsistent or disruptive of such use."\textsuperscript{74} Moreover, under the Rails-to-Trail Act and the implementing regulations, persons claiming an ownership interest in the land underlying the right-of-way have no say in whether the railroad and a qualified trail operator enter into an interim trail use agreement.\textsuperscript{75} Furthermore, and this is the provision that gives rise to takings claims, the statute provides that "if such interim use [as a trail] is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."\textsuperscript{76} In other words, even if cessation of rail operations and use of the right-of-way as a recreational trail would otherwise extinguish the railroad's easement as a matter of state law, this federal law provision overrides any such state law and any rights the owner of the underlying fee might have to exclusive use and possession of the property.\textsuperscript{77}

\begin{footnotes}
\item [70] U.S.C. §2501, a takings claim accrues upon the STB's issuance of a CITU. Caldwell v. United States, 391 F.3d 1226, 1235 (Fed. Cir. 2004).
\item [71] 49 C.F.R. § 1152.29(c)(1) (2003).
\item [72] 49 C.F.R. § 1152.29(c)(2).
\item [74] See Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1150-52 (D.C. Cir. 2001) (agreeing with the 8th Circuit in Goos v. I.C.C. that the Board's role in issuing a CITU is ministerial); Goos v. I.C.C., 911 F.2d 1283, 1285 (8th Cir. 1990) (agreeing with the ICC interpretation of the statute that the ICC has little to no discretion to refuse a voluntarily negotiated conversion).
\item [76] Citizens Against Rails-to-Trails, 267 F.3d at 1149.
\item [77] Initially, there was some question whether the ICC could require a railroad seeking authority to abandon a right of way to transfer it to a qualified organization for railbanking and interim trail use against the railroad's will. Early on, however, the ICC concluded that the Rails-to-Trails Act gave it no such authority. The ICC said it would not construe the statute as authorizing it, in effect, to take the railroad's property in the absence of explicit statutory language to that effect, and the D.C. Circuit affirmed that construction. Rail Abandonments - Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 593-97 (1986), aff'd in part, Nat'l Wildlife Fed'n, 850 F.2d at 699-702 (D.C. Cir. 1988).
\end{footnotes}
Although the Rails-to-Trail Act removed the agency's discretion in certain circumstances, it did not enlarge the broad and preemptive statutory powers that the Transportation Act of 1920 conferred on the agency to authorize or decline to authorize abandonments of rail lines and discontinuance of rail service and to impose "such terms and conditions as in its judgment the public convenience and necessity may require." As discussed earlier, the ICC had frequently imposed conditions on abandonment certificates for the purpose of preserving transportation corridors for future rail (and in some cases highway) use, and its authority to do so was consistently upheld by the courts. If the ICC declined to issue a certificate of discontinuance or abandonment, the line remained subject to ICC jurisdiction and parties could not insist that rights of way revert to them on the ground that abandonment had occurred as a matter of state law.

The only effect of the 1983 Rails-to-Trails Act was to direct the ICC not to authorize abandonment of a right of way in any case in which the railroad is willing to transfer the right of way to a qualified entity willing to manage it as a trail until it is reactivated for rail operations. Importantly, the Trails Act does not require the railroad to transfer the right of way for that purpose, nor does it impose any new obligations or restrictions on the railroads. After 1983, just as before, it has remained entirely the railroad's choice and decision whether merely to discontinue rail operations "for an indefinite period while preserving the rail corridor for possible reactivation of service in the future" or fully to abandon the right of way and thereby permit state law rights of reversion to take effect. Before 1983, as well as after, landowners could not terminate easements or compel reversion of the property until the railroad had made that decision and the federal agency had approved it.

79. See Reed, 487 F.2d at 649-50.
82. Id.
84. Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 371. As the ICC noted:

A railroad's decision to enter into a Trails Act agreement is similar to a carrier's decision to seek discontinuance rather than full abandonment authority for a particular line. Discontinuance authority, like rail banking, allows a railroad to cease operating a line for an indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future.

Id.

85. See cases cited supra notes 52 & 84.
II. The Pertinent Takings Jurisprudence

The Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation."86 The Supreme Court, however, has long held that not every law or other governmental action that restricts a person's use of his property constitutes a "taking" of the property.87 Much of the complex regulatory regime of modern government involves restrictions on the use of property, and government could hardly function if every such regulation were treated as a taking for which the government had to pay the property owner. In Pennsylvania Coal Co. v. Mahon,88 the Court laid down the "general rule . . . that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."89

The Court has consistently declined to develop any fixed formula for determining when regulation goes "too far" and becomes a taking, but it has held that many quite restrictive regulations have not gone too far and are not takings. These regulations include most zoning laws,90 laws permanently prohibiting any building on parts of property,91 laws prohibiting owners from altering the exteriors of buildings deemed to be historical landmarks,92 laws prohibiting any development of property for substantial periods of time,93 and, of particular relevance to takings claims involving the Rails-to-Trails Act, laws requiring property owners to open their property to unwanted activities or persons.94

Although it has eschewed any fixed formula, the Supreme Court has identified a number of factors that it deems relevant to determining whether a regulation has gone too far and has become a taking. In the Penn Central Transportation Co. v. New York City95 case, the Court enumerated several as having "particular significance:"96

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed

86. U.S. Const. amend. V.
88. 260 U.S. 393 (1922).
89. Id. at 415.
expectations are, of course, relevant considerations. . . . So, too, is the char
acter of the governmental action. A “taking” may more readily be found
when the interference with property can be characterized as a physical inva
sion by government . . . than when interference arises from some public pro
gram adjusting the benefits and burdens of economic life to promote the
common good.97

At least five of the current justices are of the view that the nature of the
claimant’s asserted property rights and the existing legal restrictions
on those rights when the claimant acquired his property are also relevant
in determining whether a regulation has gone “too far” and becomes a
taking.98 The Fifth Amendment requires compensation only for takings
of “private property.”99 Private property, however, is no more nor less
that the bundle of legal rights a person has with respect to a parcel of land
or some other tangible or intangible thing.100 If a person acquires a parcel
of land that is subject to an existing legal restriction, for example a public
easement or a restriction on development, a subsequent regulation that
does not increase the restriction, or does so only modestly, is not likely to
be held to have taken that person’s property even if the regulation would
be found a taking in the absence of the preexisting restriction.101 Thus, in
determining a landowner’s property rights and whether they have been
“taken” by governmental action, the Supreme Court has said that courts
must consider “existing rules or understandings that stem from an inde
pendent source such as state law” and other “relevant background prin
ciples.”102 The “existing rules” and “background principles” that define the
scope of a claimant’s property interests include federal and well as state
law,103 and the ones that are relevant are the ones in effect when the
claimant purchased his property.104

97. Id. See also PruneYard Shopping Ctr., 447 U.S. at 83 (addressing some of the factors set
forth in Penn Central); Ruckelshaus, 467 U.S. at 1005 (recognizing the factors set forth in Penn
Central).

98. See infra note 105.

99. U.S. CONST. amend. V.

100. See John E. Fee, The Takings Clause as a Comparative Right, 76 S. CAL. L. REV. 1003,
1011 (2003).

101. Lucas, 505 U.S. at 1004.

102. Id. at 1030 (quoting Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972)).

103. See, e.g., Scranton, 179 U.S. at 163; M & J Coal Co., 47 F.3d at 1154.

104. In Palazzolo, the Court’s opinions addressed, but did not clearly resolve the question
whether a claimant who acquired property after the governmental action alleged to effect a tak
ing, and who had at least constructive notice of the action when he acquired the property, could
assert that the action took his property. See Palazzolo, 533 U.S. at 626-27. All justices appeared
to endorse the notion in Lucas that the claimant’s property interests are defined by “background
principles” of law. Id. at 629. Four justices joining Justice Kennedy’s opinion for the Court
seemed to believe that such background principles would normally not include the challenged
action, and that if the challenged action was a taking, the claimant could claim compensation
even if he acquired the property after the challenged action occurred (and, perhaps, acquired it
III. APPLICATIONS OF TAKINGS JURISPRUDENCE TO THE RAILS-TO-TRAILS ACT

How should these principles apply in the situation most favorable to a person claiming that the Rails-to-Trail Act has effected a taking of his property – that is, where the claimant (or more typically, his predecessor in interest) granted only an easement over the right-of-way that was specifically limited to railroad operations and where the railroad takes actions that arguably amount to an abandonment of the easement as a matter of state law? In this writer’s view, they strongly suggest that the Act does not effect a taking. The question is a difficult one to grasp conceptually because it is not easy to fit the challenged governmental action (prohibiting “abandonment” of the right-of-way) and the claimant’s property interests (a right to regain possession of property upon the occurrence of future events that the grantor of the easement had no basis for expecting would ever occur) into the concepts employed and applied in the Supreme Court taking cases.\(^\text{105}\)

The analysis is best begun by identifying the claimant’s best arguments in favor of a taking. The main argument runs as follows: The claimant has a right under state law to exercise full possession and ownership of the right-of-way when the railroad takes actions amounting to an abandonment of its easement – specifically, actions evidencing its intention permanently to cease using the right-of-way for railroad purposes.\(^\text{106}\) In the typical Rails-to-Trails Act case, the railroad has done just that, by applying to the ICC, now the STB, for full abandonment authority and then by transferring the right-of-way to an entity that plans to use it for non-rail purposes.\(^\text{107}\) Although the Rails-to-Trails Act asserts that abandonment may not occur because the purpose of the transfer is to preserve the right-of-way for possible future rail use, in almost all cases the railroad has no present intention of resuming such service, and there is no reason to believe that

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for much less than its market price before the challenged action). \textit{Id.} at 626-30. Five justices, however, opined that the timing of the claimant’s acquisition would be relevant, though not dispositive, in determining whether the challenged action interfered sufficiently with “investment backed expectations” to amount to a regulatory taking under the \textit{Penn Central} factors. \textit{Id.} at 632-36 (O’Connor, J., concurring); 637-39 (Stevens, J., concurring and dissenting); 654 n.3 (Ginsburg, J., dissenting); 655 (Breyer, J., dissenting). \textit{See also} Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (taking claimants must “demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.”)


\(^{106}\) \textit{See, e.g., Lillich}, 320 N.W.2d at 464 (citing Roberts v. Sioux City & Pac. R.R. Co., 102 N.W. 60, 65 (1905).

\(^{107}\) \textit{Chevy Chase Land Co.}, 733 A.2d at 1060.
rail operations will resume over the right-of-way in the foreseeable future.\textsuperscript{108} When all events necessary to activate the claimant’s state law right to possession and ownership of the right-of-way have occurred, the federal government cannot prevent and indefinitely forestall that activation merely by \textit{declaring} that those events have not occurred;\textsuperscript{109} at least it may not do so without effecting a “taking” of the claimant’s property and paying just compensation for it.\textsuperscript{110} This argument would lead to the conclusion that the government has taken the right-of-way from the claimant when a transfer for trail use occurs and must pay the claimant the full fair market value of that right-of-way.

A secondary argument for the claimant runs as follows: Even if the federal government could validly prevent the abandonment of the easement without effect a taking of it, the Rails-to-Trail Act requires that the right-of-way be used for purposes other than those for which the claimant or his predecessor granted the easement to the railroad, such as hiking and biking by the public.\textsuperscript{111} Accordingly, the government has at least taken an additional easement from the claimant for which it must pay.\textsuperscript{112} This argument would lead to the conclusion that the government must pay the claimant not the full market value of the right-of-way but only the cost of the incremental burden, if any, that the additional easement imposes on the claimant over and above the burden imposed by its use for railroad operations.\textsuperscript{113}

\textsuperscript{108} Although there may be no reason to expect that rail service will be reactivated in most cases, the Supreme Court in \textit{Preseault I} rejected the landowners’ claim that the stated statutory purpose to preserve rail corridors for the future was merely a sham and a pretext for taking private property for public recreation. \textit{Preseault I}, 494 U.S. at 17-19. Moreover, in at least five cases, rail service has been reactivated over rights-of-way that had been converted to trails under the Rails-to-Trails Act. \textit{See} Norfolk & W. Ry. Co. — Abandonment Between St. Marys & Minister in Auglaize County, Ohio, 9 I.C.C.2d 1015 (1993); Missouri Pac. R.R., Co. — Abandonment Exemption — in St. Louis County, Missouri, No. AB-3 (Sub-No. 98X), 1997 STB LEXIS 2969 (Apr. 18, 1997); Iowa Power, Inc. — Constr. Exemption— Council Bluffs, Iowa, 8 I.C.C.2d 858 (1990); Georgia Great S. Div., South Carolina Cent. R.R. Co. — Abandonment & Discontinuance Exemption — Between Albany & Dawson, in Terrell, Lee, & Dougherty Counties, Georgia, No. AB-389 (Sub-No. 1X), 2003 STB LEXIS 274 (May 9, 2003); BG & CM R.R. — Exemption From 49 U.S.C. Subtitle IV, Finance Docket No. 34399, 2003 STB LEXIS 652 (Oct. 17, 2003).

\textsuperscript{109} \textit{See} Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (“[the government], by \textit{ipse dixit}, may not transform private property into public property without compensation . . . ”).

\textsuperscript{110} This argument seems to reflect the views expressed by Justice O’Connor, joined by Justices Kennedy and Scalia, in \textit{Preseault I}, \textit{Preseault I}, 494 U.S. at 20-25 (O’Connor, J., concurring).

\textsuperscript{111} 16 U.S.C. § 1247(d) (2004).

\textsuperscript{112} U.S. \textsc{const.} amend. V.

\textsuperscript{113} This conclusion is based on the principle, recently reaffirmed by the Court, that “the ‘just compensation’ required by the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.” \textit{Brown v. Legal Found. of Washington}, 538 U.S. 216, 235-36 (2003).
These arguments can be evaluated in two ways. One way, which reflects the Supreme Court’s current approach to regulatory takings questions, calls for “essentially ad hoc, factual inquiries” into such matters as the nature of the governmental action, the governmental interests at stake and the impact of the governmental actions on the reasonable investment-backed expectations of the claimant.\footnote{Penn Cent. Transp. Co., 438 U.S. at 124.} Another way is a more categorical approach, which attempts to decide whether the governmental action in issue is by its nature a “taking” of property.\footnote{See id. at 123.} Although most of the analysis that follows employs the ad hoc inquiry favored by the Court, a preliminary consideration of the question from a categorical perspective may be helpful in framing the issues.

A. A Categorical View of the Question

In the situation most favorable to a takings claim, the Rails-to-Trails Act prevents the activation of the claimant’s right to possession and full ownership by providing that, if a railroad is willing to transfer of the right-of-way to a qualified transferee for interim trail use subject to future restoration of rail service, the STB shall not permit “abandonment” of the right-of-way and by decreeing that such interim trail use shall not be deemed an “abandonment” of the right-of-way for purposes of state law or any other law.\footnote{16 U.S.C. § 1247(d) (2004).} In effect, in those circumstances, what the statute is doing is prohibiting the agency from permitting the railroad to “abandon” the right of way.\footnote{The ICC made this clear in two cases in which it authorized the reactivation of rail service over a line previously transferred to a trail user for interim trail use under the Rails-to-Trails Act. In those cases, the ICC held that the transfer of the right-of-way to a qualified trail user under the Act does not terminate the transferring railroad’s obligation to preserve the right-of-way for possible future rail use. Norfolk & W. Ry. Co. — Abandonment Between St. Marys & Minister in Auglaize County, Ohio, 9 I.C.C.2d at 1018; Iowa Power, Inc. — Constr. Exemption — Council Bluffs, Iowa, 8 I.C.C.2d at 866.}

Looking at the matter categorically, it is difficult to see how a federal law prohibiting a railroad from taking actions that would amount to an “abandonment” under state law, thereby preventing the activation of the claimant’s right to possession, could plausibly be regarded as a “taking” of the claimant’s rights. To use a simple illustration, if A granted B a perpetual lease of A’s property so long as B did not use the premises to sell narcotics, no one could plausibly contend that a subsequently enacted federal law prohibiting anyone from selling narcotics would amount to a “taking” of A’s potential right to regain possession of his property.

Abandonment was initially a state law concept, and it generally meant, in the railroad context, acts by a railroad signifying its intention...
permanently to cease rail operations over a particular line.\textsuperscript{118} But federal
law adopted the concept when, in the Transportation Act of 1920, it pro-
hibited railroads from effecting an abandonment of their rights-of-way in
a large category of circumstances, namely, in any case where the ICC and
STB have not found that abandonment was in the public interest and
therefore have not authorized such abandonment.\textsuperscript{119} Where the ICC and
STB have not authorized abandonment the railroad retains a federal
common carrier obligation to provide rail service to shippers on reason-
able demand;\textsuperscript{120} and even where no shipper is requesting service and the
line is not being used, the railroad’s obligation, absent abandonment au-
thority from the agency, is to take no action, such as selling all or part of
the right of way, that would make it impossible for it to provide service
when it is demanded.\textsuperscript{121} Since 1920, it has been within the statutory
power of the agency to deny abandonment for the reason that, even
though there is no present demand for service, there is a sufficient public
interest in potential \textit{future} use of the line that the railroad should main-
tain the integrity of the right-of-way and not do anything that would
make future rail use of the line impossible.\textsuperscript{122} This is essentially what the
agency has done when it has exercised its power under the Transportation
Act of 1920 to authorize only discontinuance of service but not full aban-
donment of a line.

To this writer’s knowledge, no court or agency decision has ever sug-
gested that these long-established restrictions on a railroad’s right to
abandon its rights-of-way might constitute a taking of a landowner’s state
law right to repossess the right-of-way in the event of full abandon-
ment.\textsuperscript{123} Nor is this surprising. There is no question that Congress’ con-
stitutional power to regulate railroads includes the power to require them to
provide reasonable service and to maintain the integrity of their lines,
even when they might prefer to abandon them.\textsuperscript{124} The mere fact that

\textsuperscript{118} 49 C.F.R. § 1152.29(e)(2) (2004).
\textsuperscript{119} Transportation Act of 1920, ch. 91 § 18, 41 Stat. 456.
\textsuperscript{120} This obligation is not frequently enforced by the agency through the issuance of orders
requiring the railroad to provide the service and the award of damages to shippers from rail-
\textsuperscript{121} \textit{See} Transportation Act of 1920, ch. 91 § 21, 41 Stat. 456.
\textsuperscript{122} \textit{Id}.
\textsuperscript{123} Justice O’Connor’s concurring opinion in \textit{Preseault I} could be read to suggest that the
ICC’s general power to deny abandonment and thereby delay property owners’ enjoyment of
their reversionary rights might amount to a taking of that property, although the focus of her
opinion was on the exercise of that power under the Rails-to-Trails Act in connection with au-
thorizing an interim trail use agreement. \textit{Preseault I}, 494 U.S. at 20-25 (O’Connor, J.,
concurring).
\textsuperscript{124} \textit{See}, e.g., \textit{Preseault I}, 494 U.S. at 17-19 (holding that Congress clearly had the constitu-
tional power to enact the Rails-to-Trail Act).
these mandated duties may preclude a state of affairs that would permit a landowner to reclaim possession should not convert the federal mandate into a taking of the landowner's property.\textsuperscript{125}

Nothing in the Rails-to-Trails Act of 1983 warrants a different analysis or conclusion. The Rails-to-Trails Act merely reflects a direct \textit{congressional} prohibition of abandonment in certain circumstances, namely, where the railroad is willing to transfer the right-of-way to a qualified transferee for interim trail use subject to the future restoration of rail service.\textsuperscript{126} The fact that Congress made the determination that the public interest warrants the preservation of rail corridors in all such situations does not make its mandate prohibiting abandonment any more of a taking than the mandates imposed by the agency on a case-by-case under the authority of the Transportation Act of 1920.

In sum, a strong argument can be made that the Rails-to-Trails Act does not effect a taking by the very nature of the governmental action.\textsuperscript{127} As will be discussed presently, applying the ad hoc, fact-specific in-

\textsuperscript{125} It is true that the federal government cannot circumvent its obligations under the Takings Clause by mere \textit{ipse dixit}, that is, merely by declaring that circumstances that would activate state property rights have not taken place. See \textit{Webb's Fabulous Pharmacies, Inc.}, 449 U.S. at 164; \textit{cf. Preseault I}, 494 U.S. at 22-23 (O'Connor, J., concurring). But what the Transportation Act of 1920 and the Rails-to-Trails Act did was not merely to \textit{declare} the absence of abandonment in circumstances that would otherwise amount to abandonment; rather, those statutes have forbidden the railroad from taking \textit{actions} (for example, selling the right-of-way to housing developers) that would preclude future use of the right-of-way for railroad purposes. See, e.g., Iowa Power, Inc. — Constr. Exemption — Council Bluffs, Iowa, 8 I.C.C.2d at 866 (“When a railroad enters into a Trails Act arrangement, the Commission retains jurisdiction (that it would have otherwise lost) over the right-of-way and the railroad forgoes the ability to dispose of the property in any other way . . . . [and] risks the possibility that it will not be allowed later to abandon the line . . . .”). A statute that prohibits certain actions which, if taken, might trigger someone else’s rights to property is very different from one that merely declares that the rights do not exist or that the property has not been taken.

\textsuperscript{126} 16 U.S.C. § 1247(d) (2004).

\textsuperscript{127} Employing a somewhat similar categorical analysis, Professor Danaya Wright also concludes that the Rails-to-Trails Act cannot effect a taking of landowners’ property rights. She argues that when the Rails-to-Trails Act was enacted, the owners of property underlying railroad easements had no \textit{present} interest in exclusive possession of the rights-of-way, but only a \textit{future} interest in such possession, which would vest only upon the abandonment of the easement. Because the Rails-to-Trails Act did not take away any present property interest but only deferred the enjoyment of a future interest, it cannot have effected a taking of property for purposes of the Takings Clause. Wright, supra note 12, at 450. The proposition that governmental interferences with unvested future interests cannot, categorically, effect a taking of property for Fifth Amendment purposes, seems questionable, however. Although not deciding the ultimate takings question, the D.C. Circuit rejected this very argument in \textit{National Wildlife Federation, Nat’l Wildlife Fed’n}, 850 F.2d at 704. As that court noted, it seems unlikely, for example, that the Government could enact a statute extending the term of a lease indefinitely without implicating the Takings Clause merely because the lessor’s right to resume exclusive possession was only a future interest that had not vested when the statute was enacted. \textit{Id.}
quity favored by the Supreme Court’s regulatory takings cases, which focuses on the impact of the Rails-to-Trails Act on the investment-backed expectations of the claimants also leads to the conclusion that the Act does not effect a taking. Before undertaking that inquiry, however, one other threshold question, also of a somewhat categorical nature, needs to be addressed: whether the Act amounts to a per se taking under certain Supreme Court cases establishing that category of takings.

B. DOES THE RAILS-TO-TRAILS ACT EFFECT A PER SE TAKING?

In Loretto v. Teleprompter Manhattan CATV Corporation, Nollan v. California Coastal Commission, and other cases, the Supreme Court has held that where the governmental action is not merely a restriction on how the claimant can use its property but results in a permanent physical occupation of the claimant’s property, the action should be deemed a taking per se, and it is not necessary to consider and balance the factors identified in Penn Central, Lucas, and other cases to determine whether it is a taking or a permissible regulation. Loretto, for example, involved a city ordinance requiring landlords to allow cable television companies to install cables and other facilities on the landlords' buildings. Nollan involved a state law requiring landowners to provide a public easement across their property as a condition for obtaining a building permit. Relying on these cases, plaintiffs in Rails-to-Trails Act cases argue that the Trails Act effects a per se taking because it requires the plaintiffs to allow the right of way to be physically occupied by members of the public.

The difficulty with this argument is that the situation in Rails-to-Trails Act cases is very different from cases where governmental action requires property that had previously been strictly private and subject to the owner’s exclusive use and control to be used by the public or by other persons. Rather, even in cases most favorable to taking claims, a landowner or his predecessor has already conveyed an easement for certain purposes, moreover, a permanent and exclusive easement; the challenged governmental action merely requires that it be used for other purposes as well – in this case, use by the public, including the claimant, as a recreational trail. The situation in Rails-to-Trail Act cases is thus more analo-

129. 458 U.S. 419 (1982).
130. id. at 424.
131. See Loretto, 458 U.S. at 434-35.
132. Id. at 421.
133. Nollan, 483 U.S. at 827.
134. As will be discussed more fully, the plurality opinion in Preseault II adopted this view. See Preseault II, 100 F.3d at 1539-40.
gous to cases like *PruneYard Shopping Center v. Robins*\(^{135}\) and *Heart of Atlanta Motel, Inc. v. United States*\(^{136}\) than to *Loretto* and *Nollan*. In *PruneYard*, a private shopping center opened its property to the public but wished to prohibit certain members of the public from distributing handbills in the shopping center, and it claimed that a state constitutional provision requiring it to permit that activity on its property constituted a taking of its property.\(^{137}\) The Supreme Court unanimously rejected the claim and ruled that the state constitutional requirement was a permissible regulation, not a taking.\(^{138}\) The Court observed that the fact that the handbill distributors “may have ‘physically invaded’ [the shopping center’s] property cannot be viewed as determinative.”\(^{139}\) Similarly, in *Heart of Atlanta Motel*, a motel owner contended that a federal law prohibiting it from excluding persons from its motel based on their race amounted to a taking of its property.\(^{140}\) The Court summarily rejected this argument as lacking “any merit.”\(^{141}\)

These cases stand for the proposition that laws requiring landowners to open their property to unwanted persons and activities are not *per se* takings if the landowners have already opened that property to other persons and activities.\(^{142}\) That is the situation in Rails-to-Trails Act cases. It is therefore appropriate to analyze the takings question on the basis of the ad hoc inquiry into the factors identified in *Penn Central* in deciding whether the Act affects a taking.

### C. The Incremental Effect of the Rails-To-Trails Act on Reasonable Investment-backed Expectations

As noted earlier, *Penn Central* and other cases call for an examination of a number of factors in deciding whether a regulation goes “too far” and becomes a taking. Chief among these is “the extent to which the regulation has interfered with distinct investment-backed expectations...”\(^{143}\)

In considering the impact of the Rails-to-Trails Act on the reasonable investment-backed expectations of claimants, it must be kept in mind, first, that even in cases most favorable to a claimant, the claimant or his predecessor had granted a perpetual easement to another entity to con-

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138. *Id.* at 84.
139. *Id.*
140. *Heart of Atlanta Motel Inc.*, 379 U.S. at 243-44.
141. *Id.* at 261.
142. *See PruneYard Shopping Ctr.*, 447 U.S. at 83; *Heart of Atlanta Motel Inc.*, 379 U.S. at 258.
duct unlimited railroad operations forever over the right-of-way, and to exclude all other persons, including the claimant himself, from even going on the right of way. In all such cases, therefore, neither the claimant nor his predecessor had any basis for expecting to be able to reclaim exclusive use of the right-of-way at any future time.

Second, since at least 1920, no owner of land adjacent to a railroad could have any reasonable expectation that the desire of the railroad to cease railroad operations would automatically entitle the owner to regain exclusive possession of the right-of-way under the terms of the easement and state law. Under the Transportation Act of 1920, a railroad wishing to abandon a right-of-way (i.e., to cease using it permanently for rail operations) has had to get permission from a federal agency to do so and that permission might be denied if the agency concludes that the public interest in continued rail service outweighs the railroad’s interest in abandoning the line. Alternatively, the agency might, and frequently did, impose conditions on its grant of abandonment authority that required that the right-of-way be preserved for future rail use, and even future highway use, and a landowner could not enforce any asserted property rights that would be inconsistent with such federally-imposed conditions.

Furthermore, under the same statute, a railroad wishing merely to discontinue rail operations but to retain the right at some unspecified future time to resume rail service could elect to seek only discontinuance authority from the agency, in which case federal law would preclude the landowner from possessing the right of way even if the terms of the original easement and state law would have given him that right in the absence of the federal law.

Although it would be inaccurate to say the Rails-to-Trails Act of 1983 made no significant changes to the pre-existing legal and regulatory regime, the changes were quite limited. First, the Act did not enlarge the rights of the federal agency to deny or condition the abandonment of rights-of-way. Nor

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144. See, e.g., W. Union Tel. Co., 195 U.S. at 270-71.
147. In theory, a landowner in those circumstances who wished to regain possession of the right of way could have filed an abandonment application himself (known as an “adverse abandonment”) and could have attempted to persuade the agency to authorize abandonment despite the railroad’s opposition. Although that was a theoretical option that the Rails-to-Trails Act eliminated, it is doubtful whether the ICC, before 1983, would have granted an adverse abandonment to a private landowner wishing to use the right-of-way for private purposes in any case in which the railroad asserted a plausible claim that it might want to reactivate rail service over the right-of-way in the future.
did it in any way curtail the discretion of railroads in any way. As noted earlier, railroads after 1983 have the same discretion they had before 1983 to choose either to abandon lines, upon receiving appropriate authority, or merely discontinue service, therebyreserving the right to resume rail service later. In sum, before 1983 and since 1920, no owner of land adjacent to a railroad right-of-way could have had any reasonable expectation that the railroad's easement would terminate; that the railroad, if it wished to terminate operations, would seek abandonment rather than the lesser discontinuance authority from the ICC or STB; or that, if the ICC or STB did authorize abandonment, it would not impose conditions requiring preservation of the right-of-way for future transportation uses. Since the reasonable expectation of an adjacent landowner ever to regain exclusive possession of the right-of-way was minimal, the extent to which the 1983 Rails-to-Trails Act interfered with that expectation is likewise necessarily minimal.

What changes did the 1983 Act bring about, then? There were three main changes, two legal and one more practical. The first is that the Act requires the agency to deny full abandonment authority in any case in which the railroad elects to transfer the right-of-way to a qualified trail operator for interim trail use, whereas under prior law the agency had discretion to grant or deny full abandonment. This was not a very significant change, however, since a railroad's election to transfer the right-of-way to an interim trail user under the Rails-to-Trails Act is functionally similar, if not equivalent, to an election to seek discontinuance rather than abandonment authority, which choice railroads had since 1920.

The second and more significant change is that the Rails-to-Trails Act authorizes a use of the easement by persons and for purposes quite different from the use that the landowner originally granted the easement. The question is whether the imposition of that new use amounts to a taking. Several courts have held that it does. The Supreme Court's decisions in PruneYard and Heart of Atlanta Motel, however, establish

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149. Id.
150. Id.
151. Id.
152. Id.
153. See Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 371 (expressly noting this similarity). It is true, as noted earlier, that before 1983, if a railroad sought only discontinuance authority in circumstances presenting no foreseeable prospect of future rail service, a landowner with reversionary rights could have filed an adverse abandonment application which, if successful, would have enabled him to regain possession. See supra note 147. The Rails-to-Trails Act extinguished this possibility. Research has revealed no case in which such a landowner filed such an adverse abandonment application, however, and the likelihood of a landowner's prevailing in such a case would probably have been quite small.
that government actions requiring owners to open their property to persons and activities not authorized and not wanted by the owner do not necessarily constitute takings of the owner’s property.\textsuperscript{155} Whether it does or not probably depends on the degree of the intrusion on the owner’s interests and the government’s interest in requiring it. That is obviously a difficult and largely subjective assessment, but the focus of the takings cases on investment-backed expectations suggests that in Rails-to-Trails Act cases, the assessment favors the no-takings conclusion. While most courts would probably conclude that the government’s interest in requiring public recreational access to rights-of-way\textsuperscript{156} is not as great as its interest in permitting leafletting in shopping malls\textsuperscript{157} or its interest in ensuring unwanted minorities access to public accommodations,\textsuperscript{158} at the same time the impact of recreational trail use on the investment value of the claimant’s property will in most cases be substantially less than the impact to which he or his predecessor voluntarily consented in the first place, namely, noisy and dangerous freight train operations of potentially unlimited frequency and permanent duration.\textsuperscript{159}

The third significant change effected by the Rails-to-Trails Act does not relate to the reasonable investment-back expectations of landowners but concerns instead the Act’s effect on the decision-making of railroads. The Act created a regime in which railroads contemplating abandonment of rail rights-of-way consisting mainly of railroad easements have nothing to lose from transferring the line to qualified trail users; by doing so, the railroads eliminate liabilities and risks associated with the property while preserving the right-of-way for possible restoration of rail operations should the need for them arise in the future.\textsuperscript{160} Before 1983, railroads who wished to preserve such lines for possible future rail service could elect to obtain only discontinuance authority, but doing so left them liable for property taxes and, possibly, for injuries to trespassers.\textsuperscript{161} In theory, if a trail user was willing to assume all responsibility for taxes and

\textsuperscript{155} See PruneYard Shopping Ctr., 447 U.S. at 84; Heart of Atlanta Motel, Inc., 379 U.S. at 260.

\textsuperscript{156} 16 U.S.C. § 1247(d) (2004).

\textsuperscript{157} PruneYard Shopping Ctr., 447 U.S. at 83-84.

\textsuperscript{158} Heart of Atlanta Motel, Inc., 379 U.S. at 252-53.

\textsuperscript{159} Furthermore, if a court concludes that what has been taken by the Rails-to-Trails Act is merely the additional right of the public to use the easement for recreational purposes, then the measure of the claimant’s compensation should merely be the additional injury to the plaintiff, \textit{if any}, of the recreational use of the right-of-way over and above the injury caused by railroad freight operations. As the Court recently reaffirmed, the measure of compensation for a taking is the injury to the property owner, not the benefit to the government, resulting from the taking. \textit{Brown}, 538 U.S. at 235-36. In Rails-to-Trails Act cases, such injury should be minimal or negative.

\textsuperscript{160} 16 U.S.C. § 1247(d) (2004).

\textsuperscript{161} Transportation Act of 1920, ch. 91, § 20, 41 Stat. 456.
injuries, railroads before 1983 could have entered into lease arrange-
ments similar to agreements authorized by the Rails-to-Trails Act, but
doing so would have left them, and the trail user, exposed to law suits or
adverse abandonment applications contending that the arrangements evi-
denced an abandonment of the easement. Unless the railroad actually
foresaw the likelihood of restoring rail service in the future, it was usually
simpler to obtain and full abandonment authority from the ICC and con-
summate it. The 1983 Act eliminated all such uncertainties, made trans-
fers for trail use a no-lose proposition for railroads, and provided
administrative procedures that fostered the conversion of rail lines to
trails. While these aspects of the Rails-to-Trails Act made conversion of
rail lines to trails much more common than they were before, they did not
effect much change to the reasonable expectations of landowners with
respect to any particular line.

Another consideration relevant to the takings question is that, to the
extent claimants have any interests in railroad rights-of-way affected by
the Rails-to-Trails Act, those interests are based on the claimants’ own-
erness of larger parcels of which the rights-of-way once formed a part. The
Supreme Court’s takings decisions, however, apply the principle that, in
deciding whether governmental action constitutes a taking, what is rele-
vant is the impact of the action on the claimant’s parcel as a whole.162
Thus, for example, it has long held that setback ordinances, prohibiting
any building within a certain distance of the street or adjacent properties,
do not constitute takings of those portions of the property.163 Since the
property at issue in takings claims involving the Rails-to-Trail Act are
100-foot wide strips across larger parcels owned by the claimants, this
principle further supports the conclusion that the Act’s impact on the
claimant’s interests and reasonable expectation does not amount to a
taking.

In sum, the limited impact on the reasonable investment-backed expec-
tations of takings claimants effected by the Rails-to-Trail Act seems
substantially less than the impact of other governmental actions that the
Supreme Court has found not to constitutes takings, such as laws prohib-
itig any development on parts of a persons property, laws prohibiting

162. PruneYard Shopping Ctr., 447 U.S. at 82-83. See also Ruckelshaus, 467 U.S. at 1004-06;
163. Gorieb, 274 U.S. at 608. Similarly, in Palazzolo, the Court held that local zoning actions
that prohibited any development of a substantial part of the claimant’s twenty acre property
(that part designated by the zoning authority as coastal wetlands) did not amount to a taking if
the value of the remaining portion that the claimant could develop was substantial. Palazzolo,
533 U.S. at 616. The Court employed a similar “parcel as a whole” analysis in Tahoe-Sierra
Preservation Council to hold that ordinances imposing a thirty-two month moratorium on all
development of certain property did not constitute a taking of the property. Tahoe-Sierra Pres.
alteration of structures deemed to have historical significant, laws requiring owners to open their property to unwanted persons and activities, and laws prohibiting any development for substantial periods of time.

At the same time, the manifest public interest in preserving priceless transportation resources underlying the Rails-to-Trails Act is at least as important as the public interests underlying the actions in those cases. The public interest underlying railbanking is much more than merely having to condemn and pay for railroad rights-of-way whenever in the future the public interest warrants their restoration for railroad purposes. If rights-of-way are fully abandoned, over time they are likely to be built upon or used for various non-rail purposes. Any future attempt to use eminent domain powers to reassemble the rail corridor will not only cost much more; in many cases it will be impossible as a practical matter, and in most cases it is likely to be much more disruptive of private interests than if the corridor had been preserved in tact.

All of these considerations support the conclusion that the Rails-to-Trails Act does not effect a taking of property even in situations most favorable to the takings claimant.

D. DOES THE AGGREGATE EFFECT OF THE RAILS-TO-TRAILS ACT AND PRIOR FEDERAL LAW EFFECT A TAKING OF PROPERTY?

The preceding analysis has proceeded from the premise that the appropriate inquiry is whether the incremental impact of the Rails-to-Trails Act on the claimant’s property interests and investment backed expectations, over and above the restrictions on those interests and expectations imposed by pre-existing law, is enough to amount to a taking of property. It is appropriate to consider more carefully whether this premise is correct? Two judges of the Federal Circuit in Preseault II thought not.164 Concurring with the plurality opinion’s holding that the Act did take the plaintiffs’ property, Judges Rader and Lourie opined that, even if the incremental effect of the Rails-to-Trails Act might not constitute a taking of landowners’ property, the aggregate effect of that Act combined with the effects of prior federal law going back to the Transportation Act of 1920 has resulted in a taking of that property.165 They said: “In this case, the offending laws are Transportation Act of 1920, . . . the Rail Revitalization and Regulatory Reform Act [of 1976], . . . and the National Trails System Act Amendments of 1983 . . . each of which took or authorized a complicit state government to take a share of the property right.”166

164. Preseault II, 100 F.3d at 1553 (Rader, J., concurring).
165. Id. at 1553-54 (Rader, J., concurring).
166. Id. This view was not endorsed by the three judges joining the plurality opinion, which rejected the suggestion that the 1920 and 1976 statutes effected a taking. Id. at 1537-38.
There is certainly some intuitive appeal to this argument. If a big governmental bite into one's property rights amounts to a taking of that property, the government should not be able to avoid its constitutional obligation to pay compensation merely by taking a series of little bites over time. The argument is not, however, consistent with the takings principles endorsed by at least five of the current justices of the Supreme Court. Moreover, even if accepted, the argument would benefit only a small class of claimants, namely, those who acquired their property and granted easements over it before 1920.

Because the Court’s decisions properly frame the regulatory takings inquiry in terms of the impact of the governmental action on the reasonable, investment-backed expectations of the claimant, not the claimant’s predecessors in interest, they necessarily require consideration of when the claimant acquired his property interest and the legal restraints on that interest at the time he acquired it. A person who, before 1920 acquired property and granted a railroad an easement over it limited to railroad purposes, might have a reasonable claim that subsequent federal legislation, including the Transportation Act of 1920 and the Rails-to-Trails Act of 1983, all had an aggregate effect on his property interests that amounts to a taking. But a person who acquired his property after 1920 acquired it subject to the restraints placed on it by the 1920 Act, and very likely paid a lower price for the property than he would have paid in the absence of those restraints. Such a person would have no persuasive basis for claiming that the 1920 legislation interfered with any reasonable investment-backed expectations he may have had either by itself or in combination with the effects of subsequent legislation.

IV. COURT DECISIONS ON THE RAILS-TO-TRAILS ACT

As noted at the outset, the Supreme Court has not ruled on whether the Rails-to-Trails Act may effect a taking of property. Lower court decisions are divided on the issue and contain a variety of rationales.

167. See, e.g., Lucas, 505 U.S. at 1027; Loveladies Harbor, Inc., 28 F.3d at 1177. As noted previously, four justices expressed a somewhat different view in Palazzolo to the effect that the timing of the claimant’s acquisition of property relative to the challenged governmental action would generally not be relevant to the takings questions. Palazzolo, 533 U.S. at 626-30. Five other justices, however, expressed the opinion that the timing of the claimant’s acquisition of property is relevant for purposes of determining whether a challenged regulation effects a taking. Id. at 632-36. Furthermore, even those endorsing the minority view might well agree that a federal regulatory regime in place for more than eighty years qualifies as “background principles” that are relevant in deciding whether the 1983 Rails-to-Trails Act took the property of persons who acquired that property under that regime.

168. Similarly, of course, a person who acquired his interests after 1983 would have no basis for claiming that the Rails-to-Trails Act interfered with any reasonable investment-backed expectations he might have had. See Lucas, 505 U.S. at 1027.
The first and most significant case to raise the takings issue was brought by Paul and Patricia Preseault, landowners in Vermont. The case involved a railroad right-of-way easement across the Preseaults’ property; the easement was initially granted by their predecessors in 1899 and was acquired by the State of Vermont in 1962, which leased it to the Vermont Railway. The Preseaults claimed that the easement had been extinguished by the termination of railroad operations by the Vermont Railway in 1975. The railroad, however, had never sought or obtained abandonment authority from the ICC. The Preseaults therefore filed their own abandonment application with the ICC in 1985. The ICC denied that application and instead granted the request of the State of Vermont and the Vermont Railway to authorize discontinuance of rail service and conveyance of the right-of-way to the City of Burlington for railbanking and interim trail use under the Rails-to-Trail Act. The Preseaults sought review of the ICC’s decision in the Second Circuit, where they argued that the Act effected an uncompensated taking of their property and was therefore unconstitutional.

The Second Circuit held that the Rails-to-Trail Act did not effect a taking of the Preseaults’ property and affirmed the ICC’s decision. The court’s rationale for rejecting the taking claim is not entirely clear, but it seems to have reasoned that whatever state-law reversionary interests the Preseaults might have had to regain possession of the right-of-way had always been subject to the ICC’s plenary authority to authorize, or refuse to authorize, abandonment, and those interests were not made worse by the Rails-to-Trails Act. The court said: “[The Preseaults’] reversionary interest, if any, is not postponed any more by the operation of § 1247(d) [the Rails-to-Trails Act] than it could otherwise be affected by the ICC’s continuing jurisdiction.” In other words, the court seems to say, since the ICC could have denied abandonment under the pre-Act law, the Act didn’t change anything.

169. Preseault II, 100 F.3d at 1529.
170. There were sharp differences among the judges reviewing the case as to what interests the original 1899 deeds conveyed and whether those interests included use of the right-of-way as a recreational trail. Preseault II, 100 F.3d at 1532-34. A majority of the Federal Circuit in Preseault II held that the deeds conveyed only easements limited to railroad use. Id. at 1537. It will be assumed here that this state law property determination was correct.
171. The Preseaults acquired different portions of the property at issue between 1966 and 1980. Id. at 1537.
173. Id.
174. Id. at 10.
175. Id.
177. Id. at 150-51.
178. Id. at 151.
This rationale is similar to the analysis offered in the preceding section, but it is somewhat misleading to suggest that the Rails-to-Trail Act had no effect on the Preseaults’ interest. Although the ICC could have denied abandonment under pre-Act law, it must be acknowledged that the Act withdrew the agency’s discretion on that issue and requires it to deny abandonment whenever the railroad and a qualified trail user agree to railbanking and interim trail use.\textsuperscript{179} The court should have acknowledged that consequence of the Act and squarely addressed whether it amounted to a taking.\textsuperscript{180}

The Supreme Court affirmed the Second Circuit’s decision but on different grounds.\textsuperscript{181} The Court expressly declined to decide whether the Rails-to-Trail Act took the Preseaults’ property but held the Act was constitutional in any event because, if it did effect a taking, the affected property owner could recover compensation from the United States in a suit under the Tucker Act.\textsuperscript{182}

In a concurring opinion, Justice O’Connor, joined by Justices Kennedy and Scalia, expressed the view: first, that the Preseaults’ property interests (\textit{i.e.}, their right to possess the right of way in given circumstances) are determined by state law, and thus will depend on the terms of the relevant deeds and easements as qualified by state law; and second, that whether the Rails-to-Trails Act interferes sufficiently with those interests to amount to a taking must be evaluated under traditional federal takings jurisprudence.\textsuperscript{183} The concurring opinion rejected what it conceived to be the Second Circuit’s view that the ICC’s power under the Rails-to-Trails Act to preempt state law by denying abandonment and requiring trail use itself circumscribed the Preseaults’ property interests and therefore did not effect a taking of them; such a view, Justice O’Connor said, would “read the Just Compensation Clause out of the Constitution.”\textsuperscript{184} It is not clear from the concurring opinion whether, or to what extent, the ICC’s long-standing authority abandonments under

\textsuperscript{180} As discussed earlier, what seems more significant for purposes of takings analysis is the fact that, whatever effect it might have had on the agency’s discretion, the Rails-to-Trail Act made no change in the railroad’s discretion either to seek and consummate an authorized abandonment or seek only permission to discontinue rail operations but retain the right to resume them in the future. See supra text accompanying notes 117-28.
\textsuperscript{181} See \textit{Preseault I}, 494 U.S. at 4.
\textsuperscript{182} \textit{Id.} Earlier, the ICC had similarly declined to decide whether the Rails-to-Trails Act effected a taking on the dual grounds that that question is for the courts, not the agency, to decide and also that the Tucker Act would presumably provide a remedy to claimants if it did effect a taking. Rail Abandonments – Use of Rights-of-Way As Trails, 5 I.C.C.2d at 374.
\textsuperscript{183} \textit{Preseault I}, 494 U.S. at 20-23 (O’Connor, J., concurring).
\textsuperscript{184} \textit{Id.} at 23 (O’Connor, J., concurring). Without deciding the question, a panel of the D.C. Circuit expressed the same view in \textit{National Wildlife Federation}. \textit{Nat’l Wildlife Fed’n}, 850 F.2d at 705.
pre-Rails-to-Trail Act federal law would be relevant to the takings question in the opinion of the concurring justices.\footnote{185}

In response to the Supreme Court’s opinion, the Preseaults filed a Tucker Act suit against the United States for compensation in the court of claims.\footnote{186} In \textit{Preseault II}, the Federal Circuit upheld their taking claim.\footnote{187} None of the opinions commanded a majority of the nine-judge en banc court, however, and accordingly none are entitled to precedential effect.\footnote{188}

The basis for the plurality opinion written by Judge Plager and joined by three other judges is far from clear. It appears to have concluded that the easement originally granted to the railroad authorized railroad operations only; that by requiring use of the right-of-way as a public trail, the Rails-to-Trails Act effected a physical invasion of the Preseaults’ property rights; and therefore under \textit{Loretto} the Act effected a \textit{per se} taking and no analysis was required of the Preseaults’ “investment-backed” expectations or other factors that would be relevant in the case of an alleged “regulatory” taking.\footnote{189} Two concurring judges, as discussed earlier, concluded that all federal legislation since 1920 effected, in the aggregate, a taking of the Preseault’s property.\footnote{190} Three dissenting judges concluded that, as a matter of Vermont law, the easement conveyed to the railroad, and later to the trail user, permitted recreational trail use and had never been abandoned.\footnote{191}

\footnote{185. The concurring opinion’s statement that “state law creates and defines the scope of the reversionary or other real property interests affected by the ICC’s actions. . . .” could be read to imply that the ICC’s long-standing authority over rail abandonments going back to 1920 would be irrelevant in assessing the Rails-to-Trails Acts’ interference with the claimant’s reasonable investment-backed expectations under traditional takings jurisprudence. \textit{Preseault I}, 494 U.S. at 20. On the other hand, the opinion acknowledged that pre-Rails-to-Trails Act federal law could be relevant to the takings questions in certain circumstances. \textit{Id}. The view that it would be irrelevant would be at odds with \textit{Lucas}, which held that federal law may be part of the “background principles” which may circumscribe the claimant’s property rights and reasonable expectations. \textit{Lucas}, 505 U.S. at 1028-30.}

\footnote{186. \textit{Preseault v. United States}, 24 Cl. Ct. 818 (1992).}

\footnote{187. \textit{Preseault II}, 100 F.3d at 1529.}


\footnote{189. \textit{Preseault II}, 100 F.3d at 1539-40. The opinion also expressed the following views, apparently in \textit{dicta}: The Transportation Act of 1920 and the 4-R Act of 1976 did not effect any taking of the Preseaults’ property. \textit{Id}. at 1537-38. It is not appropriate to consider federal regulatory law as part of the “background principles” defining a claimant’s property rights; only state law is relevant. \textit{Id}. at 1538-39. As a matter of state law, the railroad easement had been abandoned by the railroad in 1975, ten years before abandonment authority was sought from the ICC. \textit{Id}. at 1549.}

\footnote{190. \textit{Id}. at 1553 (Rader, J., concurring).}

\footnote{191. \textit{Id}. at 1554-76 (Clevenger, J., dissenting). In a recent opinion, a three-judge panel of the Federal Circuit disagreed with the Government’s characterization of \textit{Preseault II} as a plurality
Courts since Preseault II have rejected some takings claims and accepted others.\textsuperscript{192} Either expressly or implicitly adopting the views expressed in Justice O'Connor's concurring opinion in Preseault I and the Federal Circuit's plurality opinion in Preseault II, the courts in most of the cases seem to have regarded the dispositive questions to be questions of state law.\textsuperscript{193} The main state law questions have been whether the interest initially conveyed to the railroad was a fee interest or an easement; if an easement, whether the easement authorized use of the right-of-way as a recreational trail by the public; and whether the easement was abandoned, and therefore terminated, as a matter of state law when the railroad applied for abandonment authority to the ICC or STB and then conveyed the right-of-way to a trail user pursuant to the Rails-to-Trails Act.\textsuperscript{194} In several cases, takings claims have been rejected because one or more of the state law questions have been decided against the claimants.\textsuperscript{195}

In all cases since Preseault II in which the state law questions have all been decided in favor of the takings claimants, the courts have held that the Act effected a compensable taking with little, if any, further analysis of the question under the Supreme Court's takings jurisprudence.\textsuperscript{196} These courts seem erroneously to have assumed without further analysis that, if the state law questions are resolved in favor of the claimant, Justice O'Connor's concurring opinion in Preseault I and/or the Federal Cir-
cuit's decision in *Preseault II* require a finding against the United States on the ultimate takings question.

With the state law issues viewed as largely dispositive, the litigation of takings claims involving the Rails-to-Trails Act has tended to be complex, time-consuming, and fact-intensive requiring close examination of deed language, title histories, and facts bearing on the railroad's acquisition and disposition of the rights-of-way.\textsuperscript{197} It has been especially complex in class actions, some of which involve thousands of members of the plaintiff class.\textsuperscript{198}

It is the thesis of this paper that the state law questions are not dispositive for the reasons discussed at length; indeed, even if all the state law questions decided in favor of the claimant, it is submitted that the Rails-to-Trails Act would not effect a taking of the claimants property as a matter of federal constitutional law reflected in the Supreme Court's takings cases. If this thesis is correct, the complex, fact-intensive litigation that has burdened the litigation of takings claims under the Rails-to-Trails Act would be largely unnecessary and irrelevant.

Contrary to the apparent assumption of some courts, nothing in the Supreme Court's majority or concurring opinions in *Preseault I* suggest otherwise. The majority opinion specifically declined to reach the question.\textsuperscript{199} The concurring opinion only opined that the Rails-to-Trails Act itself does not require a no-takings answer and that the answer must instead be resolved under the Court's traditional takings jurisprudence, but

\textsuperscript{197} With regard to the railroads' actions in disposing of the rights-of-way, the courts are divided on the relevance of the railroads' invocation of the Rails-to-Trails Act on the issue of state law abandonment. In *Chevy Chase Land Co.*, the Maryland Court of Appeals held, among other things, that the railroad had not abandoned its easement as a matter of state law in part because, it said, "a railroad's participation in a rails-to-trails program implies that it does not intend to fully abandon the line, but rather to retain the right-of-way while permitting interim trail use." *Chevy Chase Land Co.*, 733 A.2d at 1092. Additionally, the Federal Circuit rejected the land company's taking claim based on the Maryland Court of Appeals' determinations of state law. Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 1998). In *Schneider*, the court followed the Maryland Court of Appeals' reasoning to find that the railroad had not abandoned its easements, but nevertheless concluded that the Rails-to-Trails Act resulted in a taking of some of the plaintiffs' parcels. *Schneider*, 2000 U.S. Dist. LEXIS 19822, at *5-*13. In *Glosemeyer and Toews*, the courts found the easements had been abandoned as a matter of state law despite the use of the Rails-to-Trails Act, as did the plurality opinion in *Preseault II*. See *Glosemeyer*, 45 Fed. Cl. at 776; *Toews*, 53 Fed. Cl. at 62-63; *Preseault II*, 100 F.3d at 1549. In *Schmitt*, the court made conflicting findings on the issue of state law abandonment. *Schmitt*, 2001 U.S. Dist. LEXIS 22955, at *29-*32.

\textsuperscript{198} The complex questions concern not only the scope of the claimants' state law property rights, but also, when a taking has been found, the proper valuation of the property taken or of the just compensation due the claimant from the taking. See, e.g., *Illig v. United States*, 58 Fed. Cl. 619 (2003); *Moore v. United States*, 54 Fed. Cl. 747 (2002).

