

# United States-Mexico Agricultural Trade

*James F. Smith\**

## I. THE POLITICAL ECONOMY OF MEXICO'S AGRICULTURAL EXPORTS

United States-Mexico agricultural trade began over a century ago. Mexican legislation in the 1880s authorized rail links to connect Northern Mexico with the Southwestern United States, integrating Mexico's river valleys and large cattle haciendas with the United States market and effectively severing this market from Central Mexico. After World War II, Mexico undertook massive public investment in export-oriented irrigation projects in Northwest Mexico.<sup>1</sup> Mexico implemented these policies to further their industrial development plan.

For some thirty-five years (late 1940s to early 1980s), Mexico followed an economic development strategy of import substitution.<sup>2</sup> President Miguel Alemán (1946-1952) launched policies relying on tariff as well as nontariff measures to protect its domestic industry.<sup>3</sup> During this period the Mexican economy enjoyed a phenomenal annual growth rate of six percent. Export earnings from agriculture and oil fueled development. An integral part of Mexico's strategy gave advantages to its large agribusinesses' export capacity through credit, irrigation, and the most advanced technologies in seed, fertilizers, and pesticides. This "green revolution" proved successful. Agricultural output rose at a rate of 5.7 percent annually from 1940 to 1965.<sup>4</sup>

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\* Professor of Law, School of Law, University of California, Davis.

<sup>1</sup> S. SANDERSON, *TRADE ASPECTS OF THE INTERNATIONALIZATION OF MEXICAN AGRICULTURE: CONSEQUENCES FOR THE MEXICAN FOOD CRISIS* 32-33, 35 (Monograph Series, 10, Center for U.S.-Mexican Studies, 1983); H. CROSS & J. SANDOS, *ACROSS THE BORDER* 16-48 (1981).

<sup>2</sup> "Import substitution" refers to a policy of maintaining high tariff walls as well as nontariff import permits, quotas, and licenses to protect national industries from import competition.

<sup>3</sup> F. BRANDENBURG, *THE MAKING OF MODERN MEXICO* 268 (1964); A. RIDING, *DISTANT NEIGHBORS* 196 (1986).

<sup>4</sup> Falcon, *The Green Revolution: Generations of Problems*, 52 AM. J. AGRIC.

Today Mexico exports over one-half of the winter fruits and vegetables that Americans consume.<sup>5</sup> Mexico's longer growing season and proximity to the U.S. market create a comparative advantage for their fruit and vegetable exports. Low labor costs, an undervalued foreign exchange rate favoring exports, and transfer of technology due largely to the presence of multinational corporations in the agricultural sector, significantly enhance these advantages. According to a 1987 General Accounting Office (GAO) report, the U.S. fruit and vegetable trade balance with Mexico during 1980-1986 "was consistently negative [and] tended downward from a negative \$215 million . . . to a negative \$ 742 million."<sup>6</sup> In 1988, the GAO reported that the real value of vegetable imports more than doubled and the value of fruit imports more than tripled during this same period. These trends occurred as U.S. consumers demanded more fresh fruits and vegetables in their diets.<sup>7</sup> Mexico, Chili, and Brazil primarily exported these products to the United States. Similarly, the United States International Trade Commission reported the rapid capture by Mexico in 1987 of a substantial share of the frozen asparagus (twenty-one percent), frozen broccoli (thirty-three percent) and frozen cauliflower (forty-one percent) markets.<sup>8</sup> By 1990, the GAO reported that the growth rate of United States-Mexico agricultural trade was five times greater than U.S. agricultural trade worldwide.<sup>9</sup>

While exporting luxury fruit and vegetables has enabled Mexico to obtain essential foreign exchange for industrial growth and debt servic-

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ECON., Dec. 1970, at 698-712; L. REYNOLDS, *IMAGE AND REALITY IN ECONOMIC DEVELOPMENT* (1977); ROBERTS & MIEKE, U.S. DEP'T OF AGRICULTURE, REP. NO. 220, MEXICO: AN EXPORT MARKET PROFILE (1986).

<sup>5</sup> U.S. INTERNATIONAL TRADE COMMISSION, PUB. NO. 1915, *THE IMPACT OF INCREASED UNITED STATES-MEXICAN TRADE ON SOUTHWEST BORDER DEVELOPMENT* 46 n.3 (1986) [hereafter *SOUTHWEST BORDER DEVELOPMENT*].

<sup>6</sup> U.S. INTERNATIONAL TRADE COMMISSION, PUB. NO. 2136, *COMPETITIVE CONDITIONS IN THE U.S. MARKET FOR ASPARAGUS, BROCCOLI, AND CAULIFLOWER* (1988) [hereafter *COMPETITIVE CONDITIONS*].

<sup>7</sup> GENERAL ACCOUNTING OFFICE, *AGRICULTURAL TRADE: CAUSES AND IMPACTS OF INCREASED FRUIT AND VEGETABLE IMPORTS* 2, 9 (1988) [hereafter *CAUSES AND IMPACTS*] (increasing vegetables from \$738 million to \$1.6 billion and fruit from \$482 million to \$1.6 billion).

<sup>8</sup> *COMPETITIVE CONDITIONS*, *supra* note 6, at xii.

<sup>9</sup> From 1982 to 1988, U.S. agricultural trade worldwide grew at an average rate of 2.3%, while U.S.-Mexico trade increased at an average of 11.6%. GENERAL ACCOUNTING OFFICE, *U.S.-MEXICO TRADE: TRENDS AND IMPEDIMENTS IN AGRICULTURAL TRADE* 2 (1990) [hereafter *TRENDS AND IMPEDIMENTS*]. U.S. agricultural trade with Mexico increased from 4.4% of total U.S. agricultural trade worldwide in 1982, to 7.8% in 1988. *Id.* at 23.

ing, the country increasingly has relied on importing basic grains, primarily from the United States, including feed for domestically consumed livestock. By the mid-1960s, Mexico's production of basic staples had fallen substantially. Maize, bean, rice, wheat, and oat production declined from seventy-nine percent to fifty-seven percent of total cultivation from 1940 to 1980. The Mexican government channeled investment incentives, credit, machinery, fertilizers, pesticides, infrastructure, and technical assistance primarily to the irrigated and more productive areas and away from the rain-fed subsistence zones. Mexico increasingly used these zones for the more profitable export crops and converted corn and bean production areas into livestock and forage zones.<sup>10</sup> The government "guaranteed," or officially controlled at low levels, prices for basic grain crops. The basic grain producers, mostly small, communal farmers from the rain-fed zones, suffered from diminishing subsidies and having to supply cheap food to rapidly growing urban areas. Rural unemployment, skewed income distribution, massive rural emigration, and uncontrolled urbanization followed.<sup>11</sup>

Mexico's recent efforts to remedy the lack of self-sufficiency in several basic food items, rural poverty, and underproductivity have produced little success. The most comprehensive effort, the *Sistema Alimentario Mexicano* (Mexican Food System) (SAM) of President José López Portillo's administration (1976-1982), provided an extensive array of subsidies to basic grain production. While the subsidies increased dramatically by 1981, SAM proved too costly to maintain as Mexico's economic crises of falling oil prices, massive foreign and internal debt, and hyperinflation of the 1980s brought SAM to a grinding halt. Moreover, producers in the developed and irrigated regions who decided to make a "quick killing" by switching production from traditional export crops to heavily subsidized basic grains accounted for the increases in productivity attributable to SAM. This experience suggests that subsidy or even free market forces such as grain price deregulation,

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<sup>10</sup> From 1965 to 1982 soy, alfalfa, sorghum, oats, and other cultivars related to livestock production displaced basic grains. Barkin & DeWalt, *Sorghum and the Mexican Food Crisis*, LATIN AM. RES. REV. 30, 32, (1988); Barkin & Taylor, *The Mexican Food Crisis: A Binational Problem* 8 (unpublished manuscript, Feb. 1989) (from 1966 to the mid-1980s, land dedicated to maize, wheat, and beans declined by more than one million acres, despite a 50% increase in land under cultivation, while total areas in animal feed production increased).

<sup>11</sup> SANDERSON, *supra* note 1, at 2-3, 10-11, 19, 40-41; A. Schumacher, *Agricultural Development and Rural Employment: A Mexican Dilemma* 21 (working papers in U.S.-Mexican Studies 1981); H. CROSS & J. SANDOS, *supra* note 1; Barkin & Taylor, *supra* note 10.

may resolve food security without addressing the more intractable problems of underproductivity and poverty in the countryside.<sup>12</sup>

President Carlos Salinas de Gortari's administration (1988-1994) faces a deep agricultural crisis. The seven year economic crisis, a three year drought, severe problems of infrastructure, and the absence of new agricultural investment have exacerbated the structural problems described above.<sup>13</sup> Mexico imported more agricultural products in 1988 than any previous year.<sup>14</sup> In response to the crisis, the Mexican government has begun raising guaranteed prices on corn and beans, bringing them within twenty percent, on average, of world prices compared to seventy percent in the early 1980s. Similarly, the government has reduced subsidies to consumers by sixty percent since 1984 and oriented the subsidies exclusively to low income consumers. Additionally, the Secretariat of Agriculture and Water Resources (SARH) is implementing a number of measures including privatization of governmental agricultural enterprises, elimination of intermediaries, reduction of subsidies, and decentralization of the federal government's role in agricultural management.<sup>15</sup>

At the same time, states and municipalities are being empowered through local decisionmaking, development projects, and decentralization and reform of the Banrural and government crop insurance agency credit subsidy programs. Producer cooperatives will play a much larger role. Deregulating the participants means exposing Mexican industry to world competition offering world prices for agriculture goods. An increasingly free market is hoped to reverse the trend since the forties of subsidizing industry and impoverishing agriculture.<sup>16</sup> Mexico aggressively seeks increased American investment in its agricultural sector through these and other measures.

