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CONTINUING TO PUT THE BRAKES ON MEXICAN TRUCKERS: WILL THE U.S. EVER IMPLEMENT NAFTA ANNEX I?

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I. INTRODUCTION

THE North American Free Trade Agreement (NAFTA) has been referred to as "the most comprehensive trade agreement ever negotiated."[1] With the passage of NAFTA, the United States and Mexico looked toward liberalization of restrictions pertaining to cross-border services and anticipated the allowance of cross-border trucking, which would give commercial vehicles the freedom to travel the entire "treaty region" by the end of the year 2000.[2] Mexico and the United States have wrestled with the task of complying with NAFTA obligations regarding cross-border trucking over the past several years.[3] This dispute stems from the refusal of the United States to allow the Mexican trucking services industry authority to operate fully within U.S. borders, notwithstanding NAFTA's mandate that such authorization shall be permitted.[4] "The United States has refused to permit cross-border trucking, citing the allegedly unsafe nature of Mexican trucks and drivers."[5] In May 2002, the unlikely collaboration of various environmentalist groups with the Teamsters and other truckers and union groups brought the wheels of Mexican eighteen-wheelers to a screeching halt with the help of the United States Ninth Circuit Court of Appeals' January 16, 2003, decision in *Public Citizen v. Department of Transportation*.[6] This is probably not

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1. Stephen T. Weisweaver, *International Trade: Partners, Politics, and Promises: An Analysis of the North American Free Trade Agreement's Arbitral Panel Decision Concerning the United States-Mexico Trucking Dispute*, 32 N.M. L. REV. 489 (2002).
2. Hale E. Sheppard, *The NAFTA Trucking Dispute: Pretexts for Noncompliance and Policy Justifications for U.S. Facilitation of Cross-Border Services*, 11 MINN. J. GLOBAL TRADE 235, 235 (2002).
3. Weisweaver, *supra* note 1, at 471.
4. *Id.*
5. Sheppard, *supra* note 2, at 235.
6. Press Release, Teamsters, Environmentalists' Lawsuit Keeps Border Closed – Citing Safety Concerns, Ninth Circuit Court Stops Department of Transportation from Opening U.S.-Mexico Border (Jan. 16, 2003) (stating that on May 1, 2002, the union joined a broad-based coalition of environmental, labor, and consumer

the last word on the issue of Mexico-U.S. cross-border trucking,[7] which began over a decade ago with the institution of Annex 1 of NAFTA.[8] Although it provides for the entry of Mexican trucks into U.S. border states starting in December 1995 and into all U.S. states by January 2000,[9] Mexican truckers have yet to realize the benefits of NAFTA Annex 1.

This article will provide an analysis of events leading up to the Ninth Circuit decision, including an analysis of NAFTA Annex 1. This article will further summarize and provide an analysis of the February 6, 2001 NAFTA Arbitral Panel decision, *In the Matter of Cross-Border Trucking Services,* and identify American groups who oppose NAFTA Annex 1, comparing their arguments to the arguments for NAFTA by frustrated Mexican trucking groups. This article will also show how U.S. compliance with NAFTA Annex 1 and the arbitral panel decision has been frustrated by the combination of the U.S. President's role, the U.S. Department of Transportation's (DOT) role and the role of the U.S. Congress. Additionally, this article will provide an analysis of the January 16, 2003 Ninth Circuit opinion. Finally, this article will provide a discussion of the impact of the Ninth Circuit decision on future implementation of NAFTA Annex 1 and predictions regarding the viability of the U.S. border opening to Mexican trucks and buses.

II. HISTORICAL BACKDROP

The process that ended in the signing of NAFTA began in 1982 with talks and discussions between the U.S. Council of the Mexico-U.S. Business Committee[10] and its Mexican counterpart on the issue of liberalizing

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groups in a lawsuit to stop the Bush administration from opening the border to Mexican truck traffic), *available at* http://www.teamster.org/03news/nr_030116_4.htm. *See also* Sheppard, *supra* note 2, at 236 (stating that several opposition groups insist that the moratorium on cross-border trucking must continue. These groups believe complete exclusion of Mexican vehicles is the only method available to guarantee U.S. highway safety, and have used fierce admonitions and apocalyptic predictions regarding road safety and have effectively managed to convert the NAFTA debate of the early 1990s into the NAFTA implementation debate of the year 2000).

7. Karen Brooks, *Politics Stalls Mexican Trucks - Years After NAFTA, U.S. Still Limits Them*, DETROIT FREE PRESS, Jan. 15, 2003 (noting that independent experts say that such delay tactics are wearing thin, and like it or not, the borders are destined to be open to Mexican trucks), *available at* http://www.freep.com/money/business/nafta15_20030115.htm.
8. *Id.* (noting that NAFTA was signed at the end of 1992 with the goal of streamlining trade between Mexico, Canada, and the United States).
9. *NAFTA Panel Rules in Favor of Mexico in Land Transportation Dispute*, NAFTA WORKS, Feb. 2001, at 1 (noting that NAFTA Annex 1 provides: (1) On December 18, 1985, Mexican and U.S. trucking companies would have full access to and from each country's border states; (2) On January 1, 1997, Mexican companies would be permitted to provide cross-border scheduled bus services; and (3) on January 1, 2000, Mexican and U.S. truckers would have full access to each other's countries). *See also* Brooks, *supra* note 7.
10. Arcie Izquierdo Jordan, *Progress By Mexico in Selected Areas Under the North American Free Trade Agreement*, 6 Sw. J. L. & TRADE AM. 331, n.1 (1999) (noting that the Mexico-U.S. Business Committee is a private sector organization focusing on public policy issues of interest to the business communities of the two countries.

trade and investment between the two countries.[11] Also in 1982, "Congress enacted the Bus Regulatory Reform Act, which included a two-year moratorium on the issuance of new U.S. highway authorizations to trucks domiciled in a foreign country or those owned or controlled by foreign persons."[12] The act was passed, in part, due to the refusal of the Mexican domestic market to allow access to U.S. trucking operators.[13] The moratorium applied to Mexico and Canada, but was lifted for Canada "pursuant to a presidential memorandum indicating that Canadian safety standards were equal or superior to those existing in the United States."[14] Since 1982, trucks from Mexico have been allowed only in twenty-mile commercial border zones of the United States, where the trucks then have to transfer their cargo to U.S. truckers, who then make deliveries within the United States.[15] Conversely, since 1982 Canadian trucks have been in operation on U.S. highways.[16]

A. THE GEORGE W. BUSH ADMINISTRATION: PRE-NAFTA NEGOTIATIONS TO EXECUTION OF NAFTA

The United States, Mexico, and Canada began negotiations to create NAFTA in 1990.[17] Presidents George H.W. Bush and Carlos Salinas envisioned NAFTA as the best means for bringing about a vigorous economic relationship and maintaining growth and expansion of trade and investments between the two countries.[18]

The committee has two counterparts: (1) the Mexican counterpart – Consejo Empresarial Mexicano para Asuntos Internacionales (CEMAI); and (2) the U.S. counterpart – the United States Council, which is sponsored by the Council of the Americas, the U.S. Chamber of Commerce, and the American Chamber in Mexico City).