\textsuperscript{199} *Preseault I*, 494 U.S. at 4.
it did not suggest what that answer should be.200

Although a majority of the then-judges of the Federal Circuit in Preseault II held that the Act effected a taking on the facts of that case, the decision is not controlling precedent even in cases appealable to that court because none of the opinions commanded a majority of the court.201 Furthermore, the decisional grounds of the plurality opinion are singularly murky. The plurality opinion made no assessment of the Preseault's reasonable investment-backed expectations when they acquired their property and it gave no consideration to the "parcel as a whole" principle reflected in the set-back cases and Tahoe-Sierra Preservation Council.202 To the extent the plurality concluded that the Act effects a per se taking because it entails a physical invasion, the opinion failed to address the import of PruneYard and Heart of Atlanta Motel, which found no takings in analogous circumstances.203 To the extent the plurality based its decision on its view that federal transportation law cannot constitute part of the "background principles" defining the plaintiffs' property interests, that view is at odds with the Supreme Court's opinion in Lucas indicating that federal law may do so.204 In Lucas, the Court stated: "[W]e assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title" in defense of a taking claim,205 and it cited in support of that proposition Scranton v. Wheeler,206 which was a case finding that the Government’s navigational easement was a pre-existing federal law limitation on a landowner’s title.207 Moreover, the Federal Circuit itself has found that pre-existing federal law limitations on takings claimants’ rights respecting their property are relevant in determining whether the challenged action constituted a taking.208

V. Conclusion

In sum, twenty years after Congress enacted legislation that has resulted in the creation of more than 11,000 recreational trails in the United States, the difficult and often-litigated question of whether the Rails-to-

200. Id. at 20 (O'Connor, J., concurring).
204. See Preseault II, 100 F.3d at 1538-39; Lucas, 505 U.S. at 1028-29.
205. Lucas, 505 U.S. at 1028-29.
206. Scranton, 197 U.S. at 163.
207. Id.
208. See, e.g., M & J Coal Co., 47 F.3d at 1154; California Hous. Sec., Inc. v. United States, 959 F.2d 955, 958-60 (Fed. Cir. 1992).
Trails Act can effect a taking for which the United States must pay compensation has not yet been definitively resolved by any controlling appellate court decision. For the reasons discusses in this paper, viewing the matter either categorically or in terms of the case-by-case analysis favored by the Supreme Court of investment-backed expectations and other factors, the answer to whether the Rails-to-Trails Act can effect a taking for which the United States must pay compensation has not yet been definitively resolved by any controlling appellate court decision should be no. As a categorical matter, it hardly seems a “taking” when a federal law, not only the Rails-to-Trails Act but also basic regulatory law going back to 1920, does nothing more than prohibit a railroads from taking actions which, if taken, would entitle a landowner to exclusive possession of property by the terms of deeds and state law. And, as a matter of expectations, it is difficult to see how a landowner whose ancestor granted a railroad an exclusive and perpetual right to operate an unlimited number of trains over his property can claim much of a reasonable expectation that he would ever enjoy exclusive possession of the railroad’s right of way.
Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land

Michael L. Stokes*

Tall weeds grow over a rusting railroad. Trees have sprung up through the rotting ties, and in places the rails hang in the air, suspended over gullies where rain has washed out the ballast. A quarter-mile away, an old highway bridge, built when the railroad was still active, needs to be replaced. To replace the bridge would cost millions. The state highway department wants to remove it and pave over the old rail line. Can they do it? Surprisingly, the answer may be no. This article will explain why and discuss what can be done about it.

I. SOME ILLUSTRATIONS OF THE PROBLEM

It is a well-known fact that the nation's bridges are wearing out. Highway bridges built in the 1950s and 60s are nearing the end of their useful life. According to the Federal Highway Administration, as of 1998, nearly thirty percent of the nation's 582,976 rural and urban bridges were classified as deficient.1 Of those, sixteen percent (93,072 bridges) were


1. Tom Ichniowski, DOT Says Funding Hikes Raised Quality of Roads and Bridges, ENGINEERING NEWS-REC., June 12, 2000, at 16.
considered to be structurally deficient.\textsuperscript{2}

The decline in America's railroad mileage is also well-known. In 1960, large railroads owned over 207,000 miles of trackage in the United States.\textsuperscript{3} By 2000, however, system mileage decreased to less than half that amount, meaning that over 100,000 miles of Class I railroad had been abandoned.\textsuperscript{4} And this figure does not include local spur or industrial track mileage.

Considered together, these two well-documented trends indicate a third: a significant number of the bridges that need replacement pass over unused rail lines. News reports suggest this scenario is not uncommon.\textsuperscript{5} In some cases, highway officials remove the bridge, fill the old railroad right-of-way, and rebuild the road at grade.\textsuperscript{6} In others, they replace the bridge - to the consternation of local residents, who ask questions like "why spend almost $4 million for a bridge over a railroad that has not been used in years?"\textsuperscript{7}

Why, indeed? Two road projects, one in Wisconsin and the other in Missouri, illustrate the issues involved.

\textbf{A. THE WISCONSIN TWO-STEP}

The Wisconsin project, a ten mile, $66-million-dollar major arterial highway called the Tri-County Freeway, had been planned for twenty-five


\footnote{4. Id.}

\footnote{5. \textit{See}, e.g., \textit{Bridge Project To Be Discussed}, SOUTH BEND TRIB., July 22, 1999, at E3 (proposed removal of U.S. 31 bridge over abandoned railroad); \textit{Road Projects To Total $248 Million Carbon To Receive $16.1 Million; Schuylkill Will Get $54.7 Million}, THE ALLENTOWN MORNING CALL, Nov. 29, 1996, at B3 (bridge over abandoned railroad to be removed for $295,000); Bill Moss, \textit{State Bridges Crumble As Budget Levels Tumble}, ST. PETERSBURG TIMES, Oct. 29, 1989, at 1B (U.S. Highway 301 bridge over abandoned railroad tracks structurally deficient).}

\footnote{6. \textit{See}, e.g., Press Release, Danny Morgan, Oklahoma State Representative, State Contract Awarded to Remove Highway Bridge Over Abandoned Railroad in Lincoln County (April 7, 2003), at http://www.lsbd.state.ok.us/house/news6201.htm (describing removal of bridge and regrading to highway level); George W. Davis, \textit{Stark Bids for Improvement Funds}, AKRON BEACON J., Nov. 29, 1998, at E1 ($325,415 needed to remove bridge over abandoned railroad line and fill to reconnect the highway).}

\footnote{7. \textit{See} Arthur H. Gunther, \textit{The Column Rule}, THE J. NEWS (Westchester County, NY), Jan. 16, 2001, at 4B. Mr. Gunther went on to observe that "no one thought about replacing the Western Highway bridge over the same Pierrmont branch right of way in the 1980s. The hole was simply filled in." Id.}
years.\textsuperscript{8} In the late 1980s, the Wisconsin Department of Transportation ("WisDOT") was finally ready to build it.\textsuperscript{9}

The planned highway intersected a little-used stretch of railroad over which a solitary shipper received twelve to fifteen rail cars a year.\textsuperscript{10} Putting a bridge over the tracks would have cost $2.65 million, and an at-grade crossing would have been unsafe, so WisDOT asked the Interstate Commerce Commission for permission to sever the rail line.\textsuperscript{11} But, the ICC declined.\textsuperscript{12}

The Commission recognized the state's strong public interest in cutting the rail line, but said "we do not simply weigh the dollars to be expended in building an overpass against the dollars of revenue . . . lost by [the railroad], or the increased costs experienced by shippers who lose rail service."\textsuperscript{13} Instead, the Commission said, it based its decision on the national rail transportation policy, which would be defeated if the railroad were forced to abandon trackage that was still in use and had some potential for increased future traffic.\textsuperscript{14}

But that was not the end of the story. Now bargaining from a very strong position, the railroad reached an agreement with WisDOT for removal of the track and petitioned the ICC to abandon the line.\textsuperscript{15} Granting the petition over the shipper's opposition, the Commission explained that: "It is one thing to force an abandonment over the opposition of the carrier providing the service on the line: it is quite another to authorize an abandonment when the carrier which must provide the service and incur the costs supports the action."\textsuperscript{16}

B. THE "SHOW-ME STATE" SHOW-STOPPER

The rail line affected by the Wisconsin project was seldom used, but at least it was still in service. Not so in Raytown, Missouri, where an old Union Pacific line laid unused and neglected for more than a decade before the city ripped part of it up in 1994 to realign a street.\textsuperscript{17}

At first, things seemed to go well for the city. The railroad sued in


\textsuperscript{9} Id.

\textsuperscript{10} Id. at *2.

\textsuperscript{11} Id. at *1.

\textsuperscript{12} Id. at *6.

\textsuperscript{13} Id. at *5.

\textsuperscript{14} Id.

\textsuperscript{15} Wisconsin Cent. Ltd. – Abandonment Exemption, No. AB-303 (Sub-No. 2X), 1990 WL 287427, at *1 (Feb. 22, 1990).

\textsuperscript{16} Id. at *4.

federal court to enjoin the road project, arguing that the ICC had exclusive jurisdiction over the old line, but the federal court disagreed.\textsuperscript{18} Noting that the state transportation department had reserved the right to order construction of an overpass if the railroad became active again, the court allowed the city to proceed with the project, stating:

The possibility of renewed railroad service by the Union Pacific is so speculative that it hardly merits consideration as a factor favoring a preliminary injunction against further work on the new road. Plaintiff makes no claim that it might assume the cost of refurbishing and reactivating the railroad line, and that possibility may be treated as nonexistent.\textsuperscript{19}

Significantly, however, even though the line had not been used since 1979, the ICC had never authorized its abandonment.\textsuperscript{20} So when a rail carrier sought to reactivate the line in 1997 it needed no regulatory approval to do so, despite strong opposition from communities affected by the resumption of train traffic over a line that had been dormant for nearly twenty years.\textsuperscript{21}

The line’s unforeseen reactivation also meant that Missouri, at considerable expense, had to replace the bridges that it had removed for its highway projects.\textsuperscript{22}

C. CALL BEFORE YOU DIG

These two examples seem to say that if a line of rail is in the way of a highway project, local transportation officials had better be prepared to build a costly overpass, settle for an undesirable at-grade crossing, or negotiate with a railroad that holds all the trump cards. Up to a point that is true, because national rail transportation policy is tilted in favor of maintaining economically viable rail service, and federal law generally preempts state condemnation of a rail line.\textsuperscript{23}

But if a line is not viable, the ICC and its successor, the Surface Transportation Board ("STB"), will not allow the railroad to use exclu-

\begin{footnotes}
\footnote{18. Id. at *1, *3.}
\footnote{19. Id. at *2.}
\footnote{21. Id.}
\footnote{22. See Missouri Cent. R.R. Co. – Acquisition & Operation Exemption, Finance Docket No. 33508, 1998 WL 211757, at *8 (Apr. 28, 1998); Russ Pulley, Task Force Calls For Appeal On Rail Line, KAN. CITY STAR, Dec. 6, 2000, at 6. Four years earlier, when denying to enjoin the road project, the federal court noted that “the remotely possible cost of bridging the new road is troubling [so if]... reinstatement of railroad service is contemplated... a deepening of the planned roadway may ultimately save a lot of money.” ST. LOUIS S.W. Ry. Co., 1994 WL 22466, at *2 n.4.}
\end{footnotes}
sive federal jurisdiction as leverage to block condemnation and extract unfair concessions from local officials. As the Commission explained in its 1981 decision in *Modern Handcraft*:

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance . . . of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. [When] . . . there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.24

*Modern Handcraft* established the principle that, under appropriate circumstances, the ICC (and STB) may withdraw federal jurisdiction and clear the way for a state law condemnation or quiet title action to dispose of a rail line.25 This article will consider the legal principles underlying *Modern Handcraft*; review recent STB decisions showing what circumstances justify abandonment; and discuss an apparent gap in the Board’s authority to withdraw its jurisdiction over intrastate spur or industrial tracks. Finally, the article will suggest some ways to streamline the process for letting state courts determine how to dispose of railroad right-of-way that is no longer needed in the national rail transportation system.26

II. *Modern Handcraft* and the Principle of “Adverse Abandonment”

A railroad, as a common carrier, has an obligation under federal law to provide service on a rail line it is authorized to operate.27 At the same time, however, the railroad has a federal right to remain on that line, a right that only the STB can terminate.28 And if the carrier wants to be relieved of its obligation to provide service, for example, over an unprofitable line, it must first get abandonment authorization from the STB.29

26. The article’s focus is on making unused railroad property available for public projects. But many of the issues discussed are also relevant to private landowners seeking to have a state court quiet title to an apparently abandoned railroad easement.
28. *See id.* at *5.
If there are shippers on the line, they can object to the abandonment, subsidize the line to allow its continued operation, or buy it outright.  

However, if there is no affected shipper to complain about lack of service, the railroad might not apply for abandonment authority. Instead, it might just let the line lay fallow, use the land for other purposes, and meanwhile enjoy the benefit of its federally-protected legal occupancy.

A similar situation gave rise to the ICC's Modern Handcraft decision. Before 1957, the Kansas City & Westport Belt Railway Co. operated a rail line running about eight miles from central Kansas City to the southwestern part of the county. The railway contracted the line's operation to a local company in 1957, and in 1962 it sold the line to that company, which became known as the Kansas City Public Service Freight Operation. The demand for freight service, however, was "in a steady decline, and, in September 1968, the trains ceased to run." Afterward, the railroad quit maintaining the track, made no serious effort to solicit rail customers, and began to use the land "for parking lot and billboard purposes... totally unrelated to [its] obligation to perform rail service."

A few years later, the Kansas City Area Transportation District tried to condemn the defunct line for part of its mass transit system. The Missouri Supreme Court agreed that there had been a de facto abandonment of all railroad service... and that no resumption... is anticipated in the foreseeable future." But it dismissed the condemnation suit, holding that the track remained under the ICC's jurisdiction and that "the legal abandonment of [the] line of track... can only be accomplished by order of the ICC.

The transportation authority, and a competing private landowner seeking to enforce its reversionary rights in the land, then asked the ICC

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31. Whether an unused rail corridor should remain as a unitary right-of-way, or whether the rail easement should be extinguished and the property revert to the adjacent landowners, has been the subject of much lawmaking and litigation. See, e.g., Nat'l Assoc. of Reversionary Property Owners v. Surface Transp. Bd., 158 F.3d 135, 136 (D.C. Cir. 1998); Preseault v. United States, 100 F.3d 1525, 1525 (Fed. Cir. 1996).
32. See Kansas City Area Transp. Authority v. Ashley, 555 S.W.2d 9, 10 (Mo. 1977).
34. Kansas City Public Service Freight Operation – Exemption, 7 I.C.C.2d at 218.
35. Modern Handcraft, Inc. – Abandonment, 363 I.C.C. at 971.
36. Kansas City Area Transp. Authority, 555 S.W.2d at 9.
37. Id. at 10.
38. Id. at 10-11. In parting, the court expressed its confidence that the ICC would not "allow this... railroad to persist in a non-service (embargoed) status and continue to exist under the facade of an operating railroad merely to keep a right-of-way easement in a metropolitan area out of public use...." Id. at 11.
for a ruling on the status of the rail line. Noting that “a rail line abandonment . . . sought by noncarrier applicants and opposed by the rail carrier” was “uncommon [but] not unique,” the Commission found that both parties had a sufficient interest in the line’s disposition to seek a ruling that the public convenience and necessity authorized abandonment of the rail line.

Turning to the merits, the ICC agreed that a de facto abandonment of the line had taken place, noting that “[n]o rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of [the railroad] to solicit traffic or reinstitute rail service.” Significantly, too, no shipper objected to the abandonment. Under the circumstances, the ICC concluded there was no need for the rail service that the railroad had been authorized to perform and granted the petition.

Abandonments, however, are permissive. Even after the abandonment application was granted, the railroad still could have chosen not to surrender its common carrier status and obligations. To close that loophole, the ICC explained that the “certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations.” Therefore, even if the railroad did not exercise the abandonment authority granted, the Commission emphasized that “our jurisdiction should not be seen as an impediment to the disposition of the property” by a Missouri court.

Ironically, further litigation in the Missouri courts proved to be disastrous for the transportation authority. A state appeals court concluded that much of the railroad right-of-way had been abandoned and had reverted to the adjoining landowners, so the authority was unable to buy the intact rail corridor from the railroad. And, when the authority (and the railroad) went back to the ICC to try to preserve the corridor by having a trail use condition imposed on it, the Commission held that its jurisdiction “could not have survived” the state court quiet-title case.

40. Id. at 971.
41. Id.
42. Id.
43. Id. at 972-74.
44. Modern Handcraft, Inc. – Abandonment, 363 I.C.C. at 972.
45. Id.
46. Id.
48. Kansas City Public Service Freight Operation – Exemption, 7 I.C.C.2d at 225. The Authority and the railroad argued that the procedural steps they took before the ICC’s abandonment authority became effective prevented the right-of-way from reverting to the landowners. The ICC decided this argument was moot because “(1) since Modern Handcraft we have in-
Nonetheless, the Modern Handcraft decision firmly established that the ICC would not allow a railroad to use its exclusive jurisdiction to maintain control over an unused rail line if the railroad was not making serious efforts to put the line back in service.\(^49\) Instead, the Commission showed that it would consider an "adverse abandonment" application from an interested party and, if warranted, step back to allow "the legitimate processes of State law" to dispose of the property.\(^50\) For as the Supreme Court explained soon afterward, once the ICC withdraws its jurisdiction, a rail line becomes "ordinary real property" subject to state law.\(^51\)

III. **Hayfield Northern and State Authority over Abandoned Rail Property**

To address public concern with abandonment-related rail service interruptions, in 1980 Congress amended the Interstate Commerce Act to provide a procedure for shippers to buy rail lines or subsidize their operation.\(^52\)

If the ICC found that abandonment was appropriate it would publish notice in the Federal Register.\(^53\) Thereafter, a shipper, or other person, could offer to buy or subsidize the line, and if the parties could not agree on terms, the ICC would set the price.\(^54\) If the offeror was willing to pay that amount, the line would remain in service; if not, it could withdraw its offer and the abandonment would go forward.\(^55\)

In 1981, the Chicago & North Western Transportation Co. applied to abandon forty-four miles of trackage, including a nineteen mile segment that went through Hayfield, Minnesota.\(^56\) Several shippers objected to the abandonment of the Hayfield segment, but they could not agree with the railroad on a subsidy amount.\(^57\) The ICC established an appropriate subsidy, but the shippers disagreed with it and withdrew their offer.\(^58\) Soon afterward, the ICC granted a certificate of abandonment to the railroad, "thereby relieving [it] of its federal obligation to supply rail service"

\(^49\) Modern Handcraft, Inc. – Abandonment, 363 I.C.C. at 972.

\(^50\) Id. at 717-72.


\(^52\) Id. at 629.

\(^53\) Id.

\(^54\) Id. at 630.

\(^55\) Hayfield N. R.R. Co., 467 U.S. at 630.

\(^56\) Id. at 625.

\(^57\) Id. at 625-26.

\(^58\) Id. at 626.
along the 44 miles of track.\textsuperscript{59}

In response, some of the shippers formed their own railroad, the Hayfield Northern, and sued in state court, using Minnesota eminent domain law to condemn the abandoned Hayfield segment so they could put it back into service.\textsuperscript{60} The railroad asked a federal court to intervene saying that it had plans to salvage the abandoned track to rehabilitate other active lines and arguing that the federal procedure for subsidizing and abandoning rail lines preempted state law.\textsuperscript{61}

The federal trial and appeals courts agreed with the railroad.\textsuperscript{62} Focusing on the detailed, comprehensive nature of the federal scheme regulating abandonments, the appeals court decided that federal law would be frustrated if Hayfield Northern could use state condemnation law to acquire the line.\textsuperscript{63} As the appeals court saw it, allowing the condemnation would burden the railroad with drawn-out legal proceedings and allow Hayfield Northern to circumvent the ICC’s determination of value.\textsuperscript{64} Distinguishing \textit{Modern Handcraft}, the court noted that it involved state condemnation of an abandoned rail line for “non-rail ‘public purposes’” rather than continued rail service.\textsuperscript{65}

The Supreme Court unanimously reversed the appeals court’s decision.\textsuperscript{66} First, the Court noted, there was nothing in the statute to indicate that “Congress intended to pre-empt state authority over rail property after the Commission has authorized its abandonment.”\textsuperscript{67}

Second, federal law on the subject did not occupy the field so fully as to leave no room for state condemnation of an abandoned rail line.\textsuperscript{68} Applying its test for field preemption, the Court said:

In this case, Congress has not “unmistakably ordained” that the States may not exercise their traditional power of eminent domain over railroad property that has been abandoned; nothing in the Act expressly refers to federal pre-emption with respect to the disposition of abandoned railroad property. Nor is there any indication that the subject matter at issue here – abandoned railroad property – is of the sort that “permits no other conclusion” but that it is governed by federal and not state regulation. After all, state law normally governs the condemnation of ordinary real property.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Hayfield N. R.R. Co.}, 467 U.S. at 626.
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id. at 627.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co., 693 F.2d 819, 823 (8th Cir. 1982).
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Hayfield N. R.R. Co.}, 467 U.S. at 624-25.
\item \textsuperscript{67} \textit{Id. at 628.}
\item \textsuperscript{68} \textit{Id. at 632.}
\item \textsuperscript{69} \textit{Id.}
\end{itemize}
The railroad maintained that the line did not become "ordinary real property" after abandonment, arguing that even then the line remained under the ICC's jurisdiction.\(^70\) However, the Supreme Court disagreed, holding that "unless the Commission attaches postabandonment conditions to a certificate of abandonment, the Commission's authorization of an abandonment brings its regulatory mission to an end."\(^71\) Citing several decisions, including *Modern Handcraft*, the Court held that the ICC could withdraw its jurisdiction and allow state law to operate:

According to the Commission, "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are matters subject to State law."\(^72\)

Finally, the Court found there was no conflict preemption, either.\(^73\) The expedited process for handling an offer to buy or subsidize a rail line, according to the Court,

was intended to abbreviate the period during which a carrier is obligated to furnish financially burdensome service it seeks to escape through abandonment. State condemnation proceedings do not interfere with that purpose insofar as such proceedings *follow* abandonment. After the Commission has authorized a carrier to abandon its lines, that carrier is relieved of its obligation to furnish rail service. Nothing in [the federal law] indicates a federal interest in affording special protection to a carrier after that point at which the carrier's federal obligation ends.\(^74\)

In its *Hayfield Northern* decision, the Supreme Court fully supported the principle that, once the ICC has decided a line can be abandoned, state law can govern its disposition.\(^75\) In so doing it avoided a problem highlighted by the Solicitor General, namely, the creation of "a no-man's land in which abandoned rail lines may not be regulated by the ICC or condemned by the state."\(^76\) And, as the following years would show, the

\(^70\) *Id.*

\(^71\) *Id.* at 633.

\(^72\) *Id.* at 634 (quoting Abandonment of R.R. Lines & Discontinuance of Service, 365 I.C.C. 249, 261 (1981)).

\(^73\) *Hayfield N. R.R. Co.*, 467 U.S. at 635.

\(^74\) *Id.*

\(^75\) *Id.* at 632-34.

\(^76\) Brief of Amicus Curiae United States at 9, Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984) (No. 82-1579), reprinted at http://www.usdoj.gov/osg/briefs/1983/sb830148.txt (last visited Oct. 14, 2004). The brief went on to note that the appeals court's opinion gave "no guidance on . . . the length of time following abandonment that state condemnation is preempted or whether . . . a change of circumstances would enable the state to exercise its condemnation power." *Id.* at 17. In the Solicitor General's view, "To create a special class of property thus exempt from normal processes of government regulation [would be] unwise and unwarranted." *Id.* at 9.
states would regularly need to use their eminent domain powers to oust railroads from unused rail lines.

IV. THE DEVELOPING LAW OF ADVERSE ABANDONMENT

Throughout the past two decades, government agencies and private landowners continued to file “Modern Handcraft adverse abandonment applications” with the ICC and its successor agency, the Surface Transportation Board.77 Once considered “an unusual practice,”78 the Board now hears several applications each year.79 While its decisions are grounded in the facts and circumstances of each case, some general observations can be made.

First, the standard for a third-party “adverse abandonment” is the same as for an abandonment application filed by a railroad: namely, the moving party has the burden of showing “that the public convenience and necessity require or permit abandonment.”80 In essence, the STB will decide whether it is in the public interest to remove the line from the national rail transportation network and terminate the incumbent railroad’s common-carrier obligation to serve existing or future shippers along the line.

If the rail line has been out of use for many years and fallen into disrepair, that evidence would support a Board decision to allow abandonment. But again, the question is one of federal rail transportation policy, not state property law.81 So even if the facts indicate that a given rail easement was “abandoned” under state law, the property cannot be condemned or sold for other uses unless and until the Board decides that abandonment is appropriate.82

The “public convenience and necessity” standard, moreover, is one that is weighted in favor of rail transportation. So even though condemnation of a rickety, seldom-used rail line might save millions of dollars in highway construction costs, the STB will decide the issue in accordance

79. From 2001 to 2004, the Board normally had four to five adverse abandonment cases on its docket at any given time.
82. Id.
with its view of what will best serve the national rail transportation policy. 83

Second, if the rail line is used at all, odds are the STB will deny an adverse abandonment petition. 84 In the one instance, which was later reversed on appeal, where the Board did allow adverse abandonment, the moving party was a government that already owned the property in question and wanted to devote it to other public uses. 85 Even if the local authority seeks only to narrow the right-of-way, it must convince the Board that the taking will not interfere with the railroad's operations. 86 And, even though sparse rail traffic may mean the carrier is operating the line at a loss, if it wants to continue operating, the Board will allow it to do so. 87

Third, if the line is not in service, the Board will look at its potential for future rail traffic. If the rail carrier is making efforts to solicit traffic, and there appears to be "a real potential for reactivation of service," an adverse abandonment petition will probably be denied. 88 Conversely, if

83. See Wisconsin Dep't of Transp. - Abandonment Exemption, 1988 WL 225048, at *11-13. See also New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.3d 1177, 1183-84 (D.C. Cir. 2004) (noting that the public agency's intended use for the rail property is only one of the factors to be weighed in deciding an adverse abandonment application).

84. See, e.g., Salt Lake City Corp. - Adverse Abandonment, No. AB-33 (Sub-No. 183), 2002 STB LEXIS 150, at *17, *20-21 (Mar. 6, 2002).

85. See New York City Econ. Dev. Corp. - Adverse Abandonment, No. AB-596, 2003 STB LEXIS 240, *14-17 (May 9, 2003). In July 2004 the appeals court reversed and remanded this decision for several reasons, including the Board's failure to distinguish its "earlier - and uniform - adverse abandonment precedent" denying abandonment whenever the railroad was operating the line. See New York Cross Harbor R.R., 374 F.3d at 1183. The railroad occupies several acres of city-owned waterfront property in Brooklyn and handles about five carloads of traffic a day. A virtual tour of its antiquated facilities is available on the internet. See N.Y. Cross Harbor Railroad Virtual Tour, at http://www.oldnyc.com (last visited Oct. 18, 2004).

86. In a recent example, the STB denied a city's petition for a declaratory order allowing it to condemn a twenty foot-wide strip of railroad right-of-way over five city blocks for a bicycle trail. See City of Lincoln - Petition for Declaratory Order, 2004 STB LEXIS 508, *12-13, appeal docketed, No. 04-3453 (8th Cir. Oct. 8, 2004). The Board reasoned that the partial-width taking would be preempted unless the city could prove that it would not "unduly interfere with railroad operations." Id. at *7. "Undue interference" sounds like an easy standard to meet, but it is not. The railroad's photos of freight operations in the proposed bike-path area (which the city said were staged) and its articulated safety concerns and inchoate plans to build new facilities there easily trumped the city's "extraordinary request to allow a taking of actively used railroad property." Id. at *12-13. The City of Lincoln decision suggests that, unless the public agency can show that the railroad can avoid the interference easily and at no cost, it will be considered "undue." Id.

87. See, e.g., Western Stock Show Association - Abandonment Exemption, 1 S.T.B. 113, 134 (1996).

the evidence indicates that future rail use is not realistic or economically viable, the Board may grant the petition to allow condemnation for other public purposes.\textsuperscript{89} The presence or absence of potential shippers, the railroad's efforts to try to attract them, and cost of rehabilitating the line to make it usable all are factors that bear on this decision.

However, while the table is tilted in favor of rail service, that does not mean that the railroad can act arbitrarily. For example, if parts of an operating rail line need to be condemned for some other public project and the public authority has a realistic plan for relocating it without interrupting rail service, the Board will allow the authority to proceed.\textsuperscript{90} Similarly, if a local public authority seeks to condemn part of a line to build an at-grade road crossing, the Board will not allow the railroad to use federal jurisdiction to bar the action.\textsuperscript{91}

V. ADVERSE ABANDONMENT OF RAIL SPURS

As we have seen, the STB will not allow abandonment and subsequent condemnation of a rail line that has a reasonable chance of becoming economically viable.\textsuperscript{92} It will also not allow a railroad to use its exclusive jurisdiction as leverage in disposing of a line that is unlikely to see sustainable rail traffic.\textsuperscript{93} For interstate rail lines, this principle was unaffected by the 1995 enactment of the Interstate Commerce Commission Termination Act ("ICCTA").\textsuperscript{94} For some intrastate tracks, however,
the answer might be different.

For the first time, ICCTA brought all rail trackage, including spurs, industrial tracks, and other types of ancillary track formerly regulated by the states, within the exclusive jurisdiction of the Surface Transportation Board. But ICCTA specifically excluded the construction and abandonment of spur track from the Board’s regulatory authority.

This dichotomy poses a significant question: if the Board cannot regulate abandonment of a spur, can it grant an adverse abandonment petition to withdraw its jurisdiction and allow a state to condemn the track? Or, as the railroads argue, is the abandonment of spur track a matter for their discretion alone? The answer is important, because highway bridges that need replacement sometimes cross over long-disused spur tracks. If the STB cannot withdraw its jurisdiction over the spur, then the state cannot condemn it, giving the owner of the rusting tracks unfettered power to block public projects or accommodate them for a price.

Several reasons suggest that Congress did not intend that result. First, the fundamental concept of abandonment is jurisdictional, not regulatory. When granting an abandonment petition filed by a railroad or a third party, the STB withdraws its “primary jurisdiction over the line, thereby clearing the way for the operation of state law.” As the Supreme Court made clear in Hayfield Northern, “unless the Commission

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*12 ("As the ICC explained in Modern Handcraft, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law while there is no overriding Federal interest to protect." Id. (citations omitted)).

95. “Lines of railroad” have long been a subject of federal regulation, while local rail facilities such as spur, industrial, switching, team, or side tracks were not. To determine which is which, the Board looks at factors such as the track’s length, what it is used for, whether it is stub-ended, whether it was built with light-weight rail, and whether the shipper is located at the end of the track. See, e.g., Grand Trunk Western R.R. – Petition for Declaratory Order, Finance Docket No. 35801, 1998 STB LEXIS 194, at *2–*3 (July 26, 1998).

96. See United States v. Idaho, 298 U.S. 105, 107-09 (1936) (ICC lacked jurisdiction to authorize abandonment of rail spur; the subject was up to state regulation). Before ICCTA, petitioners for adverse abandonment commonly argued that the trackage in question was spur track that could be taken by eminent domain without the ICC’s permission. See, e.g., City of Colorado Springs & Metex Metro. Dist. – Petition for Declaratory Order, 1989 ICC LEXIS 78, at *8–*9.


99. See, e.g., Ron Clayton, Bridge Project Completed a Week Early, CHATTANOOGA TIMES FREE PRESS, Sept. 2, 1999, at B5 (describing recent road widening over “a former CSX Railroad spur line that was no longer used, so the tracks were removed, dirt was hauled in and compacted, and the road widened.”); Laura Shireman, UP Asked to Give Up Spur Line, SPOKANE SPOKESMAN-REVIEW, Oct. 10, 1998, at A1 (“Bridges in need of repairs take I-90 and Seltice Way over the spur... if [it] were abandoned, the two agencies could fix the roads there more cheaply.”); Don Porter, U.S. 33 Toll Road Entrance to be Closed for Renovation, SOUTH BEND TRIB., Mar. 9, 1995, at C4 (“The work will involve removing three bridges... two of the bridges cross an abandoned railroad spur line...”).

100. Maine Central R.R. Co. – Abandonment Exemption, 2000 STB LEXIS 532, at *12.
attaches postabandonment conditions to a certificate of abandonment, the
Commission’s authorization of an abandonment brings its regulatory
mission to an end.”101 ICCTA would preclude the Board from regulating
the adverse abandonment of a rail spur by imposing conditions on it. But,
since the abandonment itself is jurisdictional, ICCTA should not be un-
derstood to preclude it.102

Second, as the Solicitor General observed in the United States’ amici-
cus curiae brief in Hayfield Northern, interpreting a statute to create a
“no-man’s land” of property that cannot be regulated by the federal gov-
ernment or condemned by a state “is unwise and unwarranted.”103

The Supreme Court agreed, holding that if the ICC withdraws its
jurisdiction a rail line becomes “ordinary real property” governed by
state law.104 This principle indicates that if the STB were to withdraw its
jurisdiction over a rail spur, it too would become ordinary real property
subject to a condemnation or quiet title action in state court.105

Third, the ICCTA did not alter the STB’s authority to authorize the

102. The STB expressed this view in its Jefferson Terminal decision dealing with some old
industrial property in Detroit. Since the facts suggested that Jefferson was using the tracks on
the property to portray itself as a common carrier in order to block a state condemnation pro-
ceeding, the Board decided to make Jefferson to go through the full regulatory process to become a
rail carrier, noting:

Here, there is ample basis to question whether what Jefferson acquired was a rail line.
The City states, and Jefferson does not deny, that rail service has not been provided
over this track for 13 years. It may be, as Jefferson claims, that this track was a rail line
that could not be removed without regulatory permission, and that a common carrier
obligation thus remains attached to the property and would devolve upon Jefferson if it
were allowed to become a rail carrier. But it may well be instead that this was ancillary
trackage that was properly taken out of service without any need for regulatory permis-
sion, as to which the common carrier obligation was this extinguished long ago.

Jefferson Terminal R.R. Co. – Acquisition and Operation Exemption, Finance Docket No.
33950, 2001 STB LEXIS 267, at *9-*10 (Mar. 15, 2001). This reasoning suggests that, if the owner
has taken a spur or industrial track out of service, the Board can recognize that a de facto
abandonment has occurred and remove its jurisdiction from the property, allowing it to be
condemned.

103. Brief of Amicus Curiae United States at 7, Hayfield N. R.R. Co. v. Chicago & N.W.


105. Whether a state could regulate a rail spur from which the STB had withdrawn its jurisdic-
tion is another question entirely. Since Congress clearly prohibited the STB from regulating a
rail spur within its jurisdiction, it seems logical that state regulation of a spur from which that
jurisdiction had been withdrawn would also be barred. But the physical taking of property for
public use is conceptually distinct from regulation. See Brown v. Legal Found. of Washington,
538 U.S. 216, 233 (2001); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440
(1982); but see Wisconsin Central Ltd., 160 F. Supp. 2d at 1013 (equating condemnation with
regulation).
"adverse abandonment" of an interstate rail line. Because the STB has that power over primary rail trackage that once served hundreds of shippers, it seems absurd that it could not withdraw its jurisdiction over an ancillary spur track built to serve a single shipper. There is no apparent reason for this odd result and neither the text nor the legislative history of ICCTA provide one. But if the distinction between abandonment, as a withdrawal of jurisdiction and putting conditions on abandonment regulation is maintained, the act can be read to avoid this absurd result. Accordingly, the principles of legislative construction indicate that reading is most appropriate.

Fourth, when reviewing conflicts between federal and state powers, the Supreme Court "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." And as the Solicitor General noted in his *Hayfield Northern* brief:

These principles are especially apt in a case involving a state's condemnation authority, which is "part of its sovereign power" and "an attribute of sovereignty . . . (that) inheres in every independent State . . . (and is) necessary for the proper performance of governmental functions."

Accordingly, if Congress had intended to preclude the States from

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   Section 10904 requires us to give preference to arrangements for continued rail service over other alternatives. But, under the statutory standard governing abandonment cases, we cannot view that interest as absolute. Modern Handcraft would be rendered a nullity if GTW or IORY could invoke Section 10904 to perpetuate our jurisdiction over property that we just found under section 10903 should be subject to the operation of the laws of the City of Cincinnati or those of the State of Ohio.
   
   Id.

107. Discussing the original House version of 49 U.S.C. 10906, the committee report expressed the hope that the agency would "minimize regulatory burdens by utilizing its exemption power wherever possible with respect to these tracks formerly excluded from its jurisdiction."
   

108. See, e.g., Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where . . . the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intention of the law.").


condemning abandoned rail spurs – and to legislatively overrule Hayfield Northern in the process – one would expect to see a clear statement of that intention.\textsuperscript{111}

In summary, while Congress did not want any government – federal, state, or local – to regulate the construction and abandonment of rail spurs, there is no reason to believe it intended to put those spurs beyond the reach of any governmental authority. When a spur is no longer in use, when its operator has \textit{de facto} abandoned it, the STB must have the power to recognize that fact and withdraw its jurisdiction. Furthermore, the Supreme Court has long held that the actual \textit{taking} of property for public use is conceptually distinct from the \textit{regulation} of property,\textsuperscript{112} and the power to take emanates from a different source than the power to regulate.\textsuperscript{113} Therefore, even if a rail spur is still in use, the STB should still have discretion to withdraw its jurisdiction to allow the spur to be condemned.\textsuperscript{114}

VI. \textbf{SOME SUGGESTIONS FOR STREAMLINING THE PROCESS}

In adjudicating the Wisconsin rail-highway conflict discussed at the beginning of this article, the ICC recognized the public interest in cutting a seldom-used rail line to save millions of road construction dollars.\textsuperscript{115} But the line was still in use, and there was reason to believe it might handle more traffic in the future.\textsuperscript{116} Accordingly, the Commission decided that national rail transportation policy required preservation of the line even while recognizing that its decision might not seem economically justifiable.\textsuperscript{117}

Balancing the competing considerations is difficult. If a rail line that

\begin{itemize}
\item \textsuperscript{111} Compare Palmer v. Massachusetts, 308 U.S. 79, 85 (1939) ("If this old and familiar power of the states was withdrawn [by] Congress . . . we ought to find language fitting for so drastic a change.").
\item \textsuperscript{112} See Brown, 538 U.S. at 233; Loretto, 458 U.S. at 440.
\item \textsuperscript{113} See, e.g., 1 PHILLIP NICOls, NIChOLS ON EMINENT DOMAin § 1.42 (Julius Sackman et al eds., 3d ed. 1998) ("What distinguishes eminent domain from the police power is that the former involves the \textit{taking} of property because of its need for the public use while the latter involves the \textit{regulation} of such property to prevent its use thereof in a manner that is detrimental to the public interest.").
\item \textsuperscript{114} Whether abandonment of a spur track would serve the public convenience and necessity involves different issues than abandonment of a main line of rail. As noted above, a spur often runs across a single shipper's land to reach that shipper's facility at the end of the track. If condemning the track diminishes the value of the shipper's remaining property, the state court condemnation award would compensate the shipper for that loss. See, e.g., State of Louisiana v. Rach, 136 So.2d 105, 107 (La. Ct. App. 1961) (condemnation award included payment for loss of rail access).
\item \textsuperscript{115} See Wisconsin Dep't of Transp. – Abandonment Exemption, 1988 WL 225048, at *5.
\item \textsuperscript{116} Id. at *4.
\item \textsuperscript{117} Id. at *5.
\end{itemize}
shows potential for economically viable use is severed by a highway, that potential is permanently destroyed, because the highway would prohibitively increase the cost of future rail service. The cumulative effect of many decisions to cut off small feeder lines could degrade the nation’s rail network as a whole. On the other hand, if a railroad’s insubstantial claims about restoring profitable service on a long-unused rail line can block a public project, the railroad has a strong incentive to manipulate the STB’s jurisdiction to better its bargaining position with the local public authority. Even though there is a national policy favoring rail transportation, if resumed service is not realistic, federal jurisdiction over a dead line of rail should not obstruct needed public projects or tie up real estate that could be put to productive use.

The abandonment procedure, too, can encourage strategic behavior, because the issuance of a certificate of abandonment does not necessarily mean that a line has been abandoned. If the STB attached conditions to the abandonment, it retains jurisdiction to ensure compliance with those conditions. But, even if no conditions are attached, the railroad might not exercise its abandonment authority leaving the abandonment “unconsummated.” In addition, if the abandonment is not consummated within a year, the certificate expires and the carrier’s obligation to provide service over the line is revived.

In theory, this penalty, reinstatement of the duty to resume unprofitable rail service if demanded by a shipper, should encourage carriers to be diligent about consummating abandonments. But, in practice, if there is no shipper on the line to demand service, the carrier can maintain control of the real estate without having to actually operate a railroad over it, a situation that rewards gamesmanship by the incumbent railroad. However, there are some ways to streamline this process and to eliminate uncertainty about the legal status of unused rail property.

First, as the ICC emphasized in Modern Handcraft, even if a railroad does not exercise abandonment authority, the “certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations.” Accordingly, if an abandonment is unconditional, its consummation or completion has no bearing on whether a state court now has jurisdiction to dispose of the property.

119. 49 C.F.R. § 1152.29(e)(2) (2004).
120. Modern Handcraft, Inc. – Abandonment, 363 I.C.C. at 972.
121. The ICC and some courts have hedged on this issue, requiring proof that an abandonment was consummated before allowing a state court to dispose of the property. See, e.g., Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 659 (8th Cir. 1996) (“State law claims can only be brought after the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization.”); Abandonment of Railroad Lines & Discontinuance of Service, 365 I.C.C. 249, 261 (1981) (“[T]he disposition of rail property after an effective
Second, even if the STB imposes post-abandonment conditions, they may not conflict with condemnation of the property or disposition of the land in a quiet title action. Or, the conditions may contain time limits, the passage of which a court could easily determine. These factors suggest the Board should use its rule-making powers to identify which conditions might conflict with state-law action. This regulatory guidance would allow a state court to adjudicate the entire matter rather than having to wait for the Board to determine whether a conflict existed. Moreover, for future conditional abandonments, the STB should explicitly state which conditions, if any, foreclose state law action, and if so, for how long.

Third, the Board should give considerable weight to a railroad’s de facto abandonment of a line. Mere cessation of operations does not and should not terminate the railroad’s duty to provide service or the STB’s power to require it to do so. But, if a rail line has not been used for a long time, that fact is compelling evidence that there is no need for rail service on it. To facilitate the disposition of such property the Board could adopt a rebuttable presumption favoring adverse abandonment if the line has not been used or maintained for a significant time.

Fourth, when looking at a railroad’s claim that it will restore a line to economically viable service, the Board should recall the maxim that “actions speak louder than words.” What efforts has the carrier made to attract business or sell the line to someone who wants to operate it? Have any potential shippers expressed a concrete interest in using the line?

certificate of abandonment has been exercised is a matter . . . within a State’s reserved jurisdiction.”). A careful reading of the Supreme Court’s Hayfield Northern opinion, however, shows that unless conditions are imposed, “the Commission’s authorization of an abandonment brings its regulatory mission to an end” and “issuing a certificate of abandonment terminates the Commission’s jurisdiction . . .” Hayfield N. R.R. Co., 467 U.S. at 633-34 (emphasis added).

122. See, e.g., Phillips Co., 97 F.3d at 1377 (“[I]f de facto abandonment were sufficient to establish abandonment under [the federal quiet title statute], a railroad could easily circumvent the ICC’s oversight and regulation by simply terminating its use of a railroad line.”).


124. In Modern Handcraft, the ICC had “no doubt” that de facto abandonment had occurred on a line that had not been used or maintained for about nine years when the underlying state court litigation began. See Modern Handcraft, Inc. – Abandonment, 363 I.C.C. at 971. Nine years and “no doubt” sets the bar somewhat high for a rebuttable presumption. Conversely, although railroads are required to inspect all their tracks weekly or before each use and to keep records of those inspections for two years, see 49 C.F.R. § 213.233(b)(3) (2004); 49 C.F.R. § 213.241(c) (2004), two years seems somewhat soon for presuming abandonment is proper. Five or six years might be an appropriate threshold. An adverse abandonment application could be filed earlier, but the applicant would not have the benefit of any presumption.

125. See, e.g., Consolidated Rail Corp., 29 F.3d at 711 (upholding adverse abandonment
Does the carrier have a realistic plan for restoring service to the line? What investments, if any, has the carrier made in the trackage or in planning for future use? Demonstrable efforts by the railroad would back up its professed belief in the line’s potential. Conversely, if the railroad is not devoting resources to develop what it says would be a profitable investment, its words will ring hollow.

VII. Conclusion

The continuation of rail service and the “banking” of railroad rights-of-way for future rehabilitation are important public policies. Under appropriate circumstances, these policies mean that other public uses of the right-of-way or the adjudication of private claims to the property in state court must take second place. But, under other circumstances, as the STB has recognized, rail carriers do try to use the agency’s exclusive jurisdiction to “shield” unused rail property “from the legitimate processes of state law.” Such strategic behavior is economically inefficient at best and, at worst, fundamentally unfair to private landowners and the public. It is hoped that this discussion of the problem proves to be helpful in correcting it.

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126. Id. at 710-12.
127. See, e.g., Consolidated Rail Corp., 29 F.3d at 712-13.

Dear Readers:

The Transportation Law Journal staff would like correct the following editing errors in Paul Stephen Dempsey’s article, *Transportation: A Legal History*, which was published in Volume 30: Issues 2-3 of the Transportation Law Journal.

**Author Autobiographical Section:**
It should be noted that Dr. Dempsey has authored fourteen books, not ten books.

The following sentence should be added:
The author would like to thank several transportation lawyers and scholars for their inspiration on the issues described herein, including Mark Andrews, Dan Baker, Dick Champlain, Jim Hardman, Rick Kissinger, Rod Macdonald, Bob McFarland, and Bill Taylor.

**Pages 342-43:**
The following paragraph should be added following the sentence marked by footnote 1015.

Criticism of economic regulation of the motor carrier industry was launched by a number of academics. For example, Professor Robert Hardaway condemned motor carrier regulation as providing “a striking example of the economic and social harm which results when classical regulation is imposed on a competitive industry.”

1016 He summarized the “harm and inefficiencies caused by trucking regulation” in terms of:
- Rates which are too high, irrational and discriminatory.
- Social and economic inequities.
- Inferior service to small communities.
- Waste and inefficiency.

The corresponding footnotes for the above paragraph should read as follows:


1017 Id. at 132-33 (citations omitted). According to Hardaway, motor carrier deregulation should follow the path of airline deregulation: “At a time when the deregulation of motor carriers and railroads is far from complete, the experience of airline deregulation nevertheless provides an excellent case study and blueprint for der-

**Page 350:**
The words “or vote” were deleted after “Committee hearing,” from the sentence marked by footnote 1077.

**Page 358:**
The following sentence should be deleted under the heading XXIV. ECONOMIC TRENDS UNDER Deregulation

The first two decades of deregulation were the darkest financial period of the airline, bus and trucking industries.

The following sentences should be added under the heading XXIV. ECONOMIC TRENDS UNDER Deregulation

In testimony before the U.S. Congress, and in books, articles and newspaper editorials, Professor Robert Hardaway insists that economic regulation was a catastrophic failure, and that deregulation has been a remarkable success, resulting in dramatic price savings, and less industry concentration. 1143 In an attempt to explain the difference in the assessment of the public policy impact of deregulation between the economics journals (which tend to praise deregulation) and the law journals (which are more critical), Hardaway accused the legal community of bias: “lawyers themselves have an interest in regulation because they play a significant role in its administration.” 1144 In an unusually harsh indictment of the legal profession and the transportation bar, particularly by a Professor of Law, Hardaway likened those who had represented carriers before regulatory agencies such as the ICC and CAB to anachronistic Marxists of the former Soviet Union. Wrote he: “Like the followers of collapsing authoritarian regimes around the world, old-time regulators took [transportation deregulation] hard. As a former associate counsel of the CAB commented, ‘It is understandably painful for one involved in economic regulation over a professional lifetime to consider one’s work outdated, or even worse, misdirected.’” 1145 In other words, the professional work and contribution of transportation lawyers that helped build what was once universally acclaimed to be the “world’s finest system of transportation”, was unfortunately “misdirected.” According to Professor Hardaway, “deregulation shows every sign of giving the transportation industry a better opportunity to serve the real needs of the consumer, the industry and its employees.” 1146 More
than three decades into deregulation, we are still waiting for it to accomplish those objectives.

Despite such academic euphoria, the first several decades of deregulation have been the darkest financial period in history for the airline, bus and trucking industries.

The corresponding footnotes for the above paragraph should read as follows:


Prof. Hardaway also became among the most prominent champions of the contribution that Frank Lorenzo made to the airline industry. See Robert Hardaway, Lorenzo: The Other Side of the Story, Boston Globe (September 4, 1990); Robert Hardaway, The Good That Lorenzo Did, The Cleveland Plain Dealer (September 1, 1990). The DOT would disagree. In reviewing Lorenzo’s fitness to operate a new airline, a DOT Administrative Law Judge concluded, “Mr. Lorenzo’s companies have lived on the edge of the law and have not desisted from improper conduct until lawsuits or governmental action deterred them from further transgressions. Since air safety is of paramount importance, the Department cannot take the risk of certifying an air carrier whose owner exhibits such manifest contempt for the legal process.” ATX, Inc. Fitness Investigation, 1993 WL 534627, at 63 (1993). On appeal, the DOT concurred with its ALJ, concluding that because of Lorenzo’s involvement with ATX, its managerial competence and compliance disposition were lacking. This conclusion was based on DOT’s review of safety, service and financial failure at Lorenzo’s prior airlines, as well as the widespread lack of personal good faith and trustworthiness in his business dealings and legal and regulatory proceedings. ATX, Inc., Fitness Investigation, DOT Order 94-4-8 (1994). In the 1980s, Lorenzo had successfully
assaulted a number of carriers with leveraged buy-outs, including Continental, People Express (that included Frontier, Britt and PBA), and Eastern Airlines. Although for a short while he presided over the free world’s largest airline empire, his carriers stumbled into bankruptcy, and Eastern was liquidated.


Page 359-60:
The following sentence marked by footnote 1165 should be deleted.

With megacarrier domination of hub airport infrastructure, computer reservations systems, code-sharing regional airlines, and frequent flying programs, the prospectus for new entry appeared dim.1165

The following sentence should be inserted after the sentence marked by footnote 1164.

But overall, pricing was set at unsustainable levels, causing the industry to lose all the profit it had earned in its history.

The following paragraph that precedes the sentence marked by footnote 1166 should be deleted.

Much of deregulation had been premised on assumptions that there were not significant economies of scale or scope in transportation (except, perhaps, in the railroad industry), and that should incumbents raise prices to supracompetitive levels, new entrants would be attracted like sharks to the smell of blood.1161 In theory, actual or potential entry would curtail the extraction of monopoly profits and discipline the market.1162 This was the theory of contestable markets, which provided the intellectual foundation for deregulation.1163 But during the 1990s, new entrants accounted for less than 5% of the national market.1164 With megacarrier domination of hub airport infrastructure, computer reservations systems, code-sharing regional airlines, and frequent flying programs, the prospectus for new entry appeared dim.1165
Page 360:
The following sentence should be added following the sentence marked by footnote 1174.

It is remarkable that deregulation advocates attribute lower prices to deregulation, but refuse to attribute financial disintegration to deregulation.

Pages 361-62:
The following sentence should be added following the sentence marked by footnote 1179.

But the $18 billion of economic losses of the early 1990s were modest in contrast to the $30 billion the airline industry lost in the early 21st Century.

Page 366:
The following sentence should be deleted in footnote 1198.
The MCIA is a part of the DOT’s Federal Highway Administration.
Articles

Trucking Laws in Mexico and Changes After the NAFTA: A Paradigm for the FTAA?

Frederick V. Perry*
Scheherazade S. Rehman**

I. INTRODUCTION

The thirty-four democracies of the Western Hemisphere are in the

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process of negotiating a Free Trade Area of the Americas ("FTAA"). To date, it has been a long and arduous road with many stumbling blocks. The official process began in 1994 during the Summit of the Americas where the heads of state and government made the following declaration in Miami, Florida:

We, therefore, resolve to begin immediately to construct the "Free Trade Area of the Americas" (FTAA), in which barriers to trade and investment will be progressively eliminated. We further resolve to conclude the negotiation of the "Free Trade Area of the Americas" no later than 2005, and agree that concrete progress toward the attainment of this objective will be made by the end of this century. We recognize the progress that already has been realized through the unilateral undertakings of each of our nations and the subregional trade arrangements in our Hemisphere. We will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together.

Past experience with the North American Free Trade Agreement ("NAFTA") and other trading blocs like the European Union ("EU") have led us to believe that, despite the ardent statements of commitment by the key players at the 1994 Summit, the road towards further liberalization, harmonization, and deregulation of competition within the thirty-four member countries of FTAA will require a long and strenuous uphill struggle. This is particularly true when certain industries are the focus of negotiations. One such industry is transportation, with trucking often being a particularly difficult impasse.

It is the process of economic integration that brings to light the importance of the variances between national legal traditions, rules of law, protected industries with their sector-specific laws and regulations, and business customs. A country’s regulatory regime and accompanying practices tend to develop and generally rest on two principal factors: history and the accompanying traditions, such as culture. Nations often learn lessons from their history and they generally understand those lessons through the prism of their culture. This leaves them with a diverse range of relations with their neighbors, both near and distant. This is especially

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2. Adrian Sainz, State Department: Chavez, Castro Won't Derail FTAA Plans, Associated Press Worldstream, Jan. 30, 2004. ("Chavez, a friend of Castro, has expressed his opposition to many aspects of the FTAA and has been accused by U.S. officials of stoking anti-American sentiment in Latin America.").

true for laws governing foreign investment where the variety of national views are often developed and biased due to historic experiences with one’s neighbors. The nations of the Americas seem particularly sensitive to this phenomenon. Moreover, this seems particularly true with respect to their transportation industry’s foreign investment, domestic regulations, and logistical structural setup. These differences become even more glaring in the face of cross-border negotiations as in the NAFTA, for example.

This paper will use the NAFTA as an example to understand the challenges facing FTAA as it provides a fertile ground for examples of the dilemmas related to embedded beliefs and fears of foreign investment and regional integration. It thus serves as a valuable primer for the negotiators of FTAA. More specifically, the first section of this paper will present three case studies that exemplify the historical and cultural impact on the Mexican transportation industry’s policy on foreign investment, domestic regulations and logistical structural setup that were bought to light during the NAFTA negotiations. Furthermore, we will discuss the reasons for restrictions on foreign investments in trucking, changes in the investment code, new foreign investment law, federal highway permits, and critical questions related to vehicle importation, operational leasing, and renting versus owning. Case #1 addresses the arguments in favor of used vehicle importation, Case #2 discusses rental or leasing versus owning, and Case #3 attempts to explain the restrictions of the trucking industry on Mexican foreign investments.