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<sup>12</sup> M. GRINDLE, ISSUES IN U.S.-MEXICAN AGRICULTURAL RELATIONS 24-29 (Monograph Series 8, Center for U.S.-Mexican Studies, 1983).

<sup>13</sup> Jones, *Farm Crisis Forces Mexico to Enforce Sweeping Action*, Wash. Post, Aug. 30, 1989, at C1, col. 1.

<sup>14</sup> See *infra* Section X.

<sup>15</sup> 7 Int'l Trade Rep. (BNA) 137 (Jan. 24, 1990).

<sup>16</sup> In May 1988 wheat prices averaged 17% of the real 1987 level, while corn, beans, and sorghum averaged roughly 48%, 38%, and 53% of their 1987 levels respectively. *Pact May Continue into June, Despite Growing Pressure*, MEXICO UPDATE, May 1988, at 1; Barbash, *Agricultural Changes Plow Ahead*, BUSINESS MEXICO, Mar. 1989, at 32. While deregulation is underway, it is too early to describe its extent or consequences.

## II. MEXICO'S TRADE LIBERALIZATION

In 1982 Mexico entered a period of economic crisis. The patent noncompetitiveness of its long protected industries, the precipitous fall in oil prices, inflation, and rising interest rates led to the devaluation of its currency and explosive foreign and internal debt. A radically new direction seemed overdue. The proponents of trade liberalization successfully argued for a strategy of reducing the public sector with an export-led economic recovery. Utilizing agricultural exports to earn badly needed foreign exchange continued.

The prime architect of Mexico's trade liberalization, President Carlos Salinas de Gortari (1988-1994),<sup>17</sup> served as general director for economic policy under President José López Portillo from 1976 to 1982. President de Gortari also served as President de la Madrid's budget director from 1982 through 1988.<sup>18</sup> Mexico acceded to the General Agreement on Tariffs and Trade (GATT)<sup>19</sup> in August 1986, heralding the beginning of the end of Mexico's long established import substitution regime and the opening of its economy. Mexico exceeded its initial commitments under GATT, reducing its maximum import tariff from forty percent to twenty percent and eliminating ninety-five percent of the tariff items from prior import licensing requirements.<sup>20</sup> In 1988, Mexico's duty rates on fresh and frozen vegetables declined from twenty-five percent to a range of ten to fifteen percent *ad valorem*. The government has eliminated minimum import prices and the import permit system for most vegetables, feed grains, and seed products. However, import permit requirements remain in several agricultural products categories.<sup>21</sup> Licensing, more than tariffs, restricts trade because tariffs not only are more transparent measures of protection, but the government gradually may reduce them without economic dislocation.

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<sup>17</sup> "The opening of the economy to foreign competition and its new orientation toward the export sector will contribute to the dynamic expansion of economic activity." *President Salinas' National Industrial Development Plan*, 6 Int'l Trade Rep. (BNA) 739 (June 7, 1989).

<sup>18</sup> 5 Int'l Trade Rep. (BNA) 1577-78 (Nov. 30, 1988).

<sup>19</sup> See English, *The Mexican Accession to the General Agreement on Tariffs and Trade* 23 TEX. INT'L L.J. 339 (1988); J. SMITH, *The General Agreement on Tariff and Trade: The GATT Rounds, Agreements and Codes*, in *DOING BUSINESS IN MEXICO* ch. 35 (1989).

<sup>20</sup> Although the 20% tariff is relatively low, it eliminates the competitiveness of some U.S. products such as beer. During the same period, Mexico raised the tariff rate on some products from 5% to 10%. See *TRENDS AND IMPEDIMENTS*, *supra* note 9, at 8.

<sup>21</sup> *TRENDS AND IMPEDIMENTS*, *supra* note 9, at 11; *COMPETITIVE CONDITIONS*, *supra* note 6, at 5-17, 6-19.

Mexico has reduced the items requiring licensing from 818 to 262 (by sixty-two percent) since 1986. The United States seeks elimination of the remaining trade barriers.<sup>22</sup>

In May 1989, the Salinas administration announced new regulations significantly liberalizing restrictions on foreign investment.<sup>23</sup> In January 1990, the Mexican government also promulgated new regulations liberalizing regulation of the transfer of technology.<sup>24</sup> President Salinas is attempting to privatize many sectors of the government owned or controlled economy, including the agricultural sector. For example, Mexico will privatize and make available the public telephone for up to twenty-three percent of foreign investment.<sup>25</sup> Economists feel such measures will attract more foreign investment in all sectors, including agriculture.<sup>26</sup> These policies reflect the administration's macroeconomic strategy of economic recovery: reducing the public sector and inflation, promoting foreign investment and export earnings, increasing private employment, and paying the foreign debt. Within this context, fruit and vegetable exports will remain a reliable source of foreign exchange, possibly employing as many workers as the much touted Border Industrial Program (*maquiladoras*).<sup>27</sup> On the other hand, importing cheap

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<sup>22</sup> Telephone interview with Don Abelson, U.S. Trade Representative, Mexico Section (Dec. 27, 1989).

<sup>23</sup> *Regulation of the Law To Promote Mexican Investment and Regulate Foreign Investment*, Diario Oficial de la Federacion, May 16, 1989, at 11; Rohter, *Mexico Loosening Investment Rules*, N.Y. Times, May 16, 1989, at A1, col. 3.

<sup>24</sup> 7 Int'l Trade Rep. (BNA) 75 (Jan. 17, 1990).

<sup>25</sup> 6 Int'l Trade Rep. (BNA) 1198 (Sept. 20, 1989).

<sup>26</sup> However, the Mexican government restricts direct ownership of agricultural lands. The only type of land title the government permits a foreigner is the 30 year trust or *fideicomiso*. This restriction comes from the following sources. No foreign land ownership is constitutionally permitted in the "prohibited zone," namely within 100 kilometers of the border or 50 kilometers of the coast. However, the 1973 Law to Promote Mexican Investment and Regulate Foreign Investment authorizes *fideicomisos* in lieu of direct ownership or minority ownership (up to 49%) of a Mexican entity holding title to such land. The Mexican Constitution also prohibits publicly held corporations from owning agricultural land. See POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES art. 27, §§ I & IV; J. SMITH, *Law To Promote Mexican Investment and Regulate Foreign Investment*, in DOING BUSINESS IN MEXICO app. E, I (1989).

However, the government permits foreign ownership of agricultural property up to 20 hectares, through the *fideicomiso*, and may authorize such trusts for acreage exceeding that amount upon approval of the Commission for Foreign Investment. See *Regulation of the Law To Promote Mexican Investment and Regulate Foreign Investment*, *supra* note 23.

<sup>27</sup> Sinaloa alone employs 180,000 in the agricultural export sector while officials estimated the maquiladora workforce at 300,000 in 1987. Thompson & Hillman, Agri-

grain and animal protein effectively combats inflation and forestalls investment necessary to self-sufficiency in these products.

In 1988, two-way trade between Mexico and the United States surpassed forty-four billion dollars.<sup>28</sup> Mexico exports goods primarily to the United States. Mexico imports its largest supply of goods from the United States. In turn, Mexico is the United States' third largest trading partner.<sup>29</sup> Additionally, Mexico's proximity to the United States and the arguably inverse relationship between Mexico's economic well-being and the flow of narcotics and undocumented immigrants northward suggests the need for a special relationship. These factors, plus Mexico's excellent performance on its foreign debt and rapid trade liberalization, in some sense have required the United States to concede trade advantages.<sup>30</sup> Whether such factors will translate into tangible trade concessions remains unclear. Indeed, economic relations between the two countries have been strained at times. Praising Mexico's trade liberalization, both the Reagan and Bush Administrations have expressed dissatisfaction with Mexico's foreign investment<sup>31</sup> and have imposed sanctions for asserted inadequate intellectual property laws.<sup>32</sup> In

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cultural Trade Between the United States and Mexico: The Impacts of Mexico's Foreign Debt 9 (June 1989) (unpublished paper).

<sup>28</sup> In 1988, U.S. exports to Mexico totalled \$20.6 billion while Mexican exports to the United States totalled \$23.5 billion. 6 Int'l Trade Rep. (BNA) 1027 (Aug. 2, 1989). In the first half of 1989, Mexican imports amounted to \$13.6 billion and U.S. exports to Mexico valued \$12.4 billion. 6 Int'l Trade Rep. (BNA) 1520 (Nov. 22, 1989).

<sup>29</sup> Joint Communique on Trade and Investment Issued by Ambassador Hills and Secretary Serra on the Occasion of the U.S.-Mexican Presidential Summit (Oct. 3, 1989) [hereafter Joint Communique].

<sup>30</sup> Farnsworth, *U.S. Praise for Mexico's President*, N.Y. Times, May 16, 1989, at D15, col. 1; McCarthy, *Breakthroughs Wait on Intellectual Property*, BUSINESS MEXICO, Sept. 1989, at 70.

<sup>31</sup> Mexico's 1973 foreign investment law limits foreign ownership to 49%. On May 15, 1989, the government issued new regulations authorizing automatic approval of 100% foreign ownership if investors meet certain conditions and the investment does not exceed \$100 million. 6 Int'l Trade Rep. (BNA) 629 (May 17, 1989).