11. *Id.* at 331.
12. Sheppard, *supra* note 2, at 236-37.
13. Weisweaver, *supra* note 1, at 473.
14. Sheppard, *supra* note 2, at 237.
15. *Id.* at 237 (pointing out that despite the longstanding restriction on Mexico, certain exceptions were made to facilitate cross-border trade, including the ability of Mexican trucks to operate within designated commercial zones in the four border states of California, Arizona, New Mexico, and Texas). *See also U.S. Court Orders Study of Mexican Trucks*, AUSTIN AMERICAN STATESMAN, Jan. 16, 2003, *available at* http://www.austin360.com/aas/news/ap/ap_story.html/National/AP.V9034. *See also* Teamsters Online, *Background: Impact of NAFTA Trucking Provisions*, Jan. 19, 2003, *available at* http://www.teamster.org/nafta/01naftabaground.htm (noting that Mexican trucks are currently permitted to operate only in a narrow 'commercial zone' in each border state) [hereinafter Teamsters].
16. Sheppard, *supra* note 2, at 237.
17. Weisweaver, *supra* note 1, at 472. *See also* Sheppard, *supra* note 2, at 237; Jordan, *supra* note 10, at 331 (stating that on June 10, 1990, Presidents Bush and Salinas agreed to begin comprehensive talks that would lead to the negotiation of a U.S.—Mexico Free Trade Agreement).
18. Weisweaver, *supra* note 1, at 472. *See also* Jordan, *supra* note 10, at 331 (noting that Presidents Bush and Salinas looked forward to a free trade agreement between the United States and Mexico that would lead to a process of gradual and comprehensive elimination of trade barriers between the United States and Mexico, including the full phased elimination of import tariffs; the elimination or fullest possible reduction of non-tariff trade barriers, such as import quotas, licenses, and technical barriers to trade; the establishment of clear, binding protection for intel-

In August 1992, NAFTA was signed with the goal of streamlining trade between Mexico, Canada, and the United States by removing barriers such as tariffs and gradually liberalizing cross-border trucking throughout the continent.[19] The agreement was entered into and executed by President Bush, President Salinas, and Prime Minister Mulroney.[20] In addition to NAFTA's general goal of removing tariff barriers, pursuant to NAFTA Annex 1, Mexican trucks were to have free access by December 18, 1995 to U.S. border states (California, Arizona, New Mexico, and Texas), and beginning in January 1, 2000, Mexican trucks were to be allowed to drive throughout the country.[21] When the agreement was completed and signed William J. Clinton was newly elected as President of the United States and had not yet taken office; however, Mr. Clinton affirmed his support of NAFTA.[22]

B. THE CLINTON ADMINISTRATION – EXECUTION OF U.S. NAFTA IMPLEMENTATION ACT THROUGH CONTINUANCE OF MORATORIUM

In November 1993, Congress passed the NAFTA Implementation Act.[23] The NAFTA Annex I reservations negotiated by the United States, which include the moratorium on Mexican cross-border trucking services, expired on December 17, 1995.[24] (These reservations will be discussed further infra). Notwithstanding the enactment of the NAFTA Implementation Act, "in 1995, under pressure from the Teamsters and labor unions worried about competition for jobs and unequal safety standards, President Bill Clinton imposed a moratorium on Mexican trucks."[25] The Clinton administration's ban was a derivative of the Bus Regulatory Reform Act of 1982,[26] which, as stated above, was initially passed partially in response to Mexico's refusal to allow U.S. truckers to enter its borders.[27] "Section 6(g) of the Bus Regulatory Reform Act im-

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lectual property rights; fair and expeditious dispute settlement procedures; and other means to improve and expand the flow of goods, services, and investment between the United States and Mexico).

19. Brooks, *supra* note 7.
20. Weisweaver, *supra* note 1, at 472.
21. *Id. See also* Sheppard, *supra* note 2, at 237.
22. Weisweaver, *supra* note 1, at 472.
23. NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT §§ 3301-3473 (1993), Pub. L. No. 103-182, 107 Stat. 2057. 139 CONG. REC. D1323-01 (Nov. 17, 1993); 139 CONG. REC. S16, 712-01 (Nov. 20, 1993).
24. *See In re Cross-Border Trucking Services* (Mex. v. U.S.), USA-MEX-98-2008-01 NAFTA Arbitral Panel, Feb. 6, 2001, *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/Nafta_Chapter_20/USA/u69801e.pdf.
25. *Id. See also* Teamsters, *supra* note 15 (stating that "[i]n December 1995, the Clinton Administration announced that it would postpone implementing the North American Free Trade Agreement's (NAFTA) cross-border trucking provisions, which would have allowed Mexican trucks to travel anywhere in the four U.S. border states (CA, TX, AZ, NM) effective January 1, 1996, and then anywhere in the United States by the year 2000").
26. BUS REGULATORY REFORM ACT OF 1982 § 6, 49 U.S.C. § 10922(m) (1994); Pub. L. No. 97-261; 96 Stat. 1102 (1982).
27. Weisweaver, *supra* note 1, at 473.

posed a two-year moratorium suspending the issuance of new grants of operating authority to motor carriers domiciled in, owned, or controlled by persons of Mexico or Canada."[28] Section 6(g) provides the president the authority to remove or modify the moratorium.[29] As stated above, the president lifted the moratorium with respect to Canada trucking services shortly after implementation of the statute. President Clinton's decision to continue to impose the moratorium on Mexico was based on reports indicating that Mexican truck and driver safety standards were lower than standards enforced in the U.S. and the inability of U.S. inspection and enforcement programs to enforce U.S. standards on Mexican trucks and drivers.[30] Congress then passed the Interstate Commerce Commission Termination Act of 1995, preserving the moratorium and the president's authority to modify or remove it.[31] As such, on December 18, 1995, the U.S. Secretary of the Department of Transportation ("DOT") stated that the DOT would place a hold on Mexican truckers' documentation, and "final disposition of pending applications would be held until consultations on safety and security issues were completed."[32] In December 1998 the Inspector General of DOT released an audit report titled Motor Carrier Safety Program for Commercial Trucks at U.S. Borders, which found that "far too few trucks were being inspected at the U.S.-Mexico border, and that too few inspected trucks complied with U.S. standards."[33] The audit report concluded that the DOT's enforcement

28. *Id.*
29. *Id.*
30. Teamsters, *supra* note 15.
31. Weisweaver, *supra* note 1, at 473 (citing 49 U.S.C. § 13902(c)(4)(B), Pub. L. No. 104-88 § 103, 109 Stat. 803, 883 (1995)).
32. Sheppard, *supra* note 2, at 238.
33. Teamsters, *supra* note 15 (noting the following other findings of the DOT Audit Report:

> The truck out-of-service rate for FY 1997 at border crossings in Texas was almost 50 percent, compared to the U.S. out-of-service rate of 25 percent. Preliminary FY 1998 data indicates no improvement for out-of-service rates at Texas border crossings.
>
> In 1997, 3.5 million commercial trucks entered the U.S., 32.8 percent (1,162,419) of those at Laredo, TX and 16.8% (596,538) at El Paso, TX. U.S. inspectors performed 17,332 inspections on those trucks, barely 1 percent; yet 44 percent of those inspected were removed from service.
>
> At the border crossing in El Paso, TX, where 1300 trucks cross every day, only one inspector is on duty and he/she can inspect only ten to fourteen trucks a day. Most inspectors work only during daytime hours, leaving crossings with no inspectors at all during much of the day.
>
> In 1997 at Laredo's two crossing points, 4800 trucks per weekday cross the border, with 2900 on Saturdays and 2100 on Sundays. Federal Highway Administration (FHWA) reports indicate that each inspector (the equivalent of less than 4 full-time inspectors) averages eight to ten inspectors per day. FHWA and state inspectors admitted that they do not routinely provide coverage on evenings or weekends, leaving limited coverage on weekdays and virtually no coverage for the 5,000 trucks crossing at Laredo on weekends.
>
> Texas (67 percent of the truck traffic from Mexico) and Arizona (9 percent) have no permanent truck inspection facilities at their border crossings. The U.S. Customs Service allows inspectors to work within the Customs com-

program is inconsistent and, thus, does not provide reasonable assurances that Mexican trucks entering the U.S. are safe.[34] Resistance from the Clinton administration was also due, in part, to fears that Mexican rigs would become a "brigade of drug traffickers with immunity to U.S. law."[35]