The second section of the paper will discuss the Mexican trucking industry and its interaction with the NAFTA lawmakers. The lessons from the NAFTA case examples and a deeper investigation of the Mexican trucking industry’s negotiations within the NAFTA provide a useful perspective and serve as a guideline by which U.S. carriers could navigate and influence the negotiations of the thirty-four member FTAA. As such, the last section of the paper will attempt to draw some lessons from the NAFTA and apply the lessons to the current FTAA negotiations.

II. MEXICO, THE NAFTA, AND THE TRANSPORTATION INDUSTRY

Prior to the NAFTA agreement, the transportation laws in Mexico, Canada, and the United States were at considerable variance with one another. Laws in Mexico were especially restrictive when it came to for-

eign carriers or foreign investors in local carriers.\textsuperscript{5} Neither was allowed, as will be seen later in this paper. Under FTAA, this problem is multifold as each of the remaining thirty-one countries of the American hemisphere has its own laws and customs in the area of trucking and related logistics operations.\textsuperscript{6} The problem is compounded by the fact that there are currently twelve sub-regional sectoral agreements covering aspects of transportation among and between the signatory countries of such sectoral agreements.\textsuperscript{7}

Moreover, during the NAFTA discussions, the American and Canadian negotiators could not understand, were confused, bemused, and often annoyed by Mexico's attitude regarding its transportation and oil industries.\textsuperscript{8} The Mexicans did not want any foreign investment or real involvement in either industry.\textsuperscript{9} The Mexican transportation regime was

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\textsuperscript{5} The term "carrier," as used in this paper, refers to over-the-road carriers or trucking companies. Unless otherwise noted, "transportation" means land transportation.

\textsuperscript{6} "Logistics" means services that deal with the organization, management of transportation, warehousing, and movement of goods, including the concept of carriage (some call this "supply chain management"). Logistics comes into play anytime a good, or the components or raw material of a manufactured good, is touched, moved, or stored at anytime in the "supply chain." This includes from the time it comes out of the ground, to manufacturing from components, its finished product, and distribution and delivery to the ultimate customer.

\textsuperscript{7} "Sub-Regional Sectoral Agreements" is a term used by the FTAA Trade Negotiations Committee to describe the various international agreements currently existing in the hemisphere.

\textsuperscript{8} Telephone Interview with Nancy McCrae, Chief U.S. Negotiator on the NAFTA transportation matters, U.S. Dep't of Transportation, Office of International Transportation (Jan. 2001).

\textsuperscript{9} See generally Jaime Suchlicki, Mexico: From Montezuma to the Fall of the PRI 709-19 (2nd ed. 2001). In Mexico's case, the restrictive mentality against foreign investment in these particular sectors was due to the lessons of history, which have become a backdrop not only for Mexico's international relations, especially with the United States, but for the Mexicans' day-to-day understanding of who they are. Mexicans traditionally have been very wary of foreigners and foreign intervention. Seven U.S. states are made up of former Mexican territory. In 1846, the U.S. annexed Texas. The Mexican-American War of 1846-1848 killed 50,000 Mexicans and took half of Mexico's territory. Mexican historians reckon uninvited, direct U.S. intervention into Mexican territory has occurred in excess of 200 times. As stated by Porfirio Díaz, "Poor Mexico, so far from God and so close to the United States." The U.S. is a colossus and every Mexican is aware of it. In the early 1860's, the Mexican conservative party and the church were at odds with the liberal party so the conservatives invited the French under Napoleon III to send in any army and an emperor, Maximilian. The French, under Maximilian, controlled Mexico for six to seven years. This culminated in a civil war that the liberals won. Maximilian was executed and the French were kicked out. Then in 1877, one of the leading generals in the war against the French, Porfirio Díaz, became President/Dictator of Mexico. He ruled for over thirty years until the revolution of 1910. During that period, or "Porfirato," as the Mexicans call it, in order to encourage development, Porfirio Díaz invited foreign oil companies, foreign mining interests and foreign transportation and communications companies to dig for oil, conduct mining operations, build railroads and telegraph and the like. The British and the American oil companies exploited the country tremendously. Foreigners controlled most mines. The foreign railroads basically controlled communications and transportation in the country and the government bu-
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highly controlled, monopolistic, expensive, and unresponsive to the fluctuating requirements of domestic and foreign shippers alike. Its anti-foreign based rules and highly restrictive domestic regulations severely constrained growth and competitiveness of the industry and made it inefficient when compared to the systems in the United States and Canada. Prior to the negotiation of NAFTA, operational truck leasing was not permitted in Mexico; foreigners could not take part in transportation activities. Foreigners could not own a single share of stock in a Mexican carrier, and U.S.-based and Canadian-based carriers could not enter Mexico to deliver goods. Some of those restrictions have been lifted completely, others have been lifted partially, and others remain. Even so, if those who were interested in taking part in these activities had not been diligent and pro-active during the time of the NAFTA's negotiation and thereafter, it is unlikely that any of these restrictions would have been changed in any way. Even though the NAFTA brought about sweeping changes to the legal landscape, in the case of transportation, over-the-road trucking, truck leasing and rental, those changes did not come about easily, even after the NAFTA was signed.

Similar diligence and pro-activity will be required in connection with

10. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001).

11. Id.


14. Prior to the writer Perry's involvement and lobbying with the U.S. NAFTA negotiators, no such changes were contemplated. It is for this reason that they asked him for suggestions and briefings in these matters.

the FTAA if U.S. and Canadian-based carriers and logistics companies wish to operate freely throughout the American hemisphere. More specifically, the key issue facing U.S. carriers is whether they wish to undertake the cost, time, and political capital to push for a competition policy that allows them full access in the area of carriage and logistics within the new FTAA construct.

A. CASE STUDY #1: ARGUMENTS IN FAVOR OF USED VEHICLE IMPORTATION

The problem of convincing the Mexican government to allow the importation of foreign used vehicles serves as an excellent illustration of the necessity to understand the commercial, historic, and cultural influence on the negotiating process that comes to the forefront during the creation of trade blocs such as the NAFTA.

There were many arguments made by U.S. carriers and leasing companies to the Mexican government, in favor of allowing the importation of used vehicles. For example, Ryder Truck Rental, Inc. ("RTR"), a wholly owned subsidiary and the rental and leasing company of Ryder System, Inc.,\textsuperscript{16} had for some time attempted to import used vehicles into Mexico. A few years prior to Ryder's expansion into other countries in the world, RTR owned approximately 160,000 vehicles in those days, spread among the United States, Canada, the United Kingdom and Germany.\textsuperscript{17} Because of vehicle fleet rotation, RTR sold about 20% of those vehicles each year.\textsuperscript{18} Under the programmed maintenance system, all vehicles were well maintained throughout their lives. RTR could not afford to have a vehicle break down, since the lease guaranteed a vehicle for constant use, absent vehicle abuse on the part of the lessee. A broken down vehicle would require RTR to replace it for the customer with another vehicle, an expensive proposition for the company.\textsuperscript{19}

With over 50 years experience in dealing with vehicles,\textsuperscript{20} the company had a reliable store of in-house actuarial data at its disposal. RTR

\textsuperscript{16} Ryder System, Inc., About Us, at http://www.ryder.com/about_us.shtml (last visited Aug. 24, 2004). Ryder is a Fortune 500 leading logistics and supply chain management provider in the United States and provides a variety of contract carriage and logistics services to its customers in the United States and abroad. Id.

\textsuperscript{17} Id.

\textsuperscript{18} Interview with Glen Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).


\textsuperscript{20} Ryder System, Inc., About Us, at http://www.ryder.com/about_us_h.shtml (last visited Aug. 24, 2004). With a $35 Model A Ford truck, Jim Ryder, the company's founder, began the business hauling concrete in 1933. In 1938, the full service leasing business began when a Miami beverage distributor leased five trucks from Jim Ryder's fledgling business. Id.
knew, given the application of the vehicle, what it was carrying and the road conditions, how long any particular part, including tires, would last.\textsuperscript{21} The lease contract usually required the vehicle to be fueled at RTR locations. Each time it was fueled, it was inspected, and minor maintenance was performed.\textsuperscript{22} Additionally, each vehicle was required to be brought in periodically for programmed maintenance to be performed.\textsuperscript{23} Parts were replaced, based on their use and RTR’s knowledge of their useful life, before they failed.\textsuperscript{24} The result was that the vehicles were always in “like new condition,” and when sold, demanded a premium in the used vehicle market place.

The basic argument of RTR to the Secretariat of Communication and Transportation (“SCT”) was as follows: by the late 1980s and beginning of the 1990s, the Mexican economy had seen rapid growth, and trade between Mexico and the United States had experienced a constant volume surpassing double digit percentage increases per year for about five years in a row.\textsuperscript{25} Mexico’s gross internal product per capita was $1,846 in 1987, $3,612 in 1991, and $4,108 in 1992.\textsuperscript{26} Trade and commerce were concomitantly expected to continue to increase, especially if a Free Trade Agreement were entered into. Studies carried out in the United States and the European community indicated a strong connection between efficient transportation networks and an increase in economic growth.\textsuperscript{27}

Essentially, there were at least two transportation related matters hampering such economic growth, but both were soluble if Ryder could be allowed to import used vehicles into Mexico. First, the truck and trailer manufacturing capacity in Mexico was not sufficient to keep up with the then current demand.\textsuperscript{28} This level of manufacture certainly

\begin{itemize}
\item \textsuperscript{21} Interview with Glen Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).
\item \textsuperscript{23} \textit{Id}.
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{26} Scotia Inverlat, Análisis Económico, Guía Económica, May 23, 2003 (using statistics from the month of January).
\item \textsuperscript{27} David Alan Aschauer, American Public Transit Ass’n, Transportation Spending and Economic Growth (1991) (analytical report explaining why one way to generate higher productivity growth is through increased funding for transportation in general, and for public transit in particular).

\item \textsuperscript{28} Interview with Licenciado Oscar Moreno Martinez, Director de Asuntos Internaciona-
would not keep up with increased commerce. Second, the ability to purchase used vehicles involved a lower sales price point, thus affording vehicle purchasers the economic access to more vehicles at lower cost. RTR tried to make the case to the Mexican government, that making affordable quality used vehicles available for purchase in the Mexican market, in turn making it increasingly likely for the appearance of more vehicles available for the transportation of goods in the burgeoning economic scheme of Mexico, for example, providing shippers more opportunity to ship their goods.

Used vehicles were usually available at 1/3 to 1/5 the price of new vehicles and, if those vehicles were well maintained throughout their life, they were nearly like new. Under Mexican law before the NAFTA, finance leases only allowed for the leasing of new vehicles, which also kept prices high, no cheaper than outright purchases. Finance leasing under the old Mexican law was actually considerably more expensive than purchasing a truck would have been. Operational leasing was strictly prohibited; in fact, the concept was largely unknown.

By 1991, certain officials in the SCT and others suggested to Ryder officials that a method of getting a “foot-in-the-door” would be through the importation of used refrigerated vehicles, since they were not manufactured in Mexico and there was a real need for them. As an example, we were told that fish brought from the Pacific to Mexico City were usually brought on ice, rather than in refrigerated vehicles. There were some refrigerated vehicles in Mexico, but they were not manufactured as such; rather they had aftermarket refrigeration units, mostly imported, and attached to conventional vehicles without proper insulation.

Although all sort of strategic approaches were tried, in the end, the exclusionary rules based on the old attitudes of distrust were too firmly...
embedded to convince them to change the structure. The 21st century has now begun, and the importation of used vehicles is still prohibited in Mexico.

It was clear that either the Mexican government wanted to protect its automotive manufacturing industry, or did not have the political will not to. It appeared to many, as has been seen, that the industry was not going to be able to produce enough trucks and trailers any time soon to keep up with the demand brought about by increased commerce. Indeed, there were not enough trucks in the early 1990s.\textsuperscript{35} The time that the government did allow the importation of used trucks, it proved to be a fiasco. In the late 1980's, in the face of automotive industry objections, the government allowed the importation of a very large number of used Japanese trucks.\textsuperscript{36} Those vehicles proved to be mostly junk and turned out to be a costly mistake, both politically and economically.\textsuperscript{37} To this must be added the matter of a lack of understanding as late as the early 1990s in many parts of the world of the concept of service. In many countries it is easy to sell something you can touch and feel, like a truck or a hammer or a basketball. By looking at the item and testing or hefting it, the potential buyer can evaluate its worth. Service however is a promise, not something that can be looked at and touched and evaluated by sensory means. When told that used vehicles had received excellent maintenance service throughout their life, and that used vehicles were like new, it is not unlikely that the Mexican government officials were very skeptical of such claims. Such a concept ran counter to all their prior experience.

B. Case Study #2: Rental and Leasing Versus Owning

The issues surrounding operational leasing and finance leasing in Mexico serve as a case-in-point for the importance of integrating the impact of history and cultural influence in negotiating process of cross-border harmonization of standards.

During the early 1980s, U.S. carriers began attempting to obtain authority to rent and lease vehicles in Mexico.\textsuperscript{38} As already mentioned, finance leasing had existed for some time in Mexico.\textsuperscript{39} It was simply


\textsuperscript{36} Interview with Alejandro Peniche, Director of Highway Transportation (SCT) in Mexico City, Mex. (June 1991).

\textsuperscript{37} Id.

\textsuperscript{38} The writer, Frederick V. Perry, worked with the SCT intensely during this period attempting to obtain such permission. Mexican attorney Licenciado Carlos Sesma who represented several foreign carriers in Mexico told Perry that a number of such carriers had been turned down for permission.

\textsuperscript{39} See generally Law for the Promotion of Mexican Investment and Regulation of Foreign
considered another financing instrument, culminating generally in purchase, and was regulated by the banking laws. Foreigners, however, were not permitted to engage in finance leasing. Foreigners were kept out of anything smacking of banking or financial exercises. As a result, financing laws, foreign investment laws, and transportation laws kept foreigners out of the trucking industry altogether.

The critical question here, in our view, was what were the benefits of leasing or renting versus owning outright. RTR attempted to negotiate both with SCT and Secretariat of Commerce and Industrial Development ("SECOFI"). The arguments made to SECOFI were economic and financial (much as the arguments in favor of used vehicles were), but they were also operational in nature. As stated previously, operators of vehicles had to purchase vehicles outright or finance-lease them. No effective competition or alternative methods of obtaining vehicles were available, which might have fostered efficiency and lowered costs of obtaining vehicles and concomitantly lowering the cost of the transportation of goods. The type of leases that many U.S. and Canadian lessors provided for customers, as does RTR, is known as a full-service lease, which included fuel, licensing services, vehicle insurance, fuel tax services, and full programmed maintenance. Vehicles were even painted with the colors and logo of the customer. When a private carrier purchases vehicles, it is tying up capital in an asset that is not related to its core business. Further, it lowers the private carrier's, often a manufacturer's, borrowing power for loans for capital to invest in its core business. By engaging in operational leases, the manufacturer - in this case, the private carrier - has use of the capital that it would have invested in vehicles, and can use it in furtherance of its core business. In essence, the manufacturer outsourced a non-core business, truck ownership and maintenance, and focused efforts and money on making money in what it does best.

Around the globe the carriage of goods is usually broken down into two broad categories: private carriage and common carriage. In many countries this is subdivided further into common carriage, contract car-

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Investment in Mexican Foreign Investment and Transfer of Technology Laws, ch. 1, arts. 4-5 (1973) [hereinafter Old Foreign Investment Law].

40. Old Foreign Investment Law, supra note 39, at art. 6.


42. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder System, Inc. (June 10, 2004) (This was a typical sales pitch, but nonetheless true, used by Ryder salesmen during this period).

riage, and private carriage. A manufacturer who carries its own goods to market on its own vehicles is referred to as engaged in private carriage. The private carrier hires and manages its own drivers, maintains, or contracts for the maintenance of, its own vehicles, and does its own routing, scheduling and dispatching of vehicles.

The definition of common carriage varies from place to place around the world, but it is generally considered a public service or at times, a public utility. It is often highly regulated, with routes and tariffs, or charges, with liability limits for loss or damage to cargo often fixed by statute. The license to perform common carriage services is often considered something of a concession given by the government for public convenience and necessity. Anyone can ostensibly have his or her goods carried by a common carrier without discrimination. However, in many countries becoming a common carrier and obtaining the concession is often difficult. The reason for this is that many countries consider common carriage to be a public service, a utility almost, and permits or concessions are often only granted, as mentioned above, for the public convenience and necessity.

In a contract carriage situation, depending on the country, many of the things fixed by statute are now governed by the contract. Shippers for specialized types of transportation, frequently recurring transportation, as well as for transportation connected with complex logistics services usually use contract carriage.

Except for the fact that the Mexican transportation law before the NAFTA was very clear on the matter, no cogent policy reason was ever articulated as to why the law could not be changed. The law said that, in order to get a concession as a common carrier or a permit as a private carrier, the carrier had to own the vehicle completely and exclusively.

44. See U.S. Department of Transportation, Cargo Liability Study 6-7 (1998) [hereinafter Cargo Liability Study].
46. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).
47. See Cargo Liability Study, supra note 44, at 4.
50. One of the writers, Frederick V. Perry, was the lawyer in charge of legal services for Ryder System's logistics division, was on the Board of Directors for the logistics division for seven years, and was the lawyer in charge of providing legal services to Ryder System's International Division for six years, providing logistics services in many countries of the world, all of which were the subject of specific contracts.
51. Ley de Vías Generales de Comunicación y Transporte [Law of General Means of Com-
In fact, transportation law did not even really allow for finance leases. The way the carriers (as a practical matter, almost exclusively private carriers) and the government got around the law respecting ownership in the case of finance leases was via the creation of a legal fiction. The contract of finance lease provided for an option to purchase for a predetermined price at the end of the term. The lessee would, at the time of signing the lease, simply exercise the purchase option, that is, issue a letter saying it was going to pay the predetermined sum at the end of the lease. The lessor then issued a second letter acknowledging the exercise of the option. Armed with the finance lease contract, and those two letters, the finance lessee would have sufficient proof of "ownership" for the government to issue the permit or concession.

The culture did not allow for changes in thinking or for changes in the rules. Getting anyone in the Mexican government to agree to allow truck rental, that is, short-term hire, or leasing, in the form of operational leasing was going nowhere. Hence we began to investigate the real reasons for such resistance. We used the national truck rental and leasing policy as a case study to illustrate the complex blend of variables that has led the Mexicans to have such an approach to their trucking industry.

Of all the arguments given by Mexican government officials in connection with transportation matters, the reason for resistance to rental and leasing, seemed the most difficult to understand. The Director of Highway Transportation tried to clarify the reason to RTR - and presumably other leasing companies if they tried to make similar arguments - by repeatedly stating that one of the primary objectives of the SCT is to ensure that goods are moved to market. For the SCT, the needs of the shipper and in the end, the economy as a whole were paramount.

In a typical transportation scenario, when goods are moved, there are two parties involved in the transportation operation. There is the shipper (the owner of the goods and the party that contracts with the transporter), and there is the transporter (the carrier, or the trucking company). To introduce a third party, such as an operational leasing company, is only to introduce a third party to the equation unrelated to the contract of carriage, which yields an unpredictable degree of vagary.

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52. Discussion with Logistics and Transportation Manager for Carnation de Mexico (Spring 1982); Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).
53. Id.
54. Id.
55. Id.
56. Interview with Alejandro Peniche, Director of Highway Transportation, SCT, in Mexico City, Mex. (June 1991).
What if there is a dispute between the lessor (the owner of the vehicle) and the lessee (the carrier) in the event of default on rent payments? According to the Director of Highway Transportation, the lessor could take possession of the vehicle and the goods would not move, thereby inflicting harm to the shipper, the consignee, and to the economy in general.

It was pointed out to officials that operational leases provided no more vagaries and dangers to the market in such a scenario than did finance leases. It did no good. It was difficult to characterize the position taken by the SCT as a logical one, since if a finance lessee were to default on its rental payments, the finance lessor would certainly repossess the vehicle and the goods would not move. The Director of Highway Transportation did not buy this argument, or did not wish to believe or accept it. "When a carrier owns it’s own vehicle, no one can take it away,” he simply said.57

C. Case Study #3:
Trucking Industry:
Restrictions on Mexican Foreign Investment

This case study explores the significance of the historic and cultural bases for the restrictions on Mexican foreign investment in trucking. Mexican trucking companies have historically been and still to this day are very much afraid of competition from U.S. truckers.

When investigating the Mexican trucking industry and engaging with a wide variety of Mexican trucking companies and their owners and with the Cámara Nacional De Autotransporte De Carga ("CANACAR"), or the national chamber of freight carriers, we found a variety of differences between the industry and its U.S. counterpart.58 To begin with, in Mexico the industry was highly politicized, that is politically well connected, and generally protected.59 Tariffs were fixed by regulation, but truckers generally charged what they wished since they controlled the routes,60 which

57. Interview with Alejandro Peniche, Director of Highway Transportation, SCT, in Mexico City, Mex. (June 1991).
60. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos,
they had been given in their concessions. If a shipper did not pay what they charged, the goods did not move.61 There was, in effect, no competition on rates. Except for a few progressive carriers in northern Mexico, there generally was no such thing as programmed maintenance, rather merely breakdown maintenance. No one knew when a vehicle would break down, perhaps many miles from maintenance stations. Because there was no programmed maintenance, fleets had to be larger, so that there were extra vehicles to pull into operation in the event of breakdowns.62 This was more expensive to fleet owners. Additionally, the vehicles were on average fifteen years old, versus an average of five years in the U.S.63 The running costs of older vehicles are usually higher than that of newer vehicles because they are not as efficient; they use more fuel and require more maintenance.64

All in all, the carriers and CANACAR did not want any foreign investment in Mexican trucking.65 They lobbied heavily with the SCT before, during, and after the NAFTA to keep foreign truckers and foreign investment in trucking out of Mexico.66 For example, Ryder executives had for years tried every argument they could manufacture to allow Ryder to invest in a Mexican trucking company, or to start up such a company. The old attitudes, however, proved to be too strongly embedded. Without significant changes in the attitude of the government and the way they viewed the world, the rules were not going to change; the laws

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de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001).

61. Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).

62. Id.


64. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).


66. See U.S. - Mexico Disputes Over Truck Access & Fructose Duties Come Under Increased Scrutiny During October, SourceMex - Econ. News & Analysis on Mexico (Oct. 27, 1999), available at http://ssdc.ucsd.edu/news/smex/h99/smex.19991027.html (last visited Aug. 29, 2004). The bitter disputes between the U.S. and Mexico regarding access of Mexican trucks to U.S. roads and Mexican tariffs on high-fructose corn syrup gained increased attention during October because of actions taken either in the U.S. Congress or the World Trade Organization ("WTO"). The longstanding disagreement about U.S. restrictions for Mexican trucks on U.S. roads came to a boil on Oct. 18, 1999 when the U.S. House of Representatives voted to require the U.S. Transportation Department to impose stiff fines on Mexican shipping companies that violate truck-transportation restrictions. Under provisions negotiated in the NAFTA, Mexican trucks would have gained free access to U.S. roads by 1995. But access was delayed twice because of safety concerns related to the wide difference in each country's requirements regarding weight, size, and insurance coverage for trucks. Id.
were not going to change. The attitude of restriction was not going to change.

During the period of the NAFTA negotiations, one of the writers provided suggested language and lobbied hard with the United States negotiators in order to get them to convince the Mexicans to allow United States carriers to carry goods into Mexico. The objective was unrestricted access into, out of, and within Mexico for such carriers.\textsuperscript{67} The NAFTA calls for a phased-in ability for U.S.-based carriers to carry goods into and out of Mexico—but not point-to-point domestic carriage within Mexico\textsuperscript{68}—and for Mexican carriers to do the same in the United States.\textsuperscript{69} Three years after signature of the NAFTA, Mexico was to allow U.S. and Canadian carriers to make cross-border deliveries to, and pick up cargo in, Mexican border states, and the United States was to allow Mexican carriers to perform the same services in U.S. border states. Six years after the NAFTA went into effect, the United States was to provide cross-border access to its entire territory to carriers from Mexico for international carriage.\textsuperscript{70} At the same time, Mexico was to provide the same treatment to carriers from Canada and the United States.\textsuperscript{71} Seven years after the NAFTA went into effect, Mexico was to allow fifty-one percent Canadian and U.S. investment in Mexican carriers providing exclusively international cargo services.\textsuperscript{72}

Ten years after the NAFTA went into effect, Mexico was to permit 100 percent investment in carriers in Mexico which provide international carriage service.\textsuperscript{73} No NAFTA country will be required to remove restrictions on truck carriage of domestic cargo for cabotage.\textsuperscript{74} Just before Mexican and United States carriers were to commence crossing the border,

\textsuperscript{67} Thomas Donahue, President and CEO of American Trucking Associations, worked very strongly lobbying, giving speeches, and conducting conversations with the Mexican head negotiator, Hermilio Blanco, trying to attain the same objective. Tom Donahue also attempted to convince the Mexicans to allow foreign investment in Mexican carriers.

\textsuperscript{68} NAFTA, supra note 15, at annex I: schedule of Mexico & schedule of United States.

\textsuperscript{69} Id. The NAFTA allows access for U.S. carriers to the six northern Mexican border states during the phase-in period, designed to give U.S. carriers a market opportunity comparable to that which Mexico gains in its access to U.S. border states. Monterrey, Mexico's second largest industrial city is in one of those six states. Virtually all the maquiladora plants and other substantial economic activity exist in those six Mexican states, representing about seventeen percent of Mexico's gross national product. The four U.S. Border States to which the Mexican carriers were to have initial access contribute just over twenty percent of U.S. gross national product, so the two market openings were roughly comparable.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id. See also Interview with Licenciado Carlos Sesma, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004). Mr. Sesma recently obtained authorization for the first international carrier to invest in a Mexican transportation carrier.

\textsuperscript{74} NAFTA, supra note 15, at annex 1.
the Clinton Administration announced that Mexican carriers were unsafe and they could not enter into United States territory, despite the language of the NAFTA. The Mexicans followed suit, disallowing United States carriers' access to Mexican territory so long as the United States restrictions were not lifted. Only recently, the United States Supreme Court declared this restriction unlawful, though Mexican and United States carriers have not commenced cross-border carriage as contemplated by the NAFTA. It is expected that they will roll across the border by the end of 2004.

### III. Changes In The Foreign Investment Code

With the NAFTA, many changes occurred. In order to implement the myriad changes contemplated by the NAFTA for the transportation industry, the foreign investment code and the law of transportation and communications had to be overhauled.

Over the last few decades before the implementation of the NAFTA, Mexico had been on a roller coaster ride from the peak of economic prosperity to the valley of financial chaos and back again. But many believed that Mexico continued to be an attractive market for foreign direct investment. The NAFTA made it more attractive and friendlier than in the past.

After a suggestion to then U.S. President George Bush by then Mexican President Carlos Salinas de Gortari, both leaders agreed to move forward on a bilateral trade agreement between the two countries. Not to be left out, a short while later, Canada asked to join the talks, and the NAFTA commenced its birthing process. After protracted negotiations and intense arguments both for and against the NAFTA, Brian Mulroney,

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76. Interview with Licenciada Adriana Ibarra Fernandez, Director Legal Consulting and Negotiation on State to State Controversies, Secretaría de Economía, in Mexico City, Mex. (Feb. 20, 2001).


78. Id.

79. See Larry Rethers, Nomination Welcomed in Mexico; Business Groups Welcome Mexico's Candidate, N.Y. TIMES, Oct. 12, 1987, at 11. Inflation in Mexico was as high as 135% in 1987, but with President Carlos Salinas de Gortari's austerity and free enterprise economic planning, inflation was brought down to less than 10% in 1994. Id. See also Mexico: Can it Cope? BUS. WEEK, Jan. 16, 1995, at 42, available at http://www.businessweek.com (last visited Aug. 29, 2004).


81. Id.
Prime Minister of Canada, and Presidents George Bush and Carlos Salinas de Gotari signed the accord on December 17, 1992.82

From 1982 to 1988, under former President of Mexico Miguel de la Madrid, foreign investors were given more latitude and lighter restrictions, sometimes on an ad-hoc basis and sometimes across the board, than was prescribed by the Foreign Investment Law then in effect, although neither the laws nor the regulations officially changed.83 The old attitudes of mistrust started to erode ever so slightly at the top.84 After Carlos Salinas became President, the “lightening up” on foreign investors continued, but neither the Foreign Investment Law nor its implementing regulations changed until the NAFTA was signed and approved.85

During its negotiation and then with the approval of the NAFTA, the attitudes and the legislation began to change quickly in Mexico. In December of 1993, the New Foreign Investment Law was enacted.86 In the same month, the new Law on Roads, Bridges and Highway Transportation (New Transportation Law) was enacted.87 In August of 1994, the Mexican government enacted a new Patent and Trademark Law.88 All three of these laws are important to foreign investors and all three will have major impact on the way in which many foreign investors will conduct their business in Mexico. The first two laws have had a major impact on the over-the-road transportation industry in Mexico.


83. One of the writers, Frederick V. Perry, worked continuously during the 1980’s and early 1990’s attempting to conduct a variety of foreign investment operations in Mexico. The Foreign Investment Law promulgated in 1972 did not change until the NAFTA required the changes.

84. One of the authors, Frederick V. Perry, obtained permission to change and broaden the corporate purpose of an old Mexican company that had been incorporated by a U.S. owner prior to the 1972 Foreign Investment Code’s restrictions requiring majority Mexican ownership in 1987. He was told at the time by the Commission on Foreign Investment that the enforcement of the rule had been lightened. In discussions with then Director of Foreign Investment, Carlos Hefiti, in February of 1991, this author was told that the Salinas Administration was continuing and even expanding the easing up on foreign investment restrictions started by the de la Madrid Administration.

85. See generally Editorial, After the NAFTA Victory, N.Y. TIMES, Nov. 19, 1993, at A32. Under U.S. law, as a commercial agreement and not a treaty, the NAFTA required no Senate ratification and no formal approval by Congress. However, the United States Congress did have to approve the implementing legislation and did so on November 17, 1993. Under Mexican law, the agreement is a treaty and required congressional approval, before and in addition to the passage of implementing legislation. In Mexico, the NAFTA is called the Treaty of Free Trade (Tratado de Libre Comercio).


IV. The New Foreign Investment Law

In order to appreciate the revolutionary impact of the New Foreign Investment Law, it is useful first to consider some aspects of the old foreign investment law. The old law was called The Law for the Promotion of Mexican Investment and Regulation of Foreign Investment (Old Foreign Investment Law). Note the use of "regulate" rather than words such as "encourage" or "promote." The national cultural attitude was so wary of foreign intervention it was only natural that such restrictive laws would be implemented and perpetuated.

The Old Foreign Investment Law was enacted under President Luís Echeverría, a president considered by many to have a socialist bent because of the intervention in the Mexican Economy during his presidency. The law was enacted at a time when restrictive foreign investment laws were implemented in many third world countries; at a time when the writings of dependency theorists were read by most and believed by many; at a time when most third world countries feared investment from and dependency upon industrialized countries. The lawmakers continued to believe in the old ways of protectionism and exclusion, mistrust of foreigners and things foreign. They collectively created the institutions that kept the foreigners out.

In his speech to the Mexican Congress when introducing the bill on the New Foreign Investment Law, President Carlos Salinas told those present that the world in which the Old Foreign Investment Law was enacted had changed. He went on to explain that because foreign investment acts as a catalyst for intra-national development, a growing number of countries had established diverse strategies to attract the flow of inter-

89. See generally Old Foreign Investment Law, supra note 39.
91. See generally Andre Gunder Frank, Capitalism and Underdevelopment in Latin America; Historical studies of Chile and Brazil (1969); Andre Gunder Frank, Dependent Accumulation and Underdevelopment (1979); Raul Prebisch, The Economic Development of Latin America and its Principle Problems (1950).
93. President Carlos Salinas, address to Mexican Congress, Doc. 011/LV/93 P.O. (Año III), at VIII, Presidencia de la República.
national capital.\textsuperscript{94} In that same speech Salinas said that according to the International Monetary Fund in 1991, Mexico was in eighth place in the world as a receiver of direct foreign investment. Among developing countries, Mexico received more direct foreign investment than any other.\textsuperscript{95} Further, he said, at that time, Mexico was the second-highest receiving country of U.S. foreign investment.\textsuperscript{96} Foreign investment, according to President Salinas was important, essential in fact, for Mexico’s continued growth.\textsuperscript{97} Accordingly, his objective behind the New Foreign Investment Law was to create a new normative framework which would promote the competitiveness of Mexico in the world economy, provide legal certainty to foreign investors and establish clear, easily understood rules that would channel international capital into productive activities.\textsuperscript{98} In one speech, Carlos Salinas became the single most important agent for change in the rules and for change in the institutions.\textsuperscript{99}

Mexico’s \textit{Old Foreign Investment Law} was notoriously restrictive, generally restricting foreign investors—in the industries in which they could invest at all—to no more than 49% equity ownership, often much less.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{94} Id. at VII.
\item \textsuperscript{95} Id. at V.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Mensaje del Presidente Carlos ‘Salinas de Gortari a la Nacion, con motivo del Tratado de Libre Comercio [Message of President Carlos Salinas de Gortari to the Nation, Because of the Free Trade Agreement], Los Pinos, (Aug. 12, 1992).
\item \textsuperscript{98} Id.
\item \textsuperscript{99} President Carlos Salinas, address to Mexican Congress, Doc. 011/LV/93 P.O. (Año III), at V.
\item \textsuperscript{100} See Old Foreign Investment Law, supra note 39, at art. 5. However, the New Foreign Investment Law provides for the concept of “neutral investment.” A neutral investment is an investment in Mexican companies or in authorized trusts that is not computed in order to determine the percentage of foreign investment in the equity of the Mexican companies. In the past, the concept of neutral investment was authorized only for those companies, which were traded on the stock exchange. Now, however, there is no such limitation. Neutral investments may be made in any companies. Neutral investment is one in which the investment is in stock that has no voting rights or has limited corporate rights. However, such investment may only be made by foreigners after obtaining prior authorization from the SECOFI and, when applicable, from the National Securities Commission. Under the concept of neutral investment, the foreign investor may not be permitted, under any circumstances, to obtain any type of control over the companies in which investments are made. This is passive or portfolio type, indirect investment. See New Foreign Investment Law, supra note 86, at art. 18. The New Foreign Investment Law sets forth very clearly what the functions of the Foreign Investment Commission shall be. The Foreign Investment Commission is given the charge of “designing mechanisms to promote investment in Mexico.” See New Foreign Investment Law, supra note 86, at art. 26. Here again, Mexicans are directed to encourage and to welcome foreigners. The new attitude espoused by the government and the lawmakers is that foreigners are okay. The new attitude is: “Welcome them; help them.” Like the old law, the new law sets forth in fair detail what the Foreign Investment Commission shall do, what it is made up of, and also talks about the National Foreign Investment Registry. In the transitory section of the law, several items of interest are covered.
\end{itemize}
As a general rule, the New Foreign Investment Law establishes the principle that a foreign investor may participate, up to any percentage he or she may wish, in the equity of Mexican companies, acquire fixed assets, start up new economic activity, manufacture new product lines, open and operate business and grow or relocate already existing businesses.\textsuperscript{101} There are, of course, some exceptions to this broad freedom.

The New Foreign Investment Law defines "foreign investment" as the participation of foreign investors, in whatever percentage, in the equity stock of Mexican companies; that investment carried out by Mexican companies with majority foreign ownership; and the participation of foreign investors in the activities and acts contemplated by the law.\textsuperscript{102}

As the Old Foreign Investment Law reserved certain activities exclusively to Mexicans,\textsuperscript{103} so does the New Foreign Investment Law.\textsuperscript{104} The new law reserves such activity to Mexicans or to companies which have clauses in their by laws that exclude any foreign equity participation in such companies, what is known as a foreign ownership exclusion clause.\textsuperscript{105} Among those activities still reserved to Mexicans are national overland transportation of passengers, tourism and cargo, excluding message and package delivery service.\textsuperscript{106}

The new law goes on to provide that a foreign investor may not participate in the aforementioned activities or companies dedicated to such activities either directly or though trust arrangements, agreements, corporate by-laws or other agreements, pyramid schemes or other schemes which give such foreign investor control or any form of participation, except as set forth in Title 5 of the New Foreign Investment Law.\textsuperscript{107}

There is a sea change in attitude reflected in the New Foreign Investment Law respecting over-the-road transportation of goods and tourists. The Old Foreign Investment Law stated that only Mexicans - and Mexican companies with foreign ownership exclusions clause could transport any-

\textsuperscript{101} See New Foreign Investment Law, supra note 86, at transitory provisions, two I-II.
\textsuperscript{102} Id. at art. 2-II. See also Old Foreign Investment Law, supra note 39, at art. 2. The Old Foreign Investment Law defined "Foreign Investor" as (1) foreign persons or companies, (2) Mexican companies in which a majority of capital is owned by foreigners, (3) Mexican companies which are managed by foreigners who may or may not own a majority of the stock, and (4) foreign entities without legal personality, such as partnerships. Id.
\textsuperscript{103} See Old Foreign Investment Law, supra note 39, at arts. 4-5.
\textsuperscript{104} New Foreign Investment Law, supra note 86, at art. 7-8.
\textsuperscript{105} Id. at art. 6.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
thing, people or cargo - there was no distinction on federal highways.\textsuperscript{108}

As a practical matter, this meant that virtually no goods or passengers could be carried intrastate, into Mexico from abroad or in most areas within the various Mexican states, inasmuch as virtually all such transportation would entail traversing a federal highway. The \textit{New Foreign Investment Law} breaks down the transportation into that of cargo, passengers and tourism\textsuperscript{109} and further divides it into national and international traffic.\textsuperscript{110} The overland transportation of cargo, passengers and tourism of national traffic, within Mexico is reserved to Mexicans and Mexican companies with a foreign ownership exclusion clause.\textsuperscript{111}

The \textit{New Foreign Investment Law} provides similar restrictions for the international overland transportation of passengers, tourism and cargo between points within Mexico; however, as already mentioned, foreign investment is allowed gradually to take over such enterprises: up to 49\% foreign ownership beginning December 18, 1995; up to 51\% foreign ownership beginning January 1, 2001; and up to 100\% foreign ownership commencing January 1, 2004.\textsuperscript{112}

This means that foreigners can buy international carriers, but not domestic carriers. Goods, which come from abroad, however they arrive, whether by road, rail, sea or air are international commerce and can be carried to their destination by such a Mexican international carrier. So, if goods are flown in to Mexico City from Korea, for example, a Mexican international carrier with foreign ownership can transport them to their final destination and distribute them within Mexico.\textsuperscript{113}

V. \textbf{TRANSPORTATION LAW}

One of the big changes in the new Transportation Law that will have a substantial impact on both sides of the border has to do with truck rental and leasing and the way the implementing regulations were drafted to interpret broadly the \textit{New Transportation Law}.

A. \textbf{TRANSPORTATION LAW BEFORE THE NAFTA}

Prior to the NAFTA, the \textit{Law of General Means of Communication}

\begin{footnotesize}
\textsuperscript{108} \textit{Old Foreign Investment Law}, supra note 39, at art. 4.
\textsuperscript{109} \textit{New Foreign Investment Law}, supra note 86, at art. 6.
\textsuperscript{110} See \textit{id}.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} \textit{Id.} at transition provisions, six.
\textsuperscript{113} Telephone Interview with Nancy McCrae, Chief U.S. Negotiator on the NAFTA transportation matters, U.S. Dep't of Transportation, Office of International Transportation (Jan. 2001). Ms. McCrae explained that point-to-point international carriage was agreed upon by the parties to the NAFTA despite the fact that it is not explicitly stated in either the NAFTA or the New Foreign Investment Law.
\end{footnotesize}
of Mexico regulated concessions and permits for common and private carriage. A common carrier, as we use the term in the United States, is a carrier that provides transportation service to the general public. Under the Old Transportation Law, common carriers were given what is called in Mexican law a concession (and then a special federal license plate for each vehicle), and private carriers were given a permit for each vehicle. In order to obtain either the concession and plates or the permit, the carrier had to prove that it owned the vehicles. Eventually, as described above, through the use of a finance lease, because for tax and accounting purposes the vehicle is on the accounting books as an asset of the lessee, the SCT allowed concessions and permits to be issued to finance lessees of vehicles, treating both common and private carriers alike in this regard.

The old law did not allow vehicles obtained under an operational lease, like those leases used by many companies in the United States and elsewhere, to be issued permits for transportation activities on the federal highways, since an operational lessee did not own the vehicle. In fact, there was no such thing as a standard operational lease of a vehicle in Mexico. Under a standard operational lease, the vehicle reverts to the lessor at the end of the payment term. During the entire term of the lease, the vehicle is the property of the lessor and remains on its books

114. General Communications Law, supra note 51.

115. See Cargo Liability Study, supra note 44, at 4 (discussing the development of common carriage in the middle ages and the notion that all customers should be treated the same way in order to avoid discrimination). See also Niagra v. Cordes, 62 U.S. 7, 22-23 (1858) ("At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods."); Hughes Aircraft, Co. v. N. Am. Van Lines, Inc., 970 F.2d 609, 613 (9th Cir. 1992) (discussing that a carrier may limit its liability for damages to cargo under 49 U.S.C. § 10730(a)). See generally Countryman & McDaniel, Index of Claims Procedures For Motor Truck Cargo For U.S. Purposes (discussing the removal of the term "common carrier" in relation to liability after the ICC Termination Act of 1995), available at http://www.cargolaw.com/guides_motor_truck.html (last visited Aug. 26, 2004).

116. General Communications Law, supra note 51, at art. 152.

117. Id.

118. Principios de Contabilidad Aceptados, de la Comisión de Principios de Contabilidad del Instituto Mexicano de Contadores Públicos, Boletín D-5, Párrafo 33; Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

119. Principios de Contabilidad Aceptados, de la Comisión de Principios de Contabilidad del Instituto Mexicano de Contadores Públicos, Boletín D-5, Párrafos 29, 32 and 54 and Párrafo 33(a). One of the writers, Frederick V. Perry, was engaged in providing legal services, including contract drafting, review and negotiation to Ryder Truck Rental, Inc. for nearly twenty years throughout the United States and Canada and many parts of the world. All operational leases that he dealt with had such provisions.
for tax and accounting purposes. Under an operating lease, the lessor gets the tax and accounting benefit of the depreciation rather than the lessee. For the lessee, it is an expense item for accounting and tax purposes, rather than a capital investment. 

For a variety of reasons, in the United States, common carriers do not typically obtain their vehicles under operational leases; they buy them outright or sometimes finance lease them. This appears also to be true in many other countries where Ryder has done business. RTR and presumably other vehicle leasing companies in the U.S. and elsewhere lease to private carriers, such as companies that transport and distribute their own goods. They typically do not lease to common carriers. This has changed in Mexico after entry into effect of the NAFTA and the new leasing regulations, and such change has increased competition in the industry.

B. Transportation Law After the NAFTA

Annex VI of the NAFTA states that “[a]n enterprise authorized in Mexico to provide bus or truck transportation services may use equipment of its own, leased vehicles with an option to purchase (finance leasing), leased vehicles (operation leasing), or short term rental vehicles.” The next line reads “(f)ederal measures will be established in relation to leasing and rental operations.” It should be noted that the language in the NAFTA is: “an enterprise authorized in Mexico to provide bus or truck transportation services.” This wording raises a question: what is an enterprise authorized to provide these services? Is it a common carrier, or is it both a common and a private carrier?

The New Transportation Law, promulgated in December of 1993, after the NAFTA, does not clearly articulate the idea that both common and private carriers can lease vehicles under an operational lease. However, the law does not prohibit private carriers from leasing vehicles. In fact, the law is encouragingly silent on the matter of vehicle ownership for

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120. See, e.g., UNION LEASING, Leasing v. Ownership (“One of the basic fundamental differences between leasing and ownership is the potential financial accounting treatment. Depending on how it’s structured, most leases may qualify as an operating lease in accordance with FASB 13. This allows the lessee to expense the lease payment up to the amount utilized for business purposes.”), available at http://www.unionleasing.com/web/why_lease/LeasingvsOwnership.asp. See also Ley de Impuestos Sobre la Renta, art. 32, sec. XIII; art. 42, sec. II & III.

121. Id.

122. Id.

123. Interview with Glenn Schneider, former Vice President of Asset Management, Ryder Truck Rental, Inc. (June 10, 2004).

124. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

125. NAFTA, supra note 15, at annex VI.

126. Id.

private carriers. Under the old law common carriers were given concessions and private carriers were given permits.\textsuperscript{128} Under the new law, both are given permits.\textsuperscript{129}

In an unrelated meeting with one of the premier transportation lawyers in Mexico,\textsuperscript{130} who had been consulted by the SCT on the matter, one of the authors\textsuperscript{131} was allowed to view the draft regulations, which were to give effect in Mexico to the leasing provisions of Annex VI of the NAFTA and the recently passed transportation law implementing the NAFTA. It was immediately apparent that there was a problem. Those draft regulations,\textsuperscript{132} which were put together in June of 1994, by a working group consisting of people from the SCT and SECOFI,\textsuperscript{133} were very clear in that they did not allow used vehicles to be leased to carriers and, although common carriers were mentioned, the draft regulations did not provide that private carriers could be lessees.\textsuperscript{134} In fact, the SCT did not contemplate that private carriers would lease vehicles; the drafters assumed that they would continue to own their own vehicles as before.\textsuperscript{135}

\begin{itemize}
  \item \textsuperscript{128} General Communications, supra note 51.
  \item \textsuperscript{129} New Transportation Law, supra note 48.
  \item \textsuperscript{130} Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese (June 1994).
  \item \textsuperscript{131} Frederick V. Perry
  \item \textsuperscript{132} Anteproyecto, Reglamento Para el Arrendamiento de Vehículos de Autotransporte Federal [Preliminary Draft of Regulation for Leasing Vehicles for Federal Transportation] (June 3, 1994) [hereinafter Preliminary Draft of Regulation].
  \item \textsuperscript{133} The primary members of that group were Director de Normatividad de Autotransporte [Director of Federal Highway Regulation], of the SCT; Licenciada Evelyn Rodriguez, Director of Economic Studies of SECOFI and personal Advisor to the Secretary; and Licenciada Luz Elena Barrios, Director General of Legislative Affairs of SECOFI.
  \item \textsuperscript{134} Preliminary Draft of Regulation, supra note 132.
  \item \textsuperscript{135} Interview with Alejandro Peniche, Director of Land Transportation of the SCT, and with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation of the SCT], in Mexico City, Mex. (Aug. 1994). The parties stated that neither the New Transportation Law nor the draft regulations contemplated that a private carrier would lease or would be allowed to lease its vehicles under an operational lease, and that the term “autotransporte federal”, really contemplated and referred to common carriers only. The New Transportation Law in its definition section did not even define private carriage and when it defined “Servicio de Autotransporte de Carga” [Service of Truck Transportation of Cargo] it stated that such service was for service to third parties. See New Transportation Law, supra note 48, at art. 2-VIII. The people at the SCT said that a fair number of people were opposed to allowing private carriers to lease vehicles, some because they interpreted the law narrowly. However, upon meeting with personnel of the Secretariat of Commerce and Industrial Development (the secretariat which masterminded, negotiated and was charged with implementing the NAFTA [SECOFI]), one of the authors got them to agree that private carriers were supposed to be allowed to lease vehicles under an operational lease. The working group that was charged with creating the leasing regulations was made up of people from both secretariats. In the end, one of the author's view and that of the convinced SECOFI prevailed and the regulations not only allowed private carriers to lease vehicles, but also allowed used vehicles to be leased.
\end{itemize}
It was also clear that CANACAR did not wish private carriers to have the ability to lease vehicles. CANACAR did not want to encourage or help the private carriers in any way, since they, in effect, compete with common carriage. One of the authors\textsuperscript{136} was in close contact with the CANACAR and knew their views. They had a strong influence on the SCT, and the SCT opposed inclusion of that capability in the leasing regulations.\textsuperscript{137} As mentioned above, leasing companies, such as Ryder Truck Rental and others lease more to private than common carriers. The draft regulations in Mexico provided that a leasing company could get permission to lease a particular vehicle only in the year of the vehicle’s manufacture, that is, new vehicles, not used ones.\textsuperscript{138} This meant that the old exclusionary attitudes were still alive and well despite the NAFTA. So only new fleets could be purchased and leased back. This restriction would substantially impair a vehicle leasing company’s ability to do business, since many leasing companies in other countries purchase a fleet from a carrier, private or common—more frequently a private carrier—and then lease those vehicles back to the carrier. As mentioned, this takes those assets off the carrier’s accounting books, thereby freeing up capital for other uses. One of the authors\textsuperscript{139} had spent the better part of the previous year and a half lobbying with the U.S. negotiators of the NAFTA, the U.S. government, the Mexican government and CANACAR to get the language of Annex VI accepted, and in fact, drafted that language. Now it seemed that all those efforts were going to be for nothing unless the author could get the SCT and SECOFI to agree upon and change the draft regulations.\textsuperscript{140}

As stated above, well-maintained used vehicles are often the subject of lease contracts in other countries, especially the U.S., UK, and Canada. If normal truck leasing and rental, as it is known is the United States, Canada and many other parts of the world were to take place in Mexico, one of the authors\textsuperscript{141} involved had to work quickly before those new regulations were signed by President Salinas. Everything had to be rewritten and revamped. In order to do that, it was necessary to convince a number

\textsuperscript{136} Frederick V. Perry

\textsuperscript{137} Interview with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation of the SCT] (Summer 1994) (stating that it became clear that the SCT, while they did not openly oppose the concept of leasing to private carriers, they did not support it and did not wish to support it).

\textsuperscript{138} Preliminary Draft of Regulation, supra note 32.

\textsuperscript{139} Frederick V. Perry

\textsuperscript{140} The Draft Regulations had been drafted by a joint committee made up of personnel from both the SCT and SECOFI. Neither Secretariat trusted the other to get it quite right. SECOFI was in overall charge of the NAFTA, and wanted to ensure that international treaty obligations were respected. The SCT was the institution charged with the regulation of transportation.

\textsuperscript{141} Frederick V. Perry
of high placed government officials in both the SCT and SECOFI about the benefits of one of the author’s proposed leasing regulations. One of the authors was involved in redrafted, in Spanish, the draft regulations, providing for the lease of used vehicles and permitting private carriers to lease vehicles. The employees at the SCT told one of the authors that a fair number of people were opposed to allowing private carriers to lease vehicles. According to them, this opposition was coming from the SCT or their constituencies. In part, this was based on a narrow reading of the new transportation law. To overcome this approach, one of the authors had to then explain fully the regime of operational leasing to a variety of government officials at both the SCT and SECOFI, since a working group from both was charged with drafting the new leasing regulations. He also had to show to them the language of the NAFTA that their country had just agreed to and emphasize its clear meaning. This author shuttled back and forth between the two secretariats for a few weeks, causing meetings to occur between them to consider the proposals. In the end, the teams from both SECOFI and the SCT were convinced that they should adopt the author’s version of the regulations, but it took finally a meeting directly with Jaime Serra Puche, the Secretary of Commerce, in order to finally get the regulations approved at the Secretary level.\textsuperscript{142}

C. FEDERAL HIGHWAY PERMITS

The current system of permitting vehicles is an anachronism, based on the system inherited from the old ways. There are different requirements and permits for common carriers and private carriers. A common carrier, once it complies with all the requirements, is given a concession (now a permit), federal license plates and a circulation card (or traffic card).\textsuperscript{143} The circulation card states what kind of cargo the vehicle can carry, and the federal license plate is a license plate issued only to a common carrier in order to provide carriage services to third parties throughout the United States of Mexico.\textsuperscript{144} A leased vehicle, just like an owned vehicle, must have such a permit to engage in the carriage of freight on the highways. Neither the law nor the regulations mention how permits are to be issued for leased vehicles. One would think, or at least the authors thought, that the permit would be issued to the carrier, not for the vehicle itself. Unfortunately, the permits of carriage are still issued for each particular vehicle, in the name of the owner. Even leased vehicles, then, are permitted as if they were common carriage vehicles, in the name of the owner/lessor, who cannot, under the law, be a carrier of freight—

\textsuperscript{142} Interview with Dr. Jaime Serra Puche, Secretary of Commerce (Oct. 11, 1994).
\textsuperscript{143} Interview with Licenciado Mandilla Olives, Director General of Transportation Department of the Federal District of Mexico, in Mex. (Sept. 6, 1994).
\textsuperscript{144} New Transportation Law, supra note 48, at art. 43.
either common or private. This is a major bone of contention since the CANACAR fears that the foreign owned leasing companies will secretly engage in carriage. This is - along with their general dislike of private carriage - one of the primary reasons that CANACAR has been hostile to the foreign leasing companies. A permit is issued for a vehicle to be leased based on the contract of lease. So a permit is only valid for the life of the lease agreement. This same procedure is in place for short-term rental, which makes for a very unwieldy process of rental, since it can take up to a week or more to get the permit.

The regime for private carriers is somewhat different. Private carriers are licensed, that is, they are given license plates in the state in which they are domiciled. So, if the owner of a vehicle is headquartered in Monterrey, the State of Nuevo Leon, the state in which Monterrey is located, will license it. The SCT then issues a federal permit and a circulation card (or traffic card) to a private carrier (once it has its state license plates). With this permit the private carrier can travel throughout Mexico, and on the federal highways, carrying its own goods but not the goods of third parties.

There is a two-step process for a private carrier to be able to carry goods interstate, and on the federal highways using leased vehicles. The first step is that, even if the SCT regulations were to allow for permitting the leased vehicles of private carriers, the leasing company or owner of the vehicles must ensure that the states will license a vehicle which is on an operating lease and not owned outright by the private carrier. As an example, representatives of the Federal District (Mexico City) and the states of Nuevo Leon and Jalisco (Guadalajara is the capital of Ja-

145. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services, SCT], and with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

146. Reglamento de Autotransporte Federal y Servicios Auxiliares [Federal Transportation Regulations], arts. 8 & 9; New Transportation Law, supra note 48, at arts. 42 & 43.

147. Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).

148. Federal Transportation Regulations, supra note 146, at ch. 6, art. 10.

149. Interview with Teresa Rodriguez Castillo, Encargada de Servicios de Arrendamientos, de Carga y Servicios de Carga Especializada [Chief of Leasing Services, Cargo, and Specialized Cargo Services], SCT, in Mexico City, Mex. (Feb. 20, 2001). Interview with Licenciado Mancilla Olivares, Director General of Transportation Department of the Federal District of Mexico, in Mex. (Sept. 6, 1994).

150. Interview with Licenciado Victor Manuel Martinez, Under Secretary of Transportation of the State of Nuevo Leon (Nov. 1994).