<sup>32</sup> In January, 1987, the United States withdrew some \$200 million in duty free treatment from Mexico pursuant to the General System of Preferences (GSP), citing the failure to provide adequate protection of intellectual property. See 19 U.S.C. § 2464(c)(3)(B)(ii) (1988). The Commercial Section of the United States Embassy in Mexico City provided a USTR press release, stating that products had become sufficiently competitive to be graduated from such GSP program. For the same reason the USTR put Mexico on the "priority watch list" under "Super 301" with a warning to make improvements by April 1990 pursuant to 19 U.S.C. §§ 2242, 2420 (1988). See 6 Int'l Trade Rep. (BNA) 684, 715, 1253-56, 1436 (May 31, 1989).

May 1989 the United States government placed Mexico and seven other nations on a "priority watch list" of countries failing to protect intellectual property rights. In October 1989, during a visit to Washington, President Salinas signed an Investment and Trade Understanding and Action Plan. The parties agreed to meet and negotiate several areas of contention.<sup>33</sup> During the meeting, Mexico doubled its steel quota under the extension of the U.S. Voluntary Restraint Agreement (a significant trade concession in itself).<sup>34</sup> Probable U.S. concessions include offering greater access to the Generalized System of Preferences (GSP).<sup>35</sup>

### III. MEXICAN AGRICULTURAL EXPORTS TO THE UNITED STATES

Today, production contracts, consignment sales, food processing, and direct foreign investment largely characterize Mexico's agricultural exports through vertical integration from farm to foreign market. Private sector ownership appearing to respond to the logic of the international markets and not to the exigencies of internal demand also characterize these agricultural exports. Nonetheless, a significant percentage of these transnational enterprises remain Mexican based and presumably subject to national direction.<sup>36</sup> The apparent substitution of domestically

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<sup>33</sup> Joint Communique, *supra* note 29. In 1990 the USTR announced the removal of Mexico from the "priority watch list" given Mexico's recent assurances that its intellectual property laws would be significantly liberalized. 7 Int'l Trade Rep. (BNA) 147 (Jan. 31, 1990).

<sup>34</sup> *Mexico-U.S. Agreement To Lead to Sectoral Free Trade Negotiations*, MEXICO UPDATE, Oct. 15, 1989, at 1.

<sup>35</sup> For the 1987 calendar year, U.S. GSP Mexican imports totalled \$1.7 billion, a 54% increase over the previous five years. In 1988 the leading Mexican exports eligible under the GSP program included beverages and spirits (\$50.3 million), sugar and sugar confectionery products (\$50.8 million), vegetables (\$18.8 million), and fruits (\$9.4 million). In 1988, GSP imports totalled \$2.1 billion. Trade experts expect Mexico to become the largest beneficiary of the program in 1989. Nonetheless, due to the failure to claim GSP, the failure to meet the 35% value-added requirements, and the failure to submit the proper documentation required of Mexican exporters, the USTR reports that Mexico is not taking full advantage of the program. Garza, *GSP: An Underused Tool*, BUSINESS MEXICO, June 1989, at 55; *see also* TRENDS AND IMPEDIMENTS, *supra* note 9, at 9.

In 1989, Mexico filed for 63 new products under the GSP, for an average duty saved of 3.5% and a total sales value of \$500 million. Some of these petitions will be granted later in 1990. Of the agricultural product petitions, the government rejected frozen strawberries and whole and cut broccoli, while it accepted chile peppers, safflower oil, and nopalitos (a popular and nutritious cactus plant). *Products Get Preliminary GSP Approval; Several Glass Items Excluded*, MEXICO UPDATE, Sept. 15, 1989, at 3.

<sup>36</sup> MARES, RESEARCH REP. 16, THE EVOLUTION OF U.S.-MEXICAN AGRICUL-



consumed staples for export crops during the SAM offers some evidence of such control.<sup>37</sup>

While exports have expanded, Southwestern agricultural producers in the United States have supplemented and financed much of the production, dampening protectionist pressures.<sup>38</sup> U.S. imports from Mexico in agriculture, fisheries, and forest products increased from \$1.4 billion in 1976 to \$2.1 billion in 1985, an average annual increase of five percent. In 1988, Mexico became the second largest supplier of such imports.<sup>39</sup> Fresh vegetables, fruits, nuts, coffee, tea, spices, fish, and shellfish (mostly shrimp) comprise approximately two-thirds of such Mexican imports. In 1988, Mexican agricultural imports to the United States valued \$1.8 billion. Fruits and vegetables accounted for forty-two percent of the total and coffee an additional sixteen percent. Additional imports, in declining order of the percentage of total value included wine and malt beverages (9.6%), sugar (2.5%), oilseeds (1.5%), grains and feeds (1.3%), and dairy products (.60%).<sup>40</sup> The primary vegetable and fruit products include tomatoes, peppers, onions, broccoli, cucumbers, squash, cauliflower, grapes, cantaloupes, mangoes, and frozen strawberries. Other leading items include beef, cattle fodder, live feeder cattle, coated and cut paper, tequila, and beer. The United States now exports beef, fruit, and vegetables to Mexico for further handling. Mexican packers then process and pack the goods in *maquiladoras* and export them back to the United States.<sup>41</sup>

Mexico's continued and recently intensified promotion of agricultural industrialization has produced problems of intense competition for American producers. For example, Mexican cucumbers, eggplant, on-

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TURAL RELATIONS: THE CHANGING ROLE OF THE MEXICAN STATE AND MEXICAN AGRICULTURE PRODUCERS (1981). Other researchers such as Sanderson, *supra* note 1, and Thompson and Hillman, *supra* note 27, at 7, have emphasized that U.S. growers, packers, shippers, and distributors provide working capital for these fruit and vegetable export enterprises in northwestern Mexico.

<sup>37</sup> Grindle, *supra* note 12.

<sup>38</sup> Cook, From Competition to Coordination in Vegetable Trade: The Case of Mexico and California (remarks at The Market for Vegetables in the Western Hemisphere: Trends, Policies and Linkages; Cook College, Rutgers Univ., Sept. 1987).

<sup>39</sup> U.S. DEP'T. OF AGRICULTURE, FOREIGN AGRICULTURAL TRADE OF THE UNITED STATES (FATUS), FISCAL YEAR 1988 SUPP. (May 1989) (EC-12 is listed at \$4,121 million followed by Mexico at \$1,903 million).

<sup>40</sup> *Id.* at 244-45. Coffee prices may rise given the apparent collapse of the International Coffee Organization's quota system. *Mexico Looks for Export Opening Following End of Coffee Quotas*, MEXICO UPDATE, July 15, 1989, at 5.

<sup>41</sup> SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 47, 102, 106; Cook, *supra* note 38, at 13.

ions, green peppers, squash, tomatoes, asparagus, broccoli, cauliflower, okra, strawberries, cantaloupes, and grapes compete with California, Texas, and Florida products.<sup>42</sup> This competition has produced considerable unfair trade practice litigation.<sup>43</sup> Complaints from the U.S. asparagus, broccoli, and cauliflower industries recently prompted an International Trade Commission (ITC) study on Mexican competition. The ITC found little threat to U.S. market share in fresh asparagus (seventeen percent), broccoli (four percent), and cauliflower (one percent). However, the ITC discovered significant inroads in frozen asparagus (twenty-one percent), broccoli (thirty-three percent), and cauliflower (forty-one percent), followed by a four percent share of canned asparagus.<sup>44</sup>

#### IV. UNITED STATES REGULATION OF MEXICAN AGRICULTURAL EXPORTS

A complex web of regulations, including tariffs;<sup>45</sup> the Perishable Agricultural Commodities Act<sup>46</sup> (marketing of fresh produce); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>47</sup> (chemicals); the Food, Drug and Cosmetic Act<sup>48</sup> (product identity); and USDA rules

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<sup>42</sup> SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 106; COMPETITIVE CONDITIONS, *supra* note 6.

<sup>43</sup> See *infra* notes 77-113 and accompanying text.

<sup>44</sup> COMPETITIVE CONDITIONS, *supra* note 6, at xi-xii.

<sup>45</sup> The USDA Foreign Agriculture Service, Horticulture, and Tropical Products Division reported tariffs ranging from 0.5% to 37.6% *ad valorem* on Mexican tomatoes, constituting 20% of all imports, with tariffs as high as 11.45%. The Division reported tariffs up to 37.6% on onions, chili and bell peppers, cucumbers, squash, lettuce, green beans, eggplant, and garlic. TRENDS AND IMPEDIMENTS, *supra* note 9, at 9-10. The SARH also reported tariffs on carrots, turnips, artichokes, broccoli, asparagus, celery, spinach, melons, and frozen orange juice. See Secretaria de Agricultura y Recursos Hidraulicos (SARH) (Mexican counterpart of USDA) (Jan. 10, 1990) (available at U.C. Davis Law Review).

<sup>46</sup> 7 U.S.C. §§ 499a-499t (1988).

<sup>47</sup> *Id.* §§ 136-136y.

<sup>48</sup> 21 U.S.C. § 381-393. No federal preemption exists under the Act. In California, the Sherman Food, Drug and Cosmetic Law, CAL. HEALTH & SAFETY CODE § 2600 (West 1988), authorizes the adoption of pesticide tolerance regulations. As a practical matter these measures conform to federal law. In the last three years the California Department of Food and Agriculture has more than doubled its testing samples, yet has detected a decrease in violations from 1.9% to 1.16%. Domestic and foreign violation rates correspond closely. Cohen, Impact of California and EPA Pesticide Monitoring, FDA Regulations, and USDA Labeling Requirements (unpublished paper at the Tenth Annual Meeting and Educational Conference of the American Agricultural Law Association, 1989) (available at U.C. Davis Law Review).