1. Summary of NAFTA ANNEX I – Schedule of the United States, Sector: Transportation, Sub-Sector: Land Transportation, Phase-Out: Cross-Border Services and Reservations

- On December 18, 1995, Mexican and U.S. trucking companies would have full access to and from each country's border states.[36]
- On January 1, 1997, Mexican companies would be permitted to provide cross-border scheduled bus services.[37]
- On January 1, 2000, Mexican and U.S. truckers would have full access to each other's countries.[38]

2. Mexico's Request For NAFTA Chapter 20 Arbitral Panel

a. Brief Summary Explanation of NAFTA Chapter 20

NAFTA created a "Free Trade Commission, which is responsible for supervising the implementation of the Agreement and resolving disputes. Trade ministers of the three NAFTA countries make up the body of the NAFTA Free Trade Commission.[39] Chapter 20 of NAFTA provides dispute resolution regarding the application and interpretation of the Agreement."[40] The Chapter 20 dispute resolution component is divided into three steps. The first Step provides for consultations between the disputing parties.[41] If the consultation stage is not successful, the complaining party may request conciliation or mediation by the NAFTA Free Trade Commission.[42] The final step provides that the complaining party may request an arbitral panel.[43] The arbitral panel is required to issue an ini-

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pound on a "space available" basis. At several major crossings, this allows enough space for only placing three or four vehicles out-of-service. When that space is full, inspections stop or out-of-service trucks are sent back to Mexico. At Brownsville and El Paso, the turn-around point for rejected trucks is in the United States and out of sight of the inspectors, preventing them from confirming that the Mexican drivers have indeed returned to Mexico.

34. *Id.*
35. Brooks, *supra* note 7.
36. *See supra* n. 9.
37. *Id.*
38. *Id.*
39. Weisweaver, *supra* note 1, at 471-72 (citing North American Free Trade Agreement, Dec. 17, 1993, Can.-Mex.-U.S., art. 2001 32 I.L.M. 296 and noting that NAFTA provides the three signing various methods for resolving disputes).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* (citing NAFTA art. 2011, which states that "NAFTA Chapter 20 regulates dispute resolution and allows a party to bring forth a complaint against another party. A panel is composed of five members. Where there are two disputing parties, both

tial report, findings of fact, a determination of the legal issues, and recommendations for resolution of the disputed issues.[44] The parties are allowed to file written comments to the initial report within fourteen days.[45] The arbitral process is concluded with the issuance of a final report within thirty days of the initial report.[46]

"The Mexican government reacted to the Clinton Administration action by first requesting consultations with the United States pursuant to Chapter 20 of NAFTA, which were held in January of 1996."[47] The consultation process did not lead to resolution of the dispute, and Mexico, therefore, requested a meeting in July 1998 with the Free Trade Commission in accordance with Article 2007 of NAFTA.[48] However, the parties were again unsuccessful in reaching an agreement.[49] Therefore, "the Government of Mexico requested the formation of an arbitral panel to hear the dispute pursuant to NAFTA Article 2008(1)."[50] While the Arbitral Panel dispute was pending, the United States failed to adhere to the January 1, 2000 NAFTA deadline, which would have given Mexican trucks access to all American roadways.[51] The justification for this action was the same offered for noncompliance in 1995 – Mexico's inadequate vehicle safety regulations and enforcement supported an extension of the moratorium.[52] In addition, President Clinton stated that the moratorium would be prolonged due to the difficulty of ensuring Mexican truckers' compliance with U.S. safety standards.[53] The NAFTA panel conducted the arbitration in May 2000 and issued a final report in February 2001.[54] The Arbitral Panel issued a unanimous decision against the United States, which held that the "blanket" refusal by the United States to allow cross-border entry of Mexican trucks constituted a breach of Annex I of NAFTA.[55] The NAFTA Panel instructed the United States to comply

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parties agree to the chair of the panel. Then each party selects two panelists who are citizens of the other party").

44. *Id.*
45. *Id.*
46. *Id.*
47. Sheppard, *supra* note 2, at 238.
48. *Id.*; *See also* NAFTA art. 2007.
49. Sheppard, *supra* note 2, at 238.
50. SICE — Foreign Trade Information System, *North American Free Trade Agreement Arbitral Panel Established Pursuant to Chapter Twenty-In the matter of Cross-Border Trucking Services* (Feb. 6, 2001), *at* http://www.sice.oas.org/DISPUTE/nafta/english/U98081ae.asp. *See also* Weisweaver, *supra* note 1, at 474 (stating that "[b]ecause of the disparity in treatment, and the provisions agreed to under NAFTA, Mexico ultimately requested arbitration in front of an international panel established under NAFTA guidelines").
51. *See* Rossella Brevetti, *DOT to Continue Current Policy Limiting Mexican Truck Access*, 17 INT'L TRADE REP. 16 (2000), *available at* http://www.bna.com/products/corplaw/itr.htm.
52. Sheppard, *supra* note 2, at 239.
53. *Clinton Promises Teamsters to Keep Border Closed*, 19 WASH. TARIFF & TRADE LETTER 1 (1999).
54. Sheppard, *supra* note 2, at 239.
55. *See* Office of the United States Trade Representative, *Arbitral Panel established pursuant to Chapter Twenty in the Matter of Cross-Border Trucking Services* ¶ 295

with its obligations under NAFTA regarding cross-border trucking services.[56]

b. U.S. Argument

The United States asserted that because of differences in U.S. and Mexican regulatory systems, the Mexican trucking industry did not conform to "like circumstances" in the U.S. trucking industry.[57] Further, the United States argued that the "Mexican safety regime lacks essential components, such as comprehensive truck equipment standards, fully functioning roadside inspections and onsite compliance reviews, strict record-keeping rules, and a substantial commitment of enforcement recourses and personnel."[58] As such, the United States contended that its decision to continue the moratorium was "prudent and consistent with its obligations under NAFTA and was not in violation of the articles of NAFTA concerning national and most favored nation treatment because similar treatment was not an obligation under NAFTA."[59] The United States said it could not ensure safety of Mexican trucks on a case-by-case basis because it could not practically inspect every truck crossing the U.S.-Mexico border.[60] As such, the United States argued that highway safety could only be ensured by a comprehensive and integrated regime within Mexico.[61]

c. Mexico's Argument

In requesting the chapter 20 arbitration, Mexico alleged that the United States had agreed to phase out its moratorium on cross-border trucking services.[62] Mexico therefore contended that the United States' failure to comply with NAFTA constituted a violation of two NAFTA provisions.[63]

The first provision requires each NAFTA party to extend national treatment and most-favored nation treatment to each party nation's service providers and investors.[64] Mexico asserted the refusal by the United States to process Mexican truckers' applications is a denial of national treatment because the operating authority for U.S. trucks is considered on a case-by-case basis.[65]

The second provision requires each party nation to eliminate reservations from the national treatment and most-favored nation treatment ob-

(Feb. 6, 2001), *available at* http://www.ustr.gov/enforcement/trucking.pdf [hereinafter NAFTA Trucking Panel Report].