151. See Reglamento de Transito del Distrito Federal [Traffic Regulation of the Federal District of Mexico] (Oct. 1994) (explaining that a state would license a vehicle for a private carrier). This information was confirmed by the Director of Traffic Regulation of Mexico.

152. Interview with Licenciado Victor Manuel Martinez, Under Secretary of Transportation
lisco) told me that they would license vehicles for private carriers obtained on an operational lease.

However, because the regimes in the various states provide for only two types of license plates for trucking, one plate for common carriers and another for private carriers, many states will likely say that since the service of leasing trucks is for third parties, that the service is public and akin to that of a common carrier—despite the fact that the lessor would not be providing carriage—and they would thus be forced to issue the leasing company a common carrier license plate. Because federal law prohibits a foreigner or a foreign owned company from being a carrier, there was some fear that the state would see this as an obstacle. In practice, it appears not to be a problem.

Ninety percent of the trucks in Mexico in the early nineties belong to private carriers, leaving only ten percent in the hands of common carriers. To disallow operational leasing by private carriers would mark a drastic change in the equal treatment previously afforded to common and private carriers in the area of vehicle ownership. As mentioned above, the new regulations as adopted allowed for used vehicles to be the subject of operating lease contracts, and allowed for private carriers to lease vehicles. Unfortunately, at the time of all that work, one of the authors did not know that the SCT was not going to issue permits, that is, blanket permits, to the carrier—private or common—using the leased or rented vehicle. Had this author known how the SCT was going to interpret the regulations, he would have attempted to provide for the matter in the regulations also. Unfortunately, the old rules—customs really, since there are no official regulations on this—are still in place in this regard. The old ways die hard. Hopefully one day soon this will change also. There are forces at work lobbying for such a change.


153. See Ley y Reglamento del Servicio de Tránsito del Estado de Jalisco [Law and Regulation for Transportation Service for the State of Jalisco]. Interview with Doctor Héctor Luna de la Vega, Director General of Land Transportation of the State of Jalisco (Nov. 1994) (confirming this information).

154. In August of 1994, one of the authors, Frederick V. Perry, had several conversations with Alejandro Peniche, Director of Land Transportation of the SCT and the Mexican negotiator of transportation issues in the NAFTA negotiations, and with officials of the SCT who reported to Mr. Peniche. They told this author that neither the New Transportation Law nor the draft regulations contemplated that a private carrier would lease or would be allowed to lease its vehicles under an operational lease, and that the term “autotransporte federal,” was really contemplated and referred to common carriers only. They agreed that, as drafted, the regulations would effectively preclude roughly 90% of vehicle owners from leasing vehicles.

155. Interview with Doctor Héctor Luna de la Vega, Director General of Land Transportation of the State of Jalisco (Nov. 1994); Interview with Licenciado Carlos Sesma Mauleón, part-
VI. THE MEXICAN TRUCKING INDUSTRY AND THE NAFTA: TRUCKING INTERESTS' OPPOSITION TO THE NAFTA AND TO LAW CHANGES

As mentioned above, one of the authors was involved, for well over a decade, in transportation related issues in Mexico. In trying to get leasing approved, in addition to working directly with the government, the author's attempted to enlist the aid of potential customers of leased vehicles and with the powerful CANACAR, the trade association of truckers in Mexico. Many large manufacturing concerns in Mexico were customers of the author's then employer, Ryder, in the United States and elsewhere. They wanted to use Ryder leased trucks for their private fleets. While such customers were supportive of Ryder's efforts, and while they understood the seemingly illogical position of the government regarding operational leasing versus finance leasing, they could do little to influence political change. CANACAR however was another matter. The association was politically very powerful and was generally considered by the SCT to be its most important constituency when it came to matters of over-the-road freight carriage. Before and during the NAFTA negotiations, Francisco Dávila, owner of trucking companies himself, was the president of CANACAR. He was and is widely known in trucking circles in the U.S., Canada, and Mexico. One of the writers shared the podium with him several times in all three countries, giving speeches on transportation-related topics. Sometime after the NAFTA's ratification, Mr. Dávila stepped down from his post as president of CANACAR. He became a member of the Mexican Senate, Mexico's upper house of the federal legislature, and became chairman of the transportation committee.

When the NAFTA was being negotiated, CANACAR was opposed

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156. Frederick V. Perry
157. Interview with Francisco Dávila, President of CANACAR (1990); Interview with Jorge Teres, Economist with CANACAR (Feb. 20, 2001); Interview with Licenciado Juan Antonio Araiza Martinez, Director de Normatividad de Autotransporte [Director of Federal Highway Regulation], of the SCT (June 1994).
158. Membership required the person or organization to be a trucker.
160. Reauthorization of ISTEAA NAFTA, Border Infrastructure and Motor Carrier Safety, Laredo and Pharr, TX, Hearing Before the House Subcomm. on Surface Transportation of the Committee on Transportation and Infrastructure, 104th Congress (1996). Submission for the record from Thomas J. Donahue, President and CEO of American Trucking Association, Inc. included a letter from Francisco J. Dávila Rodriguez, Senador de la República de Mexico [Senator
to two matters: they did not want any foreign investment in Mexican trucking companies, and they did not want foreign trucking companies crossing the border into Mexico\textsuperscript{161} to deliver or pick up goods.\textsuperscript{162} They did not appear to actively oppose the idea of leasing.\textsuperscript{163} They did not actively support it either. Now, CANACAR appears to support leasing, but they are still suspicious of foreign leasing companies, fearing that they will engage in carriage.\textsuperscript{164} Of course a change in the way permits are awarded to leased vehicles would change all this.

The roles of certain actors and the relative power of those actors were changing as a result of the NAFTA. Once the NAFTA was negotiated, and the implementing legislation was promulgated; CANACAR, seeing their power eroding, commenced a vigorous campaign to keep trucking companies from the United States from crossing the border into Mexico, despite the language agreed upon in the NAFTA.\textsuperscript{165} One of the authors was working very closely with the SCT in those days; first to lobby for and help draft the leasing regulations, and then to implement those regulations, which, as it turned out, proved even more complex than merely drafting regulations. Because of such close involvement, the author saw first-hand what was happening. Leaders of CANACAR really were afraid of leasing, or at least the possibilities under leasing, despite what everyone said. They were afraid that foreign leasing companies would make inroads into transportation, and they were afraid that they would not be able effectively to compete against U.S. leasing companies, who would, CANACAR believed, surreptitiously become carriers in some fashion. The New Director of Highway Transportation of the SCT, and his subordinate, the Director of Transportation Regulation, were

\textsuperscript{161} \textit{Endosan a La Nueva Administración el Cumplir con Cambios en el Ramo de Autotransporte} [The New Administration Endorses Compliance with Changes in the Area of Transportation], \textit{El Financiero}, (Sept. 6, 1994).

\textsuperscript{162} \textit{See International Insights, The International Forum of the American Trucking Associations} (1994). This was the subject of many public discussions between Francisco Dávila, president of CANACAR, and Tom Donohue, president and CEO of the American Trucking Associations, its U.S. Counterpart, at a number of cross-border trucking meetings that the author attended in the years 1991–1993. Mr. Dávila was also the first Chairman of the North American Transportation Alliance, which was an organization designed to “pursue common research and policy goals continent-wide” in the area of over-the-road trucking.

\textsuperscript{163} Interview with Alejandro Peniche, Mexican negotiator of transportation issues in the NAFTA negotiations, and former Federal Director of Highway Transportation (Feb. 2, 2001).

\textsuperscript{164} Interview with Licenciado Oscar Moreno Martínez, Director de Asuntos Internacionales de CANACAR [Director of International Affairs of CANACAR], Director de Asuntos Jurídicos [Director of Legal Affairs] during the time of the NAFTA negotiations and shortly thereafter, in Mexico City, Mex. (Feb. 20, 2001).

under constant pressure from CANACAR. But their response to CANACAR was always the same: "We have signed a treaty that allows U.S. truckers to cross the border, and we will live up to that obligation." When their lobbying efforts failed with the government, CANACAR took to the press, issuing statements to the press regarding the unfair competition the entry of U.S. truckers would create, and pillorying those few U.S.-based leasing companies with the temerity to enter Mexico, hoping to elicit the aid of public opinion in their quest.

It is interesting to note that a few years before, CANACAR might have had the power to pull this off, or indeed they may have been able to keep leasing, in particular, and transportation, in general, out of the NAFTA. However, during the late '80s and early '90s, CANACAR was supplanted as the most powerful agent in the institution of over-the-road freight transportation. Several things had happened to bring this about.

A. CANACAR'S LOSS OF POWER

In Mexico, as in most Latin American countries, membership in a chamber of commerce, often one specializing in one's particular industry, has been mandatory. Membership in CANACAR was no exception. The association is a cross between a chamber of commerce and a trade association. Since all the industry players were members, the voice of its lobby was loud and powerful. Just about the time of the NAFTA, this law changed, and trucking companies no longer were required to be members of CANACAR. As a result, other competing trucking trade associations sprung up and private carriers started their own trade association. Additionally, trucking in Mexico had been controlled by a very few powerful companies and families in the past. Because of the natural march of economic and commercial progress, more and more smaller and medium-sized trucking companies were being created. Finally, deregulation had a great leveling effect on both competition and freight rates. Users of

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166. Interview with Licenciado Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City, Mex.
170. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).
172. Interview with Carlos Sesma Mauleon, partner of Sesma, Sesma & McNeese, in Mexico City.
cargo transportation services could now shop around for rates and service.173 Neither tariffs nor routes were fixed as they had been before.174 In short, the power that CANACAR had enjoyed in years past had diminished by the time the NAFTA was negotiated.

B. LEASING AND RENTAL PROBLEMS

What then of vehicle leasing and rental? Once President Salinas signed the new leasing regulations, leasing companies were jumping at the chance to get started in Mexico, especially U.S. companies. However, leasing regulations were only the first step in the business process. Leasing and renting were foreign concepts to Mexicans, and no one knew really how to do it.

The truly unfortunate event in vehicle leasing, unfortunate for the leasing companies, for customers, and, as it turned out, for the SCT itself, were Article 57 and Article 59.175 While it is not totally clear from the Articles' language, these articles, taken in their totality, appear to state that leasing companies are the ones who must obtain license plates and circulation card.176 That is the way the SCT has interpreted the Articles' intent, which has given rise to two problems. First, the registration process is so cumbersome and time consuming requiring new registration for each lessee that, as a practical matter the maintenance of a fleet of short term rental vehicles is not a valid business proposition for a renting company. Further, quick response to the needs of a company that needed a rental vehicle on short notice was not possible because new permits and circulation cards would have to be requested for each short term user.

C. CANACAR OPPOSITION TO LEASING AND RENTAL

The second problem, as already mentioned, which has made the leasing business difficult for the SCT, leasing companies and lessees is the fact that leasing companies get the license plates of Autotransporte Federal de Carga, or common carriages in their own name, but for each and every vehicle. Many of these companies, and all of the initial ones li-

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173. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 3, 2004).
174. Id.
176. The Tarjeta de circulacion [traffic card] is a document that must always be carried in the cab of the vehicle. It authorizes the carriage of the particular type of goods, which may be a general cargo permit.
licensed as lessees, were foreign corporations. 177 Remember that Mexican laws specifically prohibit leasing companies from providing the service of transportation of passengers, tourism or cargo. 178 CANACAR had always been fearful that foreign companies would do just that and constantly accused them of doing so. 179 During 1997 and 1998, one of the authors attended several meetings with leasing company representatives and the New Director of Highway Transportation of the SCT regarding some of the practical procedural problems of such things as the carriage of hazardous materials, and how to change the procedures so as to allow for short term rental fleets. At one of those meetings, CANACAR representatives threatened to block all roads to Mexico City, if the SCT did not listen and react to their concerns about leasing companies providing freight common or contract carriage services. 180 From 1995 to 1998, CANACAR leaders convinced the SCT to conduct what amounted to inspection raids on foreign companies, to insure that all leasing documentation and operations were in order, and to determine what leased vehicles were really doing. 181 They were constantly accusing the foreign leasing companies of being surreptitiously involved in providing actual transportation services. This was very disruptive for the leasing companies and for their customers. In reality, no foreign leasing companies were actually found to be violating this law.

CANACAR now seems to be in favor of leasing but only if the regulations and registration procedures ensure that leased vehicles are licensed only in the names of licensed transportation companies. 182 CANACAR is no longer powerful enough to impose the changes they wish, but they continue to influence and, are constantly suggesting changes to the laws and regulations to the SCT. 183 The fact is that the NAFTA and the changes it has brought about have increased the efficiency and the economy of over-the-road transportation in Mexico and lowered the costs to shippers. 184 Even greater effi-

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177. Interview with Licenciado Zinzer, Director of Highway Transportation, in Mexico City, Mex. (Apr. 1995).
178. Regulation of Federal Transportation, supra note 175, at art. 61-III.
179. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001).
180. Interview with Ing. Aaron Dychter, Director of Federal Highway Transportation, SCT (April 1995) (This meeting was also attended by representatives of all licensed leasing companies in Mexico.).
181. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (June 5, 1998).
182. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001); Interview with Licenciado Oscar Moreno Martinez, Director of Legal Affairs of CANACAR (Feb. 2001).
183. Interview with Licenciado Jorge Torres, Economic Advisor to CANACAR (Feb. 2001).
184. Interview with Licenciado Carlos Sesma Mauleón, partner of Sesma, Sesma & McNeese, in Mexico City, Mex. (Feb. 20, 2001).
ciencies could be obtained if the permits for leased vehicles were issued to the actual user, or, if long term permits were issued for leased or rental vehicles in the name of the leasing company, allowing the leasing company to place either on rent or on lease such vehicles with validly existing carriers. The old cultural attitudes are hard to root out; they are still an entrenched paradigm. The foreigners are feared, and are still not fully trusted to respect the rule of law.

VII. Lessons For FTAA

The FTAA of thirty-four countries has had nine meetings of the Ministers of Trade, with the final stages of the FTAA negotiations to be under the co-chairmanship of Brazil and the U.S.\textsuperscript{185} It was agreed that last two plenary meetings of the Trade Ministers be held in November 2003 in Miami, U.S., and the other to be held in the later half of 2004 in Brazil.\textsuperscript{186} At the eighth meeting in Miami on November 20, 2003, the Ministers restated their commitment to the Free Trade Area of the Americas and set forth a vision of the FTAA as follows: “We, the Ministers, reaffirm our commitment to the successful conclusion of the FTAA negotiations by January 2005, with the ultimate goal of achieving an area of free trade and regional integration.”\textsuperscript{187}

Just as in Mexico, each of the thirty-four countries in the Western Hemisphere has its own history and its own manner of interpreting that history. They all have had good, bad, or indifferent relations with their neighbors, both near and distant. Many of their views on foreign investment and transportation, both foreign and domestic, will often be based upon or colored by their history and by the experience of those relations with their neighbors. Accordingly, one may find areas of the transportation law or regulations within a particular country that provides obstacles for the way in which one would wish to do business in that country as a foreign investor. The FTAA is currently in the process of being negotiated. Examples of areas of possible concern for logistics companies or carriers wishing to engage in cross-border operations are that in Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, there is a restriction on foreign investment in international carriers, allowing only minority equity participation on the part of foreigners.\textsuperscript{188} Standards in the varying countries vary, so that vehicle and trailer sizes, which are allowed on the

\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} See Acuerdo Sobre Transporte Internacional Terrestre, entre Argentina, Brazil, Bolivia, Chile, Paraguay y Uruguay [Agreement on International Land Transportation among Argentina, Brazil, Bolivia, Chile, Paraguay, and Uruguay], at art. 22 (Jan. 1, 1990).
highways can vary from country to country. 189 Certain Andean Pact countries do not permit the importation of used vehicles. 190 It is very likely that similar and a variety of other restrictions, political, legal or customary exist in the other nations of the hemisphere.

Now is the time to attempt to get any such obstacles removed or smoothed over. If transportation services company or a logistics company that, once the FTAA enters into effect, will wish to conduct new business operations within, between or among any of the signatory countries, now is the time to investigate the current transportation and transportation related legal regime in the target country or countries. The proposed operations to be carried out in the target country or countries must be clearly defined. Then the transportation regime of the target countries must be examined in detail to see if such operations are allowed. If such operations are not allowed, the necessary changes must be identified. But in order to change things, it is uniquely helpful first to understand the history behind the obstacle. It is important to understand the objective of the obstacle. Knowing these things can help in formulating arguments for changing the regime. It is also important fully to understand exactly how things need to be changed. This of course will entail consulting with local counsel who fully understand the transportation laws in the jurisdiction in question.

Once this is accomplished, U.S. carriers will have to work through the negotiators who are working on the transportation or service-related issues. Making them your ally is a key factor in getting anything accomplished. Working through the United States Ambassador in the target country can also be helpful, as the ambassador can often get investors in to see the right people in the country in order to conduct appropriate and effective lobbying efforts. Approaching the ministry in the target country, which is charged with regulating transportation can be helpful in both understanding fully the issues and perhaps in lobbying for certain changes, especially if that ministry is working closely with that country’s FTAA negotiators.

The lesson that we learned from the NAFTA experience is that if a


190. One of the authors was involved in the importation of used vehicles into Venezuela in 1990 and was successful in importing between 75-100 used vehicles. The Venezuelan Customs officials stopped the first shipment at the port, believing them to be new - they had received good programmed maintenance throughout their life, and were over five year old. The cars were then permitted entry. After nearly 100 vehicles were imported, the government adhered once again to the restrictions of the Andean Pact on the importation of vehicles, and no more used vehicles were permitted to enter Venezuela.
logistics or transportation company wants to do business in and throughout the FTAA that company should, in our view:

- Define clearly what it wants to do;
- Investigate the laws and regulations and business practices in the countries in which it wishes to conduct that activity;
- If there are restrictions, find out why they exist and what the objectives of those restrictions are;
- Prepare position papers for the U.S. negotiators explaining the state of the law in the target country, the reasons behind the law—historical, commercial or otherwise—and try to explain counter arguments the negotiators will encounter and try to come up with good reasons why your position makes sense. The position paper should also outline the regime in the U.S. that the U.S. carrier would like to emulate and the benefits of such a regime, along with statistical evidence of such benefits; and
- Lobby as much as possible and monitor the situation closely. If U.S. carriers have contacts in the foreign country, through either a law firm or even the U.S. embassy, they should also lobby with the negotiators on the other side, as Ryder did with the NAFTA.
NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision

Elizabeth Townsend*

On June 7, 2004, the United States Supreme Court, in a unanimous decision, decided Department of Transportation v. Public Citizen.¹ The case concerned questions over whether the Department of Transportation ("DOT") erred in not conducting an environmental impact statement with regard to new regulations allowing Mexican trucks to cross beyond the current commercial zone border areas.² These environmental regulations were drawn up, in part to fulfill the U.S.'s obligation under North American Free Trade Act ("NAFTA"), an obligation that the NAFTA arbitration panel found the United States had violated in 2001.³

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2. Id.
Under the NAFTA, both sides were supposed to begin allowing cross-border trucking in December 1995 in the border states, and then by January 2000, open up cross-border trucking to the greater U.S. and Mexican states.\footnote{Peter J. Cazamias, The U.S.-Mexican Trucking Dispute, A Product of a Politicized Trade Agreement, 33 Tex. Int’l L.J. 349, 349 (1998).} That did not happen on either side. But it was the Mexican government that filed for a NAFTA arbitration panel.\footnote{Memorandum of the President, Determination Under the Bus Regulatory Reform Act of 1982, 47 Fed. Reg. 41,721 (Sept. 22, 1982) [hereinafter Presidential Memorandum].} The issue of whether to allow Mexican trucks into the United States is not new; we’ve been debating and barring entry beyond the commercial zone for over twenty years.\footnote{See infra Part I.} But the reasons for the restriction have changed over the years. This article explores the strange road of trucks, in its many incarnations. This includes the pre-NAFTA history of trucks, the 2001 NAFTA arbitration decision, the congressional debate in the aftermath of the decision, and the 2003 Ninth Circuit case and its current incarnation as a Supreme Court decision, all of which are asking the question of whether and under what circumstances to allow Mexican cross-border trucking.

The story of cross-border trucks is a story that for years to come will be utilized in classrooms teaching international trade law and the NAFTA. When on February 6, 2001, a binational NAFTA arbitration panel delivered its decision, it marked the third country-to-country dispute, commonly referred to as a Chapter 20 case.\footnote{NAFTA Panel Decision, supra note 3, at 1.} Brought by Mexico against the United States, the case involved two areas of violation: not allowing cross-border trucks to be processed for application of operating authority into the United States and denying Mexicans the ability to invest in cross-border trucking in the United States in any substantial manner.\footnote{Id. at 90-91.} The panel found that the United States had violated the agreement on both counts, but added a caveat regarding safety.\footnote{See infra Part II.}

Cross-border trucking issues become illustrative of several elements including politics, the process of international and domestic law, and the problem of sorting out rhetoric from fact.\footnote{See In re Cross-Border Trucking Services (United States v. Mexico), No. USA-MEX-98-2008-01 (NAFTA Arbitral Panel, Feb. 6, 2001) [hereinafter NAFTA Panel Decision], available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/USA/ub9801e.pdf.} At once, the details may seem overwhelming, the law straightforward, the certainty of safety impossible, and the politics insurmountable. But the cross-border trucking case shows the process of our current legal system today, from treaty-making to arbi-
tation panels, to congressional politics and budgeting, to executive orders, to the circuit courts, all the way up to the Supreme Court. We see the involvement of presidents, U.S. and Mexican, the Congress, special interest groups, such as trucking unions and trade experts, and now environmentalists. It gives us a sense of what impact one seemingly small element—trucks—has on our culture, laws, politics, and trade. That is the way trade works—tomatoes, corn, brooms suddenly take on a much bigger role than one would imagine.\textsuperscript{11}

Cross-border trucking can be seen as very simple and straightforward or intensely complex and convoluted, filled with special interests, legitimate concerns, and rhetorical protectionist maneuvering on safety and the environment, and politics on a national and international scale. In regards to the organization of this paper, I have come to believe that we must first see the simple and then figure out how to deal with the complex issues that fall from the simple decisions. Part I looks at the basic issues of the NAFTA arbitration—what the questions of law were and what was argued by Mexico and the U.S. in the Chapter 20 case. Parts II, III, and IV look at the complex questions, relationships, and outcomes; this includes the pre-Panel and pre-NAFTA history of trucks, the U.S.’s response to the Panel decision in the form of congressional and executive debate on safety and infrastructure, as well as the recent environmental case concerned with the border impact of additional Mexican trucks now at the Supreme Court. Parts V and VI end with potential future roadblocks, and some questions, some answered, some posed for others to answer, on this simple and very complex topic of trucks and the border.

A final prefatory remark before beginning. I personally played a small and tedious role in this cross-border dispute. I was hired to help with the panel opinion, assisting the arbitrators to do all of the least glamorous work needed to prepare a final document of that size, including cite-checking, spell-checking, and other kinds of checking-related duties.\textsuperscript{12} It actually was very exciting— to feel part of an international issue, however slight, to be contributing to peaceful workings out of differences between one country and another. This may seem idealistic, even naive. But at the time, I really believed that the dispute settlement process was something to be taken seriously, that the opinion would be read carefully, with an eye towards detail, and that the rulings on the law would make a

\textsuperscript{11} See David A. Gantz, \textit{Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties}, 14 AM. U. INT’L L. REV. 1025, 1057-82 (1999) (describing cases filed under the NAFTA and World Trade Organization (“WTO”) dispute settlement processes, including cases involving tomatoes, high fructose corn syrup, and brooms.)

\textsuperscript{12} Other assistants included Martin Lau, Jorge Ogarrio, Nancy Oretskin, Erica Rocush, and Elizabeth Townsend; see NAFTA Panel Decision, \textit{supra} note 3, at n.24.
difference. It's not that I still do not hope for all of that, or that I would not work as hard given the same opportunity. But it no longer appears as simple as looking at the arguments in light of the law to determine what should happen.

I: Simple and Straightforward—NAFTA Violation

The NAFTA is pretty straightforward with regard to cross-border trucking. In Chapter 12, the U.S., Canada, and Mexico set out the parameters of cross-border services, including trucking, and in Annex I, the three countries agreed to phase-out times for restrictions and phase-in for free trade, i.e. allowing cross-border trucking. When the first deadline passed and the U.S. refused to process pending applications from Mexican carriers, Mexico initiated a Chapter 20 case against the U.S. This section will first briefly explain the NAFTA, its arbitration process, and then look specifically at the issues and decisions of the Panel.

A. The North American Free Trade Agreement

The U.S., Canada, and Mexico entered into the NAFTA, which was signed by President Bush on December 17, 1992 and came into force on January 1, 1994, signaled a new era between the U.S. and Mexico. The U.S. had already entered a similar agreement with Canada in 1988. NAFTA was more ambitious, but nevertheless an extension of this endeavor. The objectives of the agreement, as outlined in Article 102(1), include eliminating barriers to trade through national treatment most-favored-nation treatment and transparency. One area specifically targeted was the cross-border movement of goods and services between the U.S., Mexico, and Canada.

Through the NAFTA, the U.S. and Mexico sought to patch up relations that had traditionally been protectionist at best. The fact that Mexico was now reaching out to form an U.S.-Mexico, and eventually

13. NAFTA, supra note 3, at ch. 12, annex I.
16. NAFTA, supra note 3, art. 102(1).
17. Id. at art. 102(1)(a).
18. RALPH H. FOLGOM, NAFTA and Free Trade in the Americas In a Nutshell 5 (2d ed. 1999).
Canadian, free trade agreement marked a remarkable change since it was Mexico that historically had a phobia against foreigners in key areas. Whole new infrastructures and legislation had to be passed in Mexico in order to meet NAFTA obligations, including privatization of key industries and banking.

While the NAFTA is primarily an economic document, with the goal of the elimination of economic borders between the United States, Canada, and Mexico, it is also an incredibly expansive agreement. As David Gantz noted,

The NAFTA applies not only to trade in goods, specifically including automobiles, textiles, energy, and basic petrochemicals, but to customs procedures, agriculture, sanitary and phytosanitary measures, and safeguards and technical barriers to trade. The NAFTA contains special provisions on safeguards, government procurement, cross border trade, telecommunications and financial services. Foreign investment is protected, as are intellectual property rights; furthermore, there is limited coverage for competition policy and business travel.

That said, the political, cultural, and social impact of these economic changes are always present. The NAFTA sought to “lead to a more efficient use of North American resources—capital, land, labor, and technology—while heightening competitive market forces.” With over 80% of goods being transferred between Mexico and the U.S. by truck, part of making more efficient use of resources meant revising the existing trucking system where a trailer is currently transferred in the commercial zone, on the U.S. side, from a Mexican carrier to a U.S. carrier. By opening

19. Id. at 75.
21. Id. at 75-76.
22. FOLSOM, supra note 18, at 1.
23. Gantz, supra note 11, at 1033.
24. See generally Cazamias, supra note 4.

the border and granting reciprocal cross-border truck access, greater efficiency, and increased trade would occur when this transfer of the trailers would become unnecessary.27

B. THE NAFTA ARBITRATION PROCESS

Probably the most contentious issues, from the U.S. standpoint, were related to dispute settlement. . . .

Hermann von Berurab28

The NAFTA has built in dispute resolution mechanisms to resolve conflicts or competing interpretations. Six distinct dispute mechanisms exist within NAFTA, each one relying on a different ad hoc arbitration system.29 Each government nominates potential arbitrators and panelists are theoretically chosen from these lists.30 No permanent court, file clerks, or judges exist.31 Each case brings a new set of arbitrators, specifically chosen for that case.32 What is permanent, however, is the secretariat.33 The NAFTA designates that each country will have a secretariat in their capital.34 The secretariat under NAFTA has very limited functions, dealing only with the practicalities of setting up and running the ad hoc arbitration panels, tending to budgeting, and overseeing the procedural and logistical tasks for each of the arbitration mechanisms.35 The dispute

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27. Canary, supra note 26. At its tenth anniversary in 2003, officials reported that over $1.7 billion in NAFTA trade daily, a number that had doubled from $306 to $621 billion between the three countries. Office of the United States Trade Representative, NAFTA at 10: A Success Story (Dec. 1, 2003) available at www.ustr.gov (last visited Mar. 24, 2004). Another estimate indicated that 85% of the trade between Mexico and U.S. was conducted by land transportation. Cazamias, supra note 4, at 349 (citing Legislation to Approve the National Highway System and Ancillary Issues Relating to Highway and Transit Programs; 1995: Hearings Before the Subcomm. on Surface Transp. of the Comm. on Transp. and Infrastructure, 104th Cong. 914 (1995) (statement of Frederico Peña, Secretary of Transportation)).


32. Id.

33. Id. at art. 2002.

34. NAFTA, supra note 3, at art. 2002(1).

35. Id. at art. 2002.
settlement process was constructed this way because of sovereignty issues.\textsuperscript{36}

In all but Chapter 20 cases, private, non-governmental parties may file a case directly.\textsuperscript{37} Chapter 20 cases are reserved for country-to-country disputes.\textsuperscript{38} Chapter 20 is the mechanism to deal with interpretation of NAFTA between governments, interpreting NAFTA in light of terms of the NAFTA and international law.\textsuperscript{39} So far, there have only been three Chapter 20 decisions.\textsuperscript{40} The cross-border trucking case followed the procedures set by Chapter 20,\textsuperscript{41} beginning with an effort for the parties to consult with each other, followed by conciliation before the Free Trade Commission, which consists of cabinet-level trade representatives from each of the three NAFTA countries.\textsuperscript{42} If a satisfactory solution is not reached, an arbitration panel is set up.\textsuperscript{43} Five arbitrators are chosen, two from each of the disputing countries, chosen by the opposite country, with the chair being independent.\textsuperscript{44}

Mexico first contacted the United States Trade Representative in December 1995,\textsuperscript{45} just after the announcement that despite the agreement to open, the border would remain closed to cross-border trucking beyond the commercial zone, and while the U.S. was accepting cross-border trucking applications for operating authority, the U.S. would not be processing them.\textsuperscript{46} Talks between the U.S. and Mexico began in April 1996, with the U.S. expressing safety concerns.\textsuperscript{47} Four months and two years later, in July 1998, Mexico formally requested a meeting of the Free

\textsuperscript{36} See Peter Behr, What's at Stake as Vote Nears on NAFTA, WASH. POST, Nov. 15, 1993, at A8.


\textsuperscript{38} See id.

\textsuperscript{39} See id.


\textsuperscript{41} NAFTA Panel Decision, supra note 3, at 6.


\textsuperscript{43} NAFTA, supra note 3, at art. 2008(1).

\textsuperscript{44} Id. at art. 2011. In the three Chapter 20 cases, of the fifteen arbitrators, ten have been law professors. Gantz, supra note 11, at 1041. Additionally, all three chairs have been citizens outside the NAFTA countries – from Britain and Australia.

\textsuperscript{45} NAFTA Panel Decision, supra note 3, at 6.

\textsuperscript{46} See Remarks by Pena, infra note 173.

\textsuperscript{47} Gantz, supra note 11, at 1065.
Trade Commission ("FTC"). In August 1998, the Commission convened to discuss the same dispute. On August 19, 1998, the FTC, along with the parties failed to come to an agreement. A month later on September 22, 1998, Mexico requested the formation of the arbitral panel. The panel consisted of the British chair, J. Martin Hunter, Americans David A. Gantz, and C. Michael Hathaway, chosen by the Mexicans, and Mexicans Luis Miguel Diaz and Alejandro Ogarrio, chosen by the Americans.

Once the arbitration panel was formed, the complaining party, Mexico, transmitted an initial submission, followed by an initial counter-submission from the opposing party, the United States. This took place in the early part of 2000. Then, a second round of submissions from each party took place in April 2000, followed by a hearing in May 2000. Upon written notice, third parties can attend the hearings, make written and oral submissions to the panel, and receive written submissions of the disputing parties. In the cross-border trucking case, Canada submitted its comments in February 2000, before the second round of written submissions.

In terms of the process specified in Chapter 20, experts can be included, as long as the disputing Parties agree. Scientific review boards may be established either by the Panel or at the request of a Party. In the cross-border trucking case, the United States requested a scientific review, but the Panel rejected the request because they felt that the facts were clear that the U.S. and Mexico had different regulatory standards and that a scientific panel would not further aid the Panel in making their decision.

After the Panel deliberates, an initial report is submitted to the parties for their comments, and then a final report is given to the parties, supposedly thirty days after the initial report. What is most peculiar about the process is that, after all of this, the decision is not binding.

49. Id.
50. Id.
51. Id.
52. NAFTA Panel Decision, supra note 3, at 7.
53. Id.
54. Id.
55. Id. at 7-8.
56. NAFTA, supra note 3, at art. 2013.
57. NAFTA Panel Decision, supra note 3, at 7.
58. NAFTA, supra note 3, at art. 2014.
59. Id. at art. 2015.
60. NAFTA Panel Decision, supra note 3, at 53-54.
62. Id. at art. 2018.
After the final report, the disputing parties are to agree upon the resolution of the dispute. If the parties cannot agree, the winning party may impose trade sanctions thirty days after the final report. So far, three years after the decision, Mexico has not imposed trade sanctions on the United States although the threat has arisen on occasion.

C. The Chapter 20 Panel Decision

The Chapter 20 Panel decision can be seen as relatively straightforward, especially compared to the details in the debate afterwards. Those less familiar with the NAFTA might find it somewhat daunting, so we will proceed slowly. The case itself asked the question of whether the U.S. could exclude all Mexican trucks, even though it had been agreed upon in the NAFTA to open the U.S.-Mexican border in both directions to cross-border trucking, first among the border states, then the rest. The case also asked whether the U.S. could bar Mexicans from investing in commercial transportation in the U.S. The more technical language of the arguments surrounding Articles 1202, 1203, 1102, and 1103, as well as Annex I will be discussed below. The U.S. had violated its NAFTA obligations, said the Mexican government. The only way to justify the delaying of the border opening, namely in Article 2101, chapter Nine, or if a different interpretation was determined by the Panel of the more technical language in Article 1202 (national treatment for cross-border services), Article 1203 (most favored nation treatment for cross-border services), Article 1102 (national treatment for investment), or Article 1103 (most favored nation treatment for investment). This section will first look at the conclusion of the panel and then look at the arguments and issues put forth.

1. The Conclusions of the Panel Decision

The Panel unanimously concluded that the U.S. had violated its NAFTA obligations, that “in like circumstances” language did not give the U.S. reason to refuse to process Mexican cross-border trucking applications or allow investment in U.S. trucks, and the differences in the two regulatory systems were no justification for keeping out Mexican

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63. Id. This can include suspension of benefits. Id. at art. 2019.
64. Id. at art. 2019.
66. NAFTA Panel Decision, supra note 3, at 1.
67. Id.
68. Id.
69. Id.
70. NAFTA Panel Decision, supra note 3, at 90.
trucks.\textsuperscript{71} The Panel therefore found that the U.S. was in breach of its Annex I obligations to allow Mexican cross-border trucks beyond the commercial zone and into the border states as of 1995, and then the rest of the United States for international cargo purposes beginning in 2000.\textsuperscript{72} What should be read carefully is paragraph 298, which reads in its entirety:

It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the Panel imposing a limitation on the application of safety standards properly established and applied pursuant to the applicable obligations of the Parties under NAFTA. Furthermore, since the issue before the Panel concerns the so-called “blanket” ban, the Panel expresses neither approval nor disapproval of past determinations by appropriate regulatory authorities relating to the safety of any individual truck operators, drivers or vehicles, as to which the Panel did not receive any submissions or evidence.\textsuperscript{73}

The “level of protection” under “legitimate regulatory objectives” in the form of safety on U.S. highways and infrastructure at the border would come to dominate the discussion in Congress over 2001 and part of 2002. It would also touch upon the current Supreme Court case, which looks at the relationship of NAFTA to regulatory requirements of the Clean Air Act and National Environmental Policy Act (“NEPA”) in relation to regulations promulgated by the Department of Transportation.\textsuperscript{74} We will return to these topics further below, as part of the more complex and convoluted world of trucks. For now, what we should take away is that the U.S. was in violation of NAFTA, but the Panel was not imposing restrictions on legitimate regulatory schemes for safety, as long as those regulations did not violate NAFTA, as the “blanket” refusal had. The Panel ended with a set of recommendations which suggested that the U.S. comply with its NAFTA obligations; but to do so, they could ensure safety by implementing different standards for Mexican cross-border firms and trucks in order to make sure they comply with U.S. safety regulatory regimes.\textsuperscript{75} This is significant in that it gives the U.S. extra “teeth” in order to demand more of the Mexican cross-border trucks in order to make sure they are meeting U.S. standards. So while the Panel decision could be seen as a victory for Mexico, in that the Panel agreed that the

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 90-91.

\textsuperscript{74} Dep't of Transp. v. Public Citizen, 124 S. Ct. 2204, 2209 (2004).

\textsuperscript{75} NAFTA Panel Decision, \textit{supra} note 3, at 91.
U.S. had violated its NAFTA commitments, it could also be seen as a victory for the U.S., where the U.S. was given direction on how to implement further safety mechanisms in the face of differing regulatory practices between the two countries. How exactly the Panel reached this decision is the subject of the next sections.

a. Basic Argument of the Parties

Mexico’s basic argument was that a blanket refusal of all applications was in violation of NAFTA. They merely wanted the opportunity for their carriers to be evaluated on a case-by-case basis on whether they met the U.S. standards for operation.\(^6\) The United States responded that Mexico’s regulatory system was far inferior, and that the language of NAFTA, particularly “in like circumstances,” meant that the U.S. could keep out Mexican trucks because of safety concerns until Mexico’s regulatory system met the same standards as the U.S. and Canadian trucks and regulatory trucking system.\(^7\) Rather than spend a great deal of time on each of their arguments and supporting materials, let us turn to the details of Panel decision and look at the parties positions on the issues along the way.

b. Language and Interpretation

The Panel decision focused a great deal on interpretation of language and, in particular, the term “in like circumstances” found in Chapter Twelve of the NAFTA. The Panel prefaced its analysis with a discussion of the interpretation of the language in the NAFTA.\(^8\) Relying on international law and the preamble of the NAFTA, the Panel asserted that the language of the agreement should be interpreted in accordance with the ordinary meaning of the words in combination with meanings that furthered the goals of the agreement, that is, the liberalization of trade.\(^9\)

c. Annex I Obligations

Annex I is the schedule by which the NAFTA parties phase-out more protectionist arenas under certain, specific phase-out time periods in an effort to further liberalize trade.\(^10\) Mexico contended that the U.S. did not meet its obligations to allow cross-border trucking, as described in the phase-out section of Annex I.\(^11\) The United States, in response, inter-

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76. Id. at 1-2.
77. Id. at 2-3.
78. NAFTA Panel Decision, supra note 3, at 55-60.
79. Id. at 56.
80. NAFTA, supra note 3, at annex I.
81. NAFTA Panel Decision, supra note 3, at 60.
preted the language of Annex I to be more of a suggestion that did not actually obligate the U.S. in any way.\textsuperscript{82}

The Panel first looked to the language of a Note attached to the Annex that the drafters included for help with interpretation.\textsuperscript{83} The Panel concluded that nothing in the Annex itself, the Note, or the NAFTA left the language ambiguous or conditional, as the United States had argued, and in fact, the phase-out schedules in Annex I were unconditional.\textsuperscript{84} The United States had not made their case that the Annex I language made processing cross-border trucking cases merely an option.

d. Chapter Twelve - Services

The Panel next turned to Chapter Twelve of the NAFTA, the services section under which cross-border trucking resides. It was the heart of the argument for both Mexico and the United States. Mexico contended that the United States had violated its 1202, national treatment, and 1203, most-favored-nation, duties under the NAFTA.\textsuperscript{85} The United States contended that the language of "in like circumstances" allowed the U.S. to deny access to Mexican cross-border trucking because the regulatory systems of the two countries were not in "in like circumstances."\textsuperscript{86} Canada weighed in, siding with Mexico, and "insisting that the major issue in interpreting Article 1202 is a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically."\textsuperscript{87} Canada also believed the "blanket" refusal to process Mexican cross-border trucking applications "would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances."\textsuperscript{88} The following section will delve into understanding just what all of this means and how the Panel decided that the U.S.'s interpretation was not justification for denying Mexican cross-border trucking applications on a "blanket" basis. For this is the issue of the case: whether the U.S.'s denial of Mexican cross-border carriers "as a group is consistent with the applicable NAFTA obligations of the United States."\textsuperscript{89} The Panel found the U.S. denial of border crossing not to be consistent with NAFTA obligations.\textsuperscript{90}

\textsuperscript{82} Id. at 61.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 66-67.
\textsuperscript{85} NAFTA Panel Decision, supra note 3, at 69.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 70.
\textsuperscript{88} Id.
\textsuperscript{89} NAFTA Panel Decision, supra note 3, at 71.
\textsuperscript{90} Id. at 72-74.
The two basic issues were first whether the United States was providing national treatment as required by Article 1202 to the Mexican cross-border truckers. This trade concept means that the United States is supposed to treat foreign companies equal to national trucking companies. The other issue is most-favored nation treatment, found in Article 1203, which means the United States must treat Canada and Mexico the same, not preferencing one over the other. The phrase in question is “in like circumstances” found in both 1202 and 1203. Article 1202 provides in pertinent part: “each Party [shall] accord to service providers of another Party treatment that is no less favorable than it accords, in like circumstances, to its own service providers.” Similarly, Article 1203 states “[e]ach party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to service providers of any other Party or of a non-Party.”

It was the Panel’s job to interpret the language of “in like circumstances” by looking to NAFTA and other related case law and related treaty and international law. While it applied to both national treatment and most favored nation treatment, the Panel focused its discussion on the former. Since they found the U.S. had violated the national treatment “in like circumstances” language, they did not find it necessary to delve into the most favored nation treatment.

In analyzing “like circumstances” under national treatment, the Panel took a number of steps. First, they looked at the Free Trade Agreement (“FTA”) between the U.S. and Canada, a precursor to NAFTA, and a treaty that used much of the same language. That, along with language in the General Agreement on Tariffs and Trade (“GATT”), helped the Panel determine that treatment does not necessarily have to be identical. The Panel then had to determine what was meant by “service provider.” The Panel found that while the United States was allowing some Mexican trucks not subject to the moratorium to continue to operate, they were providing less favorable treatment to those applying for operating authority under NAFTA. The Panel concluded that by continuing the moratorium passed the Annex I deadline of December 17, 1995, the United States was committing a de jure violation of the national treat-

91. Id. at 71-72.
92. NAFTA, supra note 3, at art. 1202.
93. NAFTA Panel Decision, supra note 3, at 72.
94. Id.
95. NAFTA, supra note 3, at art. 1202 (emphasis added).
96. NAFTA Panel Decision, supra note 3, at 76.
97. Id. at 73.
98. Id. at 74.
99. NAFTA Panel Decision, supra note 3, at 76.
100. Id. at 75-76.
ment requirement, because Mexican cross-border carriers applying for operating authority were subject to less than favorable treatment to domestic carriers.\textsuperscript{101} The Panel dismissed the idea that the two regulatory systems had to be identical in order to qualify for national treatment or most-favored-nation.\textsuperscript{102}

e. Article 2101

One argument that the U.S. put forth was that they could exclude Mexican cross-border trucks from the United States because of safety concerns, relying on Article 2101 of the NAFTA.\textsuperscript{103} Article 2101(2) gives a Party the flexibility of requiring additional measures necessary in order for the compliance of regulations of laws in the Party’s country.\textsuperscript{104} The language the Panel had to define was the term “necessary.”\textsuperscript{105} The Panel looked to GATT language and cases for advice.\textsuperscript{106} The Panel noted that the “necessary” language had previously been interpreted strictly and that the U.S. itself has supported in the past a strict interpretation.\textsuperscript{107} The Panel concluded

The Panel is generally in agreement with Mexico that, consistent with the GATT/WTO history and the text of Article 2101, in order for the U.S. moratorium on processing of Mexican applications for operating authority to be NAFTA-legal, any moratorium must secure compliance with some other law or regulation that does not discriminate; be necessary to secure compliance; and must not be arbitrary or unjustifiable discrimination or a disguised restriction on trade.\textsuperscript{108} The United States did not meet the necessary requirement.\textsuperscript{109} The Panel continued

the United States has failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements than the moratorium. In fact, the application and use of exceptions would appear to demonstrate the existence of less-restrictive alternatives.\textsuperscript{110}

f. Chapter Nine

The Panel then turned to Chapter Nine of the NAFTA. The United

\textsuperscript{101} Id. at 76-77.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 69.
\textsuperscript{104} NAFTA, supra note 3, at art. 2101(2).
\textsuperscript{105} NAFTA Panel Decision, supra note 3, at 78.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 80.
\textsuperscript{109} Id.
\textsuperscript{110} NAFTA Panel Decision, supra note 3, at 80.
States had not argued the moratorium as a Chapter Nine exception, but both Canada and Mexico had made arguments that Chapter Nine did not apply.\(^{111}\) Chapter Nine pertains to "legitimate objectives of safety or the protection of human life or health" and in part relates specifically to the Land Transportation Standards Committee.\(^{112}\) The Panel explained,

Thus under Article 904, the United States has the right to set a level of protection relating to safety concerns, through the adoption of standards-related measures, notwithstanding any other provision of this Chapter, and provided only that this is done consistently with Article 907.2, which establishes a permissive (i.e. not mandatory) assessment of risk, and encourages Parties to avoid arbitrary or unjustifiable distinctions between similar goods or services, in the level of protection a Party considers.\(^{113}\)

The United States, however, would have still had to meet the national treatment and most-favored-nation requirements.\(^{114}\)

g. Investment

While investment was also part of this case, the focus has been primarily on the application process. The original moratorium keeping Mexican trucks out of the U.S. since the 1980s applied to investment in U.S. trucking companies by Mexican nationals.\(^{115}\) These restrictions were supposed to have been phased out as well.\(^{116}\) Mexico contended that the U.S. was violating the national treatment, most favored nation treatment, and standard of treatment clauses of the NAFTA.\(^{117}\) The United States' response was weak. The U.S. said there was no evidence that there was any interest in Mexican nationals investing in the U.S. trucking industry, that it had been the U.S. that had been interested in this aspect during the negotiations, and, that if anything, Mexican investors had more worries over U.S. investors in Mexico.\(^{118}\) The panel found in favor of Mexico.\(^{119}\)

II: THE CONVOLUTED WORLD SURROUNDING TRUCKS

Safety is one of many factors that make trucks more complex, both in determining what is safe or necessary to make the opening of the border safe as well as sifting rhetoric from reality. This section looks at the truck debate from myriad angles.

\(^{111}\) Id. at 81.
\(^{112}\) Id.
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) NAFTA Panel Decision, supra note 3, at 81.
\(^{116}\) Id. at 83.
\(^{117}\) Id.
\(^{118}\) Id. at 85.
\(^{119}\) NAFTA Panel Decision, supra note 3, at 85.
\(^{119}\) Id. at 90.
A. BEFORE NAFTA

Cross-border trucking as an issue was a point of contention between the United States and Mexico long before NAFTA. In many ways, the cross-border trucking issue illustrates the difficulty and long-standing tensions between the two countries, and how NAFTA seeks to eliminate these problems. Historically, Mexico and the United States have been "confrontational and protectionist" when it comes to trade. The cross-border trucking issue illustrates this history. In this author's opinion, the dispute started as a protectionist stance on the part of Mexico, which has now escalated to a still protectionist stance on the part of the U.S., backed by the Teamsters and combined with real and political concerns over first safety and supposed new concerns over the environment. In many ways, this evolution demonstrates that new mechanisms are necessary to achieve old results in the face of the NAFTA. Yet, at the same time, the pressures of the NAFTA continue to attempt to erode old antagonisms for the economic benefit of both countries. The pre-history before the Chapter 20 Cross-border case will give some sense of this in the example of trucks.

The United States, while in high profile over their unwillingness to let in Mexican trucks, was not alone. Mexico refused to allow U.S. trucks into Mexico. And it was Mexico that first put that prohibition in place long before NAFTA. Before 1980, the United States, through the Interstate Commerce Commission allowed carriers to cross the border, without distinguishing between U.S., Canadian, or Mexican applicants. This was not an open border policy. Rather, carriers had to economically justify each route of service before being approved, an actually rather restrictive mechanism causing a carrier great time and expense. Then, in 1980, the United States passed the Motor Carrier Act, which deregulated the trucking industry. Trucking changed dramatically, opening U.S. trucks to competition from both Mexico and Canada. Mexico, however, did not reciprocate; its border remained closed to U.S. trucking companies.

Two years after the Motor Carrier Act, the Bus Regulatory Reform

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120. See Folsom, supra note 18, at 4-7.
121. Id. at 5.
122. Dempsey, supra note 26, at 93.
124. Id. at 61.
126. See Operations of Mexican Motor Carriers, supra note 123, at 61.
127. Id. at 61.
Act of 1982, ended the one way flow by preventing carriers from coming into the United States if the originating country did not allow U.S. trucks reciprocal access.\textsuperscript{128} The moratorium was supposed to be part of effort to negotiate with Mexico “a fair and equitable resolution.”\textsuperscript{129} Over twenty years later, the standoff remained steadfast and unchanged, although the rhetoric now concerns safety, illegal immigration, the environment, illegal drugs, insurance liability issues, and focuses solely on the U.S. disallowing Mexican trucks across the border. Interestingly, however, Presidential Reagan’s Memorandum from September 20, 1982 clearly sets out that the differences were one of market access.\textsuperscript{130} The rhetoric and concerns of safety would not be utilized until over a decade later.\textsuperscript{131} The original moratorium also applied to Canada, but Canada allowed U.S. trucks into Canada, and so the moratorium was lifted.\textsuperscript{132} The moratorium continued against Mexico until very recently when President George W. Bush ended the moratorium on November 27, 2002.\textsuperscript{133}

The rhetoric, however, focuses on the U.S.’s violation of the NAFTA and not of Mexico’s. President Fox even went so far as to say that if Mexican trucks were not allowed into the U.S. then Mexico would not allow U.S. trucks to cross the border.\textsuperscript{134} So, in many ways, the Panel opinion of February 6, 2001, tells only part of the story.\textsuperscript{135} For we must remember that just as Mexican trucking companies were supposed to have access to the four border states of Arizona, California, New Mexico, and Texas in the United States after December 18, 1995,\textsuperscript{136} so too were the United States trucking companies supposed to have access to the six northern Mexican border states of Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas,\textsuperscript{137} and by January 1, 2000, both Mexican and U.S. trucks were supposed to be able to carry international cargo

\textsuperscript{129} Presidential Memorandum, supra note 6.
\textsuperscript{130} Id.
\textsuperscript{131} See NAFTA Panel Decision, supra note 3, at 10.
\textsuperscript{132} The purpose of the moratorium was to encourage Mexico and Canada to lift their restrictions on market access for U.S. firms. Therefore, the U.S. Congress imposed a two-year initial moratorium on foreign carriers, which could be removed or modified by the President if such action was in accord with the national interest, if the foreign country began providing reciprocal access.
\textsuperscript{133} Id.
\textsuperscript{134} Presidential Memorandum, supra note 6.
\textsuperscript{137} See generally NAFTA Panel Decision, supra note 3.
\textsuperscript{138} NAFTA, supra note 3, at annex I-United States, I-U-21.
\textsuperscript{139} Id. at annex I-Mexico, I-M-69.
from any point in the United States to any point in Mexico. The U.S. did not bring this up as a defense in the case, but instead turned to issues of safety and different regulatory systems as the reason for keeping out Mexican trucks. The U.S. did, however, try to consolidate the case against Mexico's not opening the border to U.S. trucks with the Mexican case. Mexico initially declined. In December 1999, three months into the arbitration case, the U.S. requested a meeting with Mexico; in January 2000, they failed to come to agreement on combining the two cases into a single panel. The next month, the U.S. requested a formal meeting of the Federal Trade Commission, again, to see if the two issues could be consolidated into one issue. The U.S., however, had never requested a panel on this issue, and neither side pursued it further with the Panel. Nor, did either side bring up the related cross-border bus access, which is also an issue between the two sides.

B. THE COMMERCIAL ZONE—A WORKABLE, PRACTICAL SOLUTION

While the moratorium continued, both sides worked out practical solutions. U.S. trucks are de facto allowed into Mexico in the border area without legal permits, and the Mexican trucks are legally allowed to operate in the U.S. commercial border zone. Interestingly, in 1994, Mexico signed an agreement with Canada, allowing Canadian trucks to obtain a permit into a 20 kilometre border area in Mexico for the purpose of loading and unloading goods, or inter-changing trailers. While a similar agreement between the U.S. and Mexico was also negotiated, the agreement was never signed. On the U.S. side, in 1985, the Interstate Commerce Commission began allowing Mexican trucks in limited areas at the border known as the commercial zone.

139. See NAFTA Panel Decision, supra note 3, at 69.
140. Id. at 6-7.
141. Id. at 7.
142. NAFTA Panel Decision, supra note 3, at 6-7.
143. Id. at 7.
144. Id.
145. Id.
146. Truck Transportation, supra note 138, at 1 (For U.S. trucks operating in Mexico, the distance they travel is usually less than 20-25 kilometres. Mexican law, however, does allow the maquiladoras to operate their own trucking operations by non-Mexicans.).
149. Id.
zone depends upon the size of municipality, with larger towns having larger commercial zones.\footnote{151}{49 C.F.R. § 372.241 (2004).} Most of the commercial zones have a radius of two to twenty miles, although some have been expanded beyond their previous regulatory boundaries by Congress.\footnote{152}{Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 4031, 112 Stat. 107 (1998); 49 C.F.R. § 372.237 (2004).} The commercial zone continues today.