(grades and standards) affect fresh and processed fruits and vegetables. Additionally, Federal marketing orders set size, grade, and quality standards for domestic and Mexican tomatoes, onions, oranges, grapefruit, and table grapes. Mexican authorities have complained of an essentially protectionistic motivation for applying these programs.<sup>49</sup>

Other controls relate to health and safety issues. The United States may refuse to import Mexican products that workers package under unsanitary conditions or that unsafe pesticides contaminate. The GAO reported that the Food and Drug Administration (FDA) pesticide residue detection program annually samples less than one percent of approximately one million imported food shipments. The FDA tests detect less than one-half of the pesticide chemicals available for use worldwide. Moreover, perishable shipments may enter the country before completion of testing. In some cases, officials have not recovered adulterated products. In these instances, officials may impose fines, but rarely do so.<sup>50</sup>

The GAO reported that the government inadequately enforces the law that requires notifying foreign governments of U.S.-banned pesticides.<sup>51</sup> Like their domestic competitors, Mexican exporters tend to comply with existing requirements. However, U.S. officials banned Mexican fresh citrus in 1982 under USDA quarantine restrictions due to citrus canker and again, with mangoes and papayas, in 1985 for using ethylene dibromide (EDB) against the Mediterranean fruit fly.<sup>52</sup>

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<sup>49</sup> The Agriculture Marketing Agreement Act of 1937 authorizes Federal Marketing Orders. Congress defines marketing orders, affecting more than half of all tree fruit and 15% of all vegetables grown in the United States, as "marketing plans developed by growers and handlers under enabling legislation to achieve improved returns through industry-wide regulations." 7 U.S.C. § 601 (1988); see Garoyan, *Marketing Orders*, 23 U.C. DAVIS L. REV. 697 (1990). The dual-size restriction marketing order implemented during the Mexico-Florida "tomato war" exemplifies such protectionist use. The Florida growers also advocated changes in standardized shipping cartons to increase Mexican costs. WEINTRAUB, *FREE TRADE BETWEEN MEXICO AND THE UNITED STATES* 50 (1984); Thompson & Hillman, *supra* note 27, at 7. Mexico is the major supplier of several commodities currently listed under § 608e (7 U.S.C. § 608e-1 (1988) which authorizes fruit and vegetable marketing orders, including limes, onions, table grapes, and tomatoes. Sudden changes in these orders can cause and have caused major losses to Mexican exports. See TRENDS AND IMPEDIMENTS, *supra* note 9, at 12.

<sup>50</sup> U. S. GENERAL ACCOUNTING OFFICE, REP. NO. RCED-86-219, PESTICIDES: BETTER SAMPLING AND ENFORCEMENT NEEDED ON IMPORTED FOOD (1986).

<sup>51</sup> U. S. GENERAL ACCOUNTING OFFICE, REP. NO. RCED-89-128, PESTICIDES: EXPORT OF UNREGISTERED PESTICIDES IS NOT ADEQUATELY MONITORED BY EPA (1989). The notification requirements are set forth in § 17 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). See 7 U.S.C. § 136 (1988).

<sup>52</sup> SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 107. Officials may inspect

The banning of avocados and small sour lemons, as well as restrictions on shipping mangoes, garlic, citrus, and potatoes due to disease concerns, continue to generate controversy between the two countries.<sup>53</sup>

The United States had imposed extensive sanitary controls on Mexican beef due to concern about tuberculosis. Mexican swine, poultry, sheep, and goat meat products have been banned for health reasons since the 1970s.<sup>54</sup> Mexican beef also could be banned under the quota provisions of the Meat Imported Act of 1979.<sup>55</sup> Generally, Mexican beef exports have not risen to the quota. However, the sugar quota in fact has limited Mexican sugar and sugar product exports to the United States.<sup>56</sup>

Transportation often presents problems because many Mexican motor carriers must obtain certificates from the Interstate Commerce Commission through a complex and difficult process.<sup>57</sup> The President may waive such requirements, but has refused to waive them in Mexico, responding in part to the Mexican government's restrictions on U.S. trucking in Mexico.<sup>58</sup> Mexican truckers may operate within defined U.S. commercial zones but their American counterparts may not bring their cargoes into Mexico.<sup>59</sup> This issue has been on the binational trade negotiation agenda since 1989.<sup>60</sup> Custom procedures also have in-

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and exclude plants, plant products, and Mexican soil. Plant Quarantine Act, 7 U.S.C. § 164(a) (1988); Federal Plant Pest Act, 7 U.S.C. § 150(dd) (1988); and the Mexican Border Act, 7 U.S.C. § 149 (1988).

<sup>53</sup> 6 Int'l Trade Rep. (BNA) 1253-54 (Oct. 4, 1989); SARH, *supra* note 45; TRENDS AND IMPEDIMENTS, *supra* note 9, at 15.

<sup>54</sup> The diseases these products cause are hog cholera (swine), exotic new castle disease (poultry), and scrapies (sheep and goats). See TRENDS AND IMPEDIMENTS, *supra* note 9, at 16.

<sup>55</sup> 19 U.S.C. §§ 2461-2465 (1988).

<sup>56</sup> Mexican sugar exports are subject to the U.S. Sugar Proclamation Program, established by Presidential Proclamation 4941 on May 5, 1982. In 1988 the U.S. sugar quota for Mexico was 8,000 metric tons, valued at approximately \$1.4 million. See TRENDS AND IMPEDIMENTS, *supra* note 9, at 13.

<sup>57</sup> Motor Carrier Safety Act of 1984, 49 U.S.C. §§ 10530, 10922, 10923 (1988); SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 110.

<sup>58</sup> 49 U.S.C. §§ 10523, 10526 (1988); SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 110-111.

<sup>59</sup> See TRENDS AND IMPEDIMENTS, *supra* note 9, at 19.

<sup>60</sup> Initially, this matter was placed on the agenda following the November 1987 Farmwork Agreement. In 1989 the two governments exchanged letters concerning an "action plan" to guide future discussions and actions on border transportation issues. The plan stipulates that both countries will work toward improved access regimes, compatible safety standards, streamlined customs procedures, and increased investment. Under the plan, officials from both governments will meet every six months and consult

hibited the movement of persons, goods, and vehicles from Mexico.<sup>61</sup> Finally, U.S. exporters who ship to Mexico and Central and South America must obtain export licenses that sometimes cause delays.<sup>62</sup>

## V. UNITED STATES AGRICULTURAL EXPORTS TO MEXICO

The United States produces and exports many types and amounts of commodities, including one-half of its wheat and soybeans and one-quarter of its corn production. Like most developed countries U.S. agricultural policies promote exports<sup>63</sup> and protect agricultural producers from foreign competition through quotas<sup>64</sup> and subsidies.<sup>65</sup> Target prices and commodity loans have produced large surpluses. Aggressive subsidization of U.S. commodity exports and credit programs achieved a twenty-six percent export increase in fiscal 1988. Wheat accounted for two-thirds of the volume increase. Corn, feeds, fodders, and vegetable oils comprised the remaining third.<sup>66</sup> Similarly, the European Eco-

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on an *ad hoc* basis in the interim. Joint Communique, *supra* note 29, at n.10.

<sup>61</sup> SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 111 n.1.

<sup>62</sup> *Id.* at 116; Export Administration Act of 1979, 50 U.S.C. § 2401 (1982 & Supp. V 1988).

<sup>63</sup> The Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 480, provides export credits, and the Export Administration Act, 50 U.S.C. §§ 2401-242 (1982 & Supp. V 1988), authorizes export controls. The Export Enhancement Program (EEP) subsidizes export sales with commodities from the inventory of the Commodity Credit Corporation. 5 Int'l Trade Rep. (BNA) 1201 (Aug. 24, 1988). The program remains highly controversial. U.S. trading partners claim that it inflates world farm prices, and U.S. consumer groups claim that it raises prices and may jeopardize the supply of essential food grains. 5 Int'l Trade Rep. (BNA) 1211 (Aug. 31, 1988). The United States has sold wheat under the EEP to Algeria, Egypt, India, Colombia, China, and Mexico and has offered dairy cattle sales to Morocco and Turkey.

<sup>64</sup> The Agricultural Adjustment Act of 1933, 7 U.S.C. § 624 (1988), the Agricultural Act of 1956, 7 U.S.C. § 1854 (1988) (presidential authority to negotiate import reductions) and the Meat Import Act of 1979, 19 U.S.C. §§ 2461-65 (1988), authorize import quotas.

<sup>65</sup> Agriculture subsidies have increased in the United States from \$2.7 billion dollars in 1980 to \$25.8 billion in 1986. European Economic Community (EEC) subsidies increased from \$6.5 billion in 1976 to \$21.5 billion in 1986. Valdes, *La Agricultura en la Ronda de Uruguay: Los Intereses de los Países en Desarrollo*, COMERCIO EXTERIOR, Nov. 15, 1986, at 798-99.