56. *Id.* ¶ 299
57. Weisweaver, *supra* note 1, at 475.
58. NAFTA Trucking Panel Report, *supra* note 55, at ¶¶ 153-60.
59. *Id.* ¶ 154
60. *Id.* ¶ 155
61. *Id.*
62. *Id.* ¶ 102.
63. Weisweaver, *supra* note 1, at 475.
64. *Id.* (citing NAFTA Trucking Panel Report, *supra* note 55, at ¶ 102).
65. NAFTA Trucking Panel Report, *supra* note 55, at ¶ 117.

ligation regarding trucking services as set forth in the schedules set out in the reservations.[66] In addition, Mexico contended it was being denied most favored nation treatment because the United States processes Canadian motor carriers with none of the restrictions imposed on Mexican carriers.[67]

In response to the U.S. argument regarding the differences in each party's trucking services safety standards, Mexico asserted that there is no provision in NAFTA that allows a party to impose its nations' laws on other party nations."[68] Mexico contended that the United States committed to NAFTA when both the Mexican and U.S. governments were fully aware that their respective trucking safety standards were not identical.[69] Mexico therefore argued that the lack of trucking safety standards comparable to those of the United States is not a valid reason for the United States' refusal to allow entry of Mexico's trucks.[70]

d. Analysis of Panel Decision – In Addition to National Treatment and Most Favored Nation Issues, Did Any Reservations or Exceptions to NAFTA Annex I Exist to Justify U.S. Action?

The NAFTA Panel sought to determine whether the U.S. Moratorium rendered it in breach of NAFTA Articles 1202 and 1203.[71] The Panel also sought to determine if any reservations or exceptions to the Agreement excepted the United States' actions from the purview of the Agreement"[72]

Article 1202 entitled "National Treatment" requires a Party to extend to service providers of another Party treatment no less favorable than it extends in the same or similar circumstances to its own service providers.[73] Article 1203 entitled "Most-Favored Nation Treatment" requires each Party to extend treatment no less favorable to service providers of

66. Weisweaver, *supra* note 1, at 475 (citing NAFTA Trucking Panel Report, *supra* note 55, at ¶ 102).
67. NAFTA Trucking Panel Report, *supra* note 55, at ¶ 119.
68. *Id.* ¶ 109.
69. *Id.* ¶ 111.
70. *Id.* ¶ 113.
71. Weisweaver, *supra* note 1, at 474 & 481 (citing NAFTA Trucking Panel Report at ¶1 and ¶ 241, stating that the principal issue surrounding the dispute concerning services was based largely on the parties' interpretation of NAFTA article 1202 (national treatment for cross-border services) and 1203 (most-favored nation treatment for cross border services)).
72. *Id.* at 474 (citing NAFTA Trucking Panel Report, *supra* note 55 at ¶ 100). *See also* Weisweaver, *supra* note 1, at 481 (stating the panel established that the maintenance of the moratorium needed to be justified under the language of article 1202, 1203, or some other NAFTA provision such as chapter nine's standard related measures for article 2101 on general exceptions, and noting that NAFTA allows a party to apply measures necessary to secure compliance with laws or regulations 'not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection').
73. C. O'Neal Taylor, *Two Regional Issues: The Mexican Trucking Case and NAFTA: Introduction, Commentary, and Afterword & The Future of International Economic Dispute Resolution in the Western Hemisphere (Dispute Settlement in the FTAA)*

another Party than it extends, in the same or similar circumstances, to service providers of any other Party or non-party.[74] The panel looked to the historical definition of "in like circumstances" language for most-favored-nation treatment as interpreted in the Canada-United States Free Trade Agreement (CFTA)[75] and the General Agreement on Tariffs and Trade (GATT).[76] The panel determined that the CFTA and GATT narrowly interpreted the language "in like circumstances" and that a broad interpretation could render articles 1202 and 1203 meaningless, essentially defeating the overall objective of NAFTA.[77] The panel believed it would be unreasonable to require the regulatory systems of two NAFTA countries to be substantially identical before national treatment is granted because relatively few service industry providers could ultimately qualify.[78] As such, the panel concluded that the United States' understanding of "in like circumstances" was too broad and did not justify continuation of the moratorium, rendering the United States in breach of its NAFTA obligations.[79] The panel also concluded that the United States' continuation of the moratorium was not justified under any exceptions provided in NAFTA article 2101.[80] The panel found the moratorium to be an arbitrary or unjustifiable discrimination and/or a disguised restriction on trade and determined that the United States failed to demonstrate that there were no alternative means of achieving its safety objectives that are more consistent with NAFTA.[81]

e. Holding of Arbitral Panel

The panel held that the blanket refusal by the United States to review and consider the approval of any Mexican-owned truck carrier applications for authority to provide cross-border trucking services is a breach of U.S. obligations under NAFTA.[82] The panel further held that the differences of the Mexican regulatory system from that of the United States did not provide sufficient legal justification for the United States to maintain a moratorium regarding Mexican trucks.[83] "The Panel 'recommended' that the United States take appropriate steps to bring its practices into compliance with NAFTA."[84] The panel determined that to be in compliance with Annex I, the United States did not have to give favorable consideration to all or any specific number of applications from

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the Mexican Trucking Case and NAFTA: Introduction, Commentary and Afterword: Introduction, 42 S. TEX. L. REV. 1239, 1241 n.25 (2001).

74. *Id.* at n.26.
75. *See* 27 I.L.M. 293 (indicating that much of NAFTA was modeled after the CFTA, which entered into force on Jan. 1, 1989).
76. NAFTA Trucking Panel Report, *supra* note 55, at ¶¶ 250-51.
77. *Id.* ¶¶ 259-60.
78. *Id.* ¶ 259.
79. *Id.* ¶¶ 259 & 278.
80. *Id.* ¶ 278.
81. *Id.* ¶ 269.
82. *Id.* ¶ 295.
83. *Id.* ¶ 296.
84. *Id.* ¶ 299.

a particular Mexican trucking firm if it is evident that the applicant may be unable to comply with U.S. trucking regulations when operating in the United States.[85] The panel determined that the United States – not Mexico – is responsible for the safe operation of trucks on U.S. roadways, whether the trucks are American, Canadian, or Mexican.[86] Further, the panel found that the United States is not required to treat applications from Mexican trucking firms in exactly the same manner as applications from the United States or Canada as long as each application is reviewed on a case-by-case basis.[87]

However, if the United States decided to impose different requirements for Mexican trucks than those imposed for U.S. and Canadian trucks, the requirements must abide by the following guidelines: (1) the requirements must be made in good faith with respect to legitimate safety concerns; and (2) the United States must implement requirements that fully conform to all of the NAFTA provisions.[88]

The panel found that rather than barring all Mexican applicants, the United States should examine Mexican trucking firms on a case-by-case basis to determine whether they meet U.S. safety standards.[89]

C. The George W. Bush Administration

On February 6, 2001, a few months after George W. Bush became president, the "NAFTA arbitration panel decided that the Clinton moratorium violated NAFTA and that the U.S. should expedite efforts to open the borders."[90] This ruling prompted Congress in August 2001 to pass stiff safety restrictions on Mexican trucks.[91] The United States did not comply with NAFTA Annex I within the thirty-day period deadline, nevertheless, President George W. Bush promised that he would do his best to bring the United States into compliance no later than January 1, 2002.[92] The Bush Administration stated that "a one-year waiting period would (1) allow Congress time to appropriate the necessary funds in the 2001-2002 budget to implement the new measures and (2) grant the DOT sufficient opportunity to enact regulations aimed at ensuring safety compliance."[93] The Mexican government took these statements as "a gesture of good will and announced that it would not impose trade sanctions on

85. *Id.* ¶ 300.
86. *Id.*
87. *Id.*
88. *Id.* ¶ 301.
89. *Id.* ¶ 300.
90. Brooks, *supra* note 7.
91. *Id. See also* Teamsters, *supra* note 15 (stating that "the U.S. House and Senate took immediate action and passed the FY2002 Department of Transportation Appropriations bill, which required that numerous safety measures be implemented before any Mexican trucks would be permitted to travel beyond the commercial zone").
92. David Hendricks, *Mexican Trucks Can Roll; White House Clears Road for Deliveries to Interior of the U.S.*, San Antonio Express News, Apr. 5, 2001, *available at* http://www.mysanantonio.com.
93. *Id.*

the United States as long as conciliatory efforts continued."[94]

The Bush administration made it a goal to lift the ban and comply with NAFTA's requirements.[95] After the events of September 11, 2001, U.S. border security became even more important prompting further support for keeping Mexican trucks out of the United States.[96] Although the events of September 11, 2001 stalled Bush's efforts, a deadline of May 3, 2002 was set to implement the opening of the border.[97] However, the May deadline was not met due to an unfinished inspector general's report on truck safety.[98] As such, a new deadline was set for July 2002, which has also come and gone.

