NOTES AND COMMENT

TRUCKS ON OUR TURF: SEEKING TO RESOLVE THE INTERNATIONAL INCONSISTENCY IN *PUBLIC CITIZEN v. DEPARTMENT OF TRANSPORTATION*[1]

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AUTHOR'S NOTE

Before the publishing of the below article, the United States Supreme Court heard arguments for, and ruled on, the case of *Public Citizen v. Department of Transportation*.[2] In accordance with this note's recommendation, a unanimous Supreme Court reversed a Ninth Circuit decision and held that the Federal Motor Carrier Safety Administration did not have to issue an environmental assessment for proposed rules concerning Mexican motor carriers' safety regulation.[3] In determining that neither the National Environmental Policy Act nor the Clean Air Act necessitated the claimed environmental analysis, the Court recognized the President's inherent authority to lift a trade moratorium held to violate the North American Free Trade Agreement.[4] This note provides several considerations and recommendations for the Supreme Court in ruling on the delicate balancing

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1. Pub. Citizen v. DOT, 316 F.3d 1002 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).

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2. Pub. Citizen v. DOT, 124 S. Ct. 2204 (2004).

3. *See id.*

4. *Id.* at 2211, 2217-19.

of international and national legal principles. As will be illustrated, this author believes the Supreme Court made the correct determination.

INTRODUCTION

> Man's mind, once stretched by a new idea, never regains its original dimensions.[5]

Such it is with international trade. What was once a world divided into separate and distinct cultures has now become a globe where borders continually fade and cease to exist. Although this progress brings new opportunities to many, it similarly awakens emotions of apprehension and uncertainty, while creating clashes between what was known and what is yet to be discovered. A recent Ninth Circuit case, *Public Citizen v. Department of Transportation*,[6] illuminated inconsistencies that may occur when transnational interactions attempt to fit into our previously ethnocentric societies. The discrepancy brought to light through this decision concerned a claimed conflict between an international arbitration decision under the North American Free Trade Agreement[7] (hereinafter "NAFTA") and United States environmental law.

The arbitration proceeding in question began when Mexico became frustrated with the United States' refusal to open its borders to Mexican trucks, causing the Mexican government to initiate dispute resolution proceedings under NAFTA.[8] Following the arbitral panel's decision in favor of Mexico,[9] U.S. President George W. Bush lifted the blocking moratorium and allowed Mexican carriers access to United States roads.[10] A well-known citizens' rights organization, Public Citizen, challenged this action, arguing that opening the border without conducting an Environmental Impact Statement (hereinafter "EIS") analysis violated fundamental U.S. environmental policies.[11] The Ninth Circuit held that the preparation of an

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5. LANCE SECRETAN, INSPIRATIONAL LEADERSHIP 41 (1999) (quoting Oliver Wendell Homes, Jr.).

6. *Pub. Citizen*, 316 F.3d 1002.

7. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057-2225, 32 I.L.M. 605 [hereinafter NAFTA]; *see also* North American Free Trade Agreement, Pub. L. No. 103-182, 19 U.S.C. §§ 3301-3473 (2003).

8. *In re* Cross-Border Trucking Services (U.S. v. Mexico) (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).

9. *Id.* at 81-82.

10. *Pub. Citizen*, 316 F.3d 1002.

11. *Id.* at 1014.

EIS was necessary before the moratorium could be lifted.[12] The Supreme Court recently granted the government's petition for a writ of certiorari.[13]

In reaching its ultimate conclusion, the United States Supreme Court will be faced with a clash between two areas of substantive law: international treaty law and national environmental law. Did the Ninth Circuit decision correctly apply United States environmental law, or did it improperly interfere with the resolution of a NAFTA trade dispute? How should the Supreme Court address the issues presented and balance the seeming inconsistency? This note will address the question of how the relationship between national and international law, as well as treaty and environmental law, will affect the Supreme Court's decision in *Public Citizen*. Part I gives a brief history of relevant environmental law and NAFTA, as well as the treaty's connection to the situation at hand and guidelines for NAFTA Chapter Twenty dispute resolution proceedings. Part II provides details concerning the arbitral panel's ruling and the *Public Citizen* case itself. Part III discusses whether the Ninth Circuit properly utilized U.S. environmental law, while Part IV examines the international implications of potential outcomes. The manner in which the Supreme Court handles the connection between these two legal fields will not only set United States precedent for dealing with future inconsistencies encountered in international trade, but will also impact and change the lives of many U.S. and Mexican citizens.

I. HISTORICAL BACKGROUND

A. Relevant Legal Foundations

On January 1, 1970, President Richard Nixon signed the National Environmental Policy Act (hereinafter "NEPA") into law.[14] This statutory scheme signaled the first nationwide comprehensive approach to regulating the interaction between United States citizens and their environment.[15] Several environmental predicaments fostered NEPA during the 1960s, reflecting Congressional conviction that "our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems

12. *Id.* at 1032.

13. DOT v. Pub. Citizen, 124 S. Ct. 957 (2003) (granting petition for writ of certiorari).

14. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370 (2000)); *Pub. Citizen*, 316 F.3d at 1009.

15. *Pub. Citizen*, 316 F.3d at 1010.

and crises the Nation faces."[16] The declared purpose of NEPA may be found in the statute's first section:

> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[17]

To reach these goals, Congress proceeded to impose extensive procedural requirements on governmental action affecting the environment and resolved to implement them "to the fullest extent possible."[18] Even so, this note will demonstrate how the broad goals of NEPA have led to questions of exact interpretation.

The well-recognized Clean Air Act[19] (hereinafter "CAA") of 1970 is a mere amendment to the original federal air-quality legislation, dating back to the 1950s.[20] Congress again altered the CAA in 1977 to give it further-reaching implications.[21] These amendments mandated national air-quality standards and deadlines for their attainment, as well as created an innovative federal-state partnership structure through which states developed individual "implementation plans."[22] These "road maps" aided states in attaining compliance with federal standards overseen by the newly created Environmental Protection Agency (hereinafter "EPA").[23] Alterations in 1990 vastly enlarged the list of regulated pollutants and the EPA's civil and criminal enforcement capabilities.[24]

On December 17, 1992, President Bill Clinton made economic history when he signed the North American Free Trade Agreement.[25] NAFTA established what is known as a "free-trade area" between Canada, Mexico, and the United States.[26] Congress later passed the agreement into law as the

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16. S. REP. NO. 91-296, at 4 (1969).
17. 42 U.S.C. § 4321.
18. *Id.* § 4332.
19. Clean Air Act, 42 U.S.C. §§ 7401-76719 (2000).
20. Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392.
21. *See* Clean Air Amendment of 1970, Pub. L. No. 91-604, 84 Stat. 1676.
22. *Id.*, Sec. 4(a), §§ 107-08, 84 Stat. at 1678-79.
23. *Id.*
24. Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399.
25. Pub. Citizen v. DOT, 316 F.3d 1002, 1012 (9th Cir. 2003).
26. A free trade area requires participating nations to eliminate trade barriers between one another, but each country is permitted to maintain its own external tariffs when dealing with other states. *See*

North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301-3473) (effective January 1, 1994). NAFTA purports to "CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation" while "STRENGTHENING the development and enforcement of environmental laws and regulations."[27] NAFTA explicitly permits the individual nations to adopt or maintain:

> standards-related measures, including any such measure relating to safety, the protection of human, animal or plant life or health, the environment or consumers . . . including those to prohibit the importation of a good of another Party or the provision of a service by a service provider of another Party that fails to comply with the applicable requirements of those measures or to complete the Party's approval procedures.[28]

Congress similarly made it clear that NAFTA could not be construed "to amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health [or] the protection of the environment."[29] This specific provision sparked the current contentions of those individuals and organizations advocating for truck entry barriers.

Generally, foreign trucks are permitted to enter the U.S. only if authorized to do so.[30] The Department of Transportation (hereinafter "DOT") is required to grant permission to any carrier that is "willing and able to comply with" mandatory statutes and regulations.[31] However, in 1982, Congress enacted the Bus Regulatory Reform Act that imposed a two-year moratorium on the entry of motor carriers domiciled in a "contiguous foreign country," such as Mexico.[32] Due to repeated presidential orders of renewal, the moratorium remained in place until September 19, 1996.[33] Prior to the completion of the last two-year extension, Congress enacted the ICC Termination Act of 1995.[34] This law caused all "existing restrictions on operations of motor carriers . . . domiciled in any contiguous foreign country . . . pursuant to section 6 of the

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RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 298-99 (2000).