<sup>66</sup> The United States spends approximately one billion dollars per year on the EEP, but contends that the EEC, *see infra* note 67, spends 10 times that figure. Under the "Targeted Export Assistance" (TEA) program exporters receive agency funds. The USDA allocated \$200 million under the TEA program for 1989. 5 Int'l Trade Rep. (BNA) 1095, 1305, 1515, 1546 (Nov. 7, 1988). The USDA created a Trade Assistance and Planning Office to help U.S. exporters develop markets for farm products overseas as part of the Foreign Agriculture Services (FAS) office. 5 Int'l Trade Rep. (BNA)

conomic Community (EEC)<sup>67</sup> consistently produces large commodity surpluses and low priced exports. The United States-EEC subsidy war, detrimental to all participants, has set the stage for multilateral negotiations to liberalize international agricultural trade.<sup>68</sup>

Availability of cheap commodities blesses and curses newly industrialized countries, such as Mexico. The government can pay less to subsidize urban dwellers. Rural producers, however, cannot compete and must emigrate or suffer economic stagnation. By the mid-1980s, Mexico became the fourth largest market for United States agricultural products, importing \$3.8 billion worth of such goods.<sup>69</sup> In 1988, Mexico imported \$3.5 billion of basic grains alone, including wheat, corn, dry beans, soybeans, seeds, and dairy products.<sup>70</sup>

The United States most likely will expand exportation of all agricultural products to the markets of developing countries,<sup>71</sup> including Mexico. The United States increased its agricultural exports to Mexico by over eighty-five percent from 1987 to 1988, surpassing both Canada and South America in total value.<sup>72</sup> The largest increases occurred in dairy products, poultry, and other meats (over 285%). Wheat, rice, grains, feed and fodder, oilseeds, and protein meal also increased in value (207%).

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1610 (Dec. 12, 1988). The 1988 Omnibus Act increased to 900 the number of employees in the FAS who will, to the "maximum quantity practicable," devote their activities to expanding foreign markets to include U.S. agricultural commodities. The Act also authorizes reimbursement for costs in defending such producers in foreign, unfair trade practice litigation. Pub. L. No. 100-576, 102 Stat. 1393, 1397.

<sup>67</sup> The EEC includes Belgium, France, Italy, Luxembourg, the Netherlands, West Germany, Denmark, Ireland, the United Kingdom, Greece, Portugal, and Spain.

<sup>68</sup> See *infra* notes 114-34 and accompanying text.

<sup>69</sup> SOUTHWEST BORDER DEVELOPMENT, *supra* note 5, at 102.

<sup>70</sup> 5 Int'l. Trade Rep. (BNA) 1095, 1305, 1515, 1546 (Nov. 7, 1988).

<sup>71</sup> FOOD AND AGRICULTURAL POLICY RESEARCH INSTITUTE, U.S. AND WORLD AGRICULTURAL OUTLOOK 3 (Feb. 1989); ROBERTS & MIEKE, *supra* note 4.

<sup>72</sup> U.S. agricultural exports to Mexico totalled \$2,233,673,000.00 in 1988; up from \$1,201,831,000 in 1987. Major product groups included unmilled wheat (\$98,973,000), rice (\$621,000), coarse grain (\$33,646,000.00), feeds and fodders (\$33,646,000), fruits and juices (\$13,761,000), vegetables (\$37,415,000), oilseeds (\$402,717,000), protein meal (\$107,714,000), vegetable oils (\$63,727,000), cotton (\$5,583,000), animal fats and oils (\$32,450,000), nuts (\$12,174,000), dairy products (\$136,840,000), poultry meat (\$62,930,00), and other meats (\$177,566,000). See FATUS, *supra* note 39, at 44, 48-49. Mexico is a major beneficiary of the USDA's agricultural export credit guarantee program (GSM 102 and 103). These credit guarantees to Mexico increased from \$30 million in 1982 to \$1.26 billion in 1989. See TRENDS AND IMPEDIMENTS, *supra* note 9, at 26, 34.

## VI. MEXICO'S REGULATION OF UNITED STATES AGRICULTURAL IMPORTS

Mexico reduced the number of items subject to its import permit system after entering GATT, but has not entirely replaced such licensing requirements with tariffs. Several agricultural categories, including grains, oilseeds, dairy goods, and certain horticultural products, still require such permits. Import permits pose major problems for U.S. exporters. For example, grain causes seasonal railway congestion. For apple and pear exporters, licensing poses more of an impediment than the twenty percent tariffs. However, agricultural tariffs continue to eliminate some products such as beer.<sup>73</sup> Licensing remains an agricultural trade dispute between the two countries.

Like other GATT members, Mexico passed unfair trade practice legislation in January 1987 to offset subsidies and dumping. Under GATT, exporters who commit these "trade torts" may suffer the imposition of duties on subsidized or dumped products.<sup>74</sup> Mexico has invoked the legislation and regulations against U.S. exporters of various chemical products. Countervailing duty actions against U.S. agricultural exports would appear to be legally viable.<sup>75</sup> However, such actions appear unlikely in the immediate future for two reasons. First, cheap agricultural imports help to control inflation. Second, the administration gives little support to its own agricultural sector.

Apart from licensing, few major controversies concerning U.S. agricultural exports to Mexico have existed in recent years. However, in 1989 Mexico banned U.S. hogs because of an alleged cholera threat. At the time, a cholera epidemic was devastating Mexico's hog population. The United States had controlled the disease north of the border since the 1970s, but feared that undertaking vaccinations again might reintroduce the disease.<sup>76</sup>

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<sup>73</sup> See TRENDS AND IMPEDIMENTS, *supra* note 9, at 8, 11.

<sup>74</sup> Dumping is a form of international price discrimination. A producer charges a lower price for its product in a foreign market than it charges for the product in its domestic market. See Comment, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647, 1648 (1988); *infra* notes 83-96 and accompanying text.

<sup>75</sup> Smith, *Mexico and Antidumping*, BUSINESS MEXICO, June 1987, at 40.

<sup>76</sup> 6 Int'l Trade Rep. (BNA) 447 (Apr. 12, 1989). Mexico's prior vaccination requirement is to be replaced with vaccinations in Mexico followed by a two week quarantine. See TRENDS AND IMPEDIMENTS, *supra* note 9, at 14.

## VII. UNITED STATES-MEXICO AGRICULTURAL TRADE DISPUTES UNDER UNITED STATES LAW

In the 1980s, the U.S. often preferred to resolve trade disputes with Mexico through administrative procedures of United States trade law. These included administrative petitions imposing duties on Mexican imports under the escape clause,<sup>77</sup> countervailing duties for subsidies, and antidumping duties for less than fair value sales. These actions emphasize protection of U.S. industry regardless of other bilateral considerations.

### A. *The Escape Clause (Section 201 of the 1974 Trade Act) and Mexico*

Under Article XIX of GATT and Section 201 of the 1974 Trade Act,<sup>78</sup> affected domestic industries<sup>79</sup> may petition the International Trade Commission (ITC) for a recommendation requesting the President to impose tariffs or other measures protecting the industries from injurious foreign competition. These provisions authorize "escape" from trade liberalizing regimes. In the 1970s four escape clause cases against Mexico resulted in ITC recommendations for import restriction. However, the President accepted the recommendation for relief only in the case involving a nonagricultural product (cooking utensils). The President refused to accept the recommendation in cases involving asparagus, shrimp and honey.<sup>80</sup> Maintaining a relatively open market

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<sup>77</sup> The escape clause allows temporary relief from imports if the ITC determines that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2251(b)(1) (1982).

<sup>78</sup> *Id.* §§ 2251-2254. This Act regulates agricultural and nonagricultural products. A similar provision first appeared in a Reciprocal Trade Agreement with Mexico in 1943 and later appeared in other bilateral treaties and in the GATT. J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 541 (2d ed. 1986).

<sup>79</sup> An affected industry is one which is producing an article when a like article is being imported into the United States in such increased quantities as "to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing the article directly competitive with the imported article." 19 U.S.C. § 2251(a) (1982).

<sup>80</sup> See 1 Int'l Trade Rep. (BNA) 5323 (Jan. 12, 1976) (asparagus); U.S. INTERNATIONAL AND TRADE COMMISSION, PUB. NO. 773, REPORT TO THE PRESIDENT (1976) (shrimp); U.S. INTERNATIONAL TRADE COMMISSION, PUB. NO. 701, REPORT TO THE PRESIDENT (1976) (honey); 3 Int'l Trade Rep. (BNA) 1805 (Nov. 3, 1986) (porcelain-on-steel cooking ware). In April 1989, the ITC dismissed the California Lime Handlers Association's petition against Mexico due to "legal deficiency." 6 Int'l Trade Rep.



for Mexico helped the United States persuade Mexico to begin to liberalize its trade regime.<sup>81</sup> In 1988, Congress amended the escape clause to provide special relief provisions for perishable agricultural products.<sup>82</sup>

### *B. Antidumping Actions Against Mexican Agricultural Exports*

"Dumping" involves selling products in another country at less than normal value.<sup>83</sup> Article VI of GATT sets forth international dumping law. If an exporter's "foreign market price" exceeds its "domestic price," and the price difference "cause[s] or threaten[s] to cause material injury in the territory of a contracting party or materially retards the establishment of a domestic industry" in the importer's country,<sup>84</sup> the importing nation may impose duties to offset dumping. The International Trade Administration (ITA) investigates dumping (sales at "less than fair value" (LTFV)) and "material injury."<sup>85</sup> An "adjustment process" compensates for inherent differences in export and home market pricing. However, home market surveys may not exist. In such cases, the government may use sales to a third country or "construct" the home market costs.<sup>86</sup>

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(BNA) 554 (May 3, 1989).

<sup>81</sup> Samet & Hufbauer, "Unfair" Trade Practices: A Mexican-American Drama 24 (U.S.- Mexico Project Series, No. 1, Apr. 1982).