Most of these Mexican trucks haul only short-distances within the border zone and tend to be older trucks not suitable for use for long-haul services.\footnote{153}{NAFTA Panel Decision, supra note 3, at 12 ("Mexico submitted that the comparatively poorer condition of the Mexican drayage trucks cannot be taken as an indicator for the condition of Mexican long-haul trucks.")}. These trucks had to comply with safety regulations and go through an application process, although on-site compliance review requirements do not apply to the carriers based in Mexico.\footnote{154}{Id.} As of 1999, "8,400 Mexican firms had authority to operate in the commercial zones."\footnote{155}{Id.}

Short-haul drayage trucks were not the only exception to the moratorium. Mexican trucks traveling to Canada by way of the United States were also exempted, because the U.S. Department of Transportation does not have jurisdiction over these trucks, and it was this department who regulated the moratorium.\footnote{156}{NAFTA Panel Decision, supra note 3, at 12 (citing 49 U.S.C. § 13501 (2004)).} In 1999, there was only one Mexican trucking firm operating within this category.\footnote{157}{Id. at 13.} Additionally, five Mexican carriers who had already acquired operating authority prior to the 1982 moratorium were allowed to continue crossing the border,\footnote{158}{Id.} and roughly 160 carriers U.S.-owned Mexican-domiciled trucks were exempt from the restrictions of the moratorium.\footnote{159}{Id. at 13. Finally, "Mexican owned and domiciled motor carriers that transport passengers in international charter or tour bus operations are also subject to an exception that began in 1999.

\footnote{160}{Id. at 13-14 ("[I]t was realized that 'this provision could be used to, in essence, sell U.S. carrier's operating authority to a Mexican carrier for operations beyond the commercial zone,’ Section 219 of the Motor Carrier Safety Improvement Act of 1999 ended the leasing exception.”).}
C. NAFTA ANTICIPATED CHANGES

In anticipation of the NAFTA passage in the Senate in 1993, the Washington Post reported basic elements of the agreement, including elements regarding trucks: "After a phase-in period, U.S. and Mexican truckers could travel freely in each other's countries; there are no such restrictions on U.S. and Canadian truckers. Mexican trucks would have to comply with U.S. safety rules and vice versa."\(^{163}\) Interestingly, this would be the exact same conclusion a panel would find when faced with the cross-border trucking issue seven years later.\(^{164}\) A simple statement reported in the Washington Post or a binational arbitration Panel - the result remains the same. The issues in the case were always clear cut.

What made it less clear was how to implement proper safety requirements. It was recognized from the beginning that Mexico, the U.S., and Canada had different safety standards, and probably more important, Mexico had less effective enforcement mechanisms.\(^{165}\) Mexico would argue that they wanted to be allowed to meet U.S. standards, but the U.S. would question how to ensure that Mexican trucks were complying with U.S. safety standards.\(^{166}\) NAFTA negotiators were aware of the differences between the U.S. and Mexican safety systems.\(^{167}\) The NAFTA drafters included under Article 913(5)(a)(i) the creation of a Land Transportation Standards Subcommittee, which was charged with implementing a program to make trucking standards compatible between U.S., Canada, and Mexico.\(^{168}\) Their efforts focused on non-medical standards, medical standards, vehicle standards, and road sign standards; these were

\(^{162}\) Id. at 11.

\(^{163}\) Behr, supra note 36, at A8.

\(^{164}\) NAFTA Panel Decision, supra note 3, at 91.

\(^{165}\) Id. at 37.

\(^{166}\) See id. at 37-39.

\(^{167}\) Id. at 37-38.

\(^{168}\) Id. at 15.

Under Annex 913.5.a-1, different deadlines, all based on the date of entry into force of NAFTA, were assigned for different tasks: (1) no later than a year-and-a-half for "non-medical standards-related measures respecting drivers, including measures relating to the age of and language used by the drivers;" (2) no later than two-and-one-half years for medical standards-related measures for drivers; (3) no later than three years for "standards-related measures respecting vehicles, including measures relating to weights and dimensions, tires, brakes, parts, and accessories, securement of cargo, maintenance and repair, inspections, and emissions and environmental pollution levels;" (4) no later than three years for standards-related measures respecting each Party's supervision of motor carriers' safety compliance, and (5) no later than three years for standards-related measures respecting road signs.

Id.
to go into effect at different times. But, the deadlines for making the standards compatible was set after the deadline for allowing cross-border trucking services in the border states, so that access was not conditioned on the standards already being compatible. In their first two years—1993-1995, the Land Transportation Standards Subcommittee accomplished a number of tasks, including an agreement between the U.S., Canada, and Mexico on performing uniform truck inspections, standards for commercial drivers' licenses, and the forming of a new tri-national Border Clearance Planning and Deployment Committee to look at ways to expedite traffic and improve procedures at the border.

As part of this effort, officials from the U.S. border states and Mexican border states met, along with the Commercial Vehicle Safety Alliance and the International Association of Police Chiefs ("IAPC"). There, the IAPC developed a "10-point strategy for conducting motor carrier safety and weight enforcement along the border." Centers like the National Law Center for Inter-American Free Trade Center gathered to discuss creating standards among bills of lading, a uniform liability system, and other customary law elements of trucking to make cross-border trucking a smoother transition. All of this happened in anticipation of the border opening to cross-border traffic in the border states. U.S. Secretary of Transportation Secretary Peña met with Mexican Minister of Transportation and Communication Emilio Gamboa at a North American Transportation Summit on April 29, 1994, resulting in the Memorandum of Understanding ("MOU") regarding coordination, cooperation, and a plan for preparedness on the state, federal, and international levels for both sides, and agreed, inter alia, on standardization regarding hazardous materials and access for U.S. truckers to northern Mexican border terminals and facilities.

But even before the implementation of the NAFTA, an U.S.-Mexico Border Transportation Working Group was formed, which among other things looked at ways to standardize vehicles' safety, weight, size, and deal with the logistics of the trucks themselves. One of their accom-

169. NAFTA Panel Decision, supra note 3, at 15.
170. See id.
171. Id. at 16.
172. Secretary of Transportation Federico Peña, Remarks prepared for Delivery at the NAFTA Border Opening (Dec. 18, 1995) [hereinafter Remarks by Peña] (on file with author).
173. NAFTA Panel Decision, supra note 3, at 15.
176. See NAFTA Transportation Summit Yields Accords, MEX. BUS. MONTHLY, June 1, 1994, at 19.
177. Letter from Nancy K McRae, U.S. Department of Transportation, Chief, Maritime and
plishments appeared to have been to allow the maquiladora companies “to obtain permits for private carriage to transport their inputs and final products.” Uniform guidelines for roadside inspection and commercial driver’s license were agreed upon, as well as “common standards on such criteria as knowledge and skills testing, disqualification, and physical requirements for drivers.”

As part of this new effort, the border states began building new infrastructure to accommodate the anticipated influx of traffic. For example, California had already “invested $30 million to construct two facilities for inspecting and weighing trucks from Mexico,” and Texas hired over 100 new “motor carrier enforcement officials” to conduct anticipated inspections at the border. The U.S. provided training to Mexican officials on roadside inspections and hazardous material inspections, and a campaign was begun to make Mexican companies aware of the U.S. safety requirements. In addition, the DOT gave the border states $2 million in 1994 and 1995 for inspections, with an additional $1 million promised for 1997. Mexico had also pledge money from its World Bank loans to improve border infrastructure.

In the Fall of 1995, every sign led to the belief that the first phase of the border opening to cross-border trucks would be in place by the deadline of December, 18, 1995. On September 5, 1995, U.S. Secretary of Transportation Peña issued a press release which proposed measures for a safe and smooth NAFTA transition, including comprehensive safety compliance and enforcement strategies for the border states and a broad educational campaign for the three NAFTA countries. Proposed regu-
lations were published on October 18, 1995 and December 18, 1995 in the Federal Register to implement the cross-border trucking provisions of NAFTA.187 The procedures for obtaining authority to provide service between Mexico and the border states were to be identical to those in place for applicants from the United States and Canada, except that the application form for Mexican carriers was designated OP-1MX.188

On December 4, 1995, Secretary Peña stated in a joint Mexico-U.S. press conference that both countries were ready for the opening of the borders on December 18, 1995.189 It was between December 4, 1995 and December 18, 1995 however that the story took a highly political turn and at the center of this turn was the Teamsters.

D. THE TEAMSTER’S RESPONSE

On December 12, 1995, thirty-two coalitions sent a letter to President Clinton urging him to delay implementation of the NAFTA opening of the border to Mexican trucks.190 Printed on the International Brotherhood of Teamsters letterhead, the letter contended that the differences between U.S. and Mexican commercial trucks and truck drivers pose a serious highway safety threat to U.S. citizens.191 Among their concerns were that Mexican trucks were older, heavier, poorly maintained, and that “Mexican drivers were not required to receive special training in the transport of hazardous material.”192 They also stated that Mexican drivers had no limits on the number of hours they could work, leading to increased accidents on U.S. highways, and that the safety records of Mexican drivers were “not computerized and available to U.S. law enforcement officials.”193 The letter was signed an interesting mix of groups including the United Methodist Board of Church and Society and, strangely, the American Society for Prevention for Cruelty.194 However, most of the signees were other union organizations, including International President of United Food and Commercial Workers, Texas AFL-

cable to border states was to be implemented, designed to address problems that may arise as a result of increased number of trucks engaged in cross-border operations;
- a broad educational campaign was to be launched with the objective of disseminating information on motor carrier operating requirements in the United States, Mexico and Canada.

Id.
187. Id.
188. Id. at 16-17.
189. Id. at 17.
190. Id. at 18.
191. Letter from International Brotherhood of Teamsters to Bill Clinton, President of the United States, Dec. 12, 1995 (on file with author).
192. Id.
193. Id.
194. Id.
CIO, and the International Brotherhood of Electrical Workers. An additional category of organizations with titles such as "Advocates for Highway Safety," and "Parents Against Tired Truckers" also signed. A similar letter, with much of the same wording, was sent by Congress to the White House as well. The letter was effective, but it was not the Teamsters' only effort. On December 15, 1995 – three days before the NAFTA deadline of December 18, 1995, the Teamsters filed a legal challenge against the Interstate Commerce Commission; their attempt to stop the border from opening would fail. But, their supposed safety concerns would prevail.

Secretary Peña issued a second press release three days later and two weeks after his previously positive announcement – on the day the first installment of the border was to be opened for applications for operating authority to Mexican trucks . It was an odd press release. It feels as if it was written with the excitement of the border opening talking about all the programs that have been put in place and the accomplishments for opening the border. Then, an odd paragraph is stuck in. First, Secretary Peña reminisced about his own experiences as a product of the border and then turns to safety: "So, I know we've had safety problems in the past. I've seen trucks with inadequate brakes and worn ties that shouldn't be anywhere near a highway." After three pages of comments on the myriad efforts regarding safety, Peña announced that applications for foreign motor carriers would be accepted, but not finalized for approval. The border would remain closed and the moratorium would continue to be in effect.

The next day Mexico started the process to bring a NAFTA case against the United States. The rhetoric had changed. The U.S., once

195. Id.
196. Id.
198. NAFTA Panel Decision, supra note 3, at 18 ("The case was briefed and argued by the parties in 1996 and then held in abeyance by the court pending a decision by the United States to implement NAFTA's cross-border trucking service provisions.").
199. Id.
201. Id.
202. Id. The same press release also stated that Mexican individuals would be allowed to invest in U.S. carriers engaged in international commerce. However, the DOT maintained a complete ban on Mexican nationals owning or controlling U.S. cargo and passenger motor carrier service providers because each application requires that the applicant certify that it is not a Mexican national and that the carriers are not owned or controlled by Mexican nationals. Therefore, any application indicating Mexican ownership would not be approved, banning Mexican investment in the U.S. carriers. See NAFTA Panel Decision, supra note 3, at 18-19.
203. See NAFTA Panel Decision, supra note 3, at 6.
wanting Mexico to open its border to U.S. trucks, now forbid entry of Mexican trucks because of safety. Mexico, who had for more than twenty years had refused entry of U.S. trucks, argued that the U.S. violated the NAFTA national treatment and most-favored nation treatment obligations by refusing to let all Mexican trucks into the U.S. The rhetoric continues to this day along those lines with the Republicans adopting the Mexican’s view of the U.S. need to meet the NAFTA requirements and the Democrats focused on safety and infrastructure concerns. The Teamsters and other groups continued to play an active role. So, in many ways, the Panel opinion of February 6, 2001 tells only part of the story. Many see the cross-border trucking case as illustrative of the power of the Teamsters and its 1.4 million members. Teamsters’ concerns are obvious from their posters: they are concerned about losing jobs to lower-wage Mexican workers. But they have also very effectively used safety to keep the border closed. Other citizen and environmental groups have joined in, including Public Citizen and Citizens for Reliable and Safe Highways (“C.R.A.S.H.”).

In Mexico’s argument before the NAFTA Panel, they cited political interest from groups like the Teamsters as influencing and motivating U.S. actions to keep from processing operating applications. The United States responded that while political interests might influence their actions, they were not determinative. The Panel “decline[d] to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking and investment...” noting that they would only look at what was consistent or inconsistent with the NAFTA. This is what, in great part, makes the Panel decision and the law so much cleaner and simple than the post-Panel decision environment because it confines itself to the law itself, rather than the subjective intentions of the Parties.

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204. Id. at 26.
206. Paul J. Nyden, Teamsters’ Hoffa Visits New Union Hall, CHARLESTON GAZETTE & DAILY MAIL, May 9, 2004, at P1A. But what is curious about the Teamsters is that while they have 1.3 million members, “[n]ationally, just 65,000 of the nation’s 3 million long-haul freight drivers are Teamsters.” Bonnie Pfister, It’s Hard to Find a Teamster Among South Texas Long-Haul Truck Drivers, SAN ANTONIO EXPRESS-NEWS, May 5, 2004, at 1E.
209. NAFTA Panel Decision, supra note 3, at 20.
210. Id. at 3.
211. Id. at 55.
and special interests.\textsuperscript{212}

III. \textbf{AFTER THE DECISION – THE DEPARTMENT OF TRANSPORTATION’S REGULATIONS AND THE CONGRESSIONAL DEBATES SURROUNDING SAFETY}

The Panel decision ended with a section entitled “Recommendations.”\textsuperscript{213} It is useful to look at these before turning to the debate and final legislation and regulations regarding cross-border trucking. First, the Panel wrote that the U.S. \textit{should} become compliant with the NAFTA.\textsuperscript{214} The Panel then gives an interesting roadmap for the U.S.:

The Panel notes that compliance by the United States with its NAFTA obligations would not necessarily require providing favorable consideration to all or any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S. trucking regulations when operating in the United States. Nor does it require that all Mexican-domiciled firms currently providing trucking services in the United States be allowed to continue to do so, if and when they fail to comply with U.S. safety regulations. The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis. U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican.\textsuperscript{215}

The U.S. is not required to allow Mexican trucks across the border merely because of its NAFTA obligations.\textsuperscript{216} The Mexican trucks must meet the same U.S. standards and may be denied access, as long as it is on a case by case basis, rather than the “blanket” refusal.\textsuperscript{217} Mexican trucks at all times must comply with U.S. safety standards, and to ensure this is the case, the U.S. may treat Mexican trucks \textit{differently} from U.S. or Canadian trucks.\textsuperscript{218} This is a pretty big win for the United States, but it is also what the Mexican trucking firms had wanted in the first place, to be allowed to operate within the U.S. according to U.S. standards. It would also give Congress and the Department of Transportation room to determine additional safety measures to better ensure that the Mexican firms comply with U.S. highway and truck regulations.

Finally, the Panel ends by stating that the U.S. may implement different standards for Mexican trucks to ensure safety without violating the

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} NAFTA Panel Decision, \textit{supra} note 3, at 91.
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{See id.}
\textsuperscript{218} \textit{See NAFTA Panel Decision, \textit{supra} note 3, at 91.
NAFTA.\footnote{Id.} Once again, it is worth looking at the language of the decision.

Similarly, it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement different procedures with respect to such service providers. Thus, to the extent that the inspection and licensing requirement for Mexican trucks and drivers wishing to operate in the United States may not be “like” those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable. However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those imposed on U.S. or Canadian carriers, then any such decision must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform to all relevant NAFTA provisions.\footnote{Id. (emphasis added).}

Again, the Panel clearly signaled to the U.S. the parameters of their future actions. What is odd about the debate that followed the Panel decision, however, is how rarely the language of the Panel decision was used, and how often, perhaps for rhetorical affect, interested parties claimed that Mexican carriers would not have to meet the same U.S. standards, posing a serious safety risk.

A. Reactions to the Panel Decision

The decision was released on Feb. 6, 2001.\footnote{Id. at 1.} The reaction to the decision was relatively quiet in that the regulations had been so uncertain for such a long time, and also because George W. Bush, a pro-NAFTA Republican from Texas, was pro-opening the border and now in office. Bush reversed the Clinton policy proclaiming that the border should be open by January 2002.\footnote{See Arnett, supra note 205, at 600.} On June 5th, 2001 without much fan fare, Bush lifted the moratorium investment, now allowing Mexican nationals to invest in trucking and busing firms in the U.S.\footnote{Id.} The U.S. had now met part of its obligation under the Panel’s decision. The real focus of the controversy, however, was not resolved as easily.

The story after the Panel decision begins with the Department of Transportation’s attempt to restructure the rules that would govern the requirements for obtaining permanent operating authority for Mexican carriers.\footnote{See FMCSA Proposed Rules, infra note 242.} The political reaction to the suggested rules was tremendous,
particularly from the Democrats in Congress and the Teamsters.\footnote{See Resolution Seeks to Delay Border-Opening to Mexican Trucks, Inside U.S. Trade, May 25, 2001 [hereinafter Resolution Seeks Delay]; House Panel Defeats Efforts to Delay Access for Mexican Trucks, Inside U.S. Trade, June 22, 2001 [hereinafter House Panel Defeats Effort]; Bush Promises to Fight House Language Blocking Mexican Trucks, Inside U.S. Trade, June 29, 2001 [hereinafter Bush Promise].} There followed debate in both the House and the Senate for the remaining part of the year of what would guarantee that U.S. highways would be safe from the onslaught of Mexican trucks.\footnote{See Resolution Seeks Delay, supra note 225; House Panel Defeats Efforts, supra note 225; Senate Passes Bill Restricting Access for NAFTA Trucks, Inside U.S. Trade, Aug. 3, 2001 [hereinafter Senate Passes Restricting Bill] See Congress Strikes a Deal on NAFTA Trucks Supported by White House, Inside U.S. Trade, Nov. 30, 2001.} What is interesting about the debate is that the concerns centered on the level of preparedness of the U.S. border, rather than the requirements of the Mexican trucks, although that does play some legitimate part and much great rhetorical role. The DOT rules only address the requirements for obtaining authority. The Senate version and final congressional compromised version of the cross-trucking provision to the Transportation bill address these other concerns\footnote{NAFTA Panel Decision, supra note 3, at 50. A scientific review board can be proposed by either party but it is up to the Panel’s discretion on whether the panel of experts is convened. See NAFTA, supra note 3, at art. 2015.}—concerns the U.S. should have and had been addressing as part of their NAFTA obligations long before the deadlines for opening the border.

B. SAFETY CONCERNS AND THE CONGRESSIONAL DEBATE

During the NAFTA arbitration, the United States had argued for a Scientific Review Board to determine the state of Mexico’s trucking system, and what would be necessary to make sure everything would be safe in the United States once the border was open.\footnote{Id. at 53.} The request was rejected by the Panel, stating the differences between the two systems was not in debate, and a factual search was unnecessary.\footnote{Id. at 50-51.} What is interesting for our purposes is to look at the questions that the United States put forth to be answered. They asked four questions, which were later expanded to seven.\footnote{NAFTA Panel Decision, supra note 3, at 50.} The broader questions focused on: (1) the differences between the two regulatory systems; (2) the role of safety enforcement in the two systems; (3) the role of border inspectors to ensure compliance and safety; and (4) the significance of out-of-service rates for Mexican domiciled trucking firms.\footnote{The specific questions are more interesting: [1] the differences between U.S. and Canadian government oversight of

truck safety on the one hand, and the Mexican government oversight of truck safety, on the other;\textsuperscript{232}

This is the difference between the regulatory systems again, which the Panel later ruled was not a justification for not processing applications.\textsuperscript{233}

[2] the importance of Mexican government oversight of truck safety in promoting safety for carriers operating both within Mexico and within the United States\textsuperscript{234}

This is an interesting question as it implies that an argument could be made that the difference between the two regulatory systems leads to potential safety problems within the United States. How one would determine that, as opposed to carriers meeting U.S. requirements is unclear.

[3] in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced through border inspections;\textsuperscript{235}

[4] in the absence of strong governmental oversight in Mexico, whether U.S. governmental safety regulations can be practicably or effectively enforced through operating-authority application procedures for Mexican carriers;\textsuperscript{236}

These two are very interesting questions as well, for this is the system that is currently being enacted, border inspections combined with operating-authority application procedures. It was in these two areas that Congress would concentrate effort and attention in the post-Panel debates.

[5] the significance of available data on out-of-service rates for Mexican motor carriers . . . [and] . . . whether it is significant to classify carriers as short-haul versus long-haul carriers;\textsuperscript{237}

This focuses on the question of the older short-haul trucks currently in use around the commercial zone for transporting trailers short distances and long waits to the U.S. carriers, and how allowing cross-border trucking would alter the state of the trucks. Mexico contended that newer trucks would be in use for longer-hauls, and therefore, the out-of-service rates for the short-haul trucks were irrelevant.

[6] the role of intergovernmental cooperative programs, such as complete, real-time, interoperable databases, in effectively enforcing safety regulations with respect to trucks, drivers and carriers;\textsuperscript{238}

This is one of the more fascinating and frustrating areas. Before the denial of operating-authority and denying the opening of the border, Sec-

\textsuperscript{232} Id. at 51.
\textsuperscript{233} Id. at 90-91.
\textsuperscript{234} Id. at 51.
\textsuperscript{235} NAFTA Panel Decision, supra note 3, at 51 (emphasis added).
\textsuperscript{236} Id. (emphasis added).
\textsuperscript{237} Id. at 51.
\textsuperscript{238} Id.
retary of Transportation Peña, at a press conference, seemed to indicate that programs put in place to ready the border as part of NAFTA were moving along terrifically.239 This issue of just what the intergovernmental groups have done to get ready for the border is a little reported on phenomenon. I have been surprised at how little investigation or attention has been paid by the press or interest groups. Again, I thought that during a post-Panel debate there would be more focus on the preparedness done in the past. Instead, it got very little play.

[7] whether U.S. governmental safety regulations can be practicably or effectively enforced with respect to drivers, carriers, and trucks not subject to comprehensive, integrated safety oversight systems under their domestic laws.240

This is the big question, whether the system will work once it is in place. One might assume that people would fixate on this question, but again, no. One might also assume that a comparison of the effectiveness of the oversight system on domestic trucks might be useful as a comparison of what is necessary for foreign trucks, but again, nothing of the sort dominated the discourse. Instead, the discussion was much less technical and sophisticated. The United States in its petition for the scientific review board explained, “[s]uch issues involve technical and complex questions concerning the real-life operation of trucking firms and the effectiveness of various types of governmental safety regulation. . .”241 While the Panel environment was not necessarily the right place for these questions, these questions are important but still unanswered in the post-Panel era.

C. The Department of Transportation’s Federal Motor Carrier Safety Administration’s Response

On May 3, 2001, the Department of Transportation’s Federal Motor Carrier Safety Administration (“FMCSA”) issued proposed rules with request for comments that would govern Mexican trucks coming over the border.242 In the proposal, Mexican carriers would have to file a new or

239. Id. at 17.
240. NAFTA Panel Decision, supra note 3, at 51.
241. Id. at 50.

The FMCSA regulates commercial motor vehicle (CMV) safety in the United States under a comprehensive system of regulations designed to ensure that drivers are medically qualified; meet applicable licensing standards; can read and speak the English language sufficiently to converse with the general public, understand highway traffic signs and signals in the English language, respond to official inquires and make entries
updated application form with additional information. The motor carrier would be required to complete Form MSC-150 every six months in order for the FMCSA to monitor the carriers for safety and compliance. Permanent operating authority would be conditional upon a safety audit within eighteen months of receiving its conditional operating authority. What would be struck, however, was the domicile requirement, found illegal under the NAFTA by the panel. A waiver of the new filing fee would be given to those who had filed previously under the old system and to those already operating in the commercial zone who wanted to continue only operating in the commercial zone. As of January 1, 2001, according to the FMCSA, approximately 10,000 Mexican carriers had operating authority in the commercial zone: “[s]eventy-five (75) percent of Mexican carriers had three or fewer trucks, and the 95th percentile carrier had only 15 trucks.” The FMCSA predicted that about half of these would expand their services and their routes outside of the commercial zone, with the other half not having the “financial and administrative wherewithal” to being able to expand.

First and foremost, the rules explained, “Mexican carriers would be

on reports and records; and do not operate vehicles while impaired by drugs, alcohol or excessive fatigue.

Id. at 22,372.

243. Id. at 22,374.

244. Id. (“[W]e estimate that it would take 4 hours to complete each form after compiling the necessary information.”).

245. Id. See also JOSEPH A. CRISTOFF, UNITED STATES GENERAL ACCOUNTABILITY OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT – COORDINATED OPERATIONAL PLAN NEEDED TO ENSURE MEXICAN TRUCKS’ COMPLIANCE WITH U.S. STANDARDS, 02-238, Dec. 21, 2001. [hereinafter GAO REPORT].

246. FMCSA Proposed Rules, supra note 242, at 22,372.

247. Id. at 22,374.

The FMCSA estimates that 11,787 Mexican carriers are currently operating in the United States and are categorized as follows: Mexican carriers operating pursuant to OP-2 Certificates of Registration; Mexican carriers that previously filed an OP-1(MX) application; and Mexican carriers assigned DOT numbers and no operating authority or operating without appropriate authorization. The Agency estimates that half of the Mexican carriers (approximately 5,894 carriers) known to be now operating in the U.S. will switch to OP-1(MX) authority, while the other half will continue operating pursuant to OP-2 authority. Based upon the high estimate scenario, the FMCSA anticipates 3,200 first-time applicants for either OP-2 or OP-1(MX) authority in the first year that this proposal becomes a final rule, and 2,500 applicants annually in subsequent years. The agency estimates that twenty-five percent of the first year new applicants (800) would file a Form OP-1(MX); and twenty-five percent of the subsequent-year new applicants (625 annually) would file a Form OP-1(MX). Id. at 22,374-75. The FMCSA’s proposal consisted of three basic rules to establish a “two-tiered application process,” one within the commercial zone and one beyond. GAO REPORT, supra note 245.

248. FMCSA Proposed Rules, supra note 242, at 22,375. (“For Mexican carriers with any trucks, the mean number of trucks was 5.1. That mean was pulled up by a small number of large carriers.”)

249. Id. at 22,375.
subject to the same safety regulations as domestic carriers when operating in the U.S.\textsuperscript{250} This was what the Mexicans had wanted and were asking for from the Panel, that they be given the opportunity to meet the same safety requirements as those of U.S. carriers. Moreover, the FMCSA proposed additional rules, an action condoned by the Panel if done properly. The application would be required to make a specific certification of compliance\textsuperscript{251} as well as "verification from the Mexican government that the applicant is a registered Mexican carrier authorized to conduct motor carrier operations up to the United States-Mexico border. . ."\textsuperscript{252} All drivers would also be required to have a valid Mexican driver license.\textsuperscript{253} The FMCSA proposed holding workshops and providing written material "to help the Mexican applicants understand the various requirements and the proper way to complete the applications."\textsuperscript{254}

\footnotesize

250. See id. at 22,372.  
251. Id.  
The FMCSA proposes to add a new section that would require the applicant to certify that it has a system in place to ensure compliance with applicable requirements covering driver qualifications, hours of service, drug and alcohol testing, vehicle condition, accident monitoring, and hazardous materials transportation. In addition, the FMCSA proposes that the applicant provide narrative responses describing how it will monitor hours of service, how it will maintain an accident register and what is its monitoring program. This section would also require that the applicant provide information including the names of individuals in charge of the applicant's safety program. The applicant must provide: specific locations where the applicant maintains current FMCSRs, the names of the individuals in charge of drug and alcohol testing (if applicable). The FMCSA would require only those safety certifications that apply to the applicant. For example, due to the weight of the vehicles they operate, certain applicants would not be subject to the drug and alcohol testing and CDL requirements in 49 CFR parts 382 and 383, respectively, and would not be required to certify compliance with those regulations. The certification information would enable FMCSA to evaluate, upon initial application, the safety compliance program of the applicant. The FMCSA would reject an applicant that cannot offer a specific, unambiguous plan to ensure compliance. The FMCSA proposes to add more extensive and specific certifications regarding compliance, including compliance with Department of Labor regulations. Other parts of this certification would require the applicant to affirm its willingness and ability to provide the proposed service and to comply with all pertinent statutory and regulatory requirements. It would remind the applicant of statutory and regulatory responsibilities, which if neglected or violated, might subject the applicant to disciplinary or corrective action by the FMCSA. Another certification, derived from the existing Form OP-2 application, would highlight the need to comply with applicable provisions of the U.S. Internal Revenue Code relating to payment of the Heavy Vehicle Use Tax. An additional certification would ensure that the applicant understands that the agents for service of process designated on the Form BOC-3 would also be deemed the applicant's representative in the United States for service of judicial process and notices under 49 U.S.C. 13304 and administrative notices under 49 U.S.C. 13303. Finally, the applicant would affirm that it is not currently disqualified from operating a commercial motor vehicle in the United States under the provisions of MCSIA.  

Id. at 22,372-73.  
252. Id. at 22,372. "This requirement would ensure that FMCSA's database contains current and consistent information about Mexican registrants and thus enhance the effectiveness of FMCSA's safety oversight" Id. at 22,373.  
253. Id. at 22,372.  
254. Id. at 22,372.
The FMSCA ends with the caveat that these new requirements should not "distract from or detrimentally affect, the efforts underway between the Governments of Mexico and the United States to establish compatible regulations and to ensure that a comprehensive safety oversight program is put in place in Mexico."255 In its report, the FMCSA reported that the DOT had "consulted extensively with Mexican transportation officials," who agreed to "utilize the Commercial Vehicle Safety Alliance (CVSA) out-of-service (OOS) criteria."256 However, the FMCSA believed that a safety oversight program was needed in order for the standards to be effective and ensure compliance.257 While the DOT and Mexican transportation officials worked together, "Mexico has not yet completed implementation of a comprehensive safety inspection program."258 What is not made clear by the DOT's mention of this is that this cooperation cannot be a requirement or an impediment for opening the border. The DOT's language reflects this, but subtly.

Two weeks later, on May 18, 2001, the DOT's Inspector General issued a report that said "25 of the 27 border-crossings lack[ed] sufficient resources and real estate to effectively perform their duties."259 Infrastructure problems on the U.S. side had long been known, but again, were not reason for violating the U.S.'s obligations under the NAFTA. Now, infrastructure problems would soon become the focus of the debate, something that had not been much mentioned in the opinions by the Parties of the NAFTA case. It was also very different from the rhetoric stressed in 1995, in anticipation of the border opening. The Bush administration had asked for budget increases for additional Federal inspectors and staffing personnel, but that was only just the beginning of the political debate.260 The House and Senate would concentrate much of their energy on the safety concerns on the U.S. side of the border.

D. THE HOUSE AND SENATE DEBATES

When President Bush announced that he would have the border

255. FMCSA Proposed Rules, supra note 242, at 22,373.
256. Id. at 22,372.
257. Id.
258. Id.
According to the report, the temporary facilities, which generally consist of a small portable building placed on a U.S. Customs port of entry lot and equipped with a portable computer, are often without a dedicated phone line needed to access necessary databases, and only have enough space to inspect one or two trucks at a time. The facilities also lack space to park trucks that are put out of service, often having enough for only one or two trucks or require trucks to share the space used for inspections.
Id.
260. Id.
opened by early 2002, he "asked Congress for money to build and staff new inspection stations." Congress did not comply. The House and the Senate took different approaches to stop the opening of the border. The House refused to provide funding for processing applications from Mexican firms — in direct violation of NAFTA. The Senate focused its campaign on truck safety and infrastructure issues.

The House’s ultimate response was to deny any funds for assisting in processing the application fees, an action in direct violation of the NAFTA, as the United States government is required to provide funds to implement requirements of the NAFTA. Before this tactic, however, a number of different alternatives were proposed. On May 24, 2002 Representative James Oberstar (D-MN) introduced a resolution to delay the granting of operating authority to Mexican trucks due to safety concerns. This was supported by thirty-one House members, including Minority Leader Rep. Dick Gephardt (D-MO), Rep. John Dingell (D-MI) and “22 of the 34 Democratic Members of the Transportation Committee.” This original resolution included twenty specific conditions the U.S. would have to meet before allowing Mexican trucks to cross the U.S. border past the commercial zone. These conditions included permanent inspection facilities, permanent weigh stations, the Mexican government having in place a system safety rating process, “a domestic roadside protection program, credible drug and alcohol testing, hours of service regulations, and accessible safety databases,” and that necessary steps were taken to certify that Mexican carriers complied with U.S. safety and environmental laws. Note that most of these were included in the DOT’s original regulations or were already in place. Oberstar’s resolution would not pass. Also, one wonders if requiring Mexico to adjust its regulatory regime once again violated the NAFTA.

Another proposal required the U.S. to perform safety audits on Mexican firms in Mexico. Proposed by Rep. Martin Olav Sabo (D-NM), Sabo’s Amendment was fully supported, not surprisingly by labor

262. See id.
263. Id.
264. Id.
265. See Bush Promise, supra note 225.
266. Resolution Seeks Delay, supra note 225.
267. Id.
268. See id.
269. Id.
270. See Impasse Reached on Trucks as Senate Compromise Effort Falls Flat, Inside U.S. Trade, Nov. 23, 2001.
271. See Bush Promise, supra note 225.
and the Teamsters. The DOT found this proposal "highly problematic" because "pre-conditioning grants of operating authority on a safety audit would provide no meaningful indicator of how a firm is likely to conduct itself in the United States." Moreover, this would probably be in violation of the NAFTA, as the Administration noted, because of potential sovereignty issues. A year later, however, this would be part of the DOT's new rules for operating authority.

Finally, on June 26, 2001, the House voted, 283 to 143, in favor of H.R. 15277 to prevent the administration from "using any funds in fiscal year 2002 to process applications from Mexican firms for operating au-

272. See House Panel Defeats Effort, supra note 225. "The AFL-CIO also wrote to members of the House committee urging them to support the Sabo amendment. "This approach makes good sense, is consistent with the intent of NAFTA and a recent ruling by an international NAFTA arbitration panel, and protects American highway users from the consequences of allowing uninspected motor carriers to cross our borders without assurances that they meet all U.S. safety requirements." according to the June 19, 2001 AFL-CIO letter.

273. Bush Promise, supra note 225 (citing Transportation Secretary Norman Mineta, letter to Rep. Sabo, June 12, 2001). See also House Panel Defeats Effort, supra note 225.

274. House Panel Defeats Effort, supra note 225.


276. Bush Promise, supra note 225.


[This resolution] [c]alls on the President to continue to delay granting Mexico-domiciled motor carriers authority to operate in the United States beyond the commercial zone until: (1) The President and Secretary of Transportation certify to Congress, among other specified things, that such carriers (buses and trucks) will comply with U.S. motor carrier safety, driver safety, vehicle safety, and environmental laws and regulations, that the United States is able to enforce such laws and regulations at the U.S.-Mexico border and in each State, and that granting such operating authority will not endanger the health, safety, and welfare of U.S. citizens; and (2) the Administrator of the Environmental Protection Agency (EPA) certifies to Congress that all necessary steps have been taken to ensure that the manufacturer, owner, and operator of Mexico-domiciled trucks operating outside a commercial zone comply with any Clean Air Act notice, certification, disclosure requirements, or environmental standards to the same extent that such requirements or standards apply to any heavy-duty truck or heavy-duty engine regulated by the EPA.


This is what the Mexicans wanted in the NAFTA case – to have the opportunity to meet the U.S. standards and operate in the U.S. – the U.S. was preventing them with a blanket denial of processing their applications for operating authority. See NAFTA Panel Decision, supra note 3, at 90.

[The second part of the resolution] [c]alls on the Governments of Mexico and the United States to: (1) agree to uniform application of U.S. and Mexico-domiciled motor carriers and drivers of the highest standards regarding safety, environmental protection, and driver competency, licensing, and hours of service; (2) improve truck and bus inspection and enforcement programs and their coverage; and (3) consider truck and bus safety to be of paramount importance to the relationship between the United States and Mexico.

Id.
authority” by cutting $88 million out of the transportation budget for applications and safety. “The House denied the money and voted to flatly ban all Mexican trucks beyond the border zone.” This was in direct violation of the NAFTA, both because it keeps in place a blanket ban and also because it denies the money to implement the NAFTA. Representative Sabo (D-NM), chief sponsor of the bill admitted as much, but said he had been blocked by the Republican-led Rules Committee from offering a more moderate amendment that would have delayed Administration action until it had completed safety audits of Mexican firm, which he claimed would not violate the NAFTA. This left him with no choice but to offer the straightforward language barring access for Mexican trucks in U.S. territory beyond the border’s commercial zones.

The next day in response, Mexican Secretary of Economy said that “if the U.S. could not comply with the panel’s ruling, Mexico would be prepared to suspend trade benefits, possibly including benefits relating to the services sector and industrial and agricultural products” in retaliation of up to $1 billion. This is perfectly legal within the Dispute Settlement Mechanism of the NAFTA, which allows for retaliation action within thirty days of the Panel decision. However, Mexico had incentive to wait – at this point the threat was still a means of pressure. According to Inside U.S. Trade, Mexico had agreed with Bush’s time line of opening the border on January 1, 2002 and was willing to work with the U.S., rather than retaliate immediately.

On June 11, 2001 Senate Democrats wrote to Bush to say they would oppose granting Mexican trucks authority to operate in the U.S. “unless it could be shown that the trucks do not pose a threat to U.S. Safety.” In the Senate, the controversy has been focused on the Murray-Shelby proposed language tacked onto the Transportation Bill.

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279. Bush Promise, supra note 225.
280. Spending Highlights, supra note 261, at 2073.
281. Bush Promise, supra note 225. The final transportation spending bill, with Sabo’s amendment, “passed the House on a vote of 426 to 1.” Id.
282. Id.
283. “Normally this should be in the same economic sector and can be challenged by panel review only if ‘manifestly excessive.’” Folsom, supra note 18, at 203-04.
284. Bush Promise, supra note 225.
285. Senate Leaders Oppose Bush Plan to Implement NAFTA Truck Panel, Inside U.S. Trade, June 15, 2001. ("The letter is signed by Majority Leader Tom Daschle (SD), committee Chairmen Max Baucus (MT), Tom Harkin (IA), Joe Lieberman (CT), Ted Kennedy (MA), Jeff Bingaman (NM), and John Kerry (MA), and fellow Senate Democrats Ron Wyden (OR), Evan Bayh (IN) and Dick Durbin (IL.).")
286. Department of Transportation and Related Agencies Appropriations Act, 2002, S. 1178 107th Cong. (2002). It is important to note that the Transportation bill is far more expansive than
“threatened to veto the transportation bill if it is passed with the Murray language intact.”

The Murray Provisions, sponsored by Patricia Murray of Washington and Richard Shelby of Alabama, set out twenty-two safety measures, including requiring:

the Transportation Dept. to conduct an on-site audit of Mexican trucking firms’ home offices before they are approved to operate in the U.S., require adequate facilities including weigh stations and out-of-service spaces to be in place at border crossings prior to allowing any Mexican trucks to operate throughout U.S. territory, additional inspection requirements, and require drivers’ license checks of all trucks crossing the border.\footnote{288}

Notice that these measures, unlike the FMCSA’s proposed rules, focus substantially on the U.S.’s infrastructure, rather than solely application requirements for the Mexican carriers. In many ways, the FMCSA’s rules could be seen as insufficient because the concerns of the Senate were different from the task of the FMCSA. The Murray/Shelby provision also would “appropriate $103 million for a border truck safety program aimed at evaluating the safety of Mexican trucks.”\footnote{289} Regarding the carriers themselves, the provision “would not give Mexican trucking firms access to the entire U.S. until they have undergone a thorough safety review that would take place in Mexico. Once the firms were granted access, they would subject to a second review within 18 months”\footnote{290} – similar to the FMCSA’s proposed rules. The provisions “prohibit Mexican trucks from crossing borders when they are unmanned, and mandate the installation of scales and weigh-in-motion machines at the border” and “require an electronic check of the driver’s information each time a Mexican truck enters the U.S.”\footnote{291}

In the midst of the debate were McCain and Gramm, who wanted to add language “aimed at ensuring that the bill would not violate U.S. NAFTA obligations, [but] . . . Democratic leaders in the Senate repeatedly maneuvered to limit debate on the issue.”\footnote{292} “McCain and Gramm argued that strict requirements for ensuring the safety of Mexican trucks . . . would violate NAFTA because the requirements could take as

\footnote{287. Senators Continue to Dispute NAFTA Trucking Language in Spending Bill, INSIDE U.S. TRADE, July 27, 2001 [hereinafter Senators Dispute Language].} \footnote{288. Bill Restricting Access, supra note 226.} \footnote{289. Senators Dispute Language, supra note 287.} \footnote{290. Id.} \footnote{291. Id.} \footnote{292. Senators Dispute Language, supra note 287.}
long as two years to implement.” Gramm and McCain’s additional language was defeated.

The Bush Administration saw the Murray Provisions’ requirements as in defiance of the NAFTA Panel, because it would maintain a blanket ban on access to Mexican trucks while it took the estimated two years to “put in place the safety system required by the Murray language, which would mean further delay before the U.S. adheres to its NAFTA obligations.” The Department of Transportation also responded to the Murray language and actually named the political power behind the language. At a July 31, 2001 press conference, Trade Ambassador Zoellick “attacked arguments from Teamsters . . . calling them ‘disingenuous.’ ‘It’s important . . . that we who promote free trade be ardent in dealing with the concerns that they raise – for example, safety – but also be ardent in pointing out when the arguments are fraudulent and misleading.’

[Zoellick denied a] claim propounded by Teamsters that only 1 percent of Mexican trucks now operating in border zones are subject to U.S. inspectors. The claim of 1 percent is based on counting every time a truck crosses the border, which also counts multiple crossings by the same truck, he noted. In fact, he claimed, only about 63,000 Mexican trucks are operating in the border zones, about 43,000 of which have been inspected, an inspection rate of 73 percent.

On August 1, 2001 by a voice vote, the Senate passed a transportation spending bill that, inter alia, restricts access for NAFTA trucks that the Bush administration opposes. The House and Senate bills now went to conference. The passage of the bill is seen as a victory, in part, for the Teamsters.

E. INTERESTED PARTIES

A week after the Panel decision, the AFL-CIO Executive Council

293. Id.
294. Id.
296. Id.
297. Id.
298. Id. The Teamsters retorted.
A Teamsters source defended the numbers, noting that the DOT Inspector General had found that of 4.5 million border crossings in 2000, only 46,000 inspections were performed. . . . “If Mr. Zoellick did the math then he would find that 20,000 carriers that crossed the border 72 times [on average] in one year never got inspected,” the source said. “That’s totally unacceptable.”
Id.
299. Bill Restricting Access, supra note 226.
300. Id.
adopted a resolution that "urged [President Bush to] put off complying with an order to open the American border to Mexican trucks until safety measures are in place."\textsuperscript{301} On their own website, the Teamsters told its members that "Teamsters government affairs specialists were on Capitol Hill on February 27th to brief House staffers about the danger posed to American lives by unsafe Mexican trucks."\textsuperscript{302} The site explained that "[a] panel of NAFTA bureaucrats has decreed that the U.S. must open its southern border to these impending disasters or pay a heavy price in trade sanctions."\textsuperscript{303} Jimmy Hoffa, president of the Teamsters, also urged President Bush to go slow.\textsuperscript{304} But the Teamsters were more involved than merely rhetoric, as Ambassador Zoellick's comments indicated.

Not surprisingly, the House's Sabo amendment was lobbied and greatly supported by the Teamsters.\textsuperscript{305} Jimmy Hoffa also liked the DOT Inspector Report of May 18, 2001, which focused on the U.S.'s lack of infrastructure and staffing needs to process the Mexican trucks, which he saw as the U.S.'s "inability to keep unsafe trucks off of our highways."\textsuperscript{306} Hoffa remarked, "I will urge the president to keep the border closed until an adequately designed and funded inspection program is put into place. We cannot allow for there to be two standards: none for Mexican trucks, and comprehensive standards for American drivers."\textsuperscript{307}

In March, more than 1000 Teamsters held a rally in Dallas, Texas,\textsuperscript{308} and 200 rallied in El Paso, Texas.\textsuperscript{309} In El Paso, Teamsters Freight Director and International Vice-President Phil Young said "We are here today to support public safety over corporate profit. Unsafe equipment and drivers with no basic worker protections are a recipe for disaster on our highways."\textsuperscript{310} In the summer of 2001, the Teamsters had an eleven truck convoy cross the country to increase awareness about unsafe Mexican trucks.\textsuperscript{311} The Teamsters also actively supported the Murray-Shelby

\textsuperscript{303} Id.
\textsuperscript{305} See Hoffa Letter, supra note 304.
\textsuperscript{306} DOT Outlines Hurdles, supra note 259.
\textsuperscript{307} Id.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Teamsters Convoy Highlights Dangers of Unsafe Mexican Trucks, TEAMSTERS ONLINE,
amendment. The substance of their support, comes from the study done on the Murray-Shelby amendment conducted by the Dewey Ballentine law firm for the Transportation Trades Department of the AFL-CIO.

Some of the other activities the Teamsters spearheaded included asking the DOT to extend its review process an additional sixty-days, asking the DOT to put off implementing regulations, to add a "proficiency exam" for applicants to the requirements "to demonstrate they were familiar with U.S. motor carrier safety laws and regulations," to require "more detailed records than the DOT had proposed and urging the DOT "perform a safety review prior to granting even conditional authority to Mexican carriers, which would go beyond the application process in the proposed rules." Inside U.S. Trade noted that the Teamsters did not specify what the safety review should include. They also wanted the DOT to "conduct an environmental assessment of the proposed rules" and require the Mexican carriers "certify they will comply with U.S. environmental and labor standards, as a condition of their receiving operating authority."

Even as recently as January 10, 2002, after a compromise between the House and Senate had been worked out, the Teamsters continue to focus on publicizing safety concerns. A GAO report, requested by House Democrats (no doubt influenced in part by lobbying on the part of the Teamsters), issued a report that "Mexican truck safety isn't up to U.S. standards." Hoffa concluded that "the Teamsters are proud to have fought for a DOT appropriation bill that keeps the border closed until safety can be assured." A reasonable assumption might be that the emphasis should be on the word closed rather than the phrase safety.

The Teamsters were not the only ones critical of the DOT proposed regulations. The American Insurance Association thought the application process was less rigorous than for U.S. carriers, "which are required to submit detailed data on drivers, licenses, safety and loss records, and ve-

313. Id.
315. Id.
316. Id.
318. Id.
319. Id.
vehicles." Public Citizen, a Ralph Nader group, supported the Murray-Shelby agreement and applauded the attempts to keep McCain-Gramm's addition from passing. Public Citizen is very specific in their concerns:

Public Citizen analyses have found that Mexico's truck inspection system is riddled with holes that allow vehicles with major safety defects to stay on the road. . . . Public Citizen supports legislation to require on-site inspections of Mexico-domiciled carriers; add inspection facilities, equipment and inspectors to the border crossings; and ensure that Mexican truckers comply with all U.S. safety requirements, including rules governing how long truckers may drive without rest.

The rhetoric is interesting:

"I cannot be more clear: We are not calling for Mexico-domiciled carriers to be held to higher standards; we are calling for strong inspections to ensure that the trucks are safe enough to travel on U.S. roads. Murray/Shelby assures that Mexico-domiciled trucks do in fact meet U.S. standards."

This is not far off from the panel opinion, but there is still a strong notion of keeping Mexican trucks out. In fact, they use the Panel opinion for support. Interestingly, Public Citizen uses the closing of the Canadian border in 1982 as proof that the U.S. will stop foreign traffic for

Under NAFTA, Mexican trucks must meet U.S. safety standards. But because Mexico has no mandatory standards in a variety of safety categories, it is essential that carriers be inspected by the United States. We are not calling for Mexican carriers to be held to higher standards; we are calling for strong inspection standards to ensure that the trucks are safe enough to travel on U.S. roads.

See MEXICAN TRUCK FACT SHEET.

The site also notes

Provisions of the transportation appropriations bill (H. 2299) authored by Murray and Shelby have been endorsed by Advocates for Highway and Auto Safety, Citizens for Reliable & Safe Highways (CRASH), the Consumer Federation of America, Parents Against Tired Truckers (PATT), Public Citizen and the Trauma Foundation.

Id.

324. Mexican Truck Debate, supra note 323.
safety concerns. Unfortunately, they got it wrong.

F. MEXICO’S RESPONSE

In response to the Murray Provisions, Mexico “warned that it may bring punitive tariffs on U.S. products, including high-fructose corn syrup.” More specifically, on July 24, 2001 the Mexican Secretary of Economy, Luis Ernesto Derbez Bautista, sent a letter to U.S. Senators. The Secretary was particularly concerned about the Murray amendment, because it may be a violation of the NAFTA. “In this light, we hope the legislative language will allow the prompt and non-discriminatory opening of the border for international trucking.” From a legal standpoint, the Secretary pointed out that “Mexico expects non-discriminatory treatment from the U.S. as stipulated under the NAFTA,” saying that “[i]n the integrity of the Agreement is at stake as is the commitment of the U.S. to live up to its international obligations under the NAFTA.” This was the Mexican’s argument in the NAFTA case, and the Panel agreed.

The Secretary then brought up an economic argument for allowing Mexican trucks to cross beyond the commercial zone, stating that as the U.S.’s second largest trading partner, where 75% of the goods move by truck, “[c]ompliance with the panel ruling means that products will flow far more smoothly and far less expensively between our nations. Doing this will enable us to take advantage of the only permanent comparative advantage we have: hat is our geographic proximity.”

At a July 31, 2001 press conference, Mexican Secretary of Economy Luis Ernesto Derbez acknowledged that the U.S. President and Trade Representative were trying to comply with NAFTA, even if the Congress was not.

There is a very clear position from the Administration of President Bush and

325. Id.
326. Bill Restricting Access, supra note 226.
327. Mexican Letter on Cross-Border Trucking, INSIDE U.S. TRADE, Aug. 3, 2001 (text of Letter from Luis Ernesto Derbez Bautista, Mexican Secretary of the Economy, to Trent Lott, Senate Minority Leader (July 24, 2001)).
328. Id.
329. Id.
330. Id.
331. Id.
332. See NAFTA Panel Decision, supra note 3, at 90-91.
333. Id.
Ambassador [Robert] Zoellick where they are doing all the actions required to see that the treaty will be fulfilled exactly as it has been worked," [Derbez] said. "We are satisfied, and therefore, there is no action contemplated at this point."  

Nevertheless, Mexico continued to exert pressure on the issue. President Fox in a speech at the Institute for International Economics on September 7, 2001 "renewed his call for the United States to comply with its commitments under the North American Free Trade Agreement and allow Mexican trucks access to the U.S. market."  

G. Trucks in Post-September 11, 2001 Atmosphere

On September 7, 2001, Mexico’s President Fox reiterated the importance of U.S. complying with the NAFTA obligations with regard to processing Mexican trucks. President Bush promised to veto the bill "if it includes language identical to either the House or Senate versions," and the two versions from the House and Senate were set to go to conference. In the aftermath of the World Trade Center, September 11, 2001 terrorist attacks, the discourse on trucks altered, at least for a time. In testimony at the Senate Commerce, Science, and Transportation committee, Keith Gleason, Director of Tran Haul Division, noted that border security "calls for greater inspection presence." Concerns over border infrastructure have gotten a boost from the September 11th activities, as greater technology and improvements is needed as security concerns heightened. On March 22, 2002, Bush announced a twenty-two point "smart border" plan to prevent terrorism but promote the free flow of goods and "low-risk, pre-approved border crossers." A similar type of agreement had already been signed with Canada in December, 2001. The plan calls for more infrastructure and technology along the border, totaling $50 million, already allotted by Congress as part of its $40 billion in emergency spending. The call for additional infrastructure is not new. Local economies in particular have been concerned for a long time now, even if the Congress and the DOT have been slower to share the

335. Id.
336. Fox Calls on U.S., supra note 134.
337. Id.
341. Id.
342. Id.
same concern.343

After months of negotiations, on November 30, 2001, the House344 and on December 4, 2001, the Senate approved a compromise agreement to allow Mexican-domiciled trucks to obtain conditional and permanent operating authority.345 "But DOT must put a safety inspection regime in place before granting authority to any Mexican truckers."346 The compromise keeps "many of the safety requirements included in the Senate bill but softens their implementation."347 The compromise includes:

- The hiring of new, additional inspectors, on the U.S. side. On the U.S. side at the ten busiest crossing, facilities will include scales and weigh-in-motion systems.
- Fully trained DOT auditors.
- A FMCSA policy in place to ensure that Mexican carriers comply with hours-of-service regulations before Mexican-domiciled trucks begin operation.
- Mexican carriers must pass safety exams before being issued conditional operating authority, with a "full, compliance review before granting . . . permanent authority."
- DOT will conduct on-site inspections in at least half of Mexican-domiciled carriers that will be traveling beyond the commercial zone.
- Mexican trucks granted authority would display "a Commercial Vehicle Safety Alliance decal verifying satisfactory completion of a safety inspection," and vehicles "must be inspected every 90 days for three years."
- No inspection of trucks operating solely within the commercial zone.
- Mexican trucks with three or fewer trucks will not need on-site inspections in order to obtain an interim or permanent operating authority.
- Electronic verification of drivers' licenses for half of the drivers crossing the border.348

Additional requirements are included for drivers carrying hazardous materials,349 which includes 100% inspection.350 The FMCSA is also required to "issue interim final regulations that establish requirements to ensure that carriers are knowledgeable about federal safety standards; to improve training and certification of motor carrier auditors; and to determine the appropriate number of motor-carrier inspectors for the Mexican border."351 "Finally, the secretary of Transportation must certify that the

343. Id.
346. Id.
347. Id.
348. Id.
349. Id.
opening of the border does not pose an unacceptable safety risk to the public."\textsuperscript{352}

Public Citizen supported the compromise but warned that the FMCSA often "ignored congressional mandates" and feared that "loopholes . . . may be exploited."\textsuperscript{353} Jimmy Hoffa claimed victory.\textsuperscript{354} So did both sides of the Senate, with McCain stating, "[t]his agreement represents a victory for everything we have fought for these last five months."\textsuperscript{355} Remember, he had opposed the original Murray-Shelby version.\textsuperscript{356} Groups like the Free Trade Alliance San Antonio, who seek to promote trade and commerce in San Antonio with the influx of additional Mexican trucks were also ecstatic.\textsuperscript{357} Executive Director of the Alliance, Blake Hastings, said, "We'd rather have cross-border trucking begin with some warts than not at all."\textsuperscript{358} President Bush said the compromise was "an important victory for safety and free trade."\textsuperscript{359}

What seems to have changed, to a great extent, are the requirements for the U.S. side, elements that should have been in place already with the awareness that the opening of the border was part of the NAFTA treaty. These include facilities improvements, that is, making the facilities \textit{permanent}, adding weight stations, and increasing staffing requirements. Many of the requirements for the Mexican trucks were already in place when they originally applied, that they must conform to the requirements of U.S. law, or were in place with the DOT's 2001 rules. The big change is the addition of the onsite audit requirement, originally proposed in the House by Rep. Olav, and then included in the Murray language in the Senate version.\textsuperscript{360} That made it through the compromise and is now part of the DOT rules.\textsuperscript{361} Whether this is legal under NAFTA, however, seems questionable, particularly with sovereignty issues. Can one government come into inspect businesses in another's territory in order to meet requirements for entry? This seems to be pushing the boundaries a bit.