27. NAFTA, *supra* note 7, preamble.

28. *Id.* art. 904(1).

29. 19 U.S.C. § 3312(a)(2) (2000).

30. *See generally* 49 U.S.C. §§ 13501-13541, 13901-13908 (2000); 49 C.F.R. § 365.101-.511 (2003).

31. 49 U.S.C. § 13902(a)(1) (2003).

32. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, Sec. 6(g), § 10922(1), 96 Stat. 1102, 1107-08.

33. Pub. Citizen v. DOT, 316 F.3d 1002, 1012 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).

34. 49 U.S.C. § 13902(c).

Bus Regulatory Reform Act of 1982" to remain in effect until the President expressly rescinded them for a statutorily acceptable reason, including "obligations of the United States under a trade agreement."[35]

On February 6, 2001, a specially convened arbitral panel held that the United States' sustained refusal to permit the entry of Mexican trucks beyond the established zones violated NAFTA.[36] In response to this proceeding, President George W. Bush announced his intent to comply with this determination through modification of the moratorium, according to his statutory authority. The removal would occur once the Federal Motor Carrier Safety Administration (hereinafter "FMCSA"), a DOT agency, issued regulations to govern Mexican-oriented trucks seeking entrance into the United States.[37] Hence, on March 19, 2002, FMCSA promulgated three regulations.[38] These regulations allow compliant Mexican-domiciled trucks to operate within the United States past previously specified lines.[39] DOT published Notices of Rulemaking for two of the regulations on May 3, 2001.[40] They were: (1) Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border (hereinafter "Application Rule");[41] and (2) Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States (hereinafter "Safety Rule").[42]

DOT prepared a preliminary Environmental Assessment (hereinafter "EA") for the Application and Safety Rules.[43] DOT maintained that the statutory NEPA law did not require a full EIS, since the proposed rules did not "significantly affect[ ] the quality of the human environment."[44] DOT did not prepare an EA for the third regulation: Certification of Safety Auditors, Safety Investigators, and Safety Inspectors (hereinafter "Certification Rule").[45] The *Federal Register* published the three regulations as "Interim Final Rules"

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35. *Id.*

36. *In re* Cross-Border Trucking Services (U.S. v. Mexico) (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).

37. *Pub. Citizen*, 316 F.3d at 1013.

38. *Id.* at 1012.

39. *Id.*

40. *See* 66 Fed. Reg. 22,371 (May 3, 2001) (to be codified at 49 C.F.R. pt. 365); 66 Fed. Reg. 22,415 (May 3, 2001) (to be codified at 49 C.F.R. pt. 383).

41. 67 Fed. Reg. 12,702 (Mar. 19, 2002) (to be codified at 49 C.F.R. pt. 365).

42. 67 Fed. Reg. 12,758 (Mar. 19, 2002) (to be codified at 49 C.F.R. pt. 385).

43. Pub. Citizen v. DOT, 316 F.3d 1002, 1013 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).

44. *Id.*; 42 U.S.C. § 4332(2)(C) (2000).

45. 67 Fed. Reg. 12,776 (Mar. 19, 2002) (to be codified at 49 C.F.R. pts. 350 and 385).

on March 19, 2002.[46] On November 27 of that year, President Bush modified the moratorium to permit Mexican-domiciled motor carriers to provide cross-border services between Mexico and the United States.[47]

B. NAFTA Chapter Twenty Dispute Resolution Proceedings

One of NAFTA's primary dispute resolution provisions, Chapter Twenty, relates to interpretation and application of the agreement generally.[48] Chapter Twenty calls for an initial consultation between conflicting Parties, conciliation before the "Free Trade Commission," arbitration, and ultimately, *binding* implementation of the arbitral report.[49] The drafters modeled the terms after Chapter Eighteen of the Canada-United States Free Trade Agreement and the pre-1995 General Agreement on Tariffs and Trade (hereinafter "GATT") Article XXIII procedures.[50] NAFTA enables Parties unsatisfied with administrative proceedings in any of the three countries to appeal a case to a binational arbitration panel.[51] If Parties are still unsatisfied with the panel's determinations, they have the opportunity to appeal to an Extraordinary Challenge Committee, but have "no ability to return to their respective national court systems."[52] The end result, and the form of the conflict resolution sections, had a definitive bend toward the United States' formal and legalistic dispute settlement approach, although other members would have favored a more informal, conciliation-oriented process.[53]

In most situations, Parties have a choice of whether to utilize NAFTA Chapter Twenty or the World Trade Organization (hereinafter "WTO") procedures.[54] Nevertheless, Chapter Twenty offers certain advantages, such as the inclusion of disputing party nationals on the arbitral panels and a somewhat greater receptiveness to experts.[55] Chapter Twenty involves a three-step process. The procedure commences with a request for

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46. *Pub. Citizen*, 316 F.3d at 1014; Certification Rule, 67 Fed. Reg. at 12,776.

47. *See* Memorandum for the Secretary of Transportation of November 27, 2002, 67 Fed. Reg. 71,795 (Nov. 27, 2002).

48. David A. Gantz, *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, 1030 (1999).

49. NAFTA, *supra* note 7, arts. 2006-08; *see* David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 128 (1995).

50. Gantz, *supra* note 49, at 128; Gantz, *supra* note 48, at 1030-31.

51. NAFTA, *supra* note 7, art. 2008.

52. *Id.* annex 1904.13.

53. Gantz, *supra* note 48, at 1031-32.

54. Gantz, *supra* note 49, at 128.

55. NAFTA, *supra* note 7, arts. 2009, 2014.

consultations: "the consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution for any matter through consultations under this Article or other consultative provisions of this Agreement."[56] If a consultation fails to resolve the disagreement within the designated time frame (usually thirty days), the complaining Party is permitted to seek good offices, conciliation, or mediation by the NAFTA Free Trade Commission.[57] Thirty days afterward, or after "such other period as the consulting Parties may agree," either Party is allowed to request the convening of an arbitration panel.[58]

NAFTA states that the appointed panel will provide the disputing Parties with an initial report, findings of fact, a determination of the legal issues, and recommendations for resolution of the issues in question.[59] Interestingly, the panel's determination "is not automatically applicable to resolve the dispute."[60] Instead, the "disputing Parties shall agree on the resolution of the dispute, which normally shall conform to the determinations and recommendations of the panel."[61] Thus, some scholars criticize NAFTA's dispute resolution process as being more of a "recommendation" that falls "short of authoritatively resolving the dispute."[62] Others state the panel is merely a "political troubleshooting institution rather than [an] independent arbitral body."[63]

However, these stated condemnations are misleading. The Parties' failure to implement the arbitral report may produce "prompt and serious consequences."[64] After the arbitrators present their final report to the Parties, the Parties "shall agree on the resolution of the dispute."[65] The word "shall" has been interpreted to mean compliance is mandatory.[66] If the Parties cannot agree on a resolution within thirty days after receiving the panel report, then the injured Party has the right to retaliate against the Party violating NAFTA

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56. *Id.* art. 2006.
57. *Id.* art. 2007.
58. *Id.* art. 2008.
59. *Id.* art. 2016.
60. Gantz, *supra* note 48, at 1042.
61. NAFTA, *supra* note 7, art. 2018.
62. *See*, *e.g.*, Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance*, 18 MICH. J. INT'L L. 357, 379 (1997) (discussing purported criticisms of a NAFTA arbitration panel's role as a decision-maker).
63. *See* David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 408 (1993).
64. Gantz, *supra* note 48, at 1042.
65. NAFTA, *supra* note 7, art. 2018.
66. Gantz, *supra* note 49, at 128.

rights.[67] The complaining Party is allowed to counter by suspending "the application to the Party complained against of benefits of equivalent effect until such time as [the Parties] have reached agreement on a resolution of the dispute."[68] Nevertheless, panel decisions are non-binding in the sense that they do not have direct influence over U.S. law, and neither federal nor state governments are bound by their factual findings or substantive recommendations.[69]

II. CASE UNDERPINNINGS

A. Details on Arbitral Proceeding

On February 6, 2001, an Arbitral Panel established pursuant to NAFTA Chapter Twenty, Section 2008, held that United States actions violated the international treaty.[70] The issue presented before the panel was whether the U.S. breached Article 1202 (national treatment for cross-border services) and/or Article 1203 (most favored-nation treatment for cross-border services) of NAFTA by failing to lift its moratorium on Mexico-domiciled trucks seeking to operate within the U.S. borders.[71] Mexico also asked the arbitral group to determine if the U.S. violated Articles 1102 (national treatment) and/or 1103 (most-favored-nation treatment) through refusal to allow Mexican investment in U.S. companies that provided international cargo

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67. NAFTA, *supra* note 7, art. 2019.