<sup>82</sup> The Omnibus Trade and Competitiveness Act of 1988 authorizes emergency import relief for perishable agricultural products within 28 days after filing a petition, if the ITC has monitored imports for at least 90 days and has made an affirmative preliminary injury determination. Pub. L. No. 100-418, § 1401(a), 102 Stat. 1225-1241 (1988) (codified as 19 U.S.C. § 2252(d) (1988)). The Act requires monitoring lamb imports for two years. 5 Int'l Trade Rep. (BNA) 597 (Apr. 20, 1988) (summary of House Conference Report).

<sup>83</sup> For a comprehensive discussion of U.S. dumping law, see Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981).

<sup>84</sup> GATT, art VI, para. 1.

<sup>85</sup> 19 U.S.C. § 1673 (1988) (codifying elements). The ITA determines LFTV and the ITC determines the injury. See also 19 U.S.C. §§ 1677, 1677(a)-(c) (1988).

<sup>86</sup> "Constructing home market costs" involves the 10% to 90% rule. If less than 10% of home market sales are sold below cost during the review period, no sales below cost are disregarded. If 10% to 90% of the home market sales are below cost, only those below cost sales are disregarded. If more than 90% of home market sales are below cost, all home market sales are disregarded. Construction value is used to determine foreign market value. The construction must exceed 10% for administration costs and 8% for "profits." 19 U.S.C. § 1677b (1989) (third country and constructed sales). For an example of the ITA's application of these complex statutory formulas, see *Final Antidumping Determination; Tubular Steel Framed Chairs from Taiwan*, 50 Fed. Reg. 21,917 (1989).

In the famous "tomatoes wars" case the Florida winter vegetable growers complained that Mexico price discriminated by dumping tomatoes in the United States for LTFV.<sup>87</sup> The Court of International Trade (CIT) affirmed the decision of the Commerce Department, finding no LTFV sales.<sup>88</sup> The CIT also affirmed the administrative decisions to use Canada's prices instead of constructed value, to compare average United States and Canadian prices on a daily basis, and to include below cost sales up to the bench mark of fifty percent in the LTFV formula.<sup>89</sup> These decisions lowered the foreign price, which made dumping less likely because U.S. prices probably would not be below foreign prices (dumped).<sup>90</sup> The court summarily rejected the growers' contention that the executive branch intervened in the case to assure a result favorable to Mexico.<sup>91</sup>

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<sup>87</sup> Plaintiffs filed a petition with the U.S. Treasury Department on September 12, 1978. The Department issued a tentative determination of sales at not less than fair value on November 5, 1979. 44 Fed. Reg. 63,588 (1979). The investigation was transferred to the Department of Commerce on January 1, 1980. *Southwest Florida Winter Vegetable Growers Ass'n v. Miller*, 1 Int'l Trade Rep. (BNA) 5339 (Jan. 12, 1976). The Treasury Department's preliminary negative determination was treated as though it had been issued by the Department of Commerce on January 1, 1980, under § 733 of the Tariff Act of 1930. 19 U.S.C. § 1673(b) (1982).

<sup>88</sup> *Southwest Florida Winter Vegetable Growers Ass'n v. United States*, 584 F. Supp. 100 (Ct. Int'l Trade 1984). During the litigation, the Trade Act of 1979 became law, shifting authority for the LTFV determination from the Treasury Department to the International Trade Administration (part of the Department of Commerce), and replacing diplomatic considerations with more legalistic procedures and criteria.

<sup>89</sup> *Id.* at 15-16.

<sup>90</sup> Ordinarily, the ITA uses a 10% rule. However, the ITA held that the use of a unitary price is inappropriate because the seasonal nature of the industry requires variable pricing as an accepted, reasonable, and economically necessary practice. *Certain Fresh Winter Vegetables*, 1 Int'l Trade Rep. (BNA) 5339, 5344 (Mar. 28, 1988). Although this formula rule seems reasonable, considering that the producer cannot withhold the produce from the market, the application of the rule was unique and favored Mexican exporters more than other formulas. The more common practice of using individual U.S. prices inherently disfavors the exporter because an average will always exceed its components. See Palmeter, *Agriculture and Trade Regulation: Selected Issues in the Application of U.S. Antidumping and Countervailing Duty Laws*, 23 J. WORLD TRADE 47, 51-57 (1989).

<sup>91</sup> To set aside an administrative decision on the grounds of improper political pressure upon the Secretary, the complainant must prove two elements. "[T]he content of the [improper political pressure] must be designed to force him to decide the issues upon factors not made relevant by the Congress in the applicable statute. . . . Second, the Secretary's determination must be affected by those extraneous considerations." *Southwest Florida Winter Vegetable Growers Ass'n*, 584 F. Supp. at 18 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981)). Two researchers commented that "As often happens in 'unfair' trade action involving Mexico, the imperatives of

However, in a later fresh flowers case,<sup>92</sup> the ITA used a formula that disfavored the Mexican and Latin American exporters. The ITA compared monthly weighted average prices to foreign market value over one of two six month periods.<sup>93</sup> These cases reveal not only different results and formulas, but also the more recent emphasis on "injury" to domestic industry and the irrelevance of diplomatic considerations.<sup>94</sup>

The 1988 Omnibus Act authorizes expedited dumping investigations of multiple offenders seeking to import products of a short life cycle.<sup>95</sup> The Act also expands the definition of "industry," liberalizing who may bring a dumping action. "Injured" industries may now include growers or producers of raw agricultural products, as well as processors under certain circumstances.<sup>96</sup>

### C. Countervailing Duties Actions

Under the GATT, member countries may use "subsidies."<sup>97</sup> Since 1897, however, U.S. statutes have authorized imposition of countervailing duties to offset the subsidies on imported goods if subsidization

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harmonious bilateral relations seems to have overwhelmed the independent investigative process." Samet & Hufbauer, *supra* note 81, at 17.

<sup>92</sup> Certain Fresh Cut Flowers, 9 Int'l Trade Rep. (BNA) 2103 (Mar. 3, 1987). The ITA found that Mexico was selling flowers LTFV in the United States. It used a weighted average price of U.S. sales with a foreign market value based on home market prices. The ITA also conducted averaging to take into account end-of-day sales of perishable flowers. The ITC cumulated imports from several exporting countries, found injury to the domestic industry, and imposed antidumping duties to cover the margin of "dumping."

<sup>93</sup> Palmeter, *supra* note 90, at 54-56.

<sup>94</sup> By November 15, 1989, the ITA preliminarily found material injury (cement clinker) and LTFV sales (steel pails) in two nonagriculture cases. 5 Int'l Trade Rep. (BNA) 1475 (Nov. 15, 1989).

<sup>95</sup> Pub. L. No. 100-418, § 323, 102 Stat. 1195-99 (1988) (codified as amended at 19 U.S.C. § 2252 (1988)). A multiple offender has at least two affirmative dumping findings of margins of 15% or more within an eight-year period. "Short life cycle" defines a product "likely to become outmoded within four years." See Barshefsky & Zucker, *Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitiveness Act of 1988*, 13 N.C.J. INT'L L. & COM. REG. 251, 270 (1988).

<sup>96</sup> Pub. L. No. 100-418, § 1326, 102 Stat. 1203-04 (1988) (codified as amended at 19 U.S.C. § 2252 (1988)). These circumstances include: (1) The processed agricultural product is produced from the raw product through a single line of production; and (2) A substantial coincidence of economic interest between the producer and the processor exists. Barshefsky & Zucker, *supra* note 95, at 300.

<sup>97</sup> GATT, art. XVI.

"is such as to cause or threaten material injury."<sup>98</sup> The GATT also permits imposition of offset duties. From 1897 until 1973, the United States applied eighty-four countervailing duties (CVDs).<sup>99</sup> Since the Trade Agreement Act of 1979 (TAA) implemented the GATT Subsidies Code into U.S. law, a dramatic increase in subsidization cases has occurred.<sup>100</sup>

If the exporter's country, such as Mexico, signs the Subsidies Code or assumes equivalent obligations, the exporter may utilize the "injury test." Thus, a CVD proceeding against the exporter involves simultaneous investigations by the Department of Commerce, the ITA, and the ITC. The ITA determines whether the relevant merchandise benefitted from "subsidies." The ITC determines whether the domestic industry received "material injury"<sup>101</sup> or "threats of material injury."<sup>102</sup> In April 1985, Mexico agreed to abide by the standards set forth in the GATT Subsidies Code, meaning that after that date, the United States could only impose CVDs by showing (1) that the government program is a "subsidy" under U.S. law<sup>103</sup> and (2) that the domestic industry had suffered "material injury" by reason of the subsidy.<sup>104</sup>

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<sup>98</sup> GATT, art. VI, § 6(a).

<sup>99</sup> J. JACKSON & W. DAVEY, *supra* note 78, at 748-52.

<sup>100</sup> For example, by 1985 plaintiffs had filed some 500 CVD and antidumping actions. The absence of political restraints on such actions and the recession of the early 1980s contributed to the filings. Holmer & Bello, *The Trade and Tariff Act of 1984: The Road to Enactment*, 19 INT'L LAW. 287, 288, 290 (1985).

<sup>101</sup> The 1984 Trade and Tariffs Act provides that the ITC must cumulate imports from various countries if: (1) the imports are subject to investigation, (2) the imports compete with each other and the domestic-like product, and (3) the exporter markets the imports within a reasonable coincidental period. 19 U.S.C. § 1677(7)(C)(iv) (1989).

<sup>102</sup> 19 U.S.C. §§ 1671d(b)(1)(A)(ii), 1673(2)(A)(ii), 1677(7)(F) (1989). The House-Senate Report states the "purpose of the threat provision is to prevent actual material injury from occurring." H.R. No. 1156, 98th Cong., 2d Sess. 174 (1984).