\textsuperscript{352} Id.

\textsuperscript{353} Press Release, Joan Claybrook, President, Public Citizen, Compromise on Mexican Trucks Is a Major Step Forward, but Implementation Must Be Carefully Monitored (Nov. 30, 2001), \textit{at} http://www.citizen.org/pressroom/release.cfm?ID=946 (last visited Sept. 3, 2004).

\textsuperscript{354} Cassidy, \textit{supra} note 338, at 6.

\textsuperscript{355} Id.

\textsuperscript{356} Martin, \textit{supra} note 344, at A5.

\textsuperscript{357} David Hendricks, \textit{S.A. Trade Officials See Big Gains in Border Truck Deal; Alliance Plans to Attract Mexican Firms and Create Kellyhub}, \textit{San Antonio Express-News}, Nov. 30, 2001, at 1E.

\textsuperscript{358} Id.

\textsuperscript{359} Martin, \textit{supra} note 344, at A5.

\textsuperscript{360} \textit{House Panel Defeats Effort}, \textit{supra} note 225.

\textsuperscript{361} \textit{DOT to Unveil Rules}, \textit{supra} note 275.
H. GAO Report – December 2001

In a strange postscript, in December 2001, the GAO issued a report on Mexican truck safety. The GAO report examined three areas:

(1) the extent to which Mexican-domiciled commercial trucks are likely to travel beyond the U.S. border commercial zones once the border is fully opened, (2) U.S. government agencies’ efforts to ensure that Mexican commercial carriers meet U.S. safety and emissions standards, and (3) how Mexican government and private sector efforts contribute to ensuring that Mexican commercial vehicles entering the United States meet U.S. safety and emissions standards.

In many ways, these questions mirror some of the concerns raised by the U.S. in their request for a scientific review board in the NAFTA arbitration process.

The GAO found that “[r]elatively few Mexican carriers are expected to initially operate beyond the commercial zones…” because of “specific regulatory and economic factors.” Among the factors the GAO included as prohibitive were: “(1) the lack of established business relationships beyond the U.S. commercial zones . . . (2) difficulties obtaining competitively priced insurance, (3) congestion and delays in crossing the U.S.-Mexico border that make long-haul operations less profitable, and (4) high registration fees.” Technology and increased efficiency at the border in processing would in the future reduce some of these problems.

With regard to the U.S. ensuring that Mexican-domiciled trucks comply with U.S. safety standards, “[t]he Department of Transportation does not have a fully developed or approved operation plan” in place. This is no surprise since the rules and regulations had not yet been approved. Among the continuing problems that the DOT was aware of a year prior were the need for permanent inspection facilities in all but California, the division of inspection responsibilities between federal and state authorities, how states will ensure Mexican trucks are compling with emission standards sans California, the only state that has a program in place, and the need for advanced technology, inter alia, to weigh trucks and check Mexican drivers’ licenses.

On Mexico’s side, Mexico has begun developing “five databases with

362. GAO Report, supra note 245.
363. Id.
364. See NAFTA Panel Decision, supra note 3, at 50-51.
365. GAO Report, supra note 245.
366. Id.
367. Id.
368. Id.
369. GAO Report, supra note 245.
important information on the safety records of its commercial drivers and motor carriers." but is far from being complete. The commercial drivers' license database contained only 1/4 of all commercial drivers so far: "as of October 2001, 70,150, or 23 percent, of an estimated 300,000 federal commercial driver's licenses had been entered into the database." The report continues, "However, Mexican government officials say the database has information on 90 percent of the Mexican commercial drivers now crossing the border." The records are also being updated as drivers renew the licenses, and the database is supposed to be complete by 2003. The first database, the Carrier and Vehicle Authorization Information System was completed in 1998 and the second, the Licensed Federal Information System, was completed in 1999 and went online in January 2000.

Notice that these databases were either completed or in process before the Panel decision was issued. The report said that Mexico is also continuing to participate in "NAFTA-related efforts to make motor carrier safety regulations compatible across the three member nations," efforts that had also begun before the Panel decision or the case filing. This includes participation in NAFTA's Land Transportation Standards Subcommittee ("LTSS") and specific bilateral treaties with the United States on commercial motor vehicle safety. As mentioned in the briefs and the panel's decision, the LTSS has accomplished, inter alia, "commercial driver's licenses-agreement on a common age (21 years) for operating a vehicle in international commerce; language requirements-agreement on a common language requirement . . .; drivers' logbooks and hours-of-service-agreement on safety performance information. . . ., and driver medical standards-recog-

370. Id.
371. Id.
372. Id.
373. Id.
374. GAO Report, supra note 245.
375. Id.
376. Id. See also Department of Transportation, Land Transportation Standards Subcommittee (LTSS), at http://www.dot.gov/nafta/LTSS.html (last visited Sept. 4, 2004).

The Land Transportation Standards Subcommittee (LTSS) was established by the North American Free Trade Agreement's (NAFTA) Committee on Standards-Related Measures to examine the land transportation regulatory regimes in the United States, Canada, and Mexico, and to seek to make certain standards more compatible. The Transportation Consultative Group (TCG) was formed by the three countries' departments of transportation to address non-standards-related issues that affect cross-border movements among the countries, but that are not included in the NAFTA's LTSS work program (Annex 913.5.a-1). The LTSS meets annually in plenary session, usually in conjunction with meetings of the several LTSS and TCG working groups.

Id.
nition of several binational agreements. . . .” 377 So far, the NAFTA countries have not been able to reach agreements on “commercial vehicle weight standards, maximum weight limits for truck axles, and dimensions. . . .” 378 In terms of the binational agreements, Mexico and the U.S. have agreed to “standards for drug and alcohol tests for drivers and acceptance of commercial driver’s licenses issued by the other country.” 379

The GAO concluded that “[i]n the 7 years since NAFTA was implemented, the United States and Mexico have taken a number of steps toward achieving closer economic integration.” 380 Mexico still had improvements to make on its regulatory system and completing its databases. 381 “However, Mexico’s efforts to increase regulation of its motor carrier industry are relatively new; therefore, it is too early to assess their effectiveness.” 382 On the U.S. side, permanent facilities and additional personnel and other infrastructure issues were still not in place.

IV: THE NINTH CIRCUIT AND SUPREME COURT CASES AS EMBLEMATIC OF THE COMPLEX AND THE SIMPLE

On November 27, 2002, President Bush modified the moratorium on Mexican cross-border trucking put in place in 1981 by President Reagan. 383 It was predicted that in a matter of week, Mexican cross-border trucks would be crossing beyond the commercial zone. 384 That same day, on November 27, 2002,

U.S. Transportation Secretary Norman Y. Mineta . . . directed the U.S. Department of Transportation’s Federal Motor Carrier Safety Administration (FMCSA) to act on the 130 applications received thus far from Mexico-domiciled truck and bus companies seeking to transport international cargo in cross-border services in the United States or to provide regular route services between Mexico and the United States. 385

Victory at last. Not quite. A week after Bush removed the twenty-year old moratorium, Public Citizen, the Environmental Law Foundation, the International Brotherhood of Teamsters, the California Federation of Labor AFL-CIO, and the California Trucking Association asked the

377. GAO Report, supra note 245.
378. Id.
379. Id.
380. GAO Report, supra note 245.
381. Id.
382. Id.
384. Id.
Ninth Circuit Court of Appeals for an emergency stay to keep the border closed.\textsuperscript{386} This time, instead of citing concerns over Mexican drivers, the focus was on accusing the Department of Transportation of failing to review the impact of the air quality from potential new Mexican trucks.\textsuperscript{387} This latest attempt to keep the border closed to Mexican trucks so far has worked. Public Citizen and other groups filed a case directly in the Ninth Circuit Court of Appeals against the Department of Transportation.\textsuperscript{388} The case challenged what now was being described as three regulations from the FMCSA, asserting that the “regulations failed to comply with the provisions of the National Environmental Policy Act (NEPA); and (2) that DOT failed to make a ‘conformity’ determination under the federal Clean Air Act.”\textsuperscript{389} A three-judge panel on the Ninth Circuit “ruled unanimously in favor of the petitioners on both grounds.”\textsuperscript{390} Once again, this leads to either a complex situation or very simple.

The complex way to look at it is to take serious the potential problems, just as in safety, and see these as stopping the trucks from coming across the border. This is the approach of the Ninth Circuit. But the other way is very simple. It reads the NAFTA as requiring the U.S. to treat Mexican trucks under the same standards as U.S. trucks. This is what the NAFTA Panel found, and what some predicted the Supreme Court would do.\textsuperscript{391} It does not reject the concerns. As with the panel, safety was addressed by the Ninth Circuit in that the U.S. could put in place requirements that would make sure Mexican trucks applying for operating authority met U.S. standards.\textsuperscript{392}

Just as in the past, those opposing the opening of the border fear the worst, while those in charge try to explain that the Mexican trucks, under the law, will be held to the same standards as the U.S. trucks.\textsuperscript{393} In a CBS article, Al Meyerhoff, an attorney for the groups, believed that Mexican trucks “are not being held to the same standards.”\textsuperscript{394} What gave him this impression is not included in the article. Secretary Mineta in his comments on the lifting of the moratorium said, “Mexican carriers and drivers must meet the same standards as U.S. operators. I have made a

\textsuperscript{387} Id.
\textsuperscript{388} Public Citizen v. Dep’t of Transp., 316 F.3d 1002 (9th Cir. 2003).
\textsuperscript{389} Ninth Circuit Places Entry of Mexican Trucks on Hold, 16 CAL. ENVTL. INSIDER 4 (Jan. 31, 2003) [hereinafter Ninth Circuit Entry on Hold].
\textsuperscript{390} Id.
\textsuperscript{391} See NAFTA Panel Decision, supra note 3, at 90-91.
\textsuperscript{392} Ninth Circuit Entry on Hold, supra note 389.
\textsuperscript{393} Brakes on Mexican Trucks, supra note 386.
\textsuperscript{394} Id.
lifelong commitment to equality under the law and will not, however, tolerate discriminatory enforcement. In this matter of trucking, as in all the modes of transportation, the pervasive issue is safety."

And what exactly had been done at the border after all the talk about safety? According to Kenneth Mead, Inspector General of the Department of Transportation, he stated upon the lifting of the moratorium:

The Department has worked diligently and aggressively to fulfill the requirement for establishing a strong safety program before the southern border was opened to long-haul Mexican truck traffic. This objective has been met by having in place a sufficient number of inspectors, adequate facilities and space for inspections, measures to ensure that licenses are valid and that motor carrier firms pass safety and compliance reviews. These actions are testimony that this Secretary and the Department place a high value on safety. As mandated by Congress, we will continue to review and report on the implementation of these requirements.

According to the DOT, Congress' twenty-two point law had been implemented.

396. Id.
397. Id. at 2. This included:

144 safety inspectors, 67 auditors, and 41 safety investigators. FMCSA has also constructed and expanded inspection stations along the border; provided additional parking areas for vehicles taken out of service for safety violations; acquired and installed weigh stations; and made other improvements to infrastructure and federal and state facilities.

Mexican drivers will be subject to U.S. drug and alcohol requirements. They also must follow U.S. hours of service rules to ensure that they have sufficient rest to drive safely, and they must maintain logs to prove it to safety inspectors.

To drive in the United States, commercial drivers from Mexico must have a Licencia Federal, the Mexican equivalent of a U.S. commercial driver's license. . . . U.S. and Mexican truck inspectors can access federal and state databases in the United States and Mexico during an inspection to check whether a driver's license is valid.

To receive operating authority, all Mexico-domiciled carriers must undergo a safety audit by the FMCSA. During these audits, inspectors assess a carrier's safety posture and assist applicants with information concerning U.S. safety regulations and help ensure that these carriers have methods in place to comply with the safety regulations.

The United States and Mexico will share safety data generated on both sides of the border in such audits by U.S. officials. . . .

To help ensure safety, Mexican carriers granted authority to operate in the United States beyond the border commercial zones also will receive a formal compliance review within the first 18 months of operation. Carriers that receive and maintain satisfactory compliance ratings will be awarded permanent operating authority at the end of the 18-month period of operating under provisional operating authority.

All Mexican trucks and buses operating in the United States will be required to display a valid Commercial Vehicle Safety Alliance (CVSA) inspection decal. These decals, valid for 90 days, indicate a vehicle has passed a safety inspection by a qualified inspector. Likewise, Mexican truck and bus companies will be required to carry U.S. insurance while operating in the United States.

Id. at 2-3.
A. The Ninth Circuit Case

It would be easy to characterize this case as merely the Teamsters' newest attempt to keep out the trucks but we need to look at the relationship of the NAFTA and the environmental regulations in the U.S. The case in many ways reaches the nature of the NAFTA as a treaty and how the treaty relates to environmental rules. "The Court in rendering its decision determined that rules implementing the North American Free Trade Agreement (NAFTA) are subject to invalidation if they fail to comply with the requirements of other federal laws." The three judge panel considering the petition ruled unanimously in favor of the petitioners on both grounds. Justice Thomas would later encapsulate this position in the Supreme Court decision as follows:

According to the Court of Appeals, FMCSA was required to consider the environmental effects of the entry of Mexican trucks because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the [Environmental Assessment] was prepared and the decision not to prepare an [Environmental Impact Statement] was made." Due to this perceived deficiency, the Court of Appeals remanded the case for preparation of a full [Environmental Impact Statement].

The court-ordered study is expected to take a year and cost $1.8 million. The focus of the study is to determine the effect of Mexican long- and short-haul trucks on U.S. roads. Others believe the study could take up to five years if not fast-tracked. At the time of the stay, the DOT had received 135 applications to operate past the commercial zone, half of which, according to the DOT, were ready for safety audits. In September 2003, The Bush administration appealed to the Supreme Court to stop the study. Speaking for the Bush administration, Solicitor General Theodore Olson pointed to the need to fulfill the NAFTA obligations, a misapplication of the environmental laws by the Ninth Cir-

398. Ninth Circuit Entry on Hold, supra note 389. ("The DOT was prevented from contending that NAFTA trumped other federal laws, because NAFTA itself contains a provision providing that any provision of the agreement that is inconsistent with federal law will not have any effect.")
399. Id.
402. Id.
404. Brakes on Mexican Trucks, supra note 386.
405. Truck Conflict, supra note 401.
cuit, and “constrain[ing] the president’s discretion to conduct foreign affairs, . . . prevent[ing] the president’s action from taking effect and thereby hamper[ing with] commerce.”406

B. THE SUPREME COURT CASE

The Supreme Court reviewed the relationship between presidential foreign affairs actions and domestic environmental protection requirements, specifically under the NEPA407 and the Clean Air Act.408 Was the DOT required to comply with the environmental impact statement (“EIS”) requirements of NEPA and the Clean Air Act? The Washington Post framed it as follows: “Does the Department of Transportation have to write an environmental impact statement to let Mexican truckers use U.S. roads?”409

The oral arguments began with Deputy Solicitor General Edwin Kneedler’s remarks. They are worth repeating, as they summarize the progression we have been tracing in this paper:

Mr. Chief Justice, and may it please the Court:
In February of 2001, an international arbitration panel, convened under the North American Free Trade Agreement, concluded that the United States’ continuation of a blanket ban or a moratorium on the operation of Mexican domiciled commercial carriers beyond the border zone in the United States violated NAFTA.

Soon thereafter, the President made clear . . . his intention to comply with the arbitration decision by invoking power specifically vested in him by Congress to lift the moratorium in order to comply with an international trade agreement. And the President in fact did lift the moratorium in November of 2002.

In this case, the Ninth Circuit held that the Federal Motor Carrier Safety Administration, an agency in the Department of Transportation that is limited to a . . . safety mandate, was required to conduct an elaborate and complex environmental analysis of the President’s foreign trade and foreign policy decision before it could enter or issue procedural safety regulations that were necessary to implement the President’s decision. The Ninth Circuit set aside the procedural regulations on that ground and thereby prevented the agency from granting certification to carriers that under the President’s decision were eligible to receive it.

The Ninth Circuit’s decision is incorrect and it has frustrated the President’s ability to comply with NAFTA.

Congress and the President, the two entities whose joint action brought about the lifting of the moratorium, are not subject to either NEPA or the provisions of the Clean Air Act that respondents rely on to require an envi-

406. Id.
vironmental analysis. Accordingly, the agency acted entirely reasonably in choosing to take the President's action as a given, including any increased traffic or trade that might occur as a result of the President's decision and to, instead, focus its own environmental analysis on the effects of its own procedural regulations.

FMCA's...governing statute requires it to grant registration to any carrier that is willing and able to comply with applicable safety, safety fitness, and financial responsibility requirements. The agency has no authority to deny operating permission to a carrier, foreign or domestic, based on environmental concerns or foreign trade concerns. It has no authority to countermand the President's decision or to refuse to issue the regulations that were necessary to implement the President's decision.\footnote{410}

News reports on the oral arguments at the Supreme Court on April 21, 2004 seem to point in the direction of the Court taking a clear, simple path, similar to the Panel's reading of the law in 2001. Chief Justice William Rehnquist is reported to have remarked, "it seems to me a very doubtful proposition that statutory law - in this case, the Environmental Protection Act - would trump the president's constitutional authority to implement treaties ratified by Congress."\footnote{411} And Justice Stephen Breyer "noted that, under NAFTA, 'Mexicans and Americans are to be treated alike.' That includes the treaty's trucking provisions."\footnote{412} David Hendricks of the San Antonio Express-News reported that "Justice Antonin Scalia said such a rule would require 'every agency' to conduct environmental reports on 'every decision,' since nearly all regulations have some impact on the environment."\footnote{413} "Most associate justices appeared engaged and asked detailed questions of trucking regulations, although Sandra Day O'Connor, Ruth Bader Ginsburg and Clarence Thomas remained silent."\footnote{414}

The Dallas Morning News reported the following:

"It seems to me obvious that you don't have to make an environmental impact statement on something you have no power to remedy," said Justice Antonin Scalia.

"Does this agency have the authority to exclude trucks on the basis of environmental (concerns)?" asked Justice Stephen G. Breyer.

Even Justice David H. Souter, who seemed to be searching for a rationale to permit a wider environmental examination, asked [Mr.] Weissglass if he ex-


\footnote{412} Id.


pected the federal safety agency to simply “find a safety hook” to keep out older, more polluting Mexican trucks. Under questioning by Justices Scalia and Breyer, Mr. Weissglass told the court that the safety agency can treat Mexican trucks differently from U.S.-based carriers.

“You’re saying they have to look at Mexican trucks,” said Justice Breyer. “. . . Why shouldn’t they have to look at the whole thing?” 415

The LA Times reported

Under the free-trade treaty, “Mexicans and Americans are to be treated alike,” said Justice Stephen G. Breyer. He too wondered how safety regulations in U.S. law gave the appeals court reason to block the flow of Mexican trucks. 416

And the San Francisco Chronicle reported the following:

Justice Antonin Scalia posed the hypothetical case of a “mad millionaire” who applied to the Federal Communications Commission for a license and threatened that if it were denied, he would unleash a flood of trucks that would pour out emissions and greatly increase U.S. air pollution. Scalia asked whether the FCC—which oversees communications, not the environment—would then have to develop an environmental impact statement before it issued a license, “knowing what the result would be of the mad millionaire’s actions.”

The plaintiffs’ attorney, Jonathan Weissglass of San Francisco, said the question would hinge on whether the added pollution was foreseeable. Scalia replied that yes, the mad millionaire put this threat in writing and swore to do it. “He really is crazy,” Scalia said. Weissglass replied that in that case, then the FCC would have to demand an environmental impact statement.

Justice Stephen Breyer then took Scalia’s hypothetical to a more absurd level, outlining another fictional scenario involving the Postal Service. If the Postal Service were in any way involved in the mad millionaire’s application, would that agency be required to do an environmental study, Breyer asked. “The answer is clearly no,” he said. 417

What is interesting is that Teamsters’ President Hoffa was still asserting that Mexican trucks would be held to a different standard. From the steps of the Supreme Court, he is reported to have said, “We have rules in this country and everybody has to abide by those rules. . . . American truckers have to abide by those rules. It’s that simple. That’s the basic

issue, and I think that was shown here." And Deborah Sivas, Director and Managing Attorney, of the Earthjustice Environmental Law Clinic at Stanford issued the following statement:

NAFTA requires that nations doing business in the United States obey our environmental protection laws. If the Bush administration wants to allow these polluting diesel trucks free rein on US highways they must first tell us how high an environmental price all Americans, especially those living in border states, will pay. Many communities near the border, including California’s Imperial Valley and the Los Angeles basin, are already suffering from terrible air pollution levels and they shouldn’t be subjected to the increased asthma and cancer risks posed by diesel pollution. Thousands of dirtier trucks plying our highways each day will undermine the work of local air districts to clean up the air and will place an extra burden on our factories and power plants to compensate. At a minimum, the Bush administration owes Americans a plan to bring Mexican trucks up to code.  

C. The Supreme Court Decision

On June 7, 2004, a unanimous Supreme Court issued its decision.  Written by Justice Thomas, the Court stated the question and answer:

In this case, we confront the question whether the National Environmental Policy Act of 1969 (NEPA), and the Clean Air Act (CAA), require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA’s promulgation of certain regulations would allow such cross-border operations to occur. Because FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement on FMCSA.  

The issues were then discussed in detail. Of interest here is the pollution caused by the additional inspections of trucks at the border that Public Citizen is concerned about. “Critical to its calculations was its consideration of only those emissions that would occur from the increased roadside inspections of Mexican trucks; like its NEPA analysis, FMCSA’s CAA analysis did not consider any emissions attributable to the increased presence of Mexican trucks within the United States.” Second, in the oral argument, the focus was on older trucks polluting versus newer trucks, without any mention of the commercial zone and the

420. Public Citizen, 124 S. Ct. at 2204.
421. Id. at 2209.
422. See id. at 2217.
423. Id.
current system. If trailers are no longer transferred from Mexican carriers using older more polluting trucks, wouldn’t this help the environment? This was never part of the discussion.

V: POTENTIAL FUTURE ROADBLOCKS

Not all of the possible problems with allowing Mexican carriers across the border have been exhausted. Insurance issues, drug trafficking concerns, labor laws, post-September 11, 2001 security concerns, and the most ironic of all, Mexico’s willingness to have U.S. trucks come across the border, are still issues that have yet to be fully politicized and aired for debate. For, in the end, we seem to be headed back to where we began. The U.S. closed its border in the 1980s because Mexico would not allow in U.S. trucks. This issue did not go away, upon the signing of the NAFTA, as one needs only look at the 1995 United Parcel Service (“UPS”) controversy:

In April 1995, the United States sought consultations with Mexico arising out of Mexico’s refusal to provide “national treatment” to an American-owned package delivery firm—the United Parcel Service (“UPS”). Mexico refused to allow UPS to utilize the same large trucks as its Mexican competitors. While the dispute apparently was discussed in a meeting of the Free Trade Commission, there has been no formal resolution of the case, even though “informal” discussions were reported to be continuing as late as October 1996. Meanwhile, UPS announced that it planned to abandon its Mexican operations, contending that “[b]urdensome customs procedures and protectionist regulatory practices have made our ground service to Mexico inefficient and costly to operate.”

There were also other safety concerns in Mexico as well. “[The Economist] reported that in 1996 there were approximately two attacks daily on heavy trucks in Mexico. There are also many thefts of trucks in Mexico.” How much has changed in the last eight years has not been the subject of many journalists or interest groups.

It has also been pointed out that Mexico, like the U.S., has powerful groups that are opposed to the opening of the border. Like the Teamsters, these groups, including Canacar, the largest Mexican trucking industry trade group representing seventy-eight percent of the commercial rigs, have lobbied to keep the border closed and actually void this portion

of the NAFTA.\textsuperscript{427} Even before the Panel decision was released, MexLink, a newspaper specializing in trucking and shipping interests, was reporting that Canacar was concerned about U.S. investment in Mexican trucking companies, and Canacar’s interest in having the new president-elect, now President Fox, put limitations on foreign investments to a minority position in Mexican trucking companies, this while Mexico was seeking the NAFTA obligations to be opened in investment and increased border activity on the U.S. side.\textsuperscript{428}

After the decision, Mexican truckers threatened to strike if President Fox allowed U.S. trucks to operate in Mexico in the manner required by the NAFTA.\textsuperscript{429} In fact, the president of Canacar Manuel Gomez asked Fox to put in place a Moratorium against the trucks.\textsuperscript{430} Canacar also sponsored a conference, \textit{Mexico Transporta 2002}, where President Fox suggested he might take retaliatory step regarding the safety and insurance requirements now imposed.\textsuperscript{431}

Additionally, Mexico currently prohibits foreign labor unions from competing in Mexico.\textsuperscript{432} "Mexican workers could possibly gain greater protection if U.S. labor organizations were allowed to operate in Mexico, as U.S. unions are allowed in Canada. This discovery is crucial because it points to politics as overreaching and at times overshadowing the general protection of workers’ rights."\textsuperscript{433} Again, these are areas the journalists, Teamsters, and other interest groups have not been as vocal.

\section*{VI: Conclusion—Questions Left Unanswered}

In 2001, an arbitration panel returned a verdict in Mexico’s favor;\textsuperscript{434} yet, three years later, Mexican trucks are still not allowed past the commercial zone, and legislatively and judicially, no one has even begun to deal with access for U.S. trucks into Mexico. Following the decision, throughout 2001, the U.S. Senate and House debated and implemented additional safety legislation with the DOT releasing new requirements in


\textsuperscript{428} \textit{Trucking Talk}, supra note 427, at 1.


\textsuperscript{430} \textit{Id}.

\textsuperscript{431} Wilson, \textit{supra} note 65.

\textsuperscript{432} Kraul, \textit{supra} note 427, at 1.


\textsuperscript{434} \textit{See} NAFTA Panel Decision, \textit{supra} note 3, at 90-91.
2002 for Mexican trucks to meet. But the border would still not open. Then an environmental impact statement has been required by the Ninth Circuit Court of Appeals, which was expected to delay the border opening. The Supreme Court removed the latest roadblock. Will the border open after that? How long will that take? Months? Another year? Two? Five? Not if certain powerful interests, including the Teamsters, Public Citizen, and various environmental groups have their way. One wonders how and why the opening of the border was included in the NAFTA if there is so much opposition. Of course, the easy answer is that it is a step in the process to liberalize trade. But nothing seems as simple as this when it comes to the issue of trucks.

This has also been the story of the third Chapter 20 case filed under the NAFTA, and the framework of relations surrounding the issues of cross-border trucking. In describing the negotiation process from the Mexican side, Hermann von Berurab noted that to gain support for an U.S.-Mexican free trade agreement, he had to take into account the “framework of relations”

Everything had to be understood within the framework of relations (1) between the [US’s] administration and the legislative branches, with Congress granting rights to the executive but at the same time vying to control the process; (2) between the openness of the largest market in the world and its persistent trade deficit, which created great contradictory pressures ... and (3) between the sectors that were protectionistic by tradition or need and the ones seeking to open foreign markets in a context of globalization that imposed necessary, but at times, unwelcome, transformations.

This agreement in its practical real world, political setting is about relationships. But after all these years of work and research, I am left with many unanswered questions, questions that remind me of the U.S.’s questions posed for a proposed scientific review board during the arbitration process—interesting and even useful if answered but nearly impossible in reality to actually know for sure. And so I leave you with five questions—part musings, part rants.

1. The Chapter 20 case: What was Mexico’s purpose in filing the Chapter 20 case? What did they hope to gain? What is considered a victory? What would have happened if the United States had actually opened the border? How would Mexico have reacted? Was this ever a possibility, or did Mexico know that this was merely a rhetorical move on their part, that the politics of the United States would never actually let

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436. See Ninth Circuit Entry on Hold, supra note 389, at 4.
437. See Public Citizen, 124 S. Ct. at 2209.
the border be open? Will the U.S. file its own Chapter 20 to have rights to U.S. trucks in Mexico?

2. The FMSCA Rules and Congressional Legislation: While infrastructure and on-sight inspections were included, what changed over all the debate? Why wasn’t the infrastructure complete? Did everyone realize that this would, in part, cause a delay? How prepared were the U.S. and Mexico in reality for the initial opening? How much work has been done now, and is it really sufficient?

3. How did the cross-border trucking element get into the NAFTA? If interests can work this hard to keep it out, why was it included in the first place? The Teamsters have been so influential and successful at guiding the rhetoric, politics, and courts in this issue. Where were they at the negotiation of the NAFTA? Did they have a role in these? A number of people have always commented to me that the trucking industry, rather than the Teamsters wanted this provision. Where were these influential voices when the border did not open? It is a strange tale indeed.

4. How much will really change once the border is opened to Mexican domiciled trucks? Will it change the way the U.S. and Mexican companies currently do business? How much will insurance, immigration, and other yet to be focused upon issue, play a new role? This may be only something we know in time. Some have said that the partnerships that have developed during the commercial zone era will continue, what will change is that the truck will remain with the trailer, but the driver will change at the border, or that the trailer will still be transferred from a Mexican truck to a U.S. truck, because of insurance and other liability issues. Moreover, Mexican trucks will only be allowed to transport from Mexico to a point in the U.S., not from freely from point-to-point within the U.S., and many predict this restriction will keep most Mexican carriers from doing much business in the U.S.

5. The final question, which has yet to be answered is will the border actually open to cross-border trucks beyond the commercial zone? As of May 2005, the border remained in its pre-NAFTA state – which U.S. and Mexican trucks still switching their trailers from one to the other within the commercial zone.

Today, there are the same issues we have seen in the past, with the same players, interests and concerns. In January 2005, the DOT issued another report which the Teamsters have interpreted as concluding that the Mexican government and the country’s motor carriers have not met the safety requirements and preconditions outlined in provisions of the NAFTA, and that should not be granted long-haul operating authority within the United States.\textsuperscript{439} According to the Christian Science Monitor,

\textsuperscript{439} DOT Audit Supports Teamster Position on Cross-Border Trucking Office of Inspector
"the January DOT report recommend[ed] that the trucks be examined by US inspectors before they leave Mexican soil. Mexico balked at what it said was an infringement on its sovereignty."\textsuperscript{440} The question now at issue concerns "Section 350 of the appropriations act of FY 2002, which prohibited the FMCSA from using funds to review or process applications for long haul of Mexican motor carriers until certain conditions and safety requirements were met."\textsuperscript{441} The Teamsters are claiming that the recent DOT report confirms that the safety requirements have not been met and therefore the border should not be open. \textit{Logistics Today} explains,

One hang up is the portion of Section 350 that requires the FMCSA to review 50\% of Mexican motor carriers applying for long haul authority on-site and that be at lease [sic] 50\% of the estimated truck traffic for the year. Mexico and the U.S. have not agreed on procedures for conducting the reviews. Additionally, the [Office of Inspector General] is concerned that the just as FMCSA must fulfill new requirements for background checks for U.S. drivers applying for hazardous materials endorsements, that these apply to Mexican motor carriers, as well.\textsuperscript{442}

As of April 2005, ten months after the Supreme Court decision of June 7, 2004, as of April 2005, the situation diplomatically has not been resolved in any way: "U.S. and Mexican trade officials continue to bargain over truck safety and underwriting data issues. . . ."\textsuperscript{443} In a recent Senate Hearing, Senator Murray asks Secretary of Transportation, Norman Mineta, why it has taken so long to reach an agreement with Mexico on cross-border trucking.\textsuperscript{444} His answer and her reply:

MINETA: Mostly because of [Mexico's] own reluctance to do so. We have worked—I've had a number of meetings with Secretary Cerisola, and every time I meet with him, this is a subject that I bring up.
We have had a memorandum in their office for over probably two years on trying to get this memorandum of agreement completed. And we just haven't been able to bring this to closure. . . .


\textsuperscript{441} \textit{DOT Says Mexican Trucks Shouldn't Run Long Haul in the U.S.}, \textit{Logistics Today} (2005), \textit{available at} http://www.logistictoday.com/sNO/6918/LT/displayStory.asp (last visited Apr. 28, 2005).

\textsuperscript{442} \textit{Id.}

\textsuperscript{443} Steven Tuckey, \textit{Mexican Trucks Hit Legal Speed Bumps Inland: Marine Insurers Eye Potential, Pitfalls of Cross-Border Transport}, \textsc{Nat'l Underwriter - Prop. & Casualty}, Apr. 4, 2005.

We've suggested that this be a conversation between the president and President Fox and Prime Minister Martin when they meet. I believe it's sometime...

MURRAY: So you believe that this is reluctance on behalf of Mexico to move forward with cross-border trucking?

MINETA: I think it is, because they've had tremendous pressure from their own trucking association, Canacar, to move forward on this.

You gave us the money in 2002 to bring our workforce up to place, and we have them in place. We're utilizing those inspectors that are not on the border at other inspection points.

But we're ready to move at any time that we get that memorandum of agreement signed, to allow our inspectors to go to their terminals and to their maintenance facilities of their trucking companies.445

This feels like the same rhetoric we have seen from the beginning. But will it open the border? Only time will tell. And in the most crazy twist of all, after the U. S. Supreme Court reversed the Ninth Circuit's ruling, finding that processing of Mexican applications could not be held up until one received the results of a Clean Air Act analysis and Environmental Impact Statement, a pilot study to measure emissions from Mexican trucks has begun in Nogales, Arizona. Begun in March 2005,

The study will take place over the next three weeks at the peak of the produce season and will test 1,200 trucks each day in the first hundred yards of their U.S. journey.

The hope is to quantify - for the first time - how much pollution is coming from Mexican trucks so U.S. officials have a better idea of what will happen to air quality in border cities and states when the trucks are allowed beyond the 20-mile border zone, as envisioned by the North American Free Trade Agreement, or NAFTA."446

Of course, once again, there is a complete disconnect that many of the older trucks causing the pollution would not be crossing the border if Mexican trucks were allowed to go further into the United States and that the pollution would then be cut down. But that is not discussed.

This article shows the complexity of the rather simplistic statement that Mexico cross-border trucking must meet US standards to cross the border. There has been nothing simple about trying to get the border open to cross-border trucking, and as the article points out, this is only one side of the story. How will Mexico behave if and when US trucks want to cross further into Mexico as designed by the NAFTA? Will there be another NAFTA case? What will happen? Another cliffhanger, I suppose.

445. Id.
The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]: the Treatment of “Through Transport” Contracts

Theodora Nikaki*

I. INTRODUCTION: THE HISTORICAL BACKGROUND OF THE DRAFT INSTRUMENT

The United Nations Commission on International Trade Law (“UNCITRAL”) Draft Instrument on the Carriage of Goods [wholly or partly] [by sea] (“Draft Instrument”)1 constitutes the latest attempt to update the international carriage of goods by sea regime in order to accommodate the current needs of maritime transport.2 This project was first con-


ceived in 1996 when, during its twenty-ninth Session, UNCITRAL was advised of the significant gaps the existing national laws and international conventions have left in the area of the international carriage of goods by sea with respect to various issues.3

As a result, UNCITRAL considered a proposal to

include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws. . . .4

Therefore, UNCITRAL commissioned the Secretariat to collect information, ideas, and opinions from Governments and international organizations representing the commercial sectors involved in the carriage of goods by sea with respect to the problems that arose in practice and possible solutions.5

Next, UNCITRAL collaborated with International Maritime Committee ("CMI") which worked on this project for 3 ½ years. Specifically, CMI first established a Steering Committee which identified the topics to be further examined in a report released in May 1998.6 In view of this report, CMI set up an International Working Group, which circulated a relevant questionnaire to all National Associations.7 The same Group also analyzed the responses to the questionnaire8 and, accordingly, proposed a list of issues to be considered by the International Sub-Committee on Issues of Transport Law ("IS-C").9

Then, the key issues examined during IS-C four meetings in 2000,10

4. Id.
5. Id. at para. 215. Such organizations included the International Maritime Committee ("CMI"), the International Chamber of Commerce ("ICC"), the International Union of Marine Insurance ("IUMI"), the International Federation of Freight Forwarders Association ("FIATA"), the International Chamber of Shipping ("ICS") and the International Association of Ports and Harbors ("IAPH").
8. See Issues of Transport Law, supra note 7, at 139.
9. Id. at 121. IS-C was set up in November 1999.
as well as a first CMI Draft Outline Instrument, drafted by IS-C,\textsuperscript{11} were discussed at the CMI’s 37th Conference held in Singapore in February 2001.\textsuperscript{12} In the light of the resolutions of the Singapore Conference, this first Draft was amended and then released as the “CMI Draft Outline Instrument of 31 May 2001” (“Revised CMI Draft Outline Instrument”).\textsuperscript{13}

Subsequently, this revised draft and a Consultation Paper\textsuperscript{14} were circulated to all national Associations. Following the responses to this Consultation Paper and the comments of several national associations and international organizations,\textsuperscript{15} as well as the Fifth and the Sixth Meeting of the IS-C Committee,\textsuperscript{16} CMI published its final “Draft Instrument on Issues of Transport Law” (“CMI Draft Instrument”) on December 10, 2001.\textsuperscript{17} Finally, CMI delivered its final Draft to UNCITRAL for implementation and is now known as the “UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea” (“UNCITRAL Preliminary Draft”), dated January 8, 2002.\textsuperscript{18}
UNCITRAL Working Group III on Transport Law then took over the project.\(^{19}\) Group III met three times and examined the provisions of the proposed Draft.\(^{20}\) During these meetings, Group III took into consideration United Nations Economic Commission for Europe’s ("UNECE") and United Nations Conference on Trade and Development ("UNCTAD") comments,\(^{21}\) the Secretariat’s general remarks on the Draft’s sphere of application,\(^{22}\) the replies of national associations and international organizations to the questionnaires circulated by UNCTRAL’s Secretariat\(^{23}\) and UNCTAD,\(^{24}\) a comparative table between the Draft Instrument and the other transport conventions,\(^{25}\) as well as the

\(^{19}\) 56th Session of UNCITRAL General Assembly, supra note 2, at 64-65, para. 345.


proposals of several countries. 26 Finally, in light of the reports of these three meetings, 27 UNCITRAL published a new version of the Draft, the "Draft Instrument on the carriage of goods [wholly or partly] [by sea]" ("Draft Instrument"). 28 The Draft Instrument was the subject of discussion during the Working Group's Twelfth, Thirteenth, Fourteenth, and Fifteenth Sessions, 29 where four additional national proposals, UNCTAD's and the Nordic countries comments, and the provisional re-draft of several provisions were submitted. 30


27. See supra note 20.


Additionally, the Draft Instrument is still being considered by CMI. Specifically, the IS-C has met twice since the submission of the CMI Draft to UNCITRAL. In addition, CMI organized a Colloquium in Bordeaux in June 2003, where one of the sessions focused on the Draft Instrument. Furthermore, the Draft Instrument’s provisions were discussed during the 38th International CMI Conference held in Vancouver in June 2004.


II. The Intended Door-to-Door Scope of Application of the Draft Instrument and “Through Transport” Contracts

As far as the sphere of application of the Draft Instrument is concerned, the Draft Instrument purports to cover multimodal/door-to-door transport operations provided that the carrier undertakes to perform at least a sea leg.\textsuperscript{34} At this point, it is worthy to mention that the Working Group’s original mandate covered only port-to-port transport operations, as the idea of the Draft Instrument was originally conceived in order to harmonize maritime cargo regimes.\textsuperscript{35}

The Working Group had, nonetheless, the discretion to study the desirability and feasibility of door-to-door operations, or certain aspects of those operations, and depending on the results of those studies, to propose to the UNCITRAL an appropriate extension of its mandate.\textsuperscript{36} The Working Group made use of this discretion and examined the scope of application of the Draft Instrument during the Ninth Session of the Working Group, where there was a strong debate regarding whether the Draft Instrument should be confined to port-to-port operations or whether it should encompass door-to-door operations.\textsuperscript{37}

Notwithstanding the expressed objections, the Working Group proposed the extension of the Working Group’s original mandate in order to consider door-to-door transport and establish a regime that would resolve any possible conflict between the Draft Instrument and the regimes that apply to land legs, if such legs precede or follow the sea carriage.\textsuperscript{38} Subsequently, the UNCITRAL Commission approved the working assumption that the Draft Instrument should govern door-to-door transport operations.\textsuperscript{39} Nevertheless, the Commission decided that the extended working assumption should be reconsidered, after the discussions of the substantive provisions of the Draft Instrument, which will result in a more complete understanding of their functioning in a door-to-door context.\textsuperscript{40}

However, the intended door-to-door scope of application of the Draft Instrument is subject to several exceptions, as provided for in Articles 7.2-3 (definition of the place and time of receipt and delivery of the


\textsuperscript{35} Ninth Session Working Group Report, supra note 20, at 6, para. 14.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 9, para. 26.

\textsuperscript{38} Id. at 11, para. 32.

\textsuperscript{39} 57th Session of UNCITRAL General Assembly, supra note 34, at 36, para. 224.

\textsuperscript{40} Id.
goods), 41 Article 8 (carriage preceding or subsequent to sea carriage), 42 and Article 9 (mixed contracts of carriage and forwarding, also named "through transport" contracts). 43 This article will focus on Article 9 on "through transport" contracts, under which the carrier and the shipper may agree that the carrier, acting as an agent of the shipper, will arrange the performance of a transport leg or legs by other carrier or carriers. 44

Specifically, Draft Instrument Article 9.1 provides that: "[t]he parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers." 45 Thus, it makes clear that mixed contracts of carriage and forwarding, which have become customary practice in the liner trade, are legitimate. 46

In addition, Article 9.2, which provides for the carrier's obligations, when acting as a freight forwarder, 47 reads as follows: "[i]n such event the carrier shall exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract." 48

Article 9 is similar to Hamburg Rules Article11.1, under which a carrier may contract out specified part of the carriage covered by contract of carriage, provided that such part is to be performed by a named person other than the carrier and that such agreement is included in the contract of carriage. 49 In such a case, the carrier is not liable for loss, damage, or delay in delivery caused by an occurrence, which takes place while the goods are in the charge of the actual carrier during such part of the carriage. 50 However, for the sake of the protection of the shipper, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21. 51

Nevertheless, Hamburg Rules Article 11.1 and Draft Instrument Article 9 are not identical. First, Draft Instrument governs cases where the

41. Draft Instrument, supra note 1, at 17, art. 7.
42. Id. at 18, art. 8.
43. Id. at 19, art. 9.
44. Id.
45. Id.
46. UNCITRAL Preliminary Draft, supra note 18, at 23-24, paras. 57-58.
47. See Draft Instrument, supra note 1, at 19, art. 9.
48. Id.
50. Id.
51. Id. at art. 21.
carrier, acting as a freight forwarder, arranges carriage by another carrier and provides for its obligations; while under Hamburg Rules, the carrier does not undertake such responsibilities. Second, Hamburg Rules regard such agreements as invalid if the shipper will be deprived of its right to institute judicial proceedings in a competent court. On the contrary, the Draft Instrument does not contain such a safeguard.

This article purports to argue for the necessity of the regulation of through transport, as well as for the incorporation of a general provision on due diligence of the carrier when acting as a freight forwarder.

III. The Evolution of Article 9

As far as the evolution of Article 9 is concerned, mixed contracts of carriage and freight forwarding were first regulated in the CMI Draft Outline Instrument at Article 3.2(b) and the Revised CMI Draft Outline Instrument at Article 4.2(b).\footnote{See CMI Draft Outline Instrument, supra note 11, at ch. 3.2(b); Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.2(b).} However, none of the above mentioned provisions required an express agreement between the carrier and the shipper. In addition, both drafts used the words “contract out specified parts of the carriage to a third party, thereby limiting the scope of the contract” instead of “arrange carriage by another carrier or carriers” as used in the Draft Instrument.\footnote{See CMI Draft Outline Instrument, supra note 11, at ch. 3.2(b); Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.2(b), cf. Draft Instrument, supra note 1, at 19, art. 9.} Moreover, they provided that, if a negotiable document was issued, the contracting out agreement should be incorporated in the document.\footnote{CMI Draft Outline Instrument, supra note 11, at ch. 3.2(b); Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.2(b).}

Furthermore, the current version of Article 9.2 was proposed as Alternative II in both CMI Draft Outline Instrument at Article 3.3 and Revised CMI Draft Outline Instrument at Article 4.3. The only differences between Alternative II and current Article 9 was that the previous drafts used the word “third party” instead of “other carrier,” “customary terms” rather than “usual and normal terms,” and “reasonably necessary or desirable” instead of “reasonably required.”\footnote{See CMI Draft Outline Instrument, supra note 11, at ch. 3.3; Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.3; cf. Draft Instrument, supra note 1, at 19, art. 19.}

On the other hand, Alternative I was a very detailed provision that imposed six separate obligations on the carrier when acting in the capacity of shipper’s agent.\footnote{Revised Draft Outline Instrument, supra note 13, at 360-61, art. 4.3(alt. I). Specifically, Alternative I provided that the carrier should: (a) conclude a contract with such third party on the terms that are customary for the

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\footnote{See CMI Draft Outline Instrument, supra note 11, at ch. 3.2(b); Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.2(b).}
the CMI Draft Outline Instrument and UNCITRAL Preliminary Draft Instrument adopted the current version in Article 4.3, which was also repeated in the last version of the Draft Instrument in Article 9.2.58

IV. The Debate Over the Necessity of Article 9

The necessity of the incorporation of Article 9 in the Draft Instrument has been the crux of debate since the beginning of this project.59 The issue of whether through transport should be permitted was first raised in the Singapore Conference, in February 2001,60 where no widespread support was expressed for ruling out through transport.61 On the contrary, there was general support for the transport documents including safeguards and clearly providing for the limits on the carrier’s freedom to enter into transport contracts when acting as an agent for the shipper.62 This issue was raised once again in the CMI Consultation Pa-


58. Revised Draft Outline Instrument, supra note 13, at 360, art. 4.3 (alt. II); cf. Draft Instrument, supra note 1, at 19, art. 9.2.


60. Singapore I Agenda Paper, supra note 10, at ch. 2.3.


62. Id.
per,\textsuperscript{63} as well as during the Ninth Session of the UNCITRAL Working Group on Transport Law.\textsuperscript{64}

In fact, as none of the existing transport conventions regulate the customary practice of mixed contracts of carriage and freight forwarding,\textsuperscript{65} a provision like Article 9, that strikes a fair balance between the carriers' and the shippers' interests is indispensable.

Specifically, in the light of the application of the Draft Instrument to carriage precedent or subsequent to the sea carriage, Draft Instrument Article 9 accommodates the carriers' interests as it allows them to arrange transport by other carriers.\textsuperscript{66} Thus, carriers are free to contract out transport legs they are not in charge of or do not perform.

As a balance to such a carrier's right, the Draft Instrument sets forth safeguards for the protection of shippers, such as the requirement of express agreement for the exclusion of specified parts set forth in Article 9.1.\textsuperscript{67} This requirement protects shippers from abusive practices as mixed contracts of carriage and freight forwarding are valid only if they are a considered and are a mutual decision of the parties.\textsuperscript{68} Hence, despite arguments to the contrary,\textsuperscript{69} the requirement of express agreement bans carriers from taking advantage of Article 9 in order to limit the scope of their liability to the parts of transport they actually perform. And, even if carriers might attempt to take advantage of this possibility, as carriers and shippers are not negotiating on an equal bargaining power, carriers will not have the power to impose such an agreement given that standardized through transport contracts are null and void.

Nevertheless, it may be argued that Article 9 should be deleted, as through transport contracts undermine the intended door-to-door/multimodal scope of application of the Draft Instrument. The reason is that carriers and shippers may exclude part or parts of any transport operation that would otherwise fall into the scope of application of the Draft Instrument.\textsuperscript{70}

\textsuperscript{63} Consultation Paper, supra note 14, at 379-80; see also CMI Synopsis of Responses, supra note 15, at 418-31.

\textsuperscript{64} Ninth Session Working Group Report, supra note 20, at 15, para. 42; see also Revised Preliminary Draft, supra note 21, at 19, paras. 45-46.

\textsuperscript{65} See, e.g., Ninth Session Working Group Report, supra note 20, at 15, para. 42; CMI Synopsis of Responses, supra note 15, at 427-28 (BIMCO's and ICS' Responses to the CMI Consultation Paper).

\textsuperscript{66} Draft Instrument, supra note 1, at 19, art. 9.1.

\textsuperscript{67} Id.

\textsuperscript{68} See Ninth Session Working Group Report, supra note 20, at 15, paras. 41-42.

\textsuperscript{69} See, e.g., Revised Preliminary Draft, supra note 21, at 18-19, para. 45; Ninth Session Working Group Report, supra note 20, at 15, para. 41; CIFA Submission to Transport Canada, supra note 59, at 10.

\textsuperscript{70} See CIFA Submission to Transport Canada, supra note 59, at 6. It is argued that by legitimizing the current "balkanization of through contracts" Article 9 re-affirms the tackle-to-
However, though inconsistent with the scope of application of the Draft Instrument, such a provision is indispensable as it promotes the applicability of the Draft Instrument. Absent such a provision, Article 88.1 would have not permit through carriage. In particular, any agreements for through carriage would have been null and void as they limit the carrier’s obligations under the Draft Instrument. Therefore, the contracting parties would have overcome this obstacle by entering into separate contracts of carriage governed by the relevant international conventions and contracts of freight forwarding. They would not have entered into a multimodal transport contract covered by the Draft Rules. Thus, it is evident that such practices would have undermined the application of the Draft Instrument in general, and, accordingly, would have deprived the cargo interests from the Draft Instrument’s safeguards.

In addition, it is argued that Article 9 may not accommodate the need of the continuous documentary cover throughout the voyage. The documentary cover is required by the contract of sale, and the Uniform Customs and Practices (“UCP”) 500, the set of rules that govern the majority of letter of credit transactions. The reason is that carriers will not be liable for the entire transport operation, and therefore, the transport document they issue may disclaim their responsibility after the end of the performance of their duties.

Specifically, even in cases where the sales contract expressly allows transshipment, the tender of a bill of lading or transport document that disclaims the carrier’s responsibility after transshipment, as may happen in the case of Article 9, will constitute bad tender since it does not comply with the requirement for continuous documentary cover. On the contrary, the tender of such a bill of lading or transport document in cases

tackle period of responsibility of the Hague Rules, whereas the whole premise of a multimodal convention is to modernize the outdated Hague Rules and to provide a new regime for before loading and after discharge activities. Id. (borrowing the term “balkanization of through contracts” from William Tetley, Marine Cargo Claims 925 (1988)).

71. Draft Instrument, supra note 1, at 71-72, art. 88.
73. CHARLES DEBATTISTA, THE SALE OF GOODS CARRIED BY SEA § 7-14, at 141 (2d ed. 1998); Hansson v. Hamel & Horley, Ltd., 2 A.C. 36 (H.L. 1922) (ruling that in the case of a CIF Kobe/Yokohama sale of cod, the seller breached its duty for continuous documentary coverage because the tendered bill of lading did not cover the first leg).
74. Revised Preliminary Draft, supra note 21, at 19, para. 46.
75. DEBATTISTA, supra note 58, §§ 7-30 to -31, at 152-53; See also Landauer & Co. v. Craven & Speeding Bros., 2 K.B. 94 (1912) (holding that in the case of a CIF London sale of hemp, the tendered bill of lading that did not cover the first sea leg from Manila to Hong Kong did not conform with the requirement for continuous documentary coverage); Holland Colombo Trading Soc’y Ltd. v. Segu Mohamed Khaja Alawdenn, 2 Lloyd’s Rep. 45 (P.C. 1954) (concluding that a bill of lading containing a transshipment clause that does not provide for continuous documentary coverage, constitutes a bad tender under a C.I.F. contract); Hansson, 2 A.C. 36 (H.L. 1922).
where the sale contract is silent as to transhipment will be valid only if the transhipment has not taken place at the time of the tender.\textsuperscript{76}

In addition, in the case of ocean carriage, UCP 500 Articles 23(c) and 24(c) provide that, unless the credit prohibits transhipment, banks will accept a bill of lading or a non-negotiable sea waybill stating that the goods will be transhipped if the entire transport operation is covered by one same bill of lading or non-negotiable sea waybill.\textsuperscript{77}

Similarly, according to UCP 500, Articles 23(d)(i) and 24(d)(i), if the credit explicitly bans transhipment, banks will accept a bill of lading or a non-negotiable sea waybill indicating that the cargo shipped in containers, trailers, and/or lash barges will be transhipped, only if such transport documents provide for continuous documentary coverage.\textsuperscript{78}

On the contrary, under UCP 500 Articles 23(d)(ii) and 24(d)(ii),\textsuperscript{79} the bank will also accept such documents if they contain clauses that vest the carrier with the liberty to tranship, irrespective of whether the carrier assumes responsibility for the entire carriage.\textsuperscript{80}

Moreover, if the transport operation is multimodal, according to UCP 500 Article 26(b),\textsuperscript{81} the tender of a multimodal transport document indicating that the goods will or may be transhipped is valid, irrespective of what the letter of credit says about transhipment, only if the entire transport operation is covered by one document.\textsuperscript{82} In contrast to sea transport operations, such a document should impose responsibility for the entire multimodal transport operation on one carrier even though this document provides for the carrier’s liberty to tranship.\textsuperscript{83}

Thus, the carriers may overcome the obstacle of the continuous documentary coverage under UCP in cases of sea transport if they issue bills of lading or non-negotiable sea waybills that reserve to the carrier the right to tranship.\textsuperscript{84}

In addition, carriers may overcome all of the above obstacles by issu-

\textsuperscript{76} Soproma S.p.A. v. Marine & Animal By-Products Corp., 1 Lloyd’s Rep. 367, 388-9 (Q.B. 1966). Compare DEBATTISTA, supra note 58, § 7-32, at 153 (arguing that the validity of such a tender depends on whether the transport documents “offer, at the time of the tender, the prospect of continuous cover whether or not the liberties contained therein are exercised”).