68. *Id.*

69. Gantz, *supra* note 48, at 1042-43. Several other dispute resolution provisions in NAFTA are worth briefly mentioning to better understand why Mexico employed Chapter Twenty. Chapter Eleven is perhaps the most advantageous for those initiating dispute resolution proceedings within the treaty, as it explicitly provides for monetary awards. NAFTA, *supra* note 7, arts. 1133-36. Chapter Eleven concerns investment between the three nations, and Mexico *did* bring challenges under Chapter Eleven as well as Chapter Twelve. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 81-82 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005). However, Chapter Twenty serves as a better foundation when more than one chapter is being disputed at the same time and serves as the most common avenue for resolution measures. *See* NAFTA, *supra* note 7, art. 2004. The other two chapters that provide for conflict resolution are not applicable in this scenario. Chapter Fourteen involves financial services, and Chapter Nineteen deals with binational panel review of domestic anti-dumping and counter-veiling duties. *Id.* arts. 1414, 1907.

70. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 81-82 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005). The panel specifically addressed whether the United States' failure to lift its moratorium on the processing of applications by Mexican-owned trucking firms for authority to operate within the U.S. border states violated NAFTA provisions. *Id.* at 1.

71. *Id.*

transportation.[72] This summary focuses on the first of these contentions, under Chapter Twelve, as did the actual decision.

Mexico brought the above allegations before the tribunal, contending the U.S. breached its obligations under NAFTA when it failed to phase out restrictions on cross-border trucking services.[73] Mexico maintained that U.S. commitments in Annex I of NAFTA, and its affording national treatment to Canada, required the requested discipline.[74] In response, the U.S. argued Mexico did not uphold the same rigorous standards as the regulatory systems established in the United States and Canada.[75] Thus, the "in like circumstances" language in Articles 1202 and 1203 meant the Mexican service providers could be treated differently in order to address a legitimate regulatory objective.[76]

NAFTA came into force on January 1, 1994.[77] Annex I of the agreement obligated the Parties to phase-out certain reservations to Articles 1102, 1202, 1103, and 1203.[78] With respect to cross-border trucking, Annex I provided that a Mexican national would be able to obtain authority to provide services in border states three years after NAFTA's signing (December 18, 1995) and cross-border trucking services throughout the United States six years after NAFTA's entry into force (January 1, 2000).[79] However, on December 18, 1995, the U.S. Secretary of Transportation issued a press release stating Mexican applications would be accepted, but not finalized until Mexico improved its truck safety standards.[80] This refusal continued the moratorium on Mexican trucks that had been in place prior to 1995.[81]

As of July 20, 1999, the DOT had received 184 applications from Mexican persons seeking permission to provide cross-border cargo services into the southwestern states.[82] Mexico and the U.S. agreed that the Mexican domestic regulatory system was not identical to that in the United States.[83]

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 2.
76. *Id.*
77. 19 U.S.C. §§ 3301-3473 (2000).
78. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 14 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).
79. NAFTA, *supra* note 7, app. I.
80. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 16 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).
81. *Id.*
82. *Id.* at 18.
83. *Id.*

However, the two countries disputed whether the differences seen in the structures justified the U.S. ban on Mexican trucks.[84] Consequently, the arbitral panel can be seen as focusing on determining the requisite action for the Parties under the national treatment and most-favored-nation clauses of NAFTA, modified through Annex I reservations. The panel also considered relevant exceptions to NAFTA that might validate the United States' above position.[85]

Nevertheless, the arbitral group "decline[d] to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking services" and "confine[d] its analysis to the consistency or inconsistency of that action with NAFTA."[86] Interestingly, this method was fully in line with WTO Appellate Body practices.[87] The panelists first examined NAFTA's objectives and goals found in Article 102(1).[88] They also acknowledged that Article 102(2) provided a mandatory standard for the interpretation of the treaty's detailed provisions:[89] "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with the applicable rules of international law."[90] Nevertheless, the panel still noted that NAFTA's Preamble emphasizes the Parties' rights to preserve their flexibility in order to safeguard public welfare.[91] Importantly, the panel looked to the 1969 Vienna Convention on the Law of Treaties[92] to identify the international law rules of interpretation referred to in Article 102(2) of NAFTA.[93] Both the United States and Mexico agreed the Convention was appropriate for the stated purpose.[94] The fundamental principle of the Convention is Article 31(1), which states in part: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light

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84. *Id.*
85. *Id.* at 22.
86. *Id.* at 50.
87. *Id.*
88. *Id.* at 50-51.
89. *Id.* at 51.
90. NAFTA, *supra* note 7, art. 102(2).
91. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 51 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).
92. United Nations Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 [hereinafter Vienna Convention].
93. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 52 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).
94. *Id.*

of its object and purpose."[95] Thus, the arbitral group interpreted the disputed treaty provisions with the understanding that the Parties accepted the binding nature of NAFTA and the obligation to perform its requirements in good faith.[96] Article 27 of the Vienna Convention directed the panel *not* to examine national law, but instead to look to the applicable international law; therefore, the panel utilized neither the internal law of the United States nor Mexico for NAFTA interpretation.[97]

The panel first held the Annex I reservation deadlines were unambiguous, based on the ordinary meaning of the words.[98] Thus, the U.S. *should* have complied with the original December deadline, barring any additional agreements or conditional elements relating to NAFTA.[99] Similarly, the panelists recognized that NAFTA's negotiators carefully considered the "character, purpose, mode of preparation and adoption of reservations and their Phase-Out liberalization commitments."[100] Accordingly, the phase-out obligations of the U.S. through Annex I *must* prevail unless there is another provision in NAFTA that supercedes the aforementioned duties.[101] The panel then turned to this question.[102]

The disagreement between the United States and Mexico could be viewed as resting on the interpretation of the phrase "in like circumstances" found in both Articles 1202 and 1203.[103] If read correctly, this language might enable the U.S. to deny access to *all* Mexican trucking firms on a blanket basis, regardless of the individual qualifications of particular industry members, until Mexico's own domestic regulatory system meets U.S. approval.[104] If the words are *not* construed in this manner, the U.S. actions would be viewed as a *de jure* violation of Article 1202's national treatment obligation.[105] Given NAFTA's unmistakable goals and objectives, the panel held it improbable that

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95. Vienna Convention, *supra* note 92, art. 31(1).

96. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 53 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).

97. Vienna Convention, *supra* note 92, art. 27; *In re* Cross-Border Trucking Services (U.S. v. Mexico) 53 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).

98. *In re* Cross-Border Trucking Services (U.S. v. Mexico) 60 (Feb. 6, 2001), *at* http://naftaclaims.com/disputes_us/disputes_us_9.htm (last visited Apr. 18, 2005).

99. *Id.*

100. *Id.*

101. *Id.* at 61.

102. *Id.*

103. *Id.* at 64.