<sup>103</sup> For a description of the earlier cases that construed Mexico's National Industrial Plan to provide "subsidies" and on that basis alone approved the imposition of CVDs, see Roggensack, *United States Countervailing Duty Law as Applied to Mexico: The Need for a Material Injury Test*, 18 GEO. WASH. J. INT'L L. & ECON. 183 (1984). Article VI(a) of the GATT requires an injury test before applying a CVD. However, the GATT exempts the United States from this provision due to legislation that existed when the United States acceded to the GATT through the Protocol of Provisional Application. An injury determination applies only when "required by the international obligation of the United States." 8 U.S.C. § 1303(a)(2), 1671(b)(1) (1988). Before the April 1985 Understanding, Mexico had no such agreement with the United States. See *infra* note 104.

<sup>104</sup> Dep't of State, Bulletin No. 2109, Understanding Regarding Subsidies and Countervailing Duties (1985). The U.S. Trade Representative published notice in the Federal Register that "In accordance with Section 701(b) of the Tariff Act of 1930

The 1979 TAA defined "material injury" as harm "not inconsequential, immaterial, or unimportant."<sup>105</sup> Petitioning industries must satisfy the material injury criteria for imposition of countervailing or antidumping duties, consistent with the analogous criterion of the Subsidies and Antidumping Codes of the Multilateral Trade Negotiations (MTN) of the GATT (Tokyo Round). The domestic injury must be material and "by reason of" LTFV.<sup>106</sup> The issues become whether such imports are the "principal, a substantial, or a significant cause of material injury" and whether "sufficient causal link" exists between the LTFV and the requisite injury.

Unlike the relatively rare escape clause and dumping actions against Mexico, petitioners have filed dozens of CVD actions against Mexican exporters under Mexico's National Plan for Industrial Development. Under the plan, Mexico has used export subsidies, countervailable under GATT, but more commonly has used domestic or production subsidies. The 1979 TAA made "production subsidies" countervailable.<sup>107</sup> Many of these programs have attempted to improve environmental and employment conditions, namely by providing low-cost loans for companies located outside one of three congested areas: Mexico City, Guadalajara, and Monterey. The ITA has found these governmental bounties to be "subsidies" and has subjected exports from such industries to CVDs because the programs benefitted specific regions or industries.<sup>108</sup> On the other hand, the CIT has ruled that they also may consider subsidies "generally available" programs if only a narrow and specific group utilizes them.<sup>109</sup> The Omnibus Trade and Competitiveness Act of 1988<sup>110</sup> subsequently enacted this ruling into law.

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. . . as of April 23, 1985, Mexico is a 'country under the Agreement.' " 50 Fed. Reg. 18,335 (1985). As of this writing, Mexico has not signed the subsidies code, but has continued to agree to equivalent obligations.

<sup>105</sup> 19 U.S.C. § 1677(7) (1989).

<sup>106</sup> *Id.* § 1673d(b).

<sup>107</sup> *Id.* § 1677(7).

<sup>108</sup> 47 Fed. Reg. 54,846 (1982) (red lead and lead stabilizers); 51 Fed. Reg. 36,447 (1986) (porcelain-on-steel cooking ware).

<sup>109</sup> *Cabot Corp. v. United States*, 620 F.Supp. 722 (Ct. Int'l Trade 1985). The CIT continues to articulate this doctrine in several *Cabot* rulings following their original holding. *Cabot Corp. v. United States*, 694 F. Supp. 949 (Ct. Int'l Trade 1988) (remand order approved); *Cabot Corp. v. United States*, 788 F.2d 1539 (11th Cir. 1986) (remand order held nonappealable); *Cabot Corp. v. United States*, 10 Int'l Trade Rep. (BNA) 1736 (July 21, 1988) (annual review challenge remanded).

<sup>110</sup> Section 1312 of the Omnibus Act states:

[T]he administrative authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a

The ITA ruled that agriculture is a multiple industry in Mexico and subventions to that sector, therefore are not countervailable.<sup>111</sup> By the same reasoning, in a significant ruling for Mexican agricultural exporters, the ITA held that providing water at a uniform rate to all agricultural producers in a particular region was not a bounty or grant to a particular producer. Moreover, the ITA held that Mexico's system of setting prices for fertilizers was not a subsidy because Mexico established the prices on a country-wide basis for all products.<sup>112</sup>

The Omnibus Act of 1988 amended the upstream subsidies provisions of the 1984 Act. The amendment deems subsidies to producers of raw agricultural products as bounties to processed products if the processing operation adds only limited value to the raw product.<sup>113</sup>

#### VIII. UNITED STATES-MEXICO MULTILATERAL NEGOTIATIONS: AGRICULTURAL TRADE AND THE URUGUAY ROUND (1986-1992) OF GATT

Although GATT covers agriculture, the agreement provides several exceptions.<sup>114</sup> Moreover, in 1955 the United States obtained a waiver for its agricultural import quotas from GATT.<sup>115</sup> Accordingly, agriculture remains largely exempt from the trade liberalizing regime of GATT. Protectionist measures in agriculture include nontariff barriers

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specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulations, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry.

19 U.S.C. § 2252(d) (1988).

<sup>111</sup> Fresh Cut Flowers of Mexico, 49 Fed. Reg. 15,007 (Apr. 16, 1984); Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618 (May 13, 1983).

<sup>112</sup> Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618 (May 13, 1983).

<sup>113</sup> 19 U.S.C. § 1313(a) (1988); see Barshefsky & Zucker, *supra* note 95, at 282.

<sup>114</sup> Article XI of the GATT generally prohibits quantitative restrictions. However, GATT participants may subject agricultural or fisheries products to import quotas necessary to enforce governmental restrictions on domestic production, and to export quotas necessary to relieve critical shortages of foodstuffs. Article XVI and the Subsidies Code distinguish primary from nonprimary products, and restricts subsidies on the former only if they result in "more than [an] equitable share of the world's export trade" compared to previous periods. The ambiguity of these provisions has precluded enforceable restrictions. See Phegan, *GATT Article XVI.3 Export Subsidies and "Equitable Share,"* 18 J. WORLD TRADE L. 251 (1985). Finally, Article XX allows export restrictions when "necessary to ensure essential quantities of such materials to a domestic processing industry."

<sup>115</sup> Recently, the United States reported restraining imports on cotton, cotton waste, peanuts, dairy products, and sugar.

such as import and export quotas, various sanitary or standard requirements, and massive production and export subsidies in developed countries.<sup>116</sup>

United States-Mexico agricultural trade negotiations reflect the North-South debate over issues that customarily divide developed and developing countries. The United States and Mexico have taken positions on these matters in the agricultural sessions of the GATT in the Uruguay Round. The United States initially proposed ending all agricultural restrictions and subsidies affecting international trade by the year 2000,<sup>117</sup> but modified its proposal to freeze all farm supports, subsidies, and protection during the next two years.<sup>118</sup> The EEC proposed reducing instead of eliminating subsidies and imposing more immediate stabilization measures. The Cairns group of fourteen farming nations<sup>119</sup> initially proposed eliminating world agricultural subsidies by the year 2000. This group later contemplated freezing subsidies at their current levels, exempting developing countries from the initial steps of the reform and negotiations on annual reductions. Later, they proposed a ten percent annual reduction of subsidies during negotiations.<sup>120</sup>

A special committee of the Organization of American States (OAS) adopted a resolution summarizing several recurring rhetorical themes and trade negotiating positions of Latin American countries about developed countries. The resolution noted that current U.S. trade law "seriously affects" OAS nations by "restricting entry of their exports to their principal market at a critical time in the region." The OAS further charged that U.S. unfair trade law, procedures, and safeguard measures injured the OAS and that changes in the GSP<sup>121</sup> introduced concepts of reciprocity contrary to international commitments between developed and developing countries. Finally, it was noted that U.S. trade law quantitatively restricted textiles, sugar, and steel, and high levels of support for the U.S. agricultural sector and its exports dis-

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<sup>116</sup> In 1986, the agricultural subsidies in the United States, EEC and Japan equalled the total value of all Latin American exportations (\$87 billion). Vidali, *La Agricultura Mexicana en el GATT: Experiencias para Centroamérica*, COMERCIO EXTERIOR (1988).

<sup>117</sup> 4 Int'l Trade Rep. (BNA) 860,864 (July 8, 1987).

<sup>118</sup> 5 Int'l Trade Rep. (BNA) 1495 (Nov. 16, 1988).

<sup>119</sup> The group takes its name from a ministerial meeting in Cairns, Australia in August 1986. Its members include Australia, Argentina, Brazil, Canada, New Zealand, Chile, Columbia, Hungary, Indonesia, Malaysia, Philippines, Thailand, Uruguay, and Fiji. *Id.* at 1029.

<sup>120</sup> *Id.* at 995, 1029, 1124, 1558.