\textsuperscript{77} INTERNATIONAL CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) (citing UCP 500 Rules arts. 23(c) & 24) [hereinafter ICC UNIFORM CUSTOMS].

\textsuperscript{78} Id. at arts. 23(d)(i), 24(d)(i).

\textsuperscript{79} Id. at arts. 23(d)(ii), 24(d)(ii).

\textsuperscript{80} DEBATTISTA, supra note 73, § 7-33, at 155.

\textsuperscript{81} ICC Uniform Customs, supra note 77, art. 26(b).


\textsuperscript{83} Id.

\textsuperscript{84} ICC Uniform Customs, supra note 77, at arts. 23(c)-23(d)(ii), 24(c)-24(d)(ii), 26(b).
ing through bills of lading that cover the entire transport operation.\textsuperscript{85} In particular, the carrier may sign such a bill of lading on his behalf for the part of the transport operation he undertook to perform and as an agent on behalf of the other carrier(s), making clear that he signs as an agent for the other carriers severally and not jointly.\textsuperscript{86} Needless to say, the fact that he also acts as an agent for the shipper will not be a problem as freight forwarders may act as agents for the shipper and the carrier simultaneously.\textsuperscript{87}

Despite the arguments to the contrary, Article 9 is an indispensable provision that regulates a customary practice by producing a fair balance between the carriers and shippers' interests.

V. Focused Analysis of Article 9-The Shipper’s Safeguards

A. The Preconditions for the Validity of Through Transport Contracts Set Forth in Article 9.1

Since there was general support that the Draft Instrument should clearly provide for safeguards against abusive practices,\textsuperscript{88} Article 9.1 provides for the shippers’ protection by setting forth the preconditions for the validity of such mixed contracts of carriage and forwarding.\textsuperscript{89}

Specifically, Article 9.1 provides that any agreement for contracting out should be “express,” refer to a specified part or parts of the transport of goods, and be included in the contract of carriage.\textsuperscript{90} Thus, it should be further examined what such an “express agreement” means, as well as the scope of the specified parts of the contract of carriage a carrier can arrange to be performed by another carrier.

As far as the first issue is concerned, the phrase “expressly agree” implies that such an agreement should be more than a pre-printed clause in the standard terms and conditions in the fine print on the back of a transport document or its electronic equivalent.\textsuperscript{91} In fact, there should be some indication that such an agreement was discussed between the parties and that all contracting parties have indeed consented to the agree-

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\textsuperscript{86} Id.
\textsuperscript{88} Singapore II Report, supra note 12, at 183; CMI Synopsis of Responses, supra note 15, at 419 (Denmark’s response to the Consultation Paper).
\textsuperscript{89} Draft Instrument, supra note 1, at 19, art. 9.1.
\textsuperscript{90} Id. See also Report of the Sixth I-SC Meeting, supra note 16, at 319; CMI Synopsis of Responses, supra note 15, at 419 (Denmark indicated that the most important safeguard is that the contract clearly provides for through transport and clearly defines that part of the carriage, which is contracted out and that part which the carrier only arranges carriage as agent for the shipper).
\textsuperscript{91} See Draft Instrument, supra note 1, at 19, art. 9.1.
ment.\textsuperscript{92} Moreover, such an agreed term should be stated separately on the transport document or electronic record, for instance, in a separate box on the face of the bill of lading like the declarations of higher value of the cargo in order to avoid package limitations of the transport conventions.\textsuperscript{93}

However, it is argued that the requirement for express agreement may not provide for adequate protection of the cargo interests against abusive practices since their protection basically depends on the interpretation of the terms “expressly agree” and “specified part” the national courts will adopt.\textsuperscript{94} The reason is that in legal terminology, the words “express agreement” indicate explicit mention of a term in the contract and, therefore, covers all of the small printed clauses usually contained on the reverse of a bill of lading.\textsuperscript{95}

In addition, it is noted that even if a more restrictive interpretation was adopted, a pre-printed clause or box on the face of the transport document stating “it is expressly agreed that in respect of any segment of the transport not carried out on a vessel under the carrier’s management and control, the carrier shall act as freight forwarding agent only” may arguably fulfil the preconditions set out in Article.9.1.\textsuperscript{96}

In reply to these concerns, it must be pointed out that since through transport is customary practice, the Draft Instrument’s approach that outlaws boilerplate transport clauses\textsuperscript{97} is the best safeguard that could be provided by the Draft Instrument.

At this point, it is worth mentioning that, unlike its first two versions,\textsuperscript{98} the Draft Instrument does not expressly provide that if a negotiable transport document is issued, such document shall reflect any agreement for contracting out specified part or parts of the contract of carriage. It only indicates in a note following UNCITRAL Preliminary Draft Instrument, Article 4.3, now Article 9, that if a transport document or an electronic record is issued, then such a document or record should reflect such an agreement in order to protect third parties that rely on its content.\textsuperscript{99}

However, for certainty and clarity reasons, the text of the Draft Instrument itself should set the incorporation of the express agreement for

\textsuperscript{92} See id.

\textsuperscript{93} Revised Preliminary Draft, supra note 21, at 18-19, para. 45.

\textsuperscript{94} Id.

\textsuperscript{95} Id. at 19, para. 45.

\textsuperscript{96} Id.


\textsuperscript{98} CMI Draft Outline Instrument, supra note 11, at ch. 3.2(b); Revised CMI Draft Outline Instrument, supra note 13, at 360, art. 4.2(b).

\textsuperscript{99} UNCITRAL Preliminary Draft, supra note 18, at 24 n.58.
mixed contracts of carriage and forwarding in any issued transport document or electronic record as a precondition for the validity of such agreements.

As far as the second issue is concerned, the scope of the specified parts of the contract of carriage a carrier can arrange to be performed by another carrier, the Draft Instrument does not clarify how the excluded parts of the carriage should be specified, and thus, litigation may entail on this issue. It can be argued that these parts can be indicated very generally, for instance, any segment of the transport not carried out on a vessel under the carrier's management and control.\textsuperscript{100}

Nevertheless, the excluded parts of the carriage should be specified more strictly, for example, transport from Paris to Rotterdam. The reason is that the cargo interests, as well as third parties that buy the cargo while \textit{in transito}, will be better protected from abusive practices if it is agreed at the time of the conclusion of the contract of carriage which specific parts the carrier, acting as an agent for the shipper, will arrange to be performed by other carriers.

Moreover, the wording of Article 9.1 leads to the following conclusions. First, the carrier can only agree with the shipper that he, as shipper's agent, will arrange part or parts of the carriage and not that the entire transport will be carried out by other carriers.\textsuperscript{101} If the "carrier" could contract out the entire transport, then he would act only as a freight forwarder and not as a carrier. Since he would not have undertaken to carry the cargo the Draft Instrument would not apply.\textsuperscript{102}

Similarly, the carrier when acting as an agent, cannot agree that he will arrange all maritime legs to be performed by other carriers. Under Article 1(a)-(b), a carrier has to undertake to carry the goods wholly or partly by sea, and, thus, the Draft Instrument applies only if he undertakes to perform at least one sea leg.\textsuperscript{103}

Finally, it should be pointed out that the Draft Instrument does not explicitly provide for the consequences of the carrier's failure to meet the above mentioned preconditions. However, it is implied that, in such a case the agreement for through transport will have no effect and that the carrier will be liable as a carrier under the Draft Instrument for the entire transport operation.

B. The Obligations of the Carrier Under Article 9.2

The second set of the shippers' safeguards is set forth in Article 9.2

\textsuperscript{100} Revised Preliminary Draft, supra note 21, at 18-19, para. 45.

\textsuperscript{101} See Draft Instrument, supra note 1, at 19, art. 9.1.

\textsuperscript{102} \textit{Id.} at 8, art. 1(a)-(b); 19, art 9.1.

\textsuperscript{103} \textit{Id.} at 8, art. 1(a)-(b).
that sets out the carrier's obligations when acting as an agent for the shipper. While drafting Article 9.2, the drafters faced the dilemma of whether the Draft Instrument should include a set of relatively detailed provisions, or whether, it should provide for a more generally worded due diligence obligation.\footnote{\[104\]}

This dilemma was reflected in the first two drafts that contained two alternatives. Alternative I contained six very detailed obligations, and Alternative II was drafted more generally.\footnote{\[105\]} The drafters raised this issue in the CMI Consultation Paper, where widespread support was expressed for Alternative II as it is similar to the current Article 9.2.\footnote{\[106\]} The main concern about Alternative I was that it contained too many self-evident, ambiguous, or controversial terms that would entail unnecessary litigation.\footnote{\[107\]}

Following these comments, the drafters adopted Alternative II, which imposes on the carriers three main obligations: the obligation to exercise due diligence in selecting the other carrier, the obligation to conclude the contract with such other carrier on usual and normal terms, and the obligation to do everything that is reasonably required to enable such other carrier to perform duly under its contract.\footnote{\[108\]}

Under its first obligation, a carrier should select the carrier or carriers that will perform the transport operation with due care.\footnote{\[109\]} It is evident that this obligation is drafted very vaguely since it does not specify the qualities of the other carrier, for instance, whether the carrier should be diligent, reasonable, or reputable.\footnote{\[110\]}

However, since every freight forwarder has the obligation to select qualified personnel,\footnote{\[111\]} the relevant case law may be of guidance in order

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\footnote{104. {\em Singapore I Agenda Paper, supra note 10, § 2.3, at 115; CMI Consultation Paper, supra note 14, at 380.}}

\footnote{105. {\em CMI Draft Outline Instrument, supra note 11, at ch. 3.3; Revised CMI Draft Outline Instrument, supra note 13, at art. 4.3.}}

\footnote{106. See {\em CMI Synopsis of Responses, supra note 15, at 419-24 (includes favorable responses to Alternative II by Denmark, France, Germany, Japan, Netherlands, Norway, Sweden, United Kingdom, United States, BIMCO, CS, Institute of Chartered Shipbrokers). Germany stated "[t]he exercise of due diligence appears to be a sufficient standard of responsibility if through transport is legitimated by an explicit agreement between the contracting parties." Id. at 419. In favor of Alternative I was Italy, Peru, and Switzerland. Id. at 420-24.}}

\footnote{107. See id. at 419 (responses of Denmark & Germany).}

\footnote{108. {\em Draft Instrument, supra note 1, at 19, art. 9.}}

\footnote{109. Id.}

\footnote{110. {\em Revised Preliminary Draft, supra note 21, at 18-19, para. 46.}}

to determine when a carrier, acting as a freight forwarder, fulfills this obligation. Accordingly, under the current case law, a carrier will not be guilty of a *culpa in eligendo* if he hires a reputable carrier. For instance, a carrier will fulfill this obligation if he arranges rail transport with a rail carrier he has hired several times in the past and was satisfied with its services. In fact, a reputable carrier will usually be a diligent carrier since its good reputation depends on the diligent performance of his duties.

In addition, the carrier shall conclude the contract with the other carrier on usual and normal terms. At this point, it should be noted that the first two CMI Drafts employed the phrase “customary terms,” which were replaced with the current wording because of the peculiar meaning of this term in English law.

The wording of this obligation has raised several concerns since it is not clear what “usual and normal terms” are, as well as what does “normal” mean beyond “usual.”

Therefore, it was proposed that Article 9.2 should be redrafted in order to provide that a carrier should conclude the contract of carriage with the new carrier on “usual terms,” like the Cost, Insurance, and Freight (“C.I.F”) seller under International Commercial Terms (“IN-COTERMS”). Thus, the test applied is whether the contract of carriage is in accordance with the usage and practice in the trade to carry

112. Consol. Int'l. Corp. v. S. S. Falcon, 1982 U.S. Dist. LEXIS 9683, at *17 (S.D.N.Y. 1982) (holding that the freight forwarder was not negligent in hiring a reputable trucking firm, that had been used by both parties hundreds of times before); Gov't of the United Kingdom of Great Britain and Northern Ireland v. Northstar Servs., Ltd., 1 F. Supp. 2d 521, 526-27 (D. Md. 1998) (concluding that the freight forwarder had satisfied its contractual obligation to use reasonable care in selecting a trucking company to transport shipper's degaussing range, and thus was not liable for damage shipment sustained when it struck overpass while on back of truck, where forwarder relied on recommendations of steamship companies who entrusted their own cargo to trucking company and which required trucking company to have adequate insurance, forwarder had used trucking company numerous times in past and was satisfied with company's services). A carrier will breach this obligation of reasonable care if he hires a carrier he does not know without taking some of the recommended precautions, such as checking the driver license of the driver, obtaining his name and address and communicating with the owner of the transport mean. See, e.g., Gillette Indus. Ltd., v. W. H. Martin, Ltd., 1 Lloyd's Rep. 57, 61, 64-65 (C.A. 1965) (concluding that where the freight forwarder hired a hauler from a lorry pool, without taking the above mentioned precautions, the freight forwarder was negligent in selecting the carrier, but was exonerated on the basis of an exclusion clause in his trading conditions).


114. Draft Instrument, supra note 1, at 19.

115. CMI Draft Outline Instrument, supra note 11, at ch. 3.3; Revised CMI Draft Outline Instrument, supra note 13, at art. 4.3.


117. Revised Preliminary Draft, supra note 21, at 19, para. 46.

118. Id.
goods of the contractual description shipped from and to places under a contract of carriage such as that in question.\textsuperscript{119}

It was also suggested that Article 9.2 should provide that the carrier should arrange for the transport by the other carrier according to the mandatory provisions of the international transport convention that apply to the specific contracted out part.\textsuperscript{120}

Among the above proposed approaches, the last one is preferable as it prevents litigation with respect to the terms the carrier should conclude with the other carrier in order to fulfil this obligation.

Lastly, the carrier has the obligation to facilitate the carrier he has contracted with by doing everything that is reasonably required to enable such other carrier to perform duly under its contract.\textsuperscript{121} For instance, a carrier will fulfil this obligation by informing the other carrier about the nature, size, and value of the shipment\textsuperscript{122} or about special needs of the cargo, such as refrigeration, provided that the consignor has advised him of any the need for special handling of the cargo based on the cargo’s inherent characteristics.\textsuperscript{123}

Article 9.2 raises the issue of whether the list of the obligations is exclusive. As drafted, Article 9.2 gives the impression that the carrier bears only the obligations stated therein.\textsuperscript{124} However, a freight forwarder is also charged with other duties, such as the general duty to exercise reasonable skill and care,\textsuperscript{125} the duty of obedience to principal,\textsuperscript{126} the duty to act with reasonable dispatch,\textsuperscript{127} to keep its principal informed,\textsuperscript{128} and to account to his principal.\textsuperscript{129} Therefore, it was suggested that the contracting parties should be free to determine the scope of the carrier’s duties and that Article 9.2 should apply as a default rule only in the absence of such agreement.\textsuperscript{130}

However, a preferable solution would be the provision for a more

\textsuperscript{119} Sassoon, supra note 85, at 90, para. 93.
\textsuperscript{120} Revised Preliminary Draft, supra note 21, at 19, para. 46.
\textsuperscript{121} See Report of the Sixth I-SC Meeting, supra note 16, at 319. The phrase “reasonable required” replaced the “reasonably necessary or desirable” terms contained in the first two CMI Drafts since it was not clear what these terms meant. Id.
\textsuperscript{122} Northstar Servs., Ltd., 1 F. Supp. at 526-27.
\textsuperscript{124} Draft Instrument, supra note 1, at 19.
\textsuperscript{125} De Wit, supra note 111, at 19, para. 1.25; Cliffe v. The Hull & Netherlands Steam Ship Co., Ltd., 6 Lloyd’s List L. Rep. 136, 137 (C.A. 1921); Tenneco, 1988 WL 156290, at *4.
\textsuperscript{126} Bugden, supra note 111, at 23, para. 2-22; Tenneco, 1988 WL 156290, at *4.
\textsuperscript{127} Bugden, supra note 111, at 23-24, para. 2-23; see also Yates, supra note 111, at 7-34, para. 7.2.7.16.
\textsuperscript{128} Bugden, supra note 111, at 26, para. 2-26.
\textsuperscript{129} Id. at 27, para. 2-28.
\textsuperscript{130} United States Draft Proposal No. 1, supra note 30, at 12, para. 41.
general stated due diligence obligation, which is inherent to the freight forwarding contracts in order to add flexibility to Article 9.2. A good point to start is BIFA clause 24 under which the freight forwarder undertakes to perform its duties with a reasonable degree of care, diligence, skill, and judgment.\textsuperscript{131} Thus, a carrier acting as a freight forwarder should "use such skill and care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the performance of the duties undertaken by him."\textsuperscript{132}

VI. Conclusions

The above discussion showed that the incorporation of Article 9 is indispensable for two reasons. First, Article 9 regulates the customary practice of mixed contracts of carriage and freight forwarding by producing a fair balance between the carrier and the shippers' interests. Second, it promotes the application of the Draft Instrument because, otherwise, the contracting parties would have concluded separate transport contracts in order to circumvent Draft Instrument Article 88.

Nevertheless, there is still a lot of work to be done. Specifically, Article 9 should be revised in order to provide for the incorporation of the express agreement for through transport in any issued negotiable transport. Additionally, Article 9.2 should be also amended to establish a more general stated due diligence obligation. Therefore, Article 9 should be redrafted as follows:

"1. The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of goods the carrier, acting as an agent of the shipper, will arrange carriage by another carrier or carriers. In the event that a negotiable transport document is issued, such document shall on its face reflect any agreement made in accordance with this article.

2. When acting as an agent of the shipper under Article 9.1, the carrier should perform its duties with a reasonable degree of care, diligence, skill and judgment."

\textsuperscript{131} See Yates, supra note 111, at 7-30 to -36/1, para. 7.2.7.

\textsuperscript{132} Id. at 7-30, para. 7.2.7.2. See also Bugden, supra note 111, at 22, para. 2.21 (citing William Bowstead, F.M.B. Reynolds, B. J. Davenport, Bowstead on Agency art. 42 (15th ed., 1985)); Cliffe, 6 Lloyd's List L. Rep. at 137.
How Airport Noise and Airport Privatization Effect Economic Development in Communities Surrounding U.S. Airports

Dan Kramer*

I. INTRODUCTION

With over 1.9 million passengers and more than 38,000 tons of cargo passing through U.S. airports each day, the aviation industry has grown monumentally in its first 100 years.1 A recent study by the U.S. Department of Transportation translated what this growth has meant to the U.S. economy. Currently, U.S. airports create $507 billion a year nationwide in total economic activity.2 In terms of jobs, the airline industry employs 6.7 million people, with 1.9 million jobs directly related to airports and another 4.8 million jobs indirectly created in surrounding communities.3 These jobs produce annual wages of $190.2 billion.4 And, with $33.5 billion a year generated in local, state, and federal taxes, private citizens are not the only ones reaping the benefits of the airline industry's growth.5

Despite the financial setbacks suffered due to September 11, 2001

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2. Id.

3. Id.

4. Id. at 7.

5. AIRPORT ECONOMIC IMPACT STUDY, supra note 1, at 7.
and the ensuing soft economy, the U.S. airline industry is poised for further growth. Total U.S. scheduled passenger enplanements, estimated at 683 million for 2001, are expected to top one billion in 2013. This represents a growth of 46% in total system activity, which experts believe will one day require the equivalent of ten new airports similar in size to Los Angeles International or Dallas/Forth Worth International.

The U.S. air cargo market has also expanded over the past decade. Currently, 54% of U.S. exports by volume, and 40% of the world’s cargo by value move by air. This is expected to grow at a rate of 5.3% per year over the next twelve years.

Typically, economic growth leads to increases in passenger and cargo activity. This growth often necessitates airport expansions to prevent congestion and to serve the increased needs of airlines flying through these airports. In light of the U.S. Department of Transportation study showing that for every $1 billion invested in airport development approximately 40,000 to 50,000 jobs are created, with related spending and tax revenue benefits for local, state, and federal governments, this is likely welcome news for growth-oriented municipalities surrounding airports. However, along with the positive economic benefits of airport expansions come environmental concerns for areas neighboring the airports. Of chief concern is airport noise pollution.

According to a U.S. General Accounting Office (“GAO”) survey in the year 2000, noise issues remain the primary environmental concern associated with airports in America. In fact, 58% of airport officials surveyed listed noise impacts as their primary concern versus 24% voicing concern over water quality, and 12% listing air quality as their major concern.

Within these results lies the paradox of airport expansion. Airports have to grow to maintain service levels, and to sustain increased passenger and air cargo demands. At the same time, expansions often lead to

6. Id. at 1.
7. Id.
9. AIRPORT ECONOMIC IMPACT STUDY, supra note 1, at 1.
12. Id. at 11.
increases in noise pollution. Increases in noise pollution can reduce the desirability of the areas that surround the airport, and when an area is deemed "undesirable," population growth and new development curtails. However, if airports are not given the opportunity to grow effectively to meet industry and passenger demands solely because of noise concerns, this may force corporations who rely on airport services to relocate to cities where they can be confident their air transport demands will be met. An exodus of corporations, though a worst-case scenario, is something that no city wants.

Inferring that economic growth is the goal of most cities, it is evident that airports and the surrounding municipalities must work in tandem to create an environment that will benefit both the corporations and the neighborhood residents. It is important that America's aviation system meet the growing demand being placed on it despite the complaints by some airport neighbors. This importance is not just voiced by airline passengers and industries reliant on air cargo, but also by consumers. This latter group includes the people who live in airport areas, because they, like other consumers throughout the country, demand expedient delivery of their goods. They want produce to be delivered fresh, and on-line orders delivered when they want them to the location of their choice. As the demand for expediency grows, so will certain annoyances associated with airport noise. Specifically, increased noise during night hours, as cargo flights are highly prevalent at night so shippers can ship during the last hour of the business day, and customers can receive their goods in the first hour of their business day.

Therefore, while noise is understandably burdensome for many airport neighbors, it is arguable that some of the noise, especially cargo noise, results from activities that directly benefit those who are most upset. When viewed in this light, a strong argument arises that the need for increased air capacity to meet transportation requirements may outweigh the risk associated with curtailing airport activity.

Along with expansion issues, another topic airports are currently grappling with is privatization. Relative to the international trend, U.S. airports have shunned privatization over the past decade. Recently though, the industry has been moving more toward partnerships between

14. See id.
15. Baliles, supra note 8, at 1337.
16. See id.
17. See Zambrano, supra note 13, at 446.
government owners of airports and private management firms. This approach to airport management is thought to offer several benefits to not only the airports and local governments, but to taxpayers and airport users as well. These benefits include improved airport amenities for providers and passengers and increased revenue streams for local and state governments.

This paper offers a snapshot of the impact that airport noise has on economic development in the areas that surround the airport and will attempt to ascertain the effect, if any, airport privatization has on surrounding growth. To do so, it focuses on some of the nation’s busiest airports: Denver International Airport (“DIA”), Dallas/Forth Worth International Airport (“DFW”), Dallas Love Airport, O’Hare International Airport in Chicago, Atlanta’s Hartsfield International Airport, and Pittsburgh International Airport.

II. Health Impacts From Noise Pollution

It is difficult to understand the ramifications of airport noise on economic development unless one comprehends why people are so averse to it. Sound is measured in decibels (“dB”). “The perception of noise doubles in loudness for every 10 dB increase in sound level. An 80 dB sound is perceived to be twice as loud as a 70 dB sound, four times louder than a 60 dB sound, and eight times louder than a 50 dB sound.” To put this into context, 65 decibels, which is the maximum noise many airport monitoring systems allow before they trigger a noise violation, is similar to the amount of noise emitted from a hair dryer. Sixty decibels is the equivalent of a conversation between two people standing one yard away.

People living near the airport complain that airport noise disrupts daily activities including sleep, and interferes with television viewing and conversation. In addition to general discomforts stemming from airport

20. Id.
21. Id.
23. Id.
25. Id.
noise, there are also documented health risks from living in a noise-abundant area. William Paaschier-Vermeer of the Health Council of the Netherlands, found that some of these risks include hearing impairment, and stress related health effects such as hypertension and myocardial infarction. At noise levels above 75 dB, the Environmental Protection Agency cautions that more severe health effects may occur for some portion of the population, including temporary hearing loss. Those who are frequently outdoors are of greatest concern, including young children, and people with outdoor occupations like farming and landscaping.

III. ECONOMIC IMPACT OF AIRPORT NOISE

In addition to physiological effects, airport noise can have economic impacts on areas surrounding the airport as well. A number of studies have examined the relationship between residential housing prices and airport noise, and nearly all demonstrate a significant negative relationship between airport noise and property value. In one study, a survey of real estate brokers and property appraisers indicated a perceived discounted price for single-family and multi-family residential properties in noise-effected areas. A recent study analyzing the effects of airport noise on apartment rental rates in Addison, Texas, located eleven miles outside of Dallas Love Field Airport, indicates that this concept extends to the apartment rental market as well. Apartment rental rates are established by market forces, as well as a number of physical determinants like square feet, number of bedrooms or bathrooms, age, and amenities like underground parking or pools. Location factors are also determinant, including such factors as distance to business centers, schools, or public transportation, services like property management quality, as well as rental concessions or marketing promotions. Taking these factors into consideration, the results of this study illustrate that apartment rental prices contain an average discount of $53.13 per month when located within the 65 dB noise exposure contour compared to similar apartments.

28. Id.
30. Id.
32. Id.
33. See id.
34. Id.
35. Id.
located in noise-absent areas.36

Studies outlining the effects of airport noise on the sales of single-family homes have produced similar results.37 Combining independent studies of Atlanta, Dallas, Reno, St. Louis, San Francisco, and Washington, D.C., and controlling statistically for influences such as the size of house and lot, quality and design of the house, merits of the neighborhood, quality of local schools, neighborhood crime rates, and governmental services, the studies conclude that the effect of airport noise on U.S. property values is between 0.51% and 0.67% per dB, with a weighted-mean of 0.58% per dB.38 On the surface, this does not sound significant, but when stated differently, the noise ramifications become apparent. A 58% decrease in price per increase in dB means that a given property located at 55 dB would sell for about 10-12 percent less if it was located at 75 dB, all other factors being equal.39 This translates to a $200,000 house selling for $20,000 to $24,000 less when located at 75 dB than the same house at 55 dB.40

IV. AIRPORT PRIVATIZATION

As it is clear that airport noise has economic impacts on communities surrounding the airport, the question is whether privatization can mitigate some of these negative effects or can make these negative effects inconsequential for growth and development.

Before the 1980s, airport privatization was largely a theoretical concept. This changed in 1987, when Prime Minister Margaret Thatcher shocked the airline industry by selling the British Airways Authority ("BAA") in an initial public offering of stock.41 The resulting $1.9 billion transaction sparked interest in airport privatization throughout the world.42 Since then, the merits of airport privatization have been debated in every city containing a major commercial airport. The combination of government opposition, the complexity of the airport privatization concept, and the fact that privatization is a relatively new model in practice has stalled the movement towards privatization in the U.S. However, with the benefits slowly emerging in other countries where market-oriented incentives have been introduced through privatization of everything from ownership to airport management to airport services, U.S. airport opera-

36. Id. at 11.
37. Nelson, supra note 22, at 5.
38. Id. at 4, 16.
39. Id. at 16.
40. Id.
41. Sander, supra note 19.
42. Id.
tors are beginning to consider privatization more strongly.\textsuperscript{43}

One aspect of privatization that is causing some U.S. decision makers to reconsider their opposition to the concept is the large sums of money companies are willing to pay to take part in the process. For example, the winning bid for the Argentine airport system, which is projected to generate $20 billion over the 30-year contracted term, requires an annual concession fee to the Argentine government of $171.2 million and infrastructure improvements by the concessionaire of $2 billion.\textsuperscript{44} The winning bid by AGI for a 99-year lease for the Perth Airport in Australia exceeded $500 million,\textsuperscript{45} while the price tag for the privatization of JFK’s international terminal was $1.2 billion.\textsuperscript{46}

So why are companies willing to pay so much for the opportunity to run an airport? In a nutshell, investors believe that the government entities currently running the airports are not operating as efficiently as a private company can by employing a competitive commercial model.\textsuperscript{47} Under the current government ownership model, the goal of airport management is to get planes on and off the ground, move users and cargo in and out of the airport and, whenever possible, cover operating costs.\textsuperscript{48} Under a commercial model, management must largely do the same functions, except that they will also need to increase efficiencies at every level to ensure that the airport runs at a profit, or they will fail produce a return on their large investment.\textsuperscript{49} To accomplish this, a private owner will seek to enhance services in order to maximize all possible revenue sources and cover all costs – goals that are sometimes foreign to public management.\textsuperscript{50}

Aside from the large sums of money governments can receive from selling their airports, airport privatization also offers many benefits to the end users. First, privatization reduces the airport’s reliance on government subsidies. Governments usually have limited capital available for infrastructure improvements.\textsuperscript{51} Privatization offers a way to shift the financing burden for airport infrastructure improvements to the private sector.\textsuperscript{52}

Second, privatization may improve the efficiency and quality of ser-

\textsuperscript{43} Id.
\textsuperscript{44} Powers & Freeman, supra note 18, at 112.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} See Sander, supra note 19.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Powers & Freeman, supra note 18, at 112.
\textsuperscript{52} Id.
sices provided to airlines and passengers. When competitive, private market factors can be utilized to dictate the quality, quantity and price of services, good value for money is often the end result. With privatized airport ownership and operation, the likelihood of free market economic forces existing is arguably greater than under government ownership and operation. This is indicated in studies that have shown that airports privatized through equity divestiture and management contracts have a significantly higher level of passenger responsiveness than government-owned airports. However, it is important to note that because airports are often monopoly service providers, whether government owned or privatized, there is no guarantee that privatization will result in more efficient, higher quality, or lower cost services.

Third, private airport management is thought to dramatically increase revenues from commercial operations such as retail and food services. For example, since operations at the Pittsburgh Airmall were transferred to the British Airports Authority, per passenger retail spending is reported to have increased by 250%. Thus, privatization has been shown to improve airport operations, to the benefit of the private owner and operator, the airport authority, airlines, and the traveling public. When privatization enhances things like airport facilities and airport management services, it is believed that an increase in the number of business and leisure travelers to the airport will result. This passenger increase will, in turn, benefit the general economy in the areas surrounding the airport in the form of increased hotel stays, restaurant visits, and tourist-related activities.

Furthermore, airport privatization can help encourage competition within the airline industry. Besides start-up costs as a barrier to entry, one reason there are relatively few competitors in the airline industry is

53. Id.
54. Id.
55. Sander, supra note 19.
56. Id.
57. Powers & Freeman, supra note 18, at 113.
58. Id. at 114.
60. Powers & Freeman, supra note 18, at 114.
61. Id. at 114-15.
62. See id. at 115.
that fledgling airlines seeking to compete with established airlines have difficulty obtaining gates. Typically, U.S. airports sign long-term gate-lease agreements with the major airlines, assuring a revenue stream to pay off the bonds issued to build the terminal facilities. These long-term agreements often give the airlines what amounts to a veto power over any terminal expansions. By contrast, at most of the 100+ privatized airports around the world, the gates remain under airport company control, and are allocated to individual airlines as needed. At some of these airports, the airline logo signage at each gate is electronic, so it can be changed in moments from one airline’s name to another. With more airlines to choose from, and all of them competing to win business, the U.S. traveler should reap benefits in the form of better service and lower ticket prices.

Finally, privatization can greatly benefit the financiers and banking institutions that invest in the airport. Airports, unlike many other businesses, have a multitude of revenue streams. One stream stems from aviation fees paid by the airlines such as per-passenger facility fees, take-off and landing fees, aircraft parking fees, ground handling fees, and ticket counter and VIP lounge rents. Additionally, there are also commercial revenues such as concession and sales revenues from restaurants, retail stores, and advertising.

On the other hand, airport financing does have its risks. First, a weak economy will ultimately cause airport project revenues to decline if companies cut back on their business travel. Second, war and political unrest in foreign countries can threaten profitability when there is a decline in international business and leisure travel. Third, revenues can be adversely effected by competition from alternative means of transportation. For example, Amtrak Metroliner service improvements from Boston to New York and New York to Washington may threaten the “Shuttle” service of Delta and US Airways. Lastly, the success of an airport privatization can often rest on the extent of government support for the project. A GAO report found that U.S. privatization initiatives

64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. See Powers & Freeman, supra note 18, at 122.
70. Id. at 119.
71. Id. at 119-20.
72. See id. at 120.
73. Id. at 121.
74. Id.
75. Id.
76. Id. at 124.
have a higher chance of success when they have the backing of a committed political leader.\textsuperscript{77}

While the aforementioned benefits of airport privatization are promising, there are detractors of the privatization model. Major airlines, such as Delta, in response to Hartsfield’s potential privatization, have expressed concerns that privatization may lead to higher fees and charges.\textsuperscript{78} However, it is important to note that US Airways, in response to Pittsburgh’s privatization, has supported the idea.\textsuperscript{79} Other aviation entities are equally wary. The International Air Transport Association (“IATA”), commenting on privatizations generally, stated that “[w]e generally support privatization as a way of making airports and air traffic control facilities more efficient, accountable and customer oriented, but converting a public monopoly into a private one does not, of itself, guarantee those advantages.”\textsuperscript{80} Thomas Browne, the Managing Director of the Air Transport Association, which represents major airlines operating in the United States, believes that there are only benefits to privatization when an airport is built by a private developer from scratch, but not when an existing airport transfers from being publicly owned to a private authority.\textsuperscript{81}

Despite these concerns, privatization seems to be a growing trend throughout the world. So why haven’t more U.S. airports followed this route? A major reason is government opposition and industry lobbying. For example, the passage of the Airport and Airway Safety and Capacity Expansion Act of 1987 diminished incentives for private companies looking to invest in U.S. airports.\textsuperscript{82} This act requires that public agencies receiving Federal grants for airport development use revenues generated by a public airport “for the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.”\textsuperscript{83} However, in an attempt by Congress to test the privatization waters, the Airport Improvement Privatization Program (“AIP”) was enacted.\textsuperscript{84} The AIP allows up to five


\textsuperscript{79} Mark Belko, Council Hears Backer, Critics of Airport Authority, Pittsburgh-Post Gazette, Sept. 30, 1999.

\textsuperscript{80} Powers & Freeman, supra note 18, at 115.

\textsuperscript{81} Id. at 116.

\textsuperscript{82} Id. at 116-17.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 117.
airport owners to apply to the FAA for a waiver of the "revenue diversion" restrictions contained in Federal law. In 1989, the Albany County airport in New York became the first AIP applicant, petitioning the FAA for approval to be bought by a private company. The FAA formed a taskforce to address Albany's application. The taskforce deadlocked over the legal and financial feasibilities of the proposed sale and ultimately denied the request.

Other initial applicants, like Brown Field in San Diego, abandoned their efforts after facing similar political opposition and concerted industry lobbying. Overall, the result of the AIP has been a great deal of political debate but little progress, as there seems to be continued skepticism regarding the benefits of privatization, coupled with trepidation by municipalities who are concerned about losing control over their airports.

Privatization in other parts of the world has followed a markedly different path. In the early 1990s, Vienna and Copenhagen airports sold part interests in their airports and contracted out several operations services. Several airports in the United Kingdom have been sold. In 1997, Australia raised more than $2.6 billion through the sale of Melbourne, Brisbane, and Perth airports. Bolivia has successfully implemented long-term lease concessions for its three main airports, and Düsseldorf, Naples, and Rome, have shifted to the private model with sales of proportional ownership.

In total, more than twenty countries have privatized their airports in some manner including Argentina, Austria, Bahamas, Cambodia, Canada, Chile, China, Colombia, Denmark, Dominican Republic, Germany, Hungary, Italy, Japan, Malaysia, Mexico, New Zealand, Singapore, South Africa, and Switzerland. Most have done so by means of equity divestitures, leases and incentive-laden management contracts. In most cases, the results have been favorable, resulting in significantly increased profits and lower operating costs.

85. Id.
86. Sander, supra note 19.
87. Id.
88. Id.
89. Id.
90. Id.
91. Sander, supra note 19.
92. Id.
93. Id.
94. Id.
95. Sander, supra note 19.
96. Id.
97. Id.
V. A LOOK AT MAJOR AIRPORTS THROUGHOUT THE U.S.

After looking at a general perspective of airport noise and privatization, the focus will now shift to how these concepts effect the economic development at specific U.S. airports.

A. DENVER INTERNATIONAL AIRPORT, DENVER, COLORADO

Over 34 million passengers each year contribute to make Denver International Airport the 10th busiest airport in the world.\(^98\) These visitors pour roughly $3.7 billion dollars into the economy each year.\(^99\) Close to 195,000 people are employed by the airport and its tenants, resulting in wages of $6,928,301,000, and economic activity of $16,784,212,000.\(^100\) With Denver's new convention center slated for completion in November 2004, more visitors from more industries are expected to travel through DIA than ever before.\(^101\) As more industry leaders come through Denver for meetings and conventions, it is hoped that the natural beauty and good quality of life Denver boasts will draw companies to relocate to the metro area.\(^102\) These hopes have, in part, led to predictions that by 2025, $85 billion will be spent annually within the 300 square miles surrounding DIA, up 466 % from 2002.\(^103\) Employment is expected to double to 400,000 and population is expected to grow 66 % to half a million.\(^104\)

DIA's location, in northeast metro Denver, is unique in comparison with other airports servicing major U.S. cities. While most major U.S. airports are located in densely populated areas, DIA, in contrast, is located roughly twenty miles outside of downtown Denver in a relatively undeveloped part of the city.\(^105\) This location provides a blank canvas ripe for residential, industrial, and commercial development, because developers have access to hundreds of acres of land.\(^106\) Builders have recognized this opportunity, and development has started to boom in the Northeast metro area, due in large part to efforts by economic development groups like the DIA partnership.\(^107\) According to Julie Bender, CEO of the DIA Partnership, development around DIA has increased


\(^{99}\) Id. at 6.

\(^{100}\) Id.


\(^{103}\) Nasser, supra note 8, at 4.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) See Nasser, supra note 8, at 4.

\(^{107}\) Id. at 4-5.
dramatically since DIA’s inception and will only continue to rise. In a recent USA Today interview she stated, “people are building something that’s equivalent to an entire new city.” Although many throughout Colorado questioned why DIA was placed more than twenty miles from downtown Denver, its location is arguably the primary reason why development has been so successful thus far. Both the vast quantity of available land and the fact that most of the availability is far enough away from the airport means less noise concerns, and lower land costs. Combine these factors with a highway infrastructure that provides relatively easy access to both the airport and downtown Denver, and it is clear why developers have met with so much success thus far.

1. The Inter-Governmental Agreement (“IGA”)

While new development around DIA has met with success, there have been some problems with airport noise-related issues. DIA is a publicly controlled airport, and prior to its inception, Denver and Adams County entered into lengthy negotiations to develop an Inter-governmental Agreement (“IGA”). This resulted in Denver’s annexation of fifty-three acres of land previously owned by Adams County. One of the critical issues in the negotiation was that while Adams County recognized that DIA would “serve as a catalyst for economic development in Adams County”, it had concerns for the welfare of its citizens. From day one of the negotiations, Adams County expressed its desire that the new airport “avoid unacceptable noise levels in surrounding communities.” This desire is spelled out in the IGA paragraph 5.1, entitled “Importance of noise control.” This section states it is important that “Denver recognizes that noise generated by aircraft flight operations constitutes a primary concern of [Adams County] and that [Adams County] will rely on the provisions of this Agreement to make important land use decisions concerning the appropriate location of residential, commercial and industrial developments.” The IGA further states that it is essential that “Denver recognizes that it is vitally important that the design, construc-

108. Id.
109. Id. at 4.
113. See Bd. of County Comm’r of Adams County, 40 P.3d at 33.
114. Id. at 30.
115. Id.
116. Id.
tion and operation of [DIA] result in actual Noise Exposure Levels which conform to the maximum noise levels set forth in the IGA."

To address these noise concerns, Denver and Adams County employed a team of aeronautical and environmental experts to develop Noise Exposure Performance Standards ("NEPS"). Two types of NEPS are defined in the IGA. The Leq(24) grid points – comprised of 101 locations on the north, west, and south sides of DIA, and the 65 Ldn noise contour line – which loosely traces DIA’s runway configuration with protrusions on each side of the compass. If the grid point’s noise level exceeds the standard outlined in the IGA, a Leq(24) violation occurs. A 65 Ldn violation is triggered when a noise level above 65 dB occurs on land outside of the contour line boundary.

To ensure that DIA conformed to acceptable noise levels, a system of fines was established. The system functions as follows: When a class II noise violation occurs (a class II noise violation is any violation that exceeds the NEPS by more than two decibels), the parties must jointly petition the FAA to implement flight procedures to achieve and maintain the NEPS. If the FAA fails to do so, then the City of Denver, as airport proprietor, must impose rules and regulations to maintain the NEPS. If Denver fails to take action, then Adams County may seek a court order to compel Denver to do so. If the court does not order Denver to exercise its authority, the IGA states that Denver must pay Adams County $500,000 in liquidated damages for each violation of the NEPS that is not rectified.

In 1995, the airport’s first year of existence, there were fifty-six Leq 24 grid point violations and six 65 Ldn contour violations. Seven of the Leq 24 violations and one 65 Ldn violation were not cured by the end of the first year of operations February, 28, 1996. When DIA did not rectify these violations Adams County decided to enforce the liquidated damages clause. A judgment by the trial court awarded Adams County $4 million for these eight violations, as well as $1.3 million in pre-judg-

117. Id.
118. Id. at 28.
119. Id.
120. Bd. of County Comm’r of Adams County, 40 P.3d at 28.
121. Id.
122. Id. at 34.
123. Id.
124. Bd. of County Comm’r of Adams County, 40 P.3d at 34.
125. Id. at 29.
126. Id. at 28.
127. Bd. of County Comm’r of Adams County, 40 P.3d at 28.
128. Id.
ment interest. Denver also agreed to pay fines and interest accrued for noise violations from 1996 through 2000. The grand total for five years of noise violations was $40 million.

This judgment was affirmed by the Colorado Court of Appeals in 2001, and Denver’s petition for certiorari was later denied by Colorado’s Supreme Court.

Although the IGA took three years to negotiate, with attorneys and industry experts weighing in on both sides, Denver Mayor John Hickenlooper, has approached Adams County to discuss renegotiating certain aspects of the IGA. One reason for this requested renegotiation is the location of the NEPS monitors. One monitor, with one of the lowest noise thresholds, is located at the edge of an active runway at Buckley Air Force base. Another monitor indicated that DIA violated the agreement on September 12, 2001 – a day when no commercial or private planes were flying whatsoever, due to the terrorist attacks the day before.

At this point though, the likelihood of an amended IGA seems unlikely as there has been resistance to changing the noise parameters from the Adams County city council. In a recent interview, Adams County Commissioner Elaine Valente stated, “to really help out Denver, I’m afraid we would have to do some things we aren’t willing to do.”

Another concern regarding the IGA, is its reliance on the FAA to intercede in disputes by implementing flight procedures. Based on prior history, the likelihood of the FAA imposing flight procedures on DIA is minimal. The Federal Aviation Act of 1958 gave the FAA authority over air safety and the nation’s navigable airspace. The FAA is authorized to “insure the safety of aircraft and the efficient utilization of such airspace” and “for the protection of persons and property on the ground.” Even though a 1968 congressional amendment required the FAA to develop standards to protect the public from aircraft noise, the

129. Id at 29.
131. Id.
133. Id. at 29-30; Vaughan & Patty, supra note 130, at 16A.
134. See Vaughan & Patty, supra note 130, at 16A.
136. Vaughan & Patty, supra note 130, at 16A.
137. Id.
138. See Bd. of County Comm’r. of Adams County, 40 P.3d at 34.
139. See Schlesinger, supra note 26, at 334.
140. Id.
141. Id.
FAA has shown a clear desire to support the economic success of the air transportation system over environmental concerns.\textsuperscript{142} A survey of recent lawsuits against airport operators indicates that the courts have followed suit, and have generally resisted efforts by landowners to recover for noise impacts from government agencies.\textsuperscript{143}

Public policy concerns play a large role in courts' decisions to rule against airports – even in lawsuits brought by sister municipalities. This lesson was learned in \textit{National Aviation v. City of Hayward}, a case taken to the U.S. District Court to determine if a curfew banning all aircraft which exceeded a specified noise level between 11:00 p.m. and 7:00 a.m. was unduly burdensome on the airport.\textsuperscript{144} The court focused on whether the regulation discriminated against interstate commerce, ruling that the burden on commerce must be balanced against the local interests supporting the legislation.\textsuperscript{145} In this ruling, the \textit{Hayward} court relied on the Supreme Court's formulation of this standard: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."\textsuperscript{146}

\textit{The City of Burbank v. Lockheed Air Terminal, Inc.}, also amplifies this analysis.\textsuperscript{147} In this case, the Supreme Court affirmed a decision by the Ninth Circuit Court of Appeals invalidating a municipal noise control ordinance on the grounds that federal law trumped the local ordinance.\textsuperscript{148} The Court held that federal statutes supersede local ordinances when municipalities enact regulations that hamper interstate commerce.\textsuperscript{149}

The ramifications of deciding in favor of the local government makes this ruling particularly important. If municipalities were allowed to dictate when flights can and cannot take off, it would severely limit the flexibility of the FAA in controlling air traffic flow.\textsuperscript{150} The Court foresaw that a weather delay halfway around the world could conceivably cause a flight to miss the curfew at the destination airport.\textsuperscript{151} The airline would then be forced to reroute their passengers or cargo to a municipality with less stringent noise codes, ultimately causing significant scheduling

\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 334-36.
\textsuperscript{144} \textit{Id.} at 336 (citing Nat'l Aviation v. City of Hayward, 418 F. Supp. 417, 418 (Cal. Ct. App. 1976)).
\textsuperscript{145} Schlesinger, \textit{supra} note 26, at 336-37.
\textsuperscript{146} \textit{Id.} at 337.
\textsuperscript{147} City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).
\textsuperscript{148} \textit{Lockheed Air Terminal, Inc.}, 411 U.S. at 639-40.
\textsuperscript{149} \textit{Id.} at 640.
\textsuperscript{150} \textit{Id.} at 639.
\textsuperscript{151} Baliles, \textit{supra} note 8, at 1338-39.
problems for the airline and the entire industry in general.\textsuperscript{152} Thus, the Court has concluded that the FAA could only balance safety and efficiency in the air transportation system when there was uniform system of federal regulations.\textsuperscript{153} This leaves little room for local control.\textsuperscript{154}

2. DIA Noise Mitigation

While the FAA has shown reluctance to interfere with DIA’s flight procedures, the airport has taken commendable strides to combat airport noise under its own volition. The primary weapon used by the Noise Abatement Office in the fight against noise pollution is the Airport Noise and Operations Monitoring System ("ANOMS").\textsuperscript{155} The ANOMS is a computer system designed to monitor aircraft noise at DIA, and to calculate the NEPS values, as defined by the IGA, at 101 points throughout Adams County and at twenty-eight permanent terminals located in the metro Denver area.\textsuperscript{156} The system is capable of matching actual flights with individual noise events and matching noise complaints with individual flight tracks.\textsuperscript{157} Using the data emitted from 347,420 individual flights, DIA analyzes which type of aircraft on which runway at which time of the day is responsible for what level of noise.\textsuperscript{158}

Utilizing this data, DIA developed noise abatement procedures called the Deci-Belle Departure Procedure ("Deci-Belle").\textsuperscript{159} One of the key elements of the Deci-Belle program is the preferential runway and flight track use.\textsuperscript{160} The program includes distinct procedures for daytime hours, from 7 a.m. to 10 p.m., and nighttime hours, from 10 p.m. to 7 a.m.\textsuperscript{161} For instance, only aircraft that have been built with modern noise reduction standards may use certain runways for takeoff at night.\textsuperscript{162} This excludes aircraft that has been deemed "Noise-Critical" including MD80s and re-certificated/hushkitted Boeing 727s, 737-200s, and DC9s.\textsuperscript{163} While some runways may not be used at all for nighttime departures, others may be used for takeoff, but the aircraft must climb on specified headings, generally staying east of the Airport until reaching various specified

\begin{footnotesize}
\begin{enumerate}
\item[152.] See Lockheed Air Terminal, Inc., 411 U.S. at 640.
\item[153.] Zambrano, supra note 13, at 462.
\item[154.] Id.
\item[156.] Id.
\item[157.] Id.
\item[158.] Id.
\item[159.] Id. at 3-3.
\item[160.] See id.
\item[161.] Id.
\item[162.] See id. at 3-4.
\item[163.] Id.
\end{enumerate}
\end{footnotesize}
altitudes or distances. On other runways, nighttime arrivals must turn onto their final approach course outside the outer markers to each runway or at specified minimum distances or altitudes. The noisiest aircrafts are routed to the north or south of DIA before they can begin their turns to the west. This procedure keeps aircraft and related noise well east of the Denver Metropolitan area and away from more heavily populated areas.

To further remedy the effect of noise pollution DIA applied for a $655,000 grant in 2001 to participate in the FAR Part 150 Noise Compatibility Planning Program. This program prescribes systems for, "measuring noise at airports and surrounding areas that generally provides a highly reliable relationship between projected noise exposure and surveyed reaction of people to noise; and ... determining exposure of individuals to noise that results from the operations of an airport." This study also identifies “land uses which are normally compatible with various levels of exposure to noise by individuals. It provides technical assistance to airport operators, in conjunction with other local, State, and Federal authorities, to prepare and execute appropriate noise compatibility planning and implementation programs.”

Additionally, DIA has taken steps to provide noise reduction treatments for residences surrounding the airport. Included in the $40 million settlement with Adams County is a $4 million payout to residents of 250 homes in unincorporated Adams County. People living within two miles of the airport are eligible to receive up to $20,000 to soundproof their homes, while people living farther away get smaller amounts. Fortunately for Denver's coffers, anyone who purchased their home after 1995 will be precluded from suing the airport authority to recover for damages attributable to noise because of the Aviation Safety and Noise Abatement Act of 1979 (“ASNA Act”). The original ASNA Act provided in relevant part:

164. Id. at 3-3.
165. Id.
166. Id. at 3-4.
170. Id.
172. Id.
173. Id.
No person who acquires property or an interest therein after the date of enactment of the Act in an area surrounding an airport with respect to which a noise exposure map has been submitted under section 103 of this title shall be entitled to recover damages with respect to the noise attributable to such airport if such person had actual or constructive knowledge of the existence of such noise exposure map unless, . . . such person can show that—,
(1) a significant change in the type or frequency of aircraft operations at the airport; or
(2) a significant change in the airport layout; or
(3) a significant change in the flight patterns; or
(4) a significant increase in nighttime operations; occurred after the date of the acquisition of such property. . . .

B. DALLAS LOVE FIELD, DALLAS, TEXAS

Contrary to DIA, Dallas Love Field ("DLF") is located in a noise-sensitive area of the city near residential neighborhoods. The federal government cleared the way for this expansion in March 2002, approving their $147 million master plan for upgrading the airport and, in effect, capping flights at the city-owned facility. Dallas recognized early on that the neighborhoods surrounding DLF were essential for providing economic, social and cultural stability for the city, and wanted to develop a plan to protect their quality of life. Especially since residential property values for homes that fall within the average 55 decibel noise contour total $3.9 billion and generate annual property tax revenue of about $100 million.

At the same time, the importance of operating an efficient airport that attracts business to Dallas was readily apparent. The potential increase in flights due to expansion is estimated to generate an additional $1 billion in economic impact totaling $4.4 billion annually. In order to balance these needs, the Dallas City Council officially adopted the Dallas

177. Roy Appleton, Love Field Gets Final OK for Limited Expansion; Master Plan Addresses Traffic, Noise, Pollution; Work to Begin Soon, DALLAS MORNING NEWS, Mar. 7, 2002, at 1A.
178. DLF Noise Committee, supra note 175.
179. Dallas Love Field Master Plan, supra note 176, at 3.
180. Id.
Love Field Noise Control Program in December 1981. Working with consultants, neighborhood representatives, aviation industry leaders, and the FAA, the city of Dallas developed and implemented a voluntary program to responsibly address the noise issue and effectively reduce the adverse impact of aircraft operations at Love Field. Some aspects of this program include:

- A noise abatement advisory committee;
- 24 hour noise complaint recording and investigation; and
- Introduction of the new generation of quieter aircraft into the commercial and general aviation fleets.
- Nighttime Preferential Runway for turbojet aircraft and aircraft weighing over 12,500 lbs.
- Established Channelization Tracks and Altitude Restrictions for Helicopters.
- A prohibition from midnight to 6 a.m. on all maintenance run-ups;
- Probability against training flights between the hours of 10 p.m. and 7 a.m.

The Love Field Master Plan Advisory Committee ("MPAC") believes that advances in aviation technology coupled with these airport procedures will result in the number of people who fall within the high-noise area around the airport (noise levels of 65 decibels or greater) to fall dramatically, even though there are more flights. Predictions are that these effected will drop from nearly 27,000 people in 1998 to fewer than 23,000 in 2010.

C. DALLAS/FORT WORTH INTERNATIONAL AIRPORT, DALLAS, TEXAS

Dallas Love Field is not the only major Texas airport taking significant measures to combat noise pollution. In 1995, DFW averaged forty-two noise complaints per month. Illustrating its resolve to bring this high number down, it is estimated that in addition to the $190 million spent to construct the new runway that opened in October 2003, DFW also spent $150 million in an effort to mitigate noise.