1. U.S. Department of Transportation 2002 Appropriations Bill Containing Provisions Consistent with Arbitral Panel Decision

The DOT introduced Trucking Regulations in accordance with the Bush Administration's May 2001 Conciliatory Announcement.[99] The DOT Trucking Regulations are comprised of three separate parts.[100] The first Regulation provides procedures implemented to ensure compliance by Mexican truckers in an effort to certification to operate in the four border states – California, Arizona, New Mexico and Texas.[101] The second DOT Regulation provides rules to guide the issuance of permits to operate beyond the four border states.[102] The third DOT Regulation, establishes a "supplementary oversight program," which would allow government officials to conduct roadside inspections and on-site compliance inspections at the headquarters of Mexican trucking companies.[103]

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94. *See U.S. Misses Deadline for Mexican Truck Access; Safety Concerns Postpone Policy Required by NAFTA*, ST. LOUIS POST DISPATCH, Mar. 8, 2001, at A13.

95. *See* Press Release, Determination Under the Interstate Commerce Commission Termination Act of 1995, (June 6, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010606.1.html. *See also* Press Release, Joint Statement by President George Bush and President Vincente Fox Towards a Partnership for Prosperity: The Guanajuato Proposal, (Feb. 16, 2001) *available at* http:www.whitehouse.gov/new/releases/2001/02/20010220-2.html.

96. *Bus and Truck Security and Hazardous Materials Licensing: Hearing Before the S. Subcomm. the on Surface Transportation And Merchant Marines*, 107th Cong. 38, 54 (2001) *available at* http://www.citizen.org/autosafety/Truck Safety/articles.cfm.?ID=6261(testimony of Joan Claybrook, President, Public Citizen stating that national security concerns in light of the terrorist attacks on the United States on Sept. 11, 2001, is additional authority to support not complying with Annex I) [hereinafter Bus and Truck Security].

97. Brooks, *supra* note 7.

98. *Id.*

99. Sheppard, *supra* note 2, at 235.

100. 49 C.F.R. pt. 365 (2001).

101. *See* Federal Motor Carrier Safety Administration, 66 Fed. Reg. 86,22328 (May 3, 2001) (codified as 49 C.F.R. pts. 368 & 387).

102. *Id.* at 86,22330.

103. Id. at 86,22371.

2. *Congressional Approval of the Sabo Amendment Precluded the Expenditure of U.S. Government Funds to Process Applications Pursuant to U.S. DOT 2002 Appropriations Bill by Mexican Truckers*

Congress immediately opposed the DOT trucking regulations were immediately opposed by Congress.[104] One month after publication of the proposed regulations, the U.S. House of Representatives approved the Sabo Amendment, which dealt a blow to the Bush administration's free trade intentions.[105] The House approved the Sabo Amendment with overwhelming force and effectively precluded the expenditure of U.S. government funds to process applications submitted by Mexican truckers.[106] Although this legislation was questionable in light of the NAFTA Arbitral Panel decision, many members of the House *See*med unconcerned with the validity of the legislation and sought to uphold U.S. safety standards at all costs.[107] A majority of the House members exclaimed that "NAFTA is a trade agreement – not a suicide pact."[108]

3. *U.S. Coalition Files Suit for Injunction With U.S. Ninth Circuit Court of Appeals*

With the news of George W. Bush's intention to finalize the lifting of the moratorium by May 2002, on May 1, 2002 a "coalition" of environmentalists and labor groups, including Public Citizen, the Environmental Law Foundation, California Federation of Labor, California Trucking Association, and the International Brotherhood of Teamsters, filed a lawsuit *See*king an emergency injunction to prevent the Bush administration's May 3, 2002 action.[109] Between July 2002 and August 2002, the parties to the Ninth Circuit lawsuit filed briefs and submitted oral arguments and on January 16, 2003 the court rendered a decision that found the Bush

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104. Sheppard, *supra* note 2, at 242.
105. Heather Rothman & Rossella Brevetti, *House Bars Funds for Processing of Mexican Truck Applications in U.S.*, 18 INT'L TRADE REP. 1002 (2001) *available at* http://www.bna.com/products/corplaw/itr.htm.
106. *Comments on Department of Transportation and Related Agencies Appropriations Act, 2002*, DAILY DIGEST at H3586-H3594 (June 26, 2001) (noting the distraught feelings regarding the fact that the DOT trucking regulations would allow Mexican trucks to operate in the United States for up to eighteen months without first satisfying U.S. safety standards, Rep. Martin Sabo initially introduced a less stringent amendment that simply precluded funding for the DOT regulations, unless safety requirements were satisfied before granting Mexican trucks a certificate of registration), *available at* http://thomas.loc.gov/r107/r107d26jn1.html [hereinafter Comments].
107. *See* Sheppard, *supra* note 2, at 242-43.
108. Comments, *supra* note 106, at H3587.
109. *Id.* (stating that environmental, labor, and trucking groups – which had stymied efforts to open the borders for nearly a decade by arguing about safety issues – asked for an injunction based on environmental concerns);Press Release, Teamsters, Teamsters, Environmentalists' Lawsuit Keeps Border Closed – Citing Safety Concerns, Ninth Circuit Court Stops Department of Transportation from Opening U.S.-Mexico Border (Jan. 16, 2003) *at* http://www.teamsters.org/03news/nr_030116_4.htm.

administration action was in violation of the National Environmental Policy Act (NEPA) and the Clean Air Act (CAA).[110] "The three-judge panel said the department acted 'arbitrarily and capriciously' by not preparing a full statement on air quality as required by NEPA and the CAA."[111] This decision "required the U.S. Department of Transportation to prepare a full environmental Impact Statement and Clean Air Act conformity determination before it can open the U.S. Mexican border."[112]

III. ANALYSIS OF THE NINTH CIRCUIT DECISION

A. IDENTIFICATION OF U.S. COALITION PARTIES AGAINST NAFTA ANNEX I – THE PETITIONERS

California Labor Organizations replaced the AFL-CIO. Labor organizations like the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) have vehemently pressured the Bush administration to disregard the mandate from the NAFTA panel notwithstanding the economic consequences by questioning the functionality of the DOT Regulations that respond to the NAFTA Panel decision.[113] The AFL-CIO has warned on several occasions that "because the hourly rate of Mexican driver is lower than that in the United States, 'American trucking companies will simply close their U.S. factories and move their headquarters across the border.'"[114]

Based on the foregoing, it is quite strange that the AFL-CIO was not among the petitioners in the Ninth Circuit case. This decision was likely part of a successful forum shopping attempt strategically lodged by the petitioners. The AFL-CIO was replaced with the Auto and Truck Drivers Local 70, California Labor Federation, and the California Trucking Association, a guarantee to ensure placement of this matter in the Ninth Circuit – a circuit known for its radical decisions.

The Environmentalists may have been used as pawns to make the argument more credible and deal with any problems associated with standing.