104. *Id.*

105. *Id.* at 68-69.

the drafters intended the "in like circumstances" language to permit a significant trade barrier.[106] Moreover, a broad interpretation of these words would render the national treatment and most-favored nation provisions of the treaty inconsequential.[107]

Under Article 2101, safety measures adopted by a Party (such as a moratorium) might be justified only to the extent they are "necessary to secure compliance" with laws or regulations otherwise consistent with NAFTA.[108] The panel employed the GATT/WTO jurisprudence to aid in determining the correct definition of "necessary."[109] As a result, the arbitrators agreed with Mexico and stated that any Party-created moratorium must secure compliance with another law or regulation that does not discriminate and must not arbitrarily or unjustifiably disguise a restriction on trade.[110] The panel noted it was unclear at what time, if ever, "the United States [would] be satisfied that the Mexican regulatory system [was] adequate to lift the moratorium with respect to all Mexican providers of trucking services."[111]

In conclusion, the international arbitration panel, whose five-person membership included two United States citizens, unanimously held the U.S. refusal to consider any Mexican truck applications was *inconsistent* with the obligation to provide national treatment.[112] Hence, the continuation of the moratorium beyond December 18, 1995, violated NAFTA Articles 1202 and 1203.[113] The panel found no legally sufficient basis for interpreting "in like circumstances" as permitting a blanket restriction on all Mexican trucking firms.[114] Article 2101 similarly did not provide any excuse for U.S. action.[115] Consequently, the arbitrators determined the inadequacies of the Mexican regulatory system provided an unsatisfactory foundation for the maintenance

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106. *Id.*

107. *Id.* at 69.

108. *Id.* at 70.

109. *Id.* at 70.

110. *Id.* at 72.

111. *Id.* at 73. The panel findings noted that in December 1995, it was evident that the U.S. Secretary of Transportation and many other governmental officials were convinced that the necessary controls were in place. *Id.* Required regulations had been announced and other steps taken for the anticipated removal of the moratorium in 1995, yet the United States refused to take this course of action. *Id.* The arbitrators also found it unlikely that *every* Mexican provider that had submitted an application was in violation of the U.S. laws. *Id.* at 74.

112. *Id.* at 74.

113. *Id.*

114. *Id.*

115. *Id.* at 74-75.

of the moratorium.[116] The panel recommended the U.S. take appropriate steps to bring its cross-border trucking service practices into compliance with its NAFTA obligations.[117]

B. Public Citizen v. Department of Transportation

In *Public Citizen v. Department of Transportation*, a citizens' rights group challenged the government's failure to conduct the requisite environmental analysis prior to promulgating the three aforementioned regulations regarding the moratorium.[118] The plaintiff, Public Citizen, claimed the DOT's lack of preparing an in-depth EIS for all three laws violated NEPA.[119] Similarly, the plaintiff maintained the agency's failure to conduct a "conformity determination" to ensure the regulations did not disrupt applicable State Implementation Plans violated the CAA.[120] This suit stemmed from the growing concern among southern U.S. residents that increased Mexican truck traffic would substantially disrupt their environment and lifestyle.[121] As a result, Public Citizen brought this case to ensure the moratorium remained in full force until certain environmental investigations occurred and were sufficiently evaluated.[122]

The case was brought immediately before the Ninth Circuit Court of Appeals.[123] The court began its analysis with a lengthy discussion justifying Public Citizen's standing to sue according to Article III of the United States Constitution.[124] The plaintiff successfully demonstrated an "injury in fact,"[125] causation,[126] and redressability,[127] giving it organizational standing.[128] The

116. *Id.* at 81.

117. *Id.*

118. Pub. Citizen v. DOT, 316 F.3d 1002, 1009 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).

119. *Id.*

120. *Id.*

121. *Id.* at 1015-16.

122. *See id.*

123. *Id.* at 1003, 1014. Public Citizen filed a timely petition challenging the validity of the three rules promulgated through the FMCSA. *Id.* at 1014. The petitions alleging violations of the procedural requirements of NEPA and the CAA were brought pursuant to the judicial review provision of the Administrative Procedures Act, 5 U.S.C. §§ 701-06 (2003). *Pub. Citizen*, 316 F.3d at 1014. The Ninth Circuit has jurisdiction to review the petitions under 28 U.S.C. § 2342(3)(A) (2003), which provides for direct review in a court of appeals when certain administrative actions are in question. *See id.*

124. *Pub. Citizen*, 316 F.3d at 1014-20.

125. *Id.* at 1014-16.

126. *Id.* at 1016-18.

127. *Id.* at 1018-19.

128. *Id.* at 1019.

Ninth Circuit explicitly stated "the issues before [it did] not touch on [the President's] clear, unreviewable discretionary authority to modify the moratorium pursuant to 49 U.S.C. § 13902(c)."[129] Further, "neither the validity of nor the United States' compliance with NAFTA" was before the court.[130] The judges instead narrowed their investigation to "the adequacy of the environmental analyses conduct by DOT before promulgating the three regulations."[131]

After recognizing the standard of review,[132] the opinion moved to an environmental analysis under NEPA.[133] The court held the test for determining whether the law required DOT to prepare an EIS could be viewed in two phases: (1) whether the challenged rules constituted "major" federal actions; and (2) whether the rules might significantly affect the environment.[134] The court deemed the questioned activity a "major" federal action through examination of NEPA's Council on Environmental Quality (hereinafter "CEQ") guidelines.[135] Under these instructions, a "major" federal activity contains "effects that may be major and which are potentially subject to Federal control and responsibility," including the adoption of official policy, such as either a rule or regulation.[136] The court concluded the regulations in dispute had a substantial probability of causing reasonably foreseeable "indirect" effects, and, thus, met the qualification.[137]

The CEQ principles similarly defined "significantly" to aid judges in resolving whether DOT regulations might affect the environment.[138] Because the CEQ indicates a proposed federal action must be analyzed in the local, regional, and national contexts, as well as through long- and short-term consequences, the court held that the DOT's analysis was inadequate.[139]

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129. *Id.* at 1020.

130. *Id.*

131. *Id.*

132. *Id.* at 1020-21. The Ninth Circuit acknowledged that the review of agency action, in order to determine its conformity with NEPA and the CAA, is governed through the Administrative Procedures Act, 5 U.S.C. §§ 701-06 (2003). The reviewing court must analyze whether the agency actions in promulgating the regulations were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706(2)(A).

133. *Pub. Citizen*, 316 F.3d at 1021-29.

134. *Id.* at 1021.

135. *Id.* at 1021-22.

136. 40 C.F.R. § 1508.18 (2003).

137. *Pub. Citizen*, 316 F.3d at 1022.

138. 40 C.F.R. § 1508.27 (2003).

139. *Pub. Citizen*, 316 F.3d at 1023.

Additionally, the threat to public health and safety from added pollutants,[140] the likelihood of uncertainty in deducing exact environmental impacts,[141] the prospective risk of violating high state-established standards,[142] and the extensive controversy surrounding the likelihood of these factors[143] led the court to rule the questioned regulations might "significantly" affect the environment.[144] Finally, the court concluded the DOT acted "arbitrarily and capriciously" in failing to conduct any NEPA environmental analysis for the Certification Rule.[145]

The next step in the court's reasoning turned to language under the CAA. The court looked to terminology stating the CAA contains a "conformity" requirement, prohibiting an agency or department of the Federal Government from engaging in, supporting, or providing financial assistance for, licensing or permitting, or approving any activity that did not conform to a State Implementation Plan.[146] According to the court, because the DOT failed to conduct a reliable environmental analysis, there was no guarantee the regulations would not result in emission amounts excessive to CAA requirements.[147] Proper CAA scrutiny should take place at the local and regional level, not the national one.[148] Using a "but-for" analysis suggested by EPA standards, the court lastly stated the EPA did not intend to omit all federal regulations from the scope of this constraint.[149]

Although the Ninth Circuit acknowledged the importance of United States compliance with its treaty obligations to Mexico, it stated that such acquiescence could not arise at the cost of violating established U.S. law.[150] Consequently, the court granted Public Citizen's petitions and remanded the matter to the DOT to prepare an EIS and CAA conformity determination for all three regulations.[151] The Supreme Court of the United States granted the government's petition for writ of certiorari to the Ninth Circuit Court of Appeals on December 15, 2003.[152]

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140. *Id.* at 1024.
141. *Id.* at 1024-25.
142. *Id.* at 1026-27.
143. *Id.* at 1027.
144. *Id.* at 1027-28.
145. *Id.* at 1028-29.
146. 42 U.S.C. § 7506(c)(1) (2000).
147. *Pub. Citizen*, 316 F.3d at 1030.
148. *Id.*
149. *Id.* at 1031.
150. *Id.* at 1009.
151. *Id.* at 1032.
152. DOT v. Pub. Citizen, 124 S. Ct. 957 (2003).