182. Id.
183. Id.
185. Id.
Addison Airport, just outside of Dallas, recently invested $115,000 to develop procedures that reroute airplanes farther south of the airport over industrial property.\footnote{Margaret Allen, \textit{Shhh! Fly Quietly Around Addison Airport}, \textit{Dallas Bus. J.}, June 22, 2001.} In the past, planes veered to the east over residential property to avoid the traffic of DFW and Love Field.\footnote{\textit{Id.}} Addison airport authorities have already seen benefits from these procedures. There were just four complaint calls from January 10 to February 10, 2004, when, in the past, the airport could usually count on as many as eighteen to twenty complaints over a weekend.\footnote{\textit{Id.}}

1. \textit{DFW Economic Development}

If one were to ask DFW airport officials if airport noise has effected economic development around their airport, most would answer "no". Clayton Chamber of Commerce president from Georgia, Steve Rieck would probably agree with their assessment. According to Rieck, DFW is "the poster child of development around an airport."\footnote{Gary Hendricks, \textit{Tale of Two Airports: DFW a Magnet, Hartsfield Penned In}, \textit{Atlanta J. Const.}, May 1, 2000, at B1.} This is high praise, as DFW and Atlanta's Hartsfield International Airport often compete for the same business, and are often compared to one another.\footnote{\textit{Id.}} They are both busy airports that pump billions of dollars into their respective economies.\footnote{\textit{Id.}} However, when it comes to growth in the areas surrounding the airports, the two cities are very different. The best office space in the Dallas/Fort Worth metropolitan area is considered to be directly next to the airport.\footnote{\textit{Id.}} While Hartsfield, with the exception of Delta's national headquarters, is surrounded mostly by distribution warehouses, a few hotels, and Mountain View, a community that was abandoned decades ago due to airport noise.\footnote{\textit{Id.}} Higher end development that attracts white-collar employment has been slow to come to the Hartsfield area.\footnote{\textit{Id.}}

This has led to economic and population stagnation in the areas surrounding Hartsfield relative to DFW.\footnote{\textit{Id.}} For example, from 1990 to 1998, Irving, Coppell, and Grapevine, all cities that surround DFW, saw their populations grow by 23\%.\footnote{\textit{Id.}} During the same period, Forest Park, East
Point, Hapeville, and College Park, which surround Hartsfield, suffered a net population loss of 2%.

Experts believe that a major reason for this disparity is because DFW has a public-private marketing partner, the North Texas Commission, that is financed by local governments and businesses. This entity helps promote relocation to the city and encourages high-end development around DFW. Hartsfield has no such counterpart.

Another reason for the differences between the two airports is the amount of available land around the airports. DFW sits on 18,000 acres, while Hartsfield sits on less than 4,000 acres, and struggles to find room to expand. In Dallas, tracts as large as 12,000 acres have been sold to developers, while Atlanta is surrounded by some of the oldest suburbs in the metro area, making it difficult for Atlanta developers to find even a 100 acre tract to develop. The Las Colinas project is a prime example of what developers in Dallas have accomplished with these large tracts. It contains more than twenty million square feet of office, retail, and industrial space, has 17,000 households, five-star hotels, and four golf courses. The airport noise from its proximity to DFW has not inhibited companies like Microsoft, Nokia, Verizon, Abbot Labs, Kimberly Clark, and ExxonMobil from leasing office space at Las Colinas. On the contrary, Las Colinas actually uses its close proximity to DFW as a marketing tool. When corporate relocation experts and site selectors can point to these high profile corporations as potential neighbors, it makes the area around DFW an easier sell than the areas around Hartsfield. With the area around DFW further boasting a fourteen campus school system of 8,500 students described by Texas Education Agency as exemplary, families are easily convinced that dealing with the airport noise is worth it. A lesson that developers in other cities can glean from DFW is that people may be willing to deal with airport noise when there is so many benefits from living in an airplane’s flight path.

199. See Hendricks, supra note 191.
200. Id.
201. Id.
202. Id.
203. Hendricks, supra note 191.
204. Id.
205. Id.
206. See id.
208. See id. The development is a ten-minute drive from both DFW International Airport and Dallas Love Field.
209. Id.
210. Id.
D. HARTSFIELD ATLANTA INTERNATIONAL AIRPORT, ATLANTA GEORGIA

Located just ten miles from downtown Atlanta, Hartsfield Atlanta International Airport is consistently rated the world’s busiest airport. In 2004, Hartsfield saw more than eighty million passengers walk through its gates. To accommodate these passengers, Hartsfield employs over 55,000 people, 70% of whom work directly for the airlines serving the airport. The other 30% work for entities such as air-freight carriers, ground transportation firms, retail concessions in the airport terminals, or with security firms and skyscrapers. This translates to a total airport payroll of $1.9 billion, resulting in a total annual regional economic impact of over $18 billion.

Poised for future growth, Hartsfield is currently instituting a Master Plan for capital improvement to create a bigger, more user-friendly airport. This $5.4 billion, ten year capital improvement plan will begin with the construction of a new extended fifth runway and a four-gate expansion in the International Terminal. Other improvements include enhanced road and rail access and additional parking facilities. While this capital improvement plan should bring more airport-related jobs to the region, it is also hoped that the updated airport will be a catalyst for economic development for communities surrounding the airport. Specifically, it is hoped that the improvements will attract the white-collar investment that north Georgia’s communities have so far been lacking.

The suburbs surrounding Hartsfield, such as North Clayton, are considered old and rundown, and lacking in the type of commercial and retail infrastructure that typically attracts corporations looking to relocate. Ferdinand Seefried, of Seefried Properties, who has built seven distribution parks around Hartsfield, says that as a result, most of the major com-

213. Id.
214. See id. Hartsfield-Jackson is also a major economic power in the region. It has 55,000 employees right at the airport and another 18,000 personnel who work off-site.
215. Atlanta Excellence, supra note 212.
216. Hendrick, supra note 191.
217. Id.
220. Id.
221. Id.
panies in Atlanta settle in the Georgia 400 corridor because they like being around other corporate headquarters. However, efforts to encourage corporations to reconsider the Hartsfield area are underway in Atlanta. In exchange for an agreement not to block the airport's $5.4 billion expansion proposal, Clayton representatives asked the City of Atlanta for a commitment to help attract high tech jobs to the surrounding communities. As a sign of their dedication to growth, Clayton officials along with taxpayers and local businesses recently put up $28.5 million to start Gateway Village. This is a joint venture between Clayton State University, the Economic Development Authority of Clayton County, the cities of Morrow and Lake City, and the University Financing Foundation. This mixed-use development will encompass 165 acres of property with the potential to be a $110 million plus development designed to offer 500,000 square feet of Class "A" office space, a 200-room high-tech executive conference center, a hotel, student housing, and a multi-modal/passenger rail station.

Gateway Village already has its first two tenants – National Archives and Records Administration's southeast regional headquarters and the Georgia State Archives. According to a press release,

The two archives facilities . . . represent the first such model in the nation to combine both state and federal facilities, providing "one-stop shopping" for archive researchers. The joint facility will be a high tech, state-of-the-art facility with online access to these records.

It is expected that most of the corporations who will converge on Gateway Village will target the technology industry.

Further signs of change in Hartsfield's surrounding communities began in 2000 when McDonough and Clayton Counties received awards of $75,000 and $80,000 respectively by the Atlanta Regional Commission. They were among nine metro communities to get planning money to draw up long-range development plans for their municipality. These awards served to facilitate the creation of the 3,400-acre Southside Harts-
field Redevelopment Plan Area. The vision behind this development is to create a mixed-use, pedestrian community that will not only pay its way with increased tax revenue, but will also provide an enhanced quality of life. The Southside Hartsfield redevelopment plan also hopes to promote the enhancement of the local business community, promote quality development initiatives on the part of local governments, and facilitate improvement of supportive systems for transportation and utilities as well as education, public safety and community development. Implementation of this plan will be financed through a “long-term process of coordinated public-private efforts and investments.”

1. Hartsfield Privatization

Another possible reason behind the disparity between Hartsfield and DFW is that Atlanta’s airport is publicly owned and marketed, whereas DFW is marketed by a public-private organization dedicated to promoting growth in the area. While this is not to say that government officials are not as motivated as private entities to promote growth in the areas surrounding Hartsfield, private entities are often more profit driven than government authorities. Moreover, private business generally recognizes that enhancing growth around the airport will ultimately benefit the airport itself. As discussed supra, under the current government ownership model, the goal of airport management is to get planes on and off the ground, move users and cargo in and out of the airport and, whenever possible, cover operating costs.

However, this may soon change as Hartsfield recently emerged as a possible candidate for privatization under the federal Airport Privatization Pilot Program. This privatization push is spearheaded by the Fulton County Taxpayers Association. In response to Atlanta’s decreased financial strength “no cash reserves, a substantial negative cash balance, and a multi-billion-dollar consent decree on combined sewer overflow” the Taxpayers Association is proposing to lease the airport to a major airport firm to generate new cash flow for the city from lease pay-

231. See Duffy, supra note 229, at JJ-1.
232. ARC's Livable Centers, supra note 229, at 3.
234. Id.
236. See Powers & Freeman, supra note 18, at 114.
237. Id. at 115.
238. Sander, supra note 19.
239. Global Airport Privatization, supra note 78.
240. Id.
ments.\textsuperscript{241} While no decision has yet been made, it is notable that Delta Airlines, the major carrier in Atlanta, and a major tax-payer in Georgia, has opposed the idea.\textsuperscript{242} Furthermore, Georgia has a state law that no foreign-owned company can operate the airport, which greatly diminishes the number of qualified private management companies that could bid on the project.\textsuperscript{243} While this is not an insurmountable hurdle it is clear that evidence that stumbling blocks in the prospective road to privatization may exist.\textsuperscript{244}

2. **Hartsfield Airport Noise**

Growth surrounding Hartsfield has also been hampered by airport noise. In 1975, the City of Atlanta was forced to purchase and relocate the entire Mountain View Community in Clayton County due to the effects of noise.\textsuperscript{245} Purchasing over 2,700 structures and the process of relocating the residents cost the city $171 million.\textsuperscript{246} Since then, the city has paid a further $175 million for acoustical enhancements to more than 10,000 homes and buildings in other communities surrounding the airport.\textsuperscript{247}

As a result, Hartsfield has taken significant measures to mitigate airport noise. In fact, the noise abatement/mitigation program at Hartsfield has been ongoing since 1972, making it one of the oldest programs in the country.\textsuperscript{248} The airport has installed a permanent noise and operations monitoring system ("NOMS") to provide the public information on Hartsfield's operations and address specific community concerns.\textsuperscript{249} This system consists of sixteen permanent noise-monitoring stations, and a direct-connect to the FAA's radar system for the purpose of acquiring flight track information.\textsuperscript{250} The integration of these two systems allows information to be gathered on the movement of aircraft and their corresponding noise emissions over communities surrounding the airport.\textsuperscript{251} Further evidence of Hartsfield's commitment to noise mitigation is the recent rejection of a proposal to build a sixth runway in fear that it would substan-

\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id. at 2.
\textsuperscript{251} Id.
tially increase noise levels and create a significant disruption to local communities.252

E. O’HARE INTERNATIONAL AIRPORT, CHICAGO, ILLINOIS

The city of Chicago is currently embroiled in a debate over the expansion of O’Hare International Airport. Central to the discussions are concerns over possible increases in airport noise, and whether to keep the airport in city hands or to privatize the system.253 Suburban cities opposed to O’Hare’s $6 billion expansion have proposed plans for public-private development of another airport in the southern Illinois suburb of Peotone.254 The private partner in the Peotone project would be a consortium headed by LCOR, a primary player in the development and operation of the $1.2 billion Terminal Four at Kennedy International in New York.255 The $600 million Peotone project has met with strong opposition from Chicago Mayor Richard Daley, who prefers only to expand O’Hare.256 However, other key political figures have lent their endorsement to the idea of both an O’Hare expansion and the development of a third airport in Peotone.257 Representative William Lipinski stated, “[j]ust as expanding O’Hare doesn’t eliminate the need for a third airport, building Peotone won’t replace O’Hare modernization. They’re not mutually exclusive. Both are needed to address serious aviation capacity problems in the region and the nation.”258 Lipinski’s support of the Mayor Daley’s plan, rests in the belief that the new runway configuration will reduce the number of people impacted by airport noise by half, and includes $450 million in city funds for soundproofing surrounding areas.259

Other Illinois politicians and municipalities are not as supportive of the O’Hare expansion plan. Recently, Illinois Senate President Pate Philip, Congressman Henry Hyde, and the Village of Bensenville filed suit to challenge the legality of the agreement between Chicago Mayor Richard M. Daley and Illinois Governor George Ryan to expand

254. Global Airport Privatization, supra note 78.
255. Id.
256. Id.
257. Id.
259. Id.
O'Hare.260 Citizens of the Village of Bensenville, the cities of Elmhurst and Wood Dale, and DuPage County have joined in the opposition to the proposed O'Hare expansion.261 Chicago's dual, triple-parallel runway plan, if implemented, will enable O'Hare to handle up to 1,600,000 flights per year, up from its existing use of 900,000 flights per year.262 With the vast majority of aircraft landing and taking-off in an east-west direction over Elk Grove and portions of Cook and DuPage County, residents fear that Mayor Daley's promises of a decrease in noise will be hard to keep.263 They argue that it is implausible that O'Hare can double their flights while cutting the airport noise by half.264

Another complaint regarding the O'Hare expansion is that it renders town planning obsolete.265 Elk Grove, for instance, was constructed to minimize the impact of the airport by locating industries on the eastern half of the community abutting the airport, while residential neighborhoods were located farther away from O'Hare.266 Town planners then built expressways, highways, and a forest to buffer neighborhoods from existing flight paths.267 As this planning was based on the airport's current configuration, many Elk Grove residents believe that the proposed airport configuration would effectively destroy the quality of life the town planning had ensured.268

The Alliance of Residents Concerning O'Hare ("AreCO"), an organization representing residents from forty-one communities opposes the O'Hare expansion proposal not only because of the potential increase in airport noise.269 They claim that the projected loss of businesses from the government exercising their power of eminent domain will create financial shortfalls for neighboring suburbs.270 It is estimated that the losses to all taxing bodies from businesses forced to leave Elk Grove Village Business Park alone may exceed $20 million.271 It is feared that this loss of tax revenue may have an adverse impact on the governments serv-

261. Id.
263. Id.
264. See id.
265. Id.
266. Id.
267. Id.
268. Id.
270. See id.
271. SUBURBAN O'HARE COMMISSION, Explaining the Facts: O'Hare Expansion Means Sub-
ing northeastern Illinois schools.\textsuperscript{272} In particular, School District 214 which comprised the cities of Arlington Heights, Buffalo Grove, Des Plaines, Elk Grove, Rolling Meadows, and Prospect Heights, and School District 59 serving the children of Arlington Heights, Des Plaines, Elk Grove, and Mount Prospect will be negatively effected.\textsuperscript{273}

1. \textit{O'Hare Noise Mitigation}

In response to citizens' concerns over airport noise, O'Hare has stepped up its noise mitigation program over the past few years. The Noise Commission’s 2002 Annual Report illustrated that twenty-seven of O'Hare’s thirty-one permanent noise monitors reported a 1 dB or greater reduction in aircraft noise levels in 2002 as compared to 2000.\textsuperscript{274} The average among all the monitors was a 2 dB reduction, which is a significant change on the noise scale.\textsuperscript{275} Since 1997, there has been an overall 5 dB reduction in aircraft noise around O'Hare.\textsuperscript{276} The significance of this reduction is evident in the number of residents' complaints to the O'Hare Noise Hotline, which has fallen significantly from a peak of 25,773 calls in 1998 to 5,190 calls in 2002.\textsuperscript{277}

Other indications of O'Hare's commitment to noise reduction can be seen in their soundproofing efforts. To date, eighty schools have been sound insulated at a cost of $198.1 million, and another twenty-three schools are in the construction or design stages, bringing the program expenditure to $234.7 million.\textsuperscript{278} More than 4,700 homes have been insulated at a total cost of nearly $157 million after the completion of the 2003 Residential Sound Insulation Program.\textsuperscript{279}

F. \textbf{PITTSBURGH INTERNATIONAL AIRPORT, PITTSBURGH, PENNSYLVANIA}

In November 1999, the FAA gave Pittsburgh's airport authority the go-ahead to operate the county's two airports, Pittsburgh International

\begin{thebibliography}{99}
\bibitem{272} Id.
\bibitem{273} Id.
\bibitem{275} Id.
\bibitem{276} Id.
\bibitem{277} Id.
\bibitem{278} O'Hare Press Release, supra note 274.
\bibitem{279} Id.
\end{thebibliography}
Airport in Findlay and the Allegheny County Airport in West Mifflin. In 1997, US Airways spent $75 million in rent and landing fees, partly to support the bonds that built the passenger terminal that opened in 1992. This was almost double what US Airways spent on fees at other airports. US Airways believed that privatization would remove the airport from political influences, giving it greater financial independence than government-run agencies, and would provide for more business-like operations by bringing efficiencies in purchasing and operations.

In the debate over privatization, voters were swayed by promises that converting to a privatized airport model would result in a financial boon to the airport system. A goal set by the Aviation Director at the time of the transfer was to cut costs and/or increase revenues by $7.2 million over the first eighteen months. While efficiencies and cost savings have been realized, the overall financial strength of the Pittsburgh airport has been hampered by the financial problems of their tenants. Pittsburgh is learning all too well that a downside of privatization is that project revenues are effected by both operational decisions as well as the financial strength of the airlines utilizing the airport. For example, US Airways, the airport’s primary carrier, recently eliminated all Saturday outbound flights. As a result, overall traffic at Pittsburgh International was down 9.4% for January 2004 (compared with January 2003), marking the first time in four years that less than one million passengers passed through the airport’s terminals. In response to this decline, Fitch Ratings announced that it would keep a negative rating watch in place on the Airport Authority’s $676.2 million revenue bonds, and is unlikely to upgrade their rating in the near future due to the continued uncertainty.


282. Id.

283. Id.

284. Id.


286. Powers & Freeman, supra note 18, at 121-22.


288. Id.
over the future of the US Airways hub at Pittsburgh.289

1. Pittsburgh Economic Development

Pittsburgh's shift from a government operated to an authority run airport has done little to promote the growth of the airport's surrounding areas. Since opening in 1992, the $1 billion facility has won international accolades for its design, ease of use, and shopping, yet much of the 10,000 acres of county-owned land surrounding the airport has remained unchanged.290 Despite predictions that the terminal would generate anywhere from 18,000 to 30,000 jobs by 2003, economic development, especially on the privately owned land ringing the airport, has been slow to occur.291 Both government and non-government experts seem to agree that several factors have hampered development, namely:

- Failure to get land ready for development by clearing sites and installing water and sewer lines and access roads;
- Failure to engage in better land use planning and to obtain federal releases [to help] potential developers get through the intricate Federal Aviation Administration regulations that apply to much of the land;
- Delays in completing access ramps from Interstate 79 . . . toward the airport and in starting the Findlay Connector between Route 22 and the Airport Expressway, which would open more land to development;
- A lack of regional cooperation and focus.292

Getting the land around the airport ready for development is expensive. Predictions are that it will cost an average of $100,000 an acre to clear and prepare land that will fetch no more than $60,000 per acre on the market.293 However, it is believed that even if the county sells the land at a loss, the long-term gains generated by employment, appreciating land values, and increased tax revenues would more than offset the initial losses.294

Although not mentioned as a primary reason for the lack of development around Pittsburgh International Airport, one can infer from the numerous claims filed by residents that airport noise has had a negative impact on growth as well.295 In 1998, after an eighteen year battle, Alle-


291. Id.

292. Id.

293. Id.

294. Id.

gheny County, Pennsylvania, settled a number of noise pollution lawsuits. The suits cost the county roughly $6 million to settle, with a percentage of the settlement going to soundproof homes near the runway. To date the county has settled 244 of 402 lawsuits filed after the construction of the runway in 1980.

VI. CHALLENGES FACING NOISE MITIGATION PROGRAMS THROUGHOUT THE COUNTRY

With some exceptions, economic development in areas that surround major airports has been hampered by airport noise. Airports can point to their noise mitigation programs to show that they are making strides to combat noise pollution, but airport neighbors are demanding that airports take greater steps to ensure that noise emissions do not disrupt their quality of life. In the airports’ defense, noise mitigation is not an easy task, as it requires cooperation from many players. Crucial to any mitigation plane is participation by the airlines that service the airport. A recent survey of aircraft departure tracking data at DIA indicates that full participation in the airports’ efforts is sometimes lacking. This survey revealed that 32% of departing aircraft turned off their designated flight plans earlier than desired, creating increased noise in surrounding areas as a result. At Dallas Love, non-compliance by some airlines in 2003 was as high as 45.2%. Further indication of the importance of airline compliance is that Andy Harris of DIA’s Noise Advisory Committee has stated that airline compliance with noise mitigation plans is one of the airport’s greatest challenges.

Another challenge revolves around the exorbitant costs airlines face when purchasing new planes that incorporate sound-reduction technology. Modern commercial aircraft can last for three decades or more, so to expect the airline industry to scrap working airplanes and spend billions of dollars to purchase noise-modified models is unrealistic. Furthermore, much of the new quiet engine technology is not currently available for some of the more common commercial planes, particularly

296. Id.
297. Id.
298. Id.
300. Id.
303. See Baliles, supra note 8, at 1338.
304. See id. at 1334.
the Boeing 737 and the Airbus A321.\footnote{305} The engines that fit the quieter 777 do not fit structurally under the wings of a 737 or an A321.\footnote{306} Industry experts are confident that manufacturers will address the issue of improving the noise performance in these smaller planes in the near future.\footnote{307}

Another factor that may present a stumbling block for noise mitigation programs throughout the U.S. is the "S-curve" phenomenon.\footnote{308} This phenomenon deals with the relationship between the number of flights offered by an airline and its market share. Studies show that an airline's market share increases as frequency of service increases, and decreases as frequency is reduced.\footnote{309} The S-curve phenomenon suggests that passengers prefer airlines offering more flights because they can find better departure times and available space on the carrier with greater capacity.\footnote{310} As a result, airlines will compete for market share by providing excess flights.\footnote{311} Therefore, while airports may have every intention of limiting flights, and limiting the hours of take-off and departure to fight noise pollution, they may find resistance from airlines looking to increase their market share.

VII. \textbf{How the Aerospace Industry is Helping}

The aerospace industry has been making a concerted effort to assist noise reduction efforts in the commercial airline industry. For instance, Quiet Airport Technology ("QAT") is a comprehensive five-year study that NASA began in 2001 to assess technical possibilities for noise reduction.\footnote{312} To accomplish this goal NASA is taking a holistic approach, looking at airframe system noise reduction, engine system noise reduction, and community noise impact.\footnote{313} William Wilshire Jr., the NASA scientist heading up the QAT program believes that engine technology is the key to reducing the impact of airport noise on neighboring communities.\footnote{314} The QAT program's mission is to design aircraft engines that emit less noise while maintaining their power and efficiency.\footnote{315} The current pro-

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\footnote{305}{Id. at 1339.}
\footnote{306}{Id.}
\footnote{307}{Id.}
\footnote{308}{Zambrano, supra note 13, at 450.}
\footnote{309}{Id. at 450-51.}
\footnote{310}{Id at 451.}
\footnote{311}{Id.}
\footnote{312}{See Bill Wilshire, Progress Toward Quieter Aircraft (Feb. 27, 2001), at http://www.its.berk-eyel.edu/techtransfer/events/air/2001/dl/wilshire.pdf (last visited Oct. 9, 2004).}
\footnote{313}{Id. at 3.}
\footnote{314}{Id. at 17.}
\footnote{315}{See id.}
gram has engineered designs that cut 5 dB from engines.316 Within ten years, they hope to develop commercial engines that provide a 10 dB noise reduction.317

Leonard Tobias, also of NASA, advocates Decision Support Tools ("DST") to aid Air Traffic Controllers in noise mitigation.318 It is his belief that software such as Final Approach Spacing Tool ("FAST") can generate noise reduction by helping arrival controllers dictate runway assignments, landing sequences, speed advisories, and landing trajectories, as well as vectoring and spacing of aircrafts.319 At Logan International Airport in Boston, for example, the air traffic controllers use DSTs to develop preferential flight plans that direct airplanes away from high population density areas in order to reduce the number of people effected by each flight’s noise emissions.320

VIII. Conclusion

When a municipality surrounding an airport can boast Class "A" office space, five-star hotels; luxury residences, a top-notch school district, several golf courses, and has available land for future growth, the negative effects of airport noise on the municipality’s economic development generally diminishes. In this scenario, it seems that companies and private citizens are not deterred by noise when they receive so many benefits from their proximity to the airport.

Conversely, when there is little land available for development surrounding an airport, and the already existing neighborhoods are old or unattractive from a business location perspective, municipalities have difficulty convincing people that the benefits of being close to an airport outweigh the negative life-style impacts associated with airport noise.

However, all is not lost for those municipalities that don’t possess the golden attributes that make noise less consequential. When a group of government and business leaders step forward, who are dedicated to turning their city into a place where companies and growth-minded people want to be, there is ample evidence that great results can follow. Without this strong leadership though, it is unlikely that an area exposed

316. Id.
317. Id. at 3.
319. Id.
to significant airport noise, and without much high-end infrastructure, will experience significant economic development on its own.

In terms of management models, while airport privatization is still in its infancy in the U.S., there is evidence that privatization has been largely successful in increasing the quality of airport services and amenities throughout the rest of the world.\textsuperscript{321} This should give pause to government officials in airport regions who support growth, because companies looking for a place to establish themselves or to relocate will certainly take into consideration things like ease of use and quality of airport services when making their site selection.

As to airport expansion issues, while it can lead to an increase in airport noise, it is also shown to enhance economic development in surrounding areas. Most municipalities surrounding airports want to create sustainable economic development and to increase tax revenue. Therefore, it is important for municipalities to support airport expansion plans so as not to curtail the economic growth and opportunity that this can bring. At the same time, airports, airlines, and airplane manufacturers must act to address concerns about noise and to bring noise relief to people around airports. While many of the major airports have shown significant results from their noise mitigation efforts, until all reasonable steps have been taken, there will always be room to improve in this area. However, until quieter engine technology is implemented industry wide, there is only so much airports can accomplish in these endeavors before their flight schedules are completely disrupted.

In the interim, airport proprietors can avoid liability for nuisance or trespass by acquiring easements over neighboring property.\textsuperscript{322} Luis Zambrano, an expert in the airline industry believes that by compensating landowners in exchange for property rights, future uncertainties and litigation can be significantly reduced.\textsuperscript{323} He further adds that the federal government should encourage mitigation programs by providing tax incentives to private operators and transportation funding to public operators to compensate landowners in order to avoid future problems.\textsuperscript{324}


\textsuperscript{322} Zambrano, supra note 13, at 447.

\textsuperscript{323} See id. at 445.

\textsuperscript{324} See id. at 445-46.
The Impact of Trusts and Escrow Funds on Interstate Commerce

Phillip DeCaro*

I. HISTORICAL PREFACE

Trusts have been around since the days of the Roman Empire.\(^1\) There is not a universal definition for what a trust is; however, it is agreed that a trust is an instrument of ownership of property enabling the holding of the estate by one person for the benefit of another.\(^2\) Today, Blacks Law Dictionary defines a trust as, "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary)."\(^3\) There are many different types of trusts.\(^4\) Express, contingent, implied, and involuntary, otherwise known as constructive trusts, are just a few examples.\(^5\) This paper is concerned with the impact of implied and constructive trusts on interstate commerce. An implied trust is defined as "[a] trust raised or created by implication of law; a trust im-

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1. David Johnston, The Roman Law of Trusts 9 (1988) ("Trusts are associated with Augustus; they existed before, but their legal sanction was his innovation.").
4. Id.
5. Id.
plied or presumed from circumstances.”6 Constructive trusts are defined as “[a] trust imposed by a court on equitable grounds against one who has obtained property by wrongdoing, thereby preventing the wrongful holder from being unjustly enriched.”7

The idea that has continued until today was that common ownership could be held by an entity, not a person, and administered for the common good of the common owners.8 Because of this concept, trusts have historically had a very significant - but not always beneficial impact on commerce.9

The English kings, always on the lookout for additional revenue, sold to the trusts the sole right to operate various businesses - thus creating monopolies. In 1624 the English Parliament passed the Anti-Monopoly Act.10 This took away the King’s power to sell business monopolies to trusts and, not too many years later, Parliament also took away the King.11

American colonies were usually established by charters granted from the Crown.12 These charters created business monopolies for each colony.13 The Massachusetts Business Trust law evolved in the early 1900’s as the precursor to the modern corporate law.14 Businesses in Massachusetts began to arrange themselves in the form of trustees controlling the business shares for the benefit of the owners.15 The ownership was proven by the holding of negotiable shares and the business trustees were elected by those shareholders.16 While trusts again enjoyed a growth in commerce the farmers were not far behind their urban cousins.

The end of the U.S. Civil War saw the evolution of the Farmers’ Benevolent Trusts.17 These benevolent trusts eventually evolved into coop-

8. Johnston, supra note 1, at 1.
11. Id.
13. See id.
16. Id.
eratives like Sun-Maid Raisins - arguably a monopoly of raisin growers in Fresno.\textsuperscript{18} By the 1920's, were Sun-Maid and the farmer cooperatives really beneficial organizations of small, independent producers trying to the modern economy?\textsuperscript{19} Or were they merely attempts at monopolization hiding behind clever PR and getting favorable treatment from the government?\textsuperscript{20} At least one writer believes the latter.\textsuperscript{21} Victoria Saker Woeste makes the argument that the cooperatives were not trying to continue in their small, individual productions that had to adapt to the modern economy to survive, but were instead attempts at monopolies that hid behind their preferential government treatment.\textsuperscript{22} The making of the laws and the enforcement of those laws can sometimes be found to be drastically different.

This conflict between the monopolistic trust and the public good, first prohibited in England in the Anti-Monopoly Act of 1624, was also the impetus for concern in the late 1800's.\textsuperscript{23} It was dramatically present in the Sherman Anti-Trust Act of 1890.\textsuperscript{24} I think it is telling in that the Act, while it was directed at preventing or undoing monopolies, was named "anti-trust." The good guys were described as "trust busters." Modern corporations such as IBM, Microsoft, and AT&T, have fought against the imposition of restrictions based on "anti-trust."\textsuperscript{25} WorldCom and Sprint were prevented in 2000 from merging by the European Union under anti-monopoly and anti-trust grounds.\textsuperscript{26}

Aside from the friendly image of a benevolent trustee taking care of the young or old who are beneficiaries of individual trusts, there is the third leg of historic trust law. This is the "Public Trust Doctrine." Again, this doctrine originated with the Romans and gained strength in England, and for our purpose we can consider it as a common law doctrine.\textsuperscript{27} The essence of this Doctrine involves the legal right of the public to have ac-

\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{24} Id.
\textsuperscript{27} See generally UNIVERSITY OF TOLEDO COLLEGE OF LAW, PUBLIC TRUST DOCTRINE, (reviewing the Public Trust Doctrine's definition, historical roots, and current issues in case law) [hereinafter PUBLIC TRUST DOCTRINE], at http://law.utoledo.edu/LIGL/public_trust_doctrine.htm (last visited Jan. 30, 2005).
cess to and use of certain lands and waters. The right may be concurrent with private property, as it is in California's prohibition against blocking the public's access to beaches. The legal interests of the public is not absolute, it is determined by balancing the interests of public rights and private property rights.

The definitive U.S. Supreme Court case on the Public Trust Doctrine was the case of Illinois Central Railroad Company vs. Illinois. The issue was whether the Illinois legislature could grant the use of nearly the entire waterfront area of Chicago to the Illinois Central Railroad. The Court held that the state of Illinois had title to the land underneath the navigable waters of Lake Michigan and that it held this title in trust for the public’s use. However, the Court also held that the state could convey parcels of trust land to private individuals provided the overall effect was to improve the public’s ability to exercise its trust rights. Applying this balancing of interests and results, the Court determined the conveyance to the Illinois Central Railroad didn’t meet this criteria and was therefore void.

Two examples of this balancing process include tidewaters and navigable waters, since the Doctrine was critical to fishing and travel. Recent cases still wrestle with this balancing test. One example is a South Carolina case that held that thirty-six docks did not violate the Public Trust Doctrine because the docks would not substantially impair the marine life, water quality, or public access. Another example is the case of Phillips Petroleum Company v. Mississippi where the Supreme Court reaffirmed that states have “received ownership of all lands under waters subject to the ebb and flow of the tide” through the use of the public trust doctrine. This enables states to control fishing, needed space for urban expansion, and harvesting of shellfish along its tidelands. The commercial, monopolistic history of trusts, the application of the balancing of

28. Id.
29. Id.
30. Id.
32. Id. at 452.
33. Id.
34. Id. at 453, 455-56.
35. Id. at 463-64.
36. Id. at 457 (quoting Stockton v. Baltimore & N.Y.R. Co., 32 F. 9, 19-20 (C.C.D.N.J. 1887)).
37. See generally Public Trust Doctrine, supra note 29.
40. Id. (citing Smith v. Maryland, 59 U.S. 71, 74-75 (1855)).
interests in the Public Trust Doctrine, and the constructive or implied
trusts each have a part in the concern that the misuse of trusts and es-
crows could adversely affect the rights of commercial creditors and sec-
cured parties. This is the main focus of this paper.

II. RECENT CHANGE OF REGULATORY AUTHORITY

On January 1, 1996, the Interstate Commerce Commission Termination
Act ("ICCTA") was triggered and the Interstate Commerce Com-
mission ("ICC") ceased to exist.43 In the ICC's stead, the Surface
Transportation Board ("STB") within the Department of Transpor-
tation ("DOT") became the successor regulators of interstate commerce.44
The ICCTA "transferred the motor carrier regulatory functions of the Inter-
state Commerce Commission ("ICC") to the Department of Transpor-
tation ("DOT") and the Surface Transportation Board ("STB")."45 Since
the implementation of the ICCTA, there has been a growing question of
just what the impact of escrow funds and trust accounts, initially have
been on the commerce of United States transportation.

Recent decisions by the Federal courts have applied trust principals
to the recovery for the creditors of funds claimed to be trust or escrow
funds.46 The ownership of these assets is essential to the determination of
which property is in the bankrupt's estate.47 The question of this paper is
whether judicial holdings in a number of cases have caused a permutation
among the common trust and escrow instruments, potentially impairing
secured interests of lenders and other secured creditors, and enabling the
creation of some new instruments that impair the rights of general credi-
tors. For instance, the courts have not required an absolute separation of
trust monies from the general funds of the debtor.48 Meaning that if the
creditors are able to access the debtors accounts they may also be able to
gain access to the trusts. At least one court has applied trust fund con-
cepts when a Bank seized general debtor accounts to secure payment of a
line of credit.49 This may allow future judgments to be awarded in favor
of the creditors and allow them access to all general accounts held by the

42. Phillips Petroleum Co., 484 U.S at 476 (citing McCready v. Virginia, 94 U.S. 391, 397
(1876)).
44. Id. at § 701.
46. See, e.g., id. at 1009 (quoting 49 C.F.R. § 376.2(1) and applying the regulations governing
escrow funds).
49. Gen. Cas. Co. of Wis. v. Mid-Continent Agencies, Inc., 485 N.W.2d 147, 150 (Minn. Ct.
debtor, further limiting the protection of the debtor. Most of the litigation regarding trust accounts or escrow fund and transportation companies have been at times of declared bankruptcy. Historically this has been railroads, but other forms of interstate commerce such as motor vehicle and the airline industries are effected as well.

III. Interline Railroad Compensation Agreements

The railroads move two products: freight and passengers. The railroads are required under Section 1(4) of the Interstate Commerce Act, "to participate in the interstate transportation of freight and passengers. In addition it requires that the carriers ‘establish reasonable through routes with other such carriers, and just and reasonable rates, fares, [and] charges . . . applicable thereto.’" To meet the growing market for freight, with the growth of international trade and interstate transmissions of goods, "[t]he railroads have created a system of accounting and periodic settlement of accounts to facilitate this manner of operation." The railroads have come to depend on interline agreements as the country has become more and more integrated with international and interstate commerce. Interline shipping occurs when:

a shipper or receiver pays one railroad for services of carriage for the entire shipment, although the shipment may travel over many different railroads; a railroad car may travel over the lines of many different railroads, and be used by each of them, before it again returns to the possession of the owning railroad; and a shipper whose freight may have been damaged in shipment by one of several carriers may apply to any of them for payment of his claim.

"No interline carrier has the option to refuse participation therein." Interline railroad accounts work when freight or passenger charges are collected by either the beginning or destination carriers. Congress has not passed a statute governing how railroads are to act in this situation. Instead, the interline financial accounts are set out by the

50. See Penn Cent., 486 F.2d at 521.
51. See infra section VI.
52. Penn Cent., 486 F.2d at 531 (Adams, J., concurring) (questioning the majority’s “heavy reliance” on trust law & quoting 49 U.S.C. § 1(4) (1973)).
56. In re Ann Arbor R.R. Co., 623 F.2d 480, 482 (6th Cir. 1980) (citing S. Ry. Co. v. Flournoy, 301 F.2d 847, 854 (4th Cir. 1962)).
57. Penn Cent., 486 F.2d at 523.
58. See id. at 521.
Association of American Railroads ("AAR"). Under the AAR, where a shipper may normally have to pay each railroad carrier for each separate leg of the transport, the shipper is only responsible to the beginning or terminating carrier. Those collected funds are then held in a general account by the collecting carriers to await disbursement and settlement. All of these daily transactions that occur between the railroads are then settled at the end of every month with no interest being paid on the collected monies. "AAR rules require that the statements be rendered only once each month and give the carriers 18 days to prepare the abstract of the interline freight accounts after the end of the month in which the waybill is received." Destination railroads are responsible for settling all the movements of the interline freight. The destination carrier must include in the monthly accounting all charges for which the destination carrier has received a waybill, whether or not the shipper paid. The waybill is issued by the originating carrier and prescribes the movement of the shipment and charges. The accounts are divided into two types: freight and passenger accounts; and the accounts that include railroad car repairs, switching accounts, overcharges, per diem accounts, and damage accounts.

These funds that are held and then settled at the end of the month are deemed to be constructive trusts. A constructive trust arises by operation of law where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." Also, "[t]he parties' manifestation of intention ultimately controls whether or not a trust relationship exists, but failure to expressly designate the relationship as one of trust does not necessarily negate its existence." As such, these accounts are not to be deemed to be part of the holding company's estate during bankruptcy and are not permitted to be claimed by general creditors. "[I]nterline carriers were granted a superior status vis-a-vis other creditors so as to promote and maintain an adequate, economical and

59. Id. at 521 n.1.
60. Id. at 523.
61. Id.
63. Id. at 525.
64. Id. at 523.
65. Id.
66. Penn Cent., 486 F.2d at 521.
67. Id. at 524.
69. Penn Cent., 486 F.2d at 524 (citing United States v. Orsinger, 428 F.2d 1105, 1112 (D.C. Cir. 1970)).
efficient national transportation system, a policy established in the Interstate Commerce Act." These trusts protect the loss to the other carriers in the event of the collecting carrier going bankrupt so that they in fact create/solve the secured interest disputes instead of impairing them. The commingling of funds are found to be temporary and do not create a debtor-creditor relationship, therefore under bankruptcy law, there is no supported contention that one railroad may retain the funds of another. "Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.' Nor is such an equitable interest 'property of the debtor' for purposes of [Bankruptcy Code section] 547(b)."

Among the powers of a Chapter 7 trustee is the power under § 547(b) n1 to avoid certain payments made by the debtor that would "enable a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate."

Numerous courts have found that interline accounts are trust accounts and do not belong to the bankrupt party. "First, the Court agrees with the Seventh Circuit that there is no federal statutory basis for holding the outstanding interline revenues are trust funds. As to the second consideration, the Court notes there are strong reasons for uniform regulation of interstate commerce by rail. . . ." The uniformity required of the interline railroad system is such that "[t]o make this system dependant upon the application of the various laws of the various states would not only place it in serious jeopardy, but also would virtually assure its destruction." As the court in In re Ann Arbor Railroad Company said:

We find no logic in the contention that one bankrupt railroad may retain funds belonging to another interline railroad, whether or not in bankruptcy, which the collecting carrier was required to pay under the established practice and procedure required by the Interstate Commerce Commission, the Regional Rail Reorganization Act, and the rules of the Association of American Railroads.79

Later support of the Ann Arbor Railroad case came in the Missouri

72. See Penn Cent., 486 F.2d at 533.
74. Begier, 496 U.S. at 59.
75. Id. at 56-57.
76. See Mo. Pac. R.R. Co., 702 F. Supp. at 633-34; In re Ann Arbor R.R. Co., 623 F.2d at 482; Penn Cent., 486 F.2d at 529-30; Orsinger, 428 F.2d at 1114.
78. Id. (quoting In re Lehigh & New England Ry. Co., 657 F.2d 570, 575 (3d Cir. 1981)).
79. In re Ann Arbor R.R. Co., 623 F.2d at 482.
Pacific Railroad Company v. Escanaba & Lake Superior Railroad Company, decided in 1988. There the court went through a three-pronged process in determining whether the funds held were to be properly construed as part of the estate or whether they were to be divided up among the specialized interests of other railroad creditors. In evaluating the circumstances which led to this conclusion:

[T]he court noted (a) that the commingling of funds by the collecting carrier did not defeat the finding of a trust, because the commingling was to have been temporary under the established account-settling practice; (b) that the interline railroads evinced no intent to create a debtor-creditor relationship and no interest was payable on the outstanding funds; and (c) that neither the equities nor logic supported the contention that one railroad may retain funds belonging to another.

In finding that the funds in question were held in trust, the court then reiterated that a trust does not need to be specifically detailed in the contract and that, “[a] constructive trust may also be imposed where, as here, one takes advantage of necessities (e.g. interline freight charge collection practices) to obtain assets under circumstances which render retention thereof unconscionable.”

The Begier court, in looking at the difficulty of determining property ownership and interest, took the Ann Arbor Railroad and Missouri decisions and commingled them with the Internal Revenue Services (“IRS”) definitions on trust-fund tax provisions. IRS provision, 26 U.S.C § 7501, states:

“Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be special fund in trust for the United States.” The statutory trust extends, then, only to “the amount of tax so collected or withheld.”

The provision intends to give a United States citizen the advantages and benefits of the trust doctrine with respect to collected and withheld taxes. In the Begier case, American International Airways, Inc. (“AIA”) filed for Chapter 11 bankruptcy and protection/relief from its

80. See Mo. Pac. R.R. Co., 702 F. Supp. at 632 (relying on the decision in In re Ann Arbor R.R. Co., 623 F.2d 480 (6th Cir. 1980)).
81. Id. at 633 (citing Iowa R.R. Co. v. Moritz, 840 F.2d 535 (7th Cir. 1988)).
84. See Begier, 496 U.S. at 60.
85. Id.
86. Id. at 70.
creditors.\textsuperscript{87} AIA had held off a part of its monetary assets in a special fund that was to pay the United States government taxes to the best of its ability.\textsuperscript{88} Begier was appointed trustee by the Bankruptcy Court to help oversee AIA's problems and the Chapter 11 liquidation plan.\textsuperscript{89} Begier's power as trustee enabled him, under section 547(b) to avoid payments "that would 'enable a creditor to receive payment of a greater percentage of his claim against the debtor that he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate.'"\textsuperscript{90} Begier sought to exercise that avoidance power and so he filed suit against the United States government in order to prevent the IRS from collecting the money held in the special fund.\textsuperscript{91} Overall, the Third Circuit Court of Appeals found that such monies were not to be avoided, because they had been specifically set aside in order to pay the IRS.\textsuperscript{92} Begier was able to avoid the payments that AIA had made from its general accounts.\textsuperscript{93} This case is key for its field because it lays out a clear designation of what the powers of the trustee are and just what sort of estate assets can be protected from creditors.

Overall, the railroad interline accounts are not instruments that impair a secured interest, but are simply accounting determinations of who has a right to the various funds. Many courts have found the existence of constructive trusts and upheld that the monies held in question belong to the plaintiff party since they are not something that is collected for only a temporary amount of time.\textsuperscript{94} Thus, there is a consistent application of trust fund concepts to deny general creditors access to the funds.\textsuperscript{95}

IV. Owner Operator - Motor Carriers and Trucking Industry

Unlike railroads, the motor carrier trucking industry does not rely on inter-company accounting sheets.\textsuperscript{96} Instead, motor carriers use lease agreements.\textsuperscript{97} Motor carrier lease agreements are specified agreements

\begin{footnotes}
\footnote{87. \textit{Id.} at 56.}
\footnote{88. \textit{Id.} at 55-56.}
\footnote{89. \textit{Begier}, 496 U.S. at 56.}
\footnote{90. \textit{Id.} at 56-57.}
\footnote{91. \textit{Id.} at 57.}
\footnote{92. \textit{Id.}}
\footnote{93. \textit{Id.}}
\footnote{94. See, e.g., \textit{Penn Cent.}, 486 F.2d at 525.}
\footnote{95. See \textit{Mo. Pac. R.R. Co.}, 702 F. Supp. at 634 (granting summary judgment respecting plaintiffs' trust funds claims for relief).}
\footnote{96. There is no interline system for motor carrier trucking as there is in the railroad industries. Rather the Federal 'Truth-in-Leasing' regulation, 49 C.F.R. § 376, govern what is required of owner-operator motor carrier agreements, while the AAR provides some guidelines for how interline railroad systems are to function. See 49 C.F.R. § 376; \textit{Penn Cent.}, 486 F.2d at 521 n.1.}
\footnote{97. \textit{New Prime, Inc.}, 339 F.3d at 1003.}
\end{footnotes}
between a lessor and lessee concerning the details of leases and revenue allocation between the lessee and the lessor. As is set forth in more detail below, under the Code of Federal Regulations ("CFR"), certain terms must be in these leases. These lease agreements at times create escrow funds that are held by a designated party. Escrow funds were defined in Owner-Operator Independent Drivers Association v. New Prime as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and the lessee." To the extent that the Escrow fund is not over abused, all that is required is the specific process of successorship. If there is no way to distinguish the trust funds from the general assets of the named owner of the account, it is probably abuse to artificially attempt to segregate the funds for a particular claiming creditor who would like to be designated as a beneficiary. So, what does this mean for the parties involved? Simply, that the debtor will have some protection of trust funds from every creditor that is attempting to make a claim against the debtor's estate.

Also, unlike the railroads, there are federal regulations the parties are required to follow concerning the agreements. The CFR Federal "Truth-in-Leasing" regulation requires that motor carriers and owner-operators enter into written leases that explicitly address certain contractual issues, such as compensation and duration. This regulation specifically deals with amending leasing agreements and determining the escrow funds allocated. For example, an "Amended Lease Agreement must: (1) specify what the funds held in escrow may be used for . . . and (2) specify what items owed to Success at the termination or completion of the lease may be offset against any escrow funds to be returned to Lessee. . . ." The lease must not only specify what items the escrow funds can be applied towards, but it must also specify the conditions a lessor must fulfill for the fund to be returned, the time frame for the return (not later than forty-five days), and any other obligations that the authorized carrier may deduct monies for. A written lease regarding

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98. Owner-Operator Indep. Drivers Ass'n v. Swift Transp., 367 F.3d 1108, 1109-10 (9th Cir. 2004).
99. See id. at 1110.
100. See New Prime, 339 F.3d at 1009.
101. Id. (quoting 49 C.F.R. § 376.2(1) (2002)).
102. Id.
103. See id. at 1009-10.
104. See 49 C.F.R. §§ 376.11-12 (2002); Swift, 376 F.3d at 1110.
105. See 49 C.F.R. § 376.12; see also New Prime, 339 F.3d at 1009.
106. New Prime, 339 F.3d at 1009 (citing 49 C.F.R. §§ 376.12(k)(2); (k)(5)).
107. See New Prime, 339 F.3d at 1009; see also 49 C.F.R. § 376(k)(2), (k)(6)).
Escrow funds must include the following:

1. The amount of any escrow fund.
2. The specific items to which the escrow fund can be applied.
3. That . . . the authorized carrier shall provide an accounting to the lessor . . .
4. The right of the lessor to demand to have an accounting . . .
5. That . . . the carrier shall pay interest on the escrow fund . . .
6. The conditions the lessor must fulfill in order to have the escrow fund returned . . .

Since the ICCTA, “motor carriers are required to register with the Department of Transportation (“DOT”) in order to ship most types of cargo in interstate commerce.” These regulations are in place to ensure that the secured interests of the authorized carriers are protected and to allow for the enforcement of the federal regulations. Such protection for authorized carriers enables them to prevent the interests of all general creditor parties from piercing the monies of the estate and taking what is not rightfully theirs. Such clear rules, as stated in the “Truth-in-leasing” regulations provides that such disputes as may arise can be quickly solved and adequately determined as to exactly who has a secured versus general (unsecured) interest in the estate of the bankrupt party.

V. IMPACT OF IN RE INTRENET

The recent court decision by the bankruptcy court in In re Intenet has a potential impact on both the railroad and motor carrier communities. The decision further clarifies that railroads and motor carriers holding the property of another for the benefit of that other does not permit the holding entity to count those funds as part of the property of their estate in the event of bankruptcy. As is clearly defined by the federal bankruptcy laws, “[p]roperty over which the debtor has legal title but not an equitable interest becomes property of the estate ‘only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.’”

Also, property over which a debtor exercises some power solely for the benefit of another is not property of the estate. Thus, property held by a debtor

110. In re Intenet, Inc., 273 B.R. 153 (Bankr. S.D. Ohio 2002). Tractor-trailer lessors commenced suit for declaratory judgment of funds that lessors had deposited with carrier-lessees. The funds were deposited as required by the lease to cover permit costs and other purposes. The Bankruptcy Court held that the funds were held in trust and therefore were not “property of the estate.”
111. Id. at 157.
112. Id. (quoting 11 U.S.C. § 541(d)(2002)).
in trust for the benefit of another is not property of the estate.”113 With that distinction of what property is and is not permitted to be counted within the estate, the railroads and motor carriers are able to clearly determine what assets remain. As such, In re Intenet serves to put the proverbial nail in the coffin of determining who has a secured interest in the property.114

VI. Are the Airlines next?

Recently, credit card companies have implemented reserve requirements with airlines in order to reduce the risk of loss in the event that the airlines go bankrupt.115 In October 2004, legislation was proposed and attached to the Intelligence Reform bill ostensibly to protect consumers from the airlines that cannot meet their resold ticket commitments.116 Instead, this legislation would protect credit card companies and customers.117 Rather of having to refund credit card and ticket purchases, the ticket holder would be required to seek other travel arrangements.118 The bill is intended to extend the requirement that the airlines honor tickets of defunct carriers for an additional year.119 Normally the credit card companies that process the airline accounts are responsible for covering the ticket costs, since the credit card holder can ask for a refund from the credit card issuer.120 This bill would, “shift potential losses from credit-card companies . . . to airlines.”121 The pending legislation is advanced and promoted as a protection for consumers but what this bill does is shift the risk from the credit card issuer to the consumer and to the airlines. Credit card companies have already required airlines to set aside some reserve funds since the World Trade Center attacks of September 11, 2001 in order to protect against the possible event of massive refunds.122 These holdings could be considered funds held in trust for a future, but mostly they are an instrument that is triggered only during emergency circumstances.123 Without the new bill, the airlines would have to continue to set aside greater and greater amounts of reserve capital to cover the risks of going under and ensuring the repayment of refunds to the credit card

113. In re Intenet, Inc., 273 B.R. at 157 (citing 11 U.S.C. § 541(b)(1); Begier, 496 U.S. at 59)).
116. Id. at D6.
117. Id. at D1.
118. Id. at D6.
119. Id. at D1.
120. McCartney, supra note 117, at D1.
121. Id.
122. Id. at D6.
123. Id.
companies and ticket holders. With this bill, Congress is shifting that risk to the airlines' normal operating procedures. By requiring airlines, when they are short of cash, to set aside additional funds as reserves impairs the ability of the airlines to pay its other creditors and also its secured creditors.

VII. Conclusion

The CFR does not clearly define any security provisions for bankruptcy. It is up to the courts to determine the estate of the bankrupt and to determine whether there are any trust or escrow interests that exist. Both the owner-operator lease agreements and the interline railroad accounts do not create a new tax shelter for businesses to avoid or reduce income taxes, nor, so long as they are reasonably defined and set up, do they add or diminish the property in the estate of the holder. The answer to the question posed of whether the use of the trust concepts as a means of segregating the assets of a bankrupt is diminishing the right of other creditors or even impairing secured lenders appears to be no.

There are no recent CFR amendments that oppose these court decisions that have created a rule of law that is impairing Interstate Commerce. In fact, there are no recent amendments to the CFR that have had any impact on either the owner-operator agreements or the interline railroad accounts. Even if there were such amendments, would those amendments apply retroactively to existing agreements or conduct? The Supreme Court of the United States has determined that it is not Congress's intent to govern retroactively. It does not appear that it would impair the rights of creditors, increase any parties' liability retroactively, or impose new duties on those transactions already completed.

This evolution and application of trust concepts to interline accounts and motor carrier leases has diminished the assets available to the debtors creditors. The trust fund exclusion from the estate of the bankrupt reduces funds accessible to creditors, but there has been no showing that a creditor was relying on these assets when it extended credit, and thus we have come full circle to the age old balancing of interests of the law of trusts. A recent decision from the Minnesota Court of Appeals has also

125. Id. at D1.
126. A general creditor, otherwise known as an unsecured creditor, is defined as "[a] creditor who, upon giving credit, takes no rights against specific property of the debtor." A secured creditor, on the other hand, is defined as "[a] creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt." Black's Law Dictionary (8th ed. 2004).
127. New Prime, 339 F.3d at 1006 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).
128. New Prime, 339 F.3d at 1007.
found that premiums held by an insurance agent are not trust funds.\textsuperscript{129} If the insurer consents to the agent’s com mingling of the premiums with other expenses, they are inconsistent with the concepts of trusts.\textsuperscript{130}

Courts are not using trusts and escrow funds to negatively impact the rights of creditors, whether secured or unsecured. If a creditor can show reliance on the account as in the Minnesota case, then the creditor has prevailed. If the courts are applying generic accounts common in an industry, such as interline and motor lease agreements, then the creditor is not being impaired. There is no history of these assets being available to the creditor beforehand.

At the present time, there is no evidence of any proposed legislation in Congress, and there are no new pending federal regulations recently published in the Federal Register that might impact or modify the Court’s rulings or the applications of these rulings. Nor are there any individual State actions that appear to be the beginnings of any sort of change in the current system. Not only is there no pending legislation to change this rule, this author sees no reason to change the current rules. The system is working efficiently and in a fair or just manner. There is not a party that is being clearly left out and unable to recover claims, instead the system provides for all creditors to recover if they can effectively prove the case that there interests in the bankrupt estate comes before that of others.

\textsuperscript{129} See Mid-Continent Agencies, Inc., 485 N.W.2d at 149.
\textsuperscript{130} Id. at 149-50.