<sup>121</sup> 19 U.S.C. §§ 2461 (1988).

torted world trade and penalized inefficient producers.<sup>122</sup>

Developing countries argue that liberalizing agricultural trade will not improve the basic disequilibrium between them and developed countries. They instead argue for special and differential (S&D) treatment, a concept the GATT recognized in the Kennedy Round (1963-1967).<sup>123</sup> During the earlier phase of the Uruguay Round, Third World GATT members demanded special treatment. The United States promptly rejected the demand.<sup>124</sup> United States officials urged Uruguay trade negotiators to restrict S&D under GATT provisions authorizing import quotas for balance-of-payment reasons and to insist on reciprocal trade concessions.<sup>125</sup> The United States argued that, "[t]o enjoy a more rapidly growing economy, developing countries have to change so-called cheap food policies for urban dwellers into food policies that provide incentives for agricultural production in their own countries."<sup>126</sup>

During the Uruguay Round, Mexico essentially backed the Cairns group proposal, "relative reciprocity," and "controlled free trade." Their position contained several basic points: (1) maintaining special and differential treatment and eliminating graduation and reciprocity; (2) phasing out subsidies in developed countries in a manner which will avoid a precipitous rise in commodity prices; (3) eliminating import barriers to developing countries' processed and semi-processed agricultural products, including tropical and temperate foodstuffs; (4) trans-

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<sup>122</sup> See 5 Int'l Trade Rep. (BNA) (Sept. 21, 1988) (describing Sept. 13-14, 1988 meeting of the Special Committee on Consultations and Negotiations of the Organization of American States).

<sup>123</sup> The Kennedy Round amendments to GATT appear in part IV of the GATT. Article XXXVI mandates the dissipation of economic disparity between developed countries and developing countries. Article XXXVI provides "[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." Article XXXVII, "Commitments," requires developed countries to effectuate trade-liberalizing provisions for developing countries "except when compelling reasons, which may include legal reasons, make it impossible." Part IV has become the genesis for S&D concepts such as the GSP and the notion of nonreciprocity. The Tokyo Round Codes contain several S&D provisions, but as in the GATT, the language appears precatory. The United States has taken the position that part IV creates no legal obligations, and has called its own GSP unilateral and voluntary.

<sup>124</sup> 5 Int'l Trade Rep. (BNA) 1510 (Nov. 16, 1988).

<sup>125</sup> Acting Treasury Secretary M. Peter McPherson, Remarks at a Forum of the American Enterprise Institute. McPherson cited that Mexico benefitted by conforming to outward-oriented trade policies and noted that its non-oil exports increased by 24%. 5 Int'l Trade Rep. (BNA) 1281 (Sept. 21, 1988).

<sup>126</sup> 5 Int'l Trade Rep. (BNA) 1271 (Sept. 21, 1988).



parently applying sanitary standards; (5) maintaining developing countries' restrictions and subsidies to protect their rural agricultural sectors; (6) supporting developing countries' phased reduction of restrictions and subsidies to their less vulnerable producers; and (7) supporting global, as opposed to compartmentalized, negotiations.<sup>127</sup> At the December 1988 Montreal meeting of the Uruguay Round, all GATT members except the United States agreed to a tropical products trade agreement reducing tariffs and quantitative restrictions. Countries expected the agreement to affect \$25-30 billion worth of goods from Brazil, Colombia, Mexico, Thailand, Nicaragua, and Malaysia. The United States tied its participation to success in agricultural negotiations, but indicated its willingness to enter into a separate agreement. The EEC stated it would unilaterally implement the tropical accord.

When the participants continued the mid-term review in April 1989, they adopted a framework agreement recognizing special and differential treatment to developing countries as an integral part of the negotiations. The agreement found governmental assistance to rural agricultural areas essential for developing countries and required the participants to take an account of the negative effects of developed countries' reduction of subsidies on net food importing countries. Nonetheless, the framework agreement accomplished little more than postponing the difficult but extremely important negotiation of issues that the initial postures of the United States, the EEC, and the Cairns group posed. At the seventeenth meeting of the Agriculture Negotiating Group (November 27-28, 1989), the United States submitted a paper proposing the phase-out of export subsidies in five years, the direct linkage of traditional support to production and price levels over ten years, the conversion of nontariff barriers to tariffs, and the creation of new consultation and dispute settlement procedures in sanitary and phytosanitary measures. Regarding S&D, the paper observed, "Developing countries with relatively advanced economies and/or well-developed agricultural sectors would be expected to comply fully" with the trade liberalization measures the paper advocated. However, the paper stated that developing countries "may need longer time frames for adjustment" and "contributions of developing countries should reflect their individual needs of economic and agricultural development."<sup>128</sup>

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<sup>127</sup> Vidali, *supra* note 116, at 888; Report of the Working Party on the Accession of Mexico (GATT Document L/6010, July 4, 1986); Interview with Ruperto Manffer Patino, former GATT negotiator for Mexico (Dec. 12, 1988).

<sup>128</sup> The Status of the Agriculture Negotiating Group (GATT Document, Nov. 27-28, 1989).

IX. UNITED STATES-MEXICO BILATERAL NEGOTIATIONS ON  
AGRICULTURAL TRADE: FRAMEWORK AGREEMENT OF 1987 AND  
UNDERSTANDING AND ACTION PLAN OF 1989

In November 1987, the two countries signed a "Framework Agreement" which contemplated bilateral consultations on six topics.<sup>129</sup> The first rounds of negotiations liberalized trade restrictions in steel, textiles, beer, wine, distilled spirits, agricultural seeds, confectionery chocolate, and other products.<sup>130</sup> The USDA cochairs the agricultural group with Mexico. They meet by mutual agreement. The group has discussed a number of important trade policy issues in these sessions, including Mexico's remaining licensing requirements for agricultural imports and various quota, tariff, and phytosanitary measures in the United States.

On October 3, 1989, the United States and Mexico signed a new "Trade and Investment Understanding." This understanding expanded the 1987 Framework Agreement by calling for negotiations in specific trade issues and product areas, including agriculture. Independent of these agreements, the USDA and Mexico's SARH have arranged for five intra-agency technical groups to resolve technical issues.<sup>131</sup> The arrangement cautiously commences free trade negotiations on a sectorial basis. One idea for liberalizing Mexico's agricultural imports is to eliminate all tariffs on a product in which Mexico enjoys sixty percent or more of the market. Under the most favored nations clause of the GATT, total elimination for all member countries of the GATT would

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<sup>129</sup> Interview with Don Abelson, U.S. Trade Representative (Sept. 7, 1989).

<sup>130</sup> Boyd, *Small Rise Likely in U.S. Imports from Mexico; Product Mix Shifts*, J. COM., Feb. 9, 1988, at 28.

<sup>131</sup> Ambassador Carla Hills of the USTR and Jaime Serra Puche, Secretary of Commerce and Industrial Development, issued the Joint Communique which states that:

The two governments reiterated their interest in ensuring the resolution of bilateral agricultural trade issues under the 1987 Framework Understanding and the new Understanding. They noted, as well, the creation by the U.S. Department of Agriculture and the Mexican Ministry of Agriculture and Water Resources in August 1989 of five binational technical groups. The purpose of the technical groups is to promote a closer working relationship in the agriculture sector and to facilitate commerce between and within the United States and Mexico. Through these groups, cooperation will be advanced in areas such as: technical and administrative assistance programs; improvement of marketing; inspection and research systems; improvement of joint data collection procedures to facilitate economic analysis; and harmonization of research programs and needs.

Joint Communique, *supra* note 29.

be required when no Free Trade Agreement (FTA)<sup>132</sup> existed.<sup>133</sup> In this manner, Mexico in effect could receive a bilateral concession without a GATT waiver. The FTAs with Canada and Israel certainly have encouraged sectorial negotiations with Mexico.<sup>134</sup>

Both the 1987 Framework Agreement and the 1989 Understanding pale in comparison of scope to the United States-Canada FTA. Given the enormous economic gap between Mexico and its northern neighbors, an FTA would raise profound political issues. Such problems include Mexico's resistance to further liberalization of its foreign investment rules and the United States' reluctance to consider liberalizing Mexican labor.

## X. A NORTH AMERICAN COMMON MARKET

The combination of several recent events, including signing the U.S.-Canada FTA in 1989, integrating the countries of the European Common Market in 1992, and continuing trade competition with Pacific Rim countries, has inspired considerable speculation about a North American common market. President Salinas often states that Mexico cannot yet participate, given the enormous differences in economic development between Mexico and its two northern neighbors. Several U.S. officials emphasize the desirability of a common market,<sup>135</sup> but now focus on negotiations leading to sectorial agreements.<sup>136</sup> However, the FTA offers significant guidance for United States-Mexico trade agreements. For example, these countries could agree, as provided in the United States-Canada FTA, to a binational trade dispute settlement commission to supplant the jurisdiction of the administrative and judi-

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<sup>132</sup> See GATT, art. I, XXIV.

<sup>133</sup> Interview with Don Abelson, U.S. Trade Representative, Mexico Section (Feb. 6, 1990).

<sup>134</sup> See *Experts Criticize Bilateral Approach; Mexico Considered an Exception*, MEXICO UPDATE, Oct. 15, 1989, at 3. When negotiators met on November 20, 1989, the USTR proposed discussions on three agricultural products and other issues. The participants reached no agreement.

<sup>135</sup> U.S. Commerce Secretary Robert A. Mosbacher indicated that the United States will take steps toward a common market with Mexico, 6 Int'l Trade Rep. (BNA) 1562 (Nov. 29, 1989).

<sup>136</sup> Dan Rostenkowski, chairman of the House Ways and Means Committee, asked the ITC to conduct a two-phase investigation, requiring six and twelve months respectively, on (1) the impact of Mexico's recent reforms on U.S. exporters and investors in Mexico; and (2) the experts' views on prospects for future U.S.-Mexico trade relations, including the possibility of free trade areas, an enhanced dispute settlement mechanism, possible sectorial approaches, and other options for enhanced bilateral trade relations. 6 Int'l Trade Rep. (BNA) 1430 (Nov. 1, 1990).

cial bodies of each country to adjudicate trade disputes involving Mexican imports in an accord under an FTA.<sup>137</sup>

### CONCLUSION

Perhaps