III. APPLICATION OF UNITED STATES ENVIRONMENTAL LAW

As has been observed, the NAFTA arbitration panel and Ninth Circuit decisions come down on opposite sides of the spectrum regarding this controversy. The relationship between the relevant treaty and environmental law will certainly influence the Supreme Court's ruling on the *Public Citizen* case. The method in which the Court manages the connection between these two decisions will set national precedent for dealing with international trade inconsistencies. How the line should be drawn, however, poses important considerations. This note will first examine whether or not the Ninth Circuit correctly applied U.S. environmental law. The manner in which the Supreme Court interprets these relevant statutes will prove paramount and pivotal in reaching an ultimate conclusion. Depending on questions of interpretation, the Court may either avoid the inconsistency and delicate balancing altogether, or confront it head-on.

A. Presidential Constitutional Authority

The President's direct action in lifting the moratorium began the chain reaction that led to the Public Citizen suit. When examining the duties accorded to the President and the other two branches of government, the U.S. Constitution provides a solid starting point. A President exercises foreign-affairs powers through his role as Commander-in-Chief of the armed forces,[153] his ability to "receive Ambassadors and other public Ministers,"[154] and by "tak[ing] Care that the Laws be faithfully executed."[155] The Supreme Court has defined the person holding this office as the "guiding organ in the conduct of our foreign affairs," in whom the Constitution bestows "vast powers in relation to the outside world."[156] As with treaties, an executive decision, such as the one involving the moratorium, "create[s] law applicable in U.S. courts if [it is] entered with proper Presidential authority, and do[es] not conflict with subsequent legislation."[157] Hence, Congress also plays a vital role in

153. U.S. CONST. art. II, § 2, cl. 1.

154. *Id.* art. II, § 3.

155. *Id.*

156. Ludecke v. Watkins, 335 U.S. 160, 173 (1948); *see* Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988) (recognizing "the generally accepted view that foreign policy was the province and responsibility of the Executive" (quoting Haig v. Agee, 453 U.S. 280, 293-94 (1981))).

157. Whitney v. Robertson, 124 U.S. 190 (1888); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972); Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European*

international trade. United States Constitution Article I, Section 8, Clause 3 empowers Congress to "regulate Commerce with foreign Nations."[158] The Supreme Court classified this power to control foreign trade as "broad, comprehensive" and "plenary."[159]

Trade reform agreements, including NAFTA, are created out of the joint exercise of congressional and Presidential authority.[160] There is an intermingling of the legislative foreign-commerce power and the executive foreign-affairs power to achieve the ultimate goal of reducing and eventually eliminating trade barriers across the world. NAFTA was an elementary, but indispensable, first step toward achieving a free-trade area between the North American countries and enabling them to better compete in a global marketplace. In fact, the same fast track Presidential authority that enabled NAFTA to be initially implemented "has been the key procedural linchpin of U.S. trade policy since 1974."[161] The aforementioned information illustrates that the Presidential powers questioned in this scenario are well-characterized in United States law.

B. NEPA Applicability

This case is not the first time Public Citizen attempted to prevent the implementation of NAFTA. In 1991, the group formally filed a lawsuit to compel the United States Trade Representative (hereinafter "USTR") to issue an EIS on NAFTA itself.[162] After NAFTA entered into effect in 1992, Public Citizen went back to court to ask for the EIS once again.[163] Interestingly, its argument in this second suit noted that NEPA did *not* apply to the President, and, thus, based its case on the theory that the USTR was the responsible agency.[164] The reason Public Citizen took this angle in making its argument is explained below.

Union, 17 NW. J. INT'L L. & BUS. 556, 563 (1996); *see* Head Money Cases, 112 U.S. 580, 598-99 (1884).

158. U.S. CONST. art. I, § 8, cl. 3.

159. Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 46 (1974); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125-26 (1973).

160. *See* U.S. CONST. art. I, § 8, cl. 3; *see also id.* art. II, § 2, cl. 2.

161. Steve Charnovitz, *No Time for NEPA: Trade Agreements on a Fast Track*, 3 MINN. J. GLOBAL TRADE 195, 204-05 (1994).

162. Pub. Citizen v. U.S. Trade Representative, 782 F. Supp. 139 (D.D.C. 1992), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

163. Pub. Citizen v. U.S. Trade Representative, 822 F. Supp. 21 (D.D.C. 1993), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993).

164. *Id.*

It is possible the Ninth Circuit made an error in holding that NEPA and the CAA render illusory the critical distinction between a constitutional Presidential action regarding foreign affairs and a subordinate federal agency's regulatory domestic conduct. In fact, the decision may actually remove Presidential discretion preserved through NEPA and the CAA. If this is true, the court's interpretation, overlooking this afforded freedom of choice, may hinder the executive branch's ability to swiftly respond to international diplomatic and economic issues. Despite the fact that the three governmental branches provide checks and balances on one another, there are instances where the leader of our nation is called upon to exercise the foreign-affairs power minus the hindrance of non-applicable agency guidelines.

As noted, the FMCSA is the Department of Transportation agency responsible for motor-carrier safety and registration.[165] The FMCSA fulfills its duties under a broad statutory mandate that permits registration for all domestic or foreign motor carriers that are "willing and able to comply with" applicable safety requirements.[166] Any carrier willing and able to abide by these rules receives the qualification. Hence, FMCSA possesses no individual authority to base registration decisions on environmental concerns or to advocate for enforcement of environmental requirements. The agency noted that in the situation at hand, "[t]he President, not the FMCSA, has [the] authority" to open the border and lift the moratorium.[167] This Presidential entitlement is provided for in both NEPA and the CAA.

Scholars argue the EIS process has served as one of the "cornerstones" of United States environmental policy for over twenty years.[168] As a result, approximately eighty-four other countries used NEPA as a model for their own environmental impact assessment analysis.[169] Nevertheless, this assertion does not alter the conclusion that under the NEPA laws of *this* country, the President is afforded special protection. Although NEPA applies to both economic and commercial agreements negotiated through U.S. governmental agencies, a close scrutiny reveals the law is not relevant to trade agreements made through the President. Under NEPA, *federal agencies* must complete a detailed EIS before undertaking what are referred to as "major Federal

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165. *See* 49 U.S.C. § 113(f) (2003).

166. *Id.* § 13902(a)(1).

167. Petition for a Writ of Certiorari at 10, Pub. Citizen v. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003) (No. 03-358) [hereinafter Petition].

168. Charnovitz, *supra* note 161, at 206.

169. *Id.*

actions significantly affecting the quality of the human environment."[170] To assure compliance, the CEQ implements regulations defining these statutory requirements, which are "entitled to substantial deference."[171] Within these guidelines, "federal agencies" subject to NEPA do *not* include "the Congress, the Judiciary, or the President."[172] No "agency" makes a proposal for trade agreement legislation.[173] "The President makes the proposal, and the President is not an agency."[174] Congress chose to limit NEPA instead of expanding its range to cover a broader spectrum of issues. Consequently, the President's lifting of the moratorium falls outside the control of NEPA's EIS constraint. The Ninth Circuit decision, therefore, did not have the authority to delay the removal of the trade barrier.

The appellate court actually refused to address this issue directly.[175] Instead, it carved a path through the maze by reasoning CEQ regulations mandated FMCSA to prepare an EIS because the President's action that removed the moratorium was a "reasonably foreseeable" consequence of FMCSA's rulemakings.[176] In reaching this deduction, the court relied primarily on two CEQ provisions. The first of these states a federal agency is compelled to study not only environmental direct effects, but also "[i]ndirect effects, which are caused by the action and are later in the time or farther removed in distance, but are still reasonably foreseeable."[177] This "indirect effect" argument has three principle weaknesses.

First, indirect effects that prompt an EIS must be "caused by [agency] action."[178] The effects from the President opening the border between the United States and Mexico do not fit this requirement. Instead, the executive choice resulted from compliance with a NAFTA arbitration panel's ruling. When the agency created the regulations, the President had already resolved to lift the moratorium according to the belief that it would best serve this country and our international trade relations.[179] This conviction "prompted"

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170. 42 U.S.C. § 4332(C) (2000).