The International Brotherhood of Teamsters and the Brotherhood of Teamsters (Teamsters), one of the largest organized labor groups, is on the front lines of the war against allowing the entry of Mexican trucks into the United States. The Teamsters' main fear is the "the potential negative repercussions of eliminating thousands of U.S. jobs, endangering

110. *Id.* (stating that the "Ninth Circuit required the U.S. Department of Transportation (DOT) to prepare a full Environmental Impact Statement and Clean Air Act conformity determination before it can open the U.S. Mexican border").

111. *U.S. Court Orders Study of Mexican Trucks*, AUSTIN AMERICAN STATESMAN, Jan. 16, 2003), *available at* http://www.austin360.com/aas.news/ap/ap_story.html/National/AP.V9034. *See also* Teamsters, *supra* note 15.

112. Environmentalists, *supra* note 109.

113. *Transportation Labor Endorses House Resolution to Keep Unsafe Mexican Trucks and Buses Off U.S. Highways*, U.S. NEWSWIRE, 2001 WL 21894138 (May 24, 2001).

114. *Teamsters Asks DOT About Change in Highway Access for Mexican Trucks*, 16 INT'L TRADE REP. 1537 (1999), *at* http://www.bna.com/products/corplaw/itr.htm.

American drivers, drug smuggling and imperiling the environment."[115] It is frequently argued that the Teamsters' true motive is job protectionism.[116] They assert that they will suffer "both from extra competition and from a possible increase in the number of truck accidents" – in their view, Annex I threatens both their pocketbooks and their safety.[117] The Teamsters are concerned that Mexican truckers "fix things with bubble gum and tape."[118]

Public Citizen is also at the forefront of NAFTA trucking opposition.[119] Public Citizen argues that it is unrealistic to believe the safety of American motorists will be guaranteed by inspecting each Mexican truck, because current resources allow for the inspection of only 1 percent of Mexican trucks at the border.[120] In addition, Public Citizen argues that full NAFTA trucking compliance would be catastrophic for U.S. towns located on the border because of the lucrative temptations of transporting narcotics, undocumented immigrants, and contraband such as weapons and stolen cars.[121] Public Citizen advocates that the United States should continue to violate its NAFTA obligations by closing its border until a consensus is reached regarding safety standards and contends that the United States should opt to pay the noncompliance fine rather than comply with NAFTA Annex I.[122] To do otherwise, Public Citizen believes, will cause the public to realize the dangers that "an anti-democratic and anti-safety decision rendered by a secret international trade tribunal can bring to the United States' front door."[123]

B. Significant Facts

The petitioners, including Teamsters, Auto and Truck Drivers Local 70, California Labor Federation, California Trucking Association, Environmental Law Foundation, and Public Citizen, and the petitioners in intervention, including the Natural Resources Defense Council and the Planning and Conservation League (collectively petitioners) filed suit

115. Press Release, Teamsters, Inspector General's Report Confirms U.S. Is Not Ready to Open Border with Mexico (May 10, 2001) http://www.teamster.org/nafta/01naftabackground.htm [hereinafter Inspector General]; *See also* Press Release, Teamsters, ABC Nightline Reveals DEA Hid Information on Mexican Drug Smuggling During 1993 NAFTA Debate (May 8, 1997), *at* http://www.teamster.org/nafta/01naftabackground.htm.

116. Sheppard, *supra* note 2, at 255.

117. *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483 (D.C. Cir. 1994).

118. Inspector General, *supra* note 115.

119. *See, e.g.*, Public Citizen, *Mexican Truck Inspection Program Sorely Lacking, Allows Trucks with Faulty Brakes, Leaky Fuel Lines to Stay on Road* (Feb. 7, 2001), *at* http://www.citizen.org/pressroom/release.cfm?ID=710; Public Citizen, *NAFTA Truck Ruling Imperils U.S. Public Safety*, (Nov. 29, 2000), *at* http://www.citizen.org/pressroom/release.cfm?ID=490.

120. Public Citizen, *The Coming NAFTA Crash: The Deadly Impact of a Secret NAFTA Tribunal's Decision to Open U.S. Highways to Unsafe Mexican Trucks*, (Feb. 1, 2001), *at* http://www.citizen.org/ publications/release.cfm?ID=6839.

121. *Id.*

122. *Id.*

123. *Id.*

against respondents the U.S. DOT, the Federal Motor Carrier Safety Administration (FMCSA), Joseph M. Clapp, and Nicholas R. Walsh.[124] The action was brought before a three-judge panel of the Ninth Circuit, and challenged the DOT's failure to conduct environmental analysis prior to promulgation of the three DOT safety regulations by the FMCSA, which the Bush administration felt were necessary to bring the United States into compliance with NAFTA Annex I.[125] Petitioners alleged that the DOT's failure to prepare an in-depth Environmental Impact Statement (EIS) for all three regulations violates the National Environmental Policy Act of 1969 (NEPA) and that the DOT's failure to conduct a "conformity determination" to ensure that the three safety regulations do not disrupt applicable state implementation plans violates the Clean Air Act (CAA).[126]

The DOT completed a preliminary environmental assessment (EA) for two of the three regulations (the application and safety rules) and determined there was no need for a full EIS, because the rules did not "significantly affect the quality of the human environment."[127] Thus, the DOT issued a finding of no significant impact.[128] The DOT did not prepare a preliminary EA for the certification rule because it determined that this regulation fell into the categorical exclusions from the EA/EIS requirement in the NEPA regulations.[129] Nor did the DOT prepare a CAA conformity determination for any of the three safety regulations, because it determined that certain categorical exceptions to the conformity determination requirement applied to them.[130]

All three of the DOT safety regulations were published in the Federal Register on March 19, 2002.[131] Petitioners timely filed petition to challenge the validity of the application and safety rules on May 2, 2002 (No. 02-70986), which was followed by the timely filed petition challenging the validity of the certification rule on May 14, 2002 (No. 02-71249).[132] Both petitions alleging violations of the procedural requirements of NEPA and CAA were brought pursuant to the judicial review provision of the Administrative Procedure Act (APA).[133] It should be noted that the petitioners' claim is technically not regarding NAFTA Annex I, which is a provision of an international agreement but rather regarding the legality of the three DOT safety regulations that are appurtenant to NAFTA Annex I.

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124. *Public Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1009 (9th Cir. 2003).
125. *Id.*
126. *Id.*
127. *Id.*; 42 U.S.C. § 4332(2)(c) (2003) (cited in *Public Citizen*, 316 F.3d at 1013).
128. *Public Citizen*, 316 F.3d at 1013.
129. *Id.*
130. *Id.*
131. *Id.* at 1014.
132. *Id.*
133. *Id.*

C. Issues

The court stated that its function was very narrow—to determine whether the DOT's act of promulgating the three safety regulations violated NEPA and CAA. The court first considered whether the DOT acted arbitrarily and capriciously when it failed to prepare an EIS pursuant to NEPA for the application and safety rules on the basis of its EA.[134] Next, the court considered whether the DOT acted arbitrarily and capriciously in failing to conduct an EA and/or EIS at all pursuant to NEPA for the certification rule.[135] Finally, the court considered whether the DOT acted arbitrarily and capriciously in failing to conduct a conformity determination pursuant to CAA for any of the three regulations.[136]

Quite interestingly, the court admitted at the outset and at the end of the decision that "[t]he President of the United States is not a party to this action, and the issues before [the court] do not touch on his clear, unreviewable discretionary authority to modify the moratorium pursuant to the Interstate Commerce Commission Termination Act of 1995."[137] The court further stated that "neither the validity of nor the United States' compliance with NAFTA" would be considered by the court.[138] As will be illustrated below, the court's statements in this regard are inconsistent with its analysis to determine whether the petitioners had standing to bring the suit.[139]

D. Analysis

1. Standing

The court first looked at the issue of whether the petitioners had standing to bring the suit.[140] The court determined that it "only needed to find that one Petitioner had standing to allow the case to proceed."[141] Following the recommendation of the petitioners, the court considered the standing of Public Citizen only.[142] The court followed the basic textbook standing analysis – injury in fact, causation, and redressability.[143] The court's redressability analysis is arguably flawed. The court found redressability because "if [the court] granted Public Citizen's petition, no Mexico domiciled trucks would be permitted into the United States beyond the commercial border zones until DOT conducted the required analysis."[144] Moreover, the court stated that "Public Citizen would suffer harm if [the court] denied its petitions, but the harm would be avoided

134. *Id.* at 1021.
135. *Id.* at 1028.
136. *Id.* at 1029.
137. *Id.* at 1020.
138. *Id.*
139. *See id.* at 1019.
140. *Id.* at 1014-15.
141. *Id.*
142. *Id.* at 1015.
143. *Id.* at 1014-19.
144. *Id.* at 1019.

entirely if it granted the petitions."[145] This analysis is wholly inconsistent with the court's declaration at the end of its standing analysis that its decision would have no effect on the president's clear, unreviewable discretionary authority to modify the moratorium pursuant to the Interstate Commerce Commission Termination Act of 1995.[146] Regardless of whether the court granted the petitioner's petitions, the president could still lift the moratorium pursuant to authority granted to him in this act. As such, redressability arguably was lacking. At any rate, the court found that Public Citizen had standing to bring the suit.[147]

2. *Did DOT Act Arbitrarily and Capriciously When it Failed to Prepare an EIS Pursuant to NEPA for the Application and Safety Rules on the Basis of its EA?*

The court determined that NEPA mandates that all "major federal activities significantly effecting the human environment conduct the preparation of an EIS.[148] In some instances, an agency may prepare an EA in lieu of preparing an EIS in an effort of making a preliminary determination of significant environmental effect.[149] If, however the EA findings indicate significant environmental effect, an EIS must be prepared.[150] If the EA findings indicate that there is no significant environmental effect, the agency must issue a Finding of No Significant Impact ("FONSI") in addition to a convincing statement of the reasons why.[151]

As such, to decide whether an EIS was required, the court found that it must determine: (1) whether the challenged rules constitute major federal actions; and (2) whether the rules may significantly affect the environment.[152] In its analysis of these questions, the court looked to the Council on Environmental Quality (CEQ), which was established by NEPA,[153][154] The court relied on these regulations to guide its review of an agency's compliance with NEPA, finding that the Supreme Court has held that agencies are entitled to substantial deference.[155] The court determined that the "relevant CEQ regulations implementing NEPA define 'major Federal actions' as 'actions with effects that may be major and which are potentially subject to Federal control and responsibility' including 'adoption of official policy, such as rules, regulations, and interpretations."[156] The DOT did not dispute that its actions were federal, but did

145. *Id.*
146. *Id.*
147. *Id.* at 1020.
148. *Id.* at 1021.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. 42 U.S.C. §§ 4342-4347 (1970).
154. *Public Citizen*, 316 F.3d at 1022.
155. *Id.*
156. *Id.*

dispute the petitioners' allegations regarding the regulations' effects.[157]

The court then turned to the analysis of whether the action "significantly affected the human environment."[158] The DOT asserted that the effects of the application and safety rules would result in no increase of Mexican truck traffic.[159] Within its analysis of whether the DOT application and safety regulations "significantly affected the human environment," the court looked to the CEQ regulations, which explained that these considerations must be analyzed by studying the "national, regional, and local contexts as well as by looking at the short- and long-term effects of the proposed action."[160] The court found that the DOT's EA was inadequate in this regard because the DOT analyzed the possible emissions only on a national level – "it did not conduct any analysis regarding whether increased in emissions could occur on a localized level in certain areas near the Mexican border, i.e. southern California or Texas."[161] As such, the court found that the DOT's EA regarding the application and safety rules was inadequate to lead to a FONSI and that the DOT acted arbitrarily and capriciously in failing to prepare an EIS.[162]

3. *Did DOT Act Arbitrarily and Capriciously in Failing to Conduct an EA and/or EIS Pursuant to NEPA for the Certification Rule?*

The CEQ regulations provide that actions that do not have a significant effect on the human environment be excluded.[163] These actions do not require an EA or an EIS.[164] Agencies are required to implement guidelines to distinguish which of their actions do or do not require an EA or EIS.[165] The court found that FMCSA and DOT guidelines did not include a categorical exclusion that would encompass the certification rule.[166] The DOT argued that although the certification rule is not subject to any of the DOT's categorical exclusions, it should be categorically excluded from the EA/EIS requirement because it has no significant environmental impact.[167] The court flatly invalidated this assertion and found that since the DOT failed to identify any particular categorical exclusion applicable to the certification rule, it acted arbitrarily and capriciously in failing to prepare an EA and/or EIS for the certification rule.[168]

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157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 1023.
161. *Id.*
162. *Id.* at 1021-22, 1027.
163. *Id.* at 1028.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1029.
168. *Id.*

4. Did DOT Act Arbitrarily and Capriciously in Failing to Conduct a Conformity Determination Pursuant to CAA for Any of the Three Regulations?

The CAA required the Environmental Protection Agency ("EPA") to establish air quality standards with regarding the pollutants[169] at issue.[170] As a result, each state is required to submit a State Implementation Plan ("SIP") for each pollutant to the EPA for approval."[171] To ensure compliance with these plans, the CAA contains a "Conformity Requirement," which provides that activities that do not conform with a SIP shall not be approved.[172] Most federal actions affecting levels of pollutants in nonattainment regions require that the responsible agency conduct a conformity determination.[173] This requirement exempts the following two categories of federal action: (1) "actions where the total of direct and indirect emissions are below the emissions level specified in the regulations;[174] and (2) actions which would result in no emissions increase or an increase in emissions that is clearly de minimis, including rulemaking and policy development and issuance."[175] The court found that this would require DOT conduct analysis that would lead to predictions of emissions levels.[176] Because the court found that the DOT failed to conduct reliable analysis, it had no credible information regarding predictions of emissions levels, and as such, acted arbitrarily and capriciously by failing to conduct conformity determinations for any of the three regulations.[177]

E. HOLDING – U.S. DOT ORDERED TO PREPARE NEPA EIS AND CAA CONFORMITY DETERMINATION

Based on the foregoing, "the Court held that DOT acted arbitrarily and capriciously in failing to prepare a Full EIS pursuant to NEPA as well as a Conformity Determination pursuant to CAA for the Three Regulations."[178] The court granted the petitioners' petitions and remanded the matter to the DOT so that it might prepare a full EIS and conformity determination for all three regulations.[179] As stated above, the court strongly reiterated that its decision "made no determinations about the actions of the President of the United States (George W. Bush) nor the validity of NAFTA, neither of which was before it."[180]

169. 42 U.S.C. § 7409 (1970).
170. *Public Citizen*, 316 F.3d at 1029.
171. *Id.*
172. *Id.*
173. *Id.*
174. 40 C.F.R. § 93.153(c)(1) (2003).
175. *Public Citizen*, 316 F.3d at 1029.
176. *Id.* at 1030.
177. *Id.* at 1031.
178. *Id.* at 1032.
179. *Id.*
180. *Id.*

IV. IMPLICATIONS OF THE NINTH CIRCUIT DECISION

A. HIERARCHY/CONFLICT OF LAWS

Two principal types of law exist within international law.[181] The first type is treaty law, which refers to obligations that emanate from express agreements among states.[182] The second type of international law, customary international law, refers to unwritten obligations that are inferred from general practices of states.[183] Obviously, NAFTA is a product of treaty international law.

Article II, section 2, clause 2 of the U.S. Constitution provides the president with authority to enter into treaties with the advice and consent of the Senate.[184] However, no reference is made to executive agreements in the text of the Constitution. Nevertheless, executive agreements have long been accepted practice in the United States, and they do not require advice and consent of the Senate.[185] Furthermore, article IV of the Constitution (the Supremacy Clause) provides that "treaties, along with federal statutes, are supreme over any inconsistent state law."[186] As such, the rule of hierarchy of laws dictates that if a treaty is self-executing, it preempts state laws and other law equal to federal statutory law, and below federal constitutional law.[187] In this regard, treaties are generally thought to be equal in status to federal statutes, and if a conflict arises between a federal statute and a treaty, the "last-in-time" rule governs.[188] However, the last-in-time rule applies only to self-executing treaties.[189] A treaty and its provisions can be either "self-executing" or "non self-executing".[190] Distinguishing between "self-executing" and "non self-executing" treaties is a judicially developed doctrine.[191] The Supremacy Clause has been interpreted to mean that self-executing treaties automatically become supreme law of the land without the need for any legisla-

181. Eric George Reeves, Note, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877, 880 (1993).
182. *Id.*
183. *Id.*
184. Marley S. Weiss, *International Treaties and Constitutional Systems of the United States, Mexico, Canada: Foreward: Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada: Laboring in the Shadow of Regional Integration*, 22 MD. J. INT'L L. & TRADE 185, 197 (1998).
185. *Id.*
186. Reeves, *supra* note 181, at 881.
187. Weiss, *supra* note 184, at 208.
188. Reeves, *supra* note 181, at 881.
189. *Id.* at 882.
190. Mike Townsend, Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 796 (1989).
191. Weiss, *supra* note 184, at 206-07 (noting that the courts have developed a series of factors for utilization in making such a determination, including language and purpose of the treaty, circumstances of its execution, nature of the obligations imposed by the treaty, existence of domestic institutions and procedures appropriate for direct implementation, including institutional capacity of the judiciary to resolve the dispute, availability and feasibility of alternative enforcement methods, and the consequences of treating the treaty as self-executing or failing to do so).

tive action.[192] The implementing legislation of non self-executing treaties is supreme law of the land.[193] As such, self-executing and non self-executing treaties may both have domestic implication; however, Congress may repeal the domestic consequences of a treaty in three ways: (1) by terminating the treaty; (2) by repealing the legislation implementing a non self-executing treaty; or (3) by enacting legislation triggering the last-in-time rule for self-executing treaties.[194] Because treaties and federal statutes occupy equal position in the hierarchy of U.S. law, the later-in-time rule is employed to resolve conflicts between federal statutes and treaties.[195] Courts apply constructive and interpretive rules disfavoring the implication of congressional intent to overturn prior treaty-based law, attempting as much as possible to give effect to both the treaty and the later-in-time statute.[196] However, if the conflict cannot be resolved, the one enacted later in time will control.[197]

B. Effect on President's Ability to Carry Out Terms of NAFTA Annex I

The Ninth Circuit's decision has no real impact on the president's ability to lift the moratorium. The president did not need the promulgation of the DOT regulations to lift the moratorium. As stated above, the Ninth Circuit decision impacts only the validity of the DOT regulations – not the validity of NAFTA or the NAFTA Implementation Act. Although President Bush may proceed with lifting the moratorium, at this point the DOT will have to comply with the court's ruling before it can begin to process applications of Mexican trucking firms. As such, it would be futile for the president to lift the moratorium until the DOT complies with the Ninth Circuit's ruling.

V. CONCLUSION

Notwithstanding the Ninth Circuit's decision's direct effect on the president's ability to bring the United States into compliance with NAFTA Annex I, the Sabo Amendment[198] is later in time than the NAFTA Implementation Act. Currently, speculation exists as to whether the United States will comply with Annex I and begin to process Mexican trucks.[199] Although Bush has lifted the moratorium concerning U.S.-domiciled

192. Townsend, *supra* note 190, at 796.
193. *Id.* at 797.
194. Weiss, *supra* note 184, at 207.
195. *Id.* at 206.
196. *Id.*
197. *Id.* at 208.
198. *See supra* notes 105 & 106.
199. *See* CRASH, *GAO Report Says Mexican Truck Safety Still Lags* (Jan. 10, 2002), *at* http://www.trucksafety.org/gaoreport.html; *Transport Topics, Border to Open by June* (Jan. 7, 2002), *at* http://www.ttnews.com%5c/members/topNews/0008347.*html*; *House Votes to Allow Mexican Trucks*, N.Y. Times, Nov. 30, 2001, *available at* http://www.nytimes.com/ aponline/national/AP-Mexican-Trucks.html.

Mexican trucks, the moratorium is still in effect for Mexican-domiciled Mexican trucks.

The DOT may file a motion for rehearing en banc in the Ninth Circuit and/or may possibly file writ of certiorari with the Supreme Court to determine under what circumstances an EIS is needed.

Even if President Bush lifted the moratorium, unless the Supreme Court decides that the EIS and conformity determinations are not required, the DOT will still have to prepare them. This is because the DOT will not be able to process Mexican trucking firms' applications for certification to enter the United States due to the Ninth Circuit finding the three enabling regulations invalid.

What measures can Mexico take if the United States fails to comply with the NAFTA chapter 20 panel decision, and what would be the impact on future trade agreements? NAFTA articles 2018 and 2019 provide that the United States and Mexico should have agreed upon a resolution consistent with the panel's determinations and recommendations within thirty days of receiving the panel's final report – approximately March 8, 2001. Even if the president lifts the moratorium, if the DOT cannot process applications, the United States will still fall short of compliance with NAFTA. President Bush's assurances that the United States would comply with NAFTA were taken by the Mexican government in good faith, stalling the Mexican government's right under NAFTA to collect approximately $5 billion in sanctions.

Some scholars believe the United States is technically not bound by the findings or recommendations of the NAFTA chapter 20 panel because NAFTA is not a constitutionally ratified treaty.[200] This contention is based on the Constitution, article 2 section 2, which requires treaties to be approved by two-thirds of the Senate.[201] The NAFTA Implementation Act was not passed by two-thirds of the Senate.[202]

If the United States does honor its obligations pursuant to NAFTA Annex I, it will most likely occur during the George W. Bush administration. President Bush has been true to form in carrying out all of the missed and/or failed objectives of his father's administration. In addition, as the former governor of Texas — one of the commercial zone border states — President Bush has always been in favor of cross-border trucking. President Bush will likely complete his efforts to lift the moratorium and honor the United States' obligations under NAFTA Annex I. Further, the current Republican congressional occupation makes this the best time to meet the objectives of NAFTA Annex I. The Supreme Court will probably grant the DOT's writ of certiorari and rule that the Ninth Circuit was without jurisdiction to decide the validity of a congressional act, i.e., the three DOT regulations. As such, the DOT will be able to process applications of Mexican trucking firms.

200. Weisweaver, *supra* note 1, at 484.
201. *See supra* note 185.
202. *See supra* note 23.

Interestingly, the last-in-time implications of the Sabo Amendment were not raised or considered by the Ninth Circuit. Notwithstanding the Sabo Amendment, Congress may utilize last in time to circumvent the United States' obligations under Annex I, if it so desires. Based on the courts' interpretation of such a conflict, however, it is likely that as much legal effect as possible would be given to both NAFTA and any such later-in-time congressional act.

Perspective Article