171. *Id.*

172. 40 C.F.R. § 1508.12 (2003).

173. Charnovitz, *supra* note 161, at 208.

174. *Id.*

175. *See* Pub. Citizen v. DOT, 316 F.3d 1002, 1032 (9th Cir. 2003) ("[W]e draw no conclusions about the actions of the President of the United States . . . ."), *rev'd*, 124 S. Ct. 2204 (2004).

176. *Id.* at 1022.

177. 40 C.F.R. § 1508.8(b); *see id.* § 1502.16(b).

178. 40 C.F.R. § 1508.8(a).

179. *Pub. Citizen*, 316 F.3d at 1013.

FMCSA to issue its safety regulations.[180] Therefore, the agency guidelines themselves did not "cause" the indirect effects in question. The Presidential pronouncement did, and, as previously noted, this decision is exempt from NEPA scrutiny.

Second, under the Ninth Circuit's rationale, a subordinate agency that participates in Presidential policy implementation is required to look at itself as the "cause" of that policy.[181] However, under the U.S. Constitution, the agency does not possess any direct control over Presidential decision-making. Appellate courts have also held agencies are not compelled to conduct NEPA reviews of "ministerial" decisions over which there is no control.[182] This qualification is directly analogous to the present situation. Here, FMCSA conducted an environmental evaluation of its own safety rules, but did not have to prepare an EIS to address the Presidential action over which it had no control.

The third flaw involves a determination that a Presidential action is subject to NEPA scrutiny. As recognized, the President is *not* a "federal agency"[183] and cannot fall under this type of analysis. NEPA's purpose is to "help public officials make decisions."[184] Even apart from the President's secure exemption, this goal is not served when a federal agency is required to prepare an EIS concerning a foreign-affairs decision with potentially global implications. Consequently, the NEPA EIS requirement is not a necessary step when Presidential discretion concerning international trade is involved.

The additional CEQ regulation the Ninth Circuit relied on maintains an agency EIS should address "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts."[185] A "cumulative impact" is defined as an impact that "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" of any person.[186] FMCSA conducted a

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180. *Id.*

181. Petition, *supra* note 167, at 16.

182. *See* Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1151 (D.C. Cir. 2001) ("If . . . the agency does not have sufficient discretion to affect the outcome of its actions, and its role is merely ministerial, the information that NEPA provides can have no effect on the agency's actions, and therefore NEPA is inapplicable."); Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995) (collecting cases).

183. 40 C.F.R. § 1508.12.

184. *Id.* § 1500.1(c); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (discussing the EIS requirement).

185. 40 C.F.R. § 1508.25(a)(2).

186. *Id.* § 1508.7.

"cumulative impact" analysis when it compared before and after effects of the regulations' execution.[187] The agency did not conduct this analysis with regard to the actual decision to lift the moratorium, as Public Citizen argues should have occurred.[188] Yet, the President's choice is not an issue that falls under the "cumulative effects" examination. Instead, the border opening is a Presidential decision exempt from EIS requirements.[189] Even if the Ninth Circuit had determined an EIS might have been necessary, FMCSA should have been afforded the final discretionary decision-making capability upon remand.[190]

C. CAA Applicability

Arguments brought concerning the CAA are equally questionable. Normally, under this statute, a federal "department, agency, or instrumentality" may not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" violating a relevant State air-quality implementation strategy.[191] As seen with NEPA, Presidential actions are not subject to this CAA conformity obligation, because the President is not considered a federal "department, agency, or instrumentality."[192] Accordingly, while the CAA requirements apply to agency-initiated regulations, a Presidentially-instigated action cannot be restricted in the same manner.

Nevertheless, the plaintiff maintained the Ninth Circuit decision is correct because Congress stated NAFTA implementation is subject to national environmental laws.[193] This contention reminded the court that while the U.S. is under the obligation to comport with its treaty obligations, the environment trumps when there is a direct conflict between treaty and environmental law. Although initially convincing, this assertion overlooks the fact that the issue presented here is whether the environmental laws mandate an EIS preparation

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187. Pub. Citizen v. DOT, 316 F.3d 1002, 1013 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).

188. *Id.* at 1014.

189. 40 C.F.R. § 1508.12.

190. *See*, *e.g.*, Wisconsin v. Weinberger, 745 F.2d 412, 426 (7th Cir. 1984) (holding a court that finds a NEPA violation "should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction" (quoting Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1006 (5th Cir. 1981))).

191. 42 U.S.C. § 7506(c)(1) (2000); 40 C.F.R. § 93.150.

192. *See* Franklin v. Massachusetts, 505 U.S. 788, 799-800 (1992); *see also* 40 C.F.R. § 93.152 (using "federal agency" and "federal department, agency, or instrumentality" interchangeably).

193. 19 U.S.C. § 3312(a) (2000); Petition, *supra* note 167, at 20.

of Presidential foreign-related action, not whether those laws are applicable to NAFTA implementation as a whole. The President's decision regarding the moratorium does not change the fact that a Mexican carrier, which obtains authorization to operate within the United States, is still "subject to the same Federal and State laws, regulations, and procedures that apply to carriers domiciled in the United States . . . including those administered by . . . Federal and State environmental agencies."[194] Hence, these protections will be upheld, whether or not the trade barrier is removed. Under the current system, *all* Mexican trucks are barred, regardless of their compliance with these regulations. It is this scenario that the NAFTA arbitration panel deemed unacceptable, especially since Canadian trucks do not face the same dilemma.

D. Conclusion

From the above analysis, one may discern that it is entirely possible that the relationship between the national and international substantive law systems is not inconsistent at all. Instead, the Ninth Circuit merely misapplied the balancing tactics between treaty and environmental rules. Contrary to the conclusion of the court, the laws present various exceptions for Presidential action that exempt his decisions from statutory scrutiny. As a result, the arbitration panel's decision may be afforded deference, since there is no direct conflict with U.S. internal law processes. If the Supreme Court fails to take this road of reasoning and determines a conflict with U.S. environmental law does exist, it will then be faced with a strategic examination of national and international policy interests. In conducting this balancing, several concerns arise.

IV. POTENTIAL INTERNATIONAL IMPLICATIONS FROM THE ARBITRAL DECISION

Apart from potential misapplication of U.S. environmental law, the current outcome of *Public Citizen v. Department of Transportation* could have further widespread implications involving foreign trade relations and the view toward the United States' international character. The Ninth Circuit ruling undoubtedly prolongs a trade dispute the President sought to resolve in accordance with the requirements of NAFTA and the decision of an arbitration panel. Whether an additional delay at the hands of the U.S.

194. Petition, *supra* note 167, at 20.

Supreme Court would negatively impact the United States internationally is the next issue this note raises. Three areas of significance discussed in this section are: (1) resultant consequences of the interference with constitutionally-awarded Presidential power; (2) future implications for NAFTA; and (3) the United States' global reputation. The below analysis will introduce questions of whether the Supreme Court should perhaps overrule the Ninth Circuit, not for considerations of environmental law application, but because of larger, global concerns.

A. Potential Interference with Foreign Affairs

The *Public Citizen* decision may be viewed as constraining executive discretion to conduct foreign affairs in two ways. Initially, the lower court's use of NEPA and the CAA could endanger the President's capability of reacting swiftly and resolutely in the international realm. As previously recognized, only Congress and the President may regulate international trade under the U.S. Constitution.[195] The cases of *United States v. Curtiss-Wright Export Corp.*,[196] *United States v. Belmont*,[197] and *United States v. Pink*[198]marked the beginning of a tremendous expansion in the conception of independent Presidential authority relating to foreign affairs.[199] The Supreme Court ruled that "the President alone has the power to speak or listen as a representative of the nation . . . the Senate cannot intrude [into the field of negotiation]; and Congress itself is powerless to invade it."[200] The President's "complete monopoly over foreign communications" finds justification in its acceptance throughout our nation's history and in various Presidents'

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195. Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., 26 F. Supp. 2d 1022, 1024 (S.D. Ohio 1998).

196. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

197. United States v. Belmont, 301 U.S. 324 (1937).

198. United States v. Pink, 315 U.S. 203 (1942).

199. David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1915 n.376 (1998); *see Pink*, 315 U.S. at 228-30 (upholding the Litvinov Assignment by stating, "If the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment"); *Belmont*, 301 U.S. at 330-31 (upholding the Litvinov Assignment through indicating "the Executive had authority to speak as the sole organ of [the] government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (article 2, § 2), require the advice and consent of the Senate."); *Curtiss-Wright Export Corp.*, 299 U.S. at 318-21 (noting the amount of expansive dicta dealing with Presidential foreign affairs powers).

200. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319; *see also Pink*, 315 U.S. at 229-34 (holding the President has authority to settle international claims without specific congressional authorization).

insistence upon it.[201] This authority is vital to ensure the smooth workings of the federal government as it interrelates with other nations in the global political realm. The "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"[202] combined with congressional delegation, is the basis for bilateral and multilateral treaty actions. As the situation at hand demonstrates, the Executive branch is often called upon to react quickly to a growing international dilemma, thus avoiding further confrontation with neighboring countries. The Constitution grants this ability to the President and entrusts it specifically to that role.

United States courts have established broad Presidential authority in the area of foreign affairs, "including the Power to conclude international accords in the form of agreements not subject to the formal treaty-ratification process."[203] The lifting of the moratorium falls directly within this category of action. Hence, neither the Constitution, nor federal statutes, required the President to proceed through a prescribed approval process when he made the decision to remove the moratorium. In *Public Citizen*, the conditions Congress *did* impose were satisfied through the FMCSA regulations by November of 2002.[204] Afterward, the President, acting within his inherent authority and with express congressional authorization,[205] removed the restriction against Mexico.[206] *Public Citizen* diverted this attempt at compliance, and thus interferes with afforded Constitutional authority.

Secondly, Supreme Court precedent has held that the Executive's decisions in the "sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements."[207] As a result, the plaintiffs in this case cannot block the President's proclamation from transpiring through an indirect route and challenge. "The President's findings of fact and the motivations for his action are not subject to review."[208] The U.S. Court of Appeals for the Federal Circuit held that "legislation conferring upon the President discretion to regulate foreign commerce

201. Golove, *supra* note 199, at 1890-91.
202. *See Curtiss-Wright Export Corp.*, 299 U.S. at 320.
203. Gantz, *supra* note 49, at 21.
204. Petition, *supra* note 167, at 25.
205. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375 (2000).
206. Pub. Citizen v. DOT, 316 F.3d 1002, 1014 (9th Cir. 2003), *rev'd*, 124 S. Ct. 2204 (2004).
207. Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984).
208. *Id.* (citing United States v. George S. Bush & Co., 310 U.S. 371, 379-80 (1940)).

invokes, and is reinforced and augmented by, the President's constitutional power to oversee the political side of foreign affairs."[209] These two grants of authority weigh more heavily than the requirements of agency regulations that are not designed to influence Presidential freedom. In the area of international trade, congressional authorizations of Presidential power "intimately involved" in foreign affairs "should be given a broad construction and not 'hemmed in' or 'cabined, cribbed, [or] confined' by anxious judicial blinders."[210] In agreeing to the implementation of NAFTA, the U.S. government recognized that this treaty upholds the aforementioned foundational principles. In conclusion, it may be argued that the Supreme Court should heavily weigh the manner in which this case decision could encumber Presidential authority granted through the Constitution, even to the point of sidestepping the Ninth Circuit's emphasis on environmental law.

B. Importance of NAFTA for Economic Enhancement

NAFTA is a comprehensive trade agreement between Canada, Mexico, and the United States, created to improve business transactions within North America.[211] The agreement eliminated all tariffs between the United States and Canada by 1998, and will eliminate almost all tariffs between the United States and Mexico by 2008.[212] Since its implementation, the United States' economy has grown significantly, and NAFTA has helped create fair and open markets within the participating countries.[213] NAFTA's purpose is to "bring about a sweeping change in the terms and conditions under which companies do business in Canada, Mexico and the United States."[214] It never was, nor is today, an "easy" road to travel. Relations between the diametrically different cultures have seen a confrontational past, due in large part to contradictory economic conditions and personal values. Despite the fact that Presidents who act under broad statutory authority grants have "imposed and lifted embargoes, prohibited and allowed exports, suspended and resumed

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209. Am. Ass'n of Exporters & Importers—Textile & Apparel Group v. United States, 751 F.2d 1239, 1248 (Fed. Cir. 1985).

210. *Id.* at 1248 (quoting *Florsheim Shoe Co.*, 744 F.2d at 793 (quoting S.P.R. Sugar Co. Trading Corp. v. United States, 334 F.2d 622, 633 (Ct. Cl. 1964))).

211. Marisa Yee, *The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 85, 86 (2002).

212. NAFTA, *supra* note 7, ann. 302.2.

213. Yee, *supra* note 211, at 86.

214. Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1249 (N.D. Ala. 1999), *vacated by* 242 F.3d 1300 (11th Cir. 2001).

commercial intercourse with foreign countries,"[215] NAFTA execution created trials the United States had not experienced before.

When former President Clinton reported NAFTA's effects to Congress in 1997, he stated that

> cooperation between the Administration and the Congress on a bipartisan basis has been critical in our efforts to reduce the deficit, to conclude trade agreements that level the global playing field for America, to secure peace and prosperity along America's borders, and to help prepare all Americans to benefit from expanded economic opportunities.[216]

The former President even admitted that changes to United States-Mexican trade policies would most likely not have come to pass without the implementation of the treaty.[217] This factor demonstrates the often-overlooked underpinnings in play, and the strong desire held by our government to make NAFTA successful. If NAFTA is continuously challenged, and in essence rejected through the judicial system, it will have little effect in enhancing prosperity in North America.

President Bush himself stated that the new permission of Mexican truck traffic is "consistent with obligations of the United States under NAFTA and with our national transportation policy."[218] In addition, "expeditious action [was] required to implement th[e] modification to the moratorium."[219] The delay in compliance has already caused the Mexican government to implement parallel restrictions on United States' motor carrier operations and to threaten additional trade sanctions.[220] While those consequences harm U.S. businesses and consumers, the U.S.'s international character is also in significant jeopardy of being wounded if non-compliance continues.

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215. *S.P.R. Sugar Co. Trading Corp.*, 334 F.2d at 633; B-West Imports v. United States, 75 F.3d 633, 636 (Fed. Cir. 1996); *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322-27 (1936); Field v. Clark, 143 U.S. 649, 680 (1892).

216. *Made in the USA Found.*, 56 F. Supp. 2d at 1268 (citations omitted).

217. *Id.* at 1249.

218. Petition, *supra* note 167, at 11.

219. *Id.*

220. *Id.* at 14. The Mexican government asserted it has suffered billions of dollars worth of economic damages due to the trucking moratorium. *See* Ricardo Alonso-Zaldivar, *NAFTA Panel Rejects Constraints on Mexico Trucks: The Bush Administration Must Decide Whether To Allow Full Access or To Pay Compensation*, L.A. TIMES, Feb. 7, 2001, at A1 (indicating the Mexican government claimed losses of two billion dollars as of the date of the arbitration decision). Mexico also used the U.S. failure to implement the arbitral ruling as justification for its own restrictions on the operations of United States motor carriers within its own country. *See* Tim Weiner, *Mexico Vows To Retaliate Against U.S. on Trucking*, N.Y. TIMES, Aug. 3, 2001, at A5.

C. Preserving the United States' International Reputation

The global reputation of the United States is necessary to validate national courses of action. The question of which individuals are responsible for preserving this status has been the source of much past controversy. To partially resolve this conflict, the Supreme Court acknowledged the importance of preserving presidential discretion in foreign matters and the problematic nature of judicial interference.[221] "From all outward appearances, the President stands at the helm of our nation's foreign affairs power. He meets with leaders of other countries, negotiates international agreements, and commands our military forces."[222] The President derives this authority from the "structure of our government and national practices that have developed throughout the history of the polity that have facilitated the executive's agglomeration of power."[223]

Since early in our country's history, Congress has not doubted that the President is the "sole organ of communication with foreign governments: Congress does not speak or receive communications on behalf of the United States, or negotiate with foreign governments, or 'conduct foreign relations.'"[224] In the arena of international negotiation, the President must be able to "speak for the Nation with one voice," and make decisions on behalf of the United States without a fear of repercussion through the Courts.[225] Applicable to the case at hand, fulfillment of the President's lawful obligations should not hinge on "subordinate executive officials" having not "undertaken environmental reviews of [his] actions or other matters lying outside their authority, or because a court questions whether [his] action is consistent with conclusions an agency reached in an EIS."[226] Interestingly, the Ninth Circuit is the only court of appeals that has applied NEPA and the CAA to Presidential deeds.

The United States has been in a similar position before: one of attempting to justify to the international community an apparent disregard for its negotiated treaty obligations. Instead of defaulting to its transnational

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221. *See*, *e.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 103-04 (1948).

222. Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 689 (1996).

223. *Id.*

224. Michael C. McClintock, *Sunrise Mexico, Sunset NAFTA—Centric FTAA—What Next and Why?*, 7 SW. J.L. & TRADE AM. 1, 31 (2000).

225. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381-82 (2000); *see* Heckler v. Mathews, 465 U.S. 728, 748 (1984) ("Great nations, like great men, should keep their word.") (brackets omitted).

226. Petition, *supra* note 167, at 24-25.

agreements, the U.S. has occasionally interpreted its own law in a manner so as to circumvent governmental-approved concessions.[227] Justly or unjustly, this course of action damages the country's international reputation and harms facilitation of multi-lateral trade. Two primary examples of this phenomenon are summarized below.

Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa[228] concerned a product liability suit between an Iowan plaintiff and a French defendant.[229] While both parties initially worked under the Federal Rules of Civil Procedure, the defendant eventually contested requests for depositions and documents.[230] The defendant argued the language of the French blocking statute, "subject to treaties . . . ," indicated the Hague Evidence Convention must be employed.[231] The Supreme Court identified four possibilities for applicability of the Evidence Convention: (1) the Convention always applies; (2) the Convention must be used first, but not exclusively; (3) the Convention is a supplemental set of procedures for the Federal Rules that is optional under treaty law; and (4) the Convention is not ever required, but is simply an undertaking to facilitate discovery a U.S. court should use when deemed appropriate to the relevant parties' situations.[232] The majority put the third rationale into practice and held a case-by-case analysis based on comity is required in each scenario.[233] To the international community, the Court effectively overlooked U.S. obligations under the Evidence Convention.

Volkswagenwerk Aktiengesellschaft v. Schlunk[234] created yet another globally unpopular Supreme Court ruling. The case involved a plaintiff whose parents were killed in a car crash.[235] The plaintiff's attorney filed suit in Illinois state court and decided to serve process on the German manufacturer defendant by delivering the documents to its U.S. wholly-owned subsidiary, in compliance with state statutes.[236] The defendant parent contested the

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227. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. Iowa, 482 U.S. 522 (1987).

228. 482 U.S 522 (1987).

229. *Id.* at 524-25.

230. *Id.* at 525-26.

231. *Id.* at 526 n.6.

232. *Id.* at 533.

233. *Id.* at 540-41.

234. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 695 (1988).

235. *Id.* at 696.

236. *Id.* at 696-97.

service, claiming the Hague Service Convention should have been utilized.[237] The Court held service was proper,[238] again seemingly overlooking the relevant nature of an international agreement. Thus, even though the Convention's Article I language indicates it is "mandatory,"[239] the treaty is mandatory only when it applies, such as an occasion to transmit documents for service abroad.[240]

International critics argue the United States categorically took two treaties and, through its legal system, rendered them useless.[241] The Supreme Court employed state law to "get out of" the Service Convention and made the Evidence Convention, at best, an option. The two above cases have resulted in friction between the U.S. and other treaty partners. Although the judiciary and legal scholars have justified the results of both *Schlunk* and *Aérospatiale* in a convincing manner,[242] other nations are often deaf and blind to these rationales.

It is important to remember that the Supreme Court will not be ruling on international law in the *Public Citizen* case, as it did with *Schlunk* and *Aérospatiale*. Nevertheless, it should heed the ramifications these cases produced, and keep these international concerns in mind when ruling on treaty and U.S. environmental law. Consequently, the Court must strongly justify its decision if it elects to uphold the Ninth Circuit ruling, as anything less could seem like another attempt to evade agreed-upon duties. A solid rationale describing why the Court chose to follow substantive environmental law, despite the obvious conflict with NAFTA obligations, would help

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237. *Id.* at 697.

238. *Id.* at 707-08.

239. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter Hague Service Convention].

240. *See Schlunk*, 486 U.S. at 699-706.

241. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. Iowa, 482 U.S. 522 (1987) (Blackmun, J., dissenting); *see also* Kenneth M. Minesinger, Volkswagenwerk Aktiengesellschaft v. Schlunk*: The Supreme Court Interprets the Hague Service Convention*, 23 GEO. WASH. J. INT'L L. & ECON. 769 (1990); Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 378-79 (2001); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559 (1996); Russell J. Weintraub, *The Need for Awareness of International Standards When Construing Multilateral Conventions: The Arbitration, Evidence, and Service Conventions*, 28 TEX. INT'L L.J. 441, 466-76 (1993); Brenda L. White, *Service of Process: Application of the Hague Service Convention in United States Courts*, 30 HARV. INT'L L. J. 277 (1989).

242. *See*, *e.g.*, Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1478-81 (1991) (book review); *see also* Anne-Marie Kim, *The Inter-American Convention and Additional Protocol on Letters Rogatory: The Hague Service Convention's "Country Cousins"?*, 36 COLUM. J. TRANSNAT'L L. 687, 693 (1998); Rogoff, *supra* note 241.

alleviate a flashback to *Schlunk* and *Aérospatiale*. Although the President possesses the ability to negotiate matters with foreign countries, other national governments will not be willing to cooperate with the United States unless they believe commitments will be honored.[243] Congress has recognized this predicament and taken steps to remedy the situation.[244] Nevertheless, any U.S. perceived slip-up could cause a more drastic response than would originally have been expected. Analogously, if the Supreme Court utilizes national environmental law to avoid NAFTA obligations, the United States could again lose credibility in the eyes of the international community.

CONCLUSION

This note has attempted to suggest how the United States Supreme Court should balance the apparent inconsistency between national and international law. As has been demonstrated, perhaps there is no inconsistency at all. It is entirely possible the Court could overrule the Ninth Circuit and hold that the NAFTA arbitration decision does not conflict with U.S. environmental statutes. The laws the Ninth Circuit called into question possess exceptions permitting a U.S. President to act within his afforded powers in a manner done so here. Environmental law will also continue to be followed, as each Mexican carrier must meet the given standards before it is able to operate within the United States. Only the blanket ban will be removed. If the Court takes this path, the balancing might be presently avoided.

Nevertheless, if the High Court chooses to adopt the lower court's rationale and either refuses to address the Presidential authority issue or interprets environmental law as mandating an EIS, it should still consider the international implications of a decision in favor of re-installing the moratorium. This note raised several prospective concerns regarding barriers to the implementation of NAFTA and other transnational agreements. For many crusaders, NAFTA has become a symbol of "new-fangled internationalist entanglements that threatens to compromise our 'sovereignty.'"[245] A disregard of the arbitral decision could spur this fight against opening national borders even more, causing a retreat from the

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243. Charnovitz, *supra* note 161, at 199.

244. *Id.* Presidential grants of negotiating authority date back to as early as 1798, when Congress empowered then-President Adams to end a trade embargo against France provided certain conditions were met. *Id.*

245. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 803 (1995).

essential progress already made in global trade. The judicial system should, thus, strive to carefully examine challenges to treaty agreements. International commerce is inevitable in our future, and treaties such as NAFTA are only the beginning footprints. The Supreme Court will continue to face scenarios similar to *Public Citizen* in the years and decades ahead. As the realm of international trade grows, these inconsistencies will not lessen; consequently, the judiciary must establish a solid course of action as soon as possible to provide both clarity and guidance, carving a path and calibrating the scale for future balancing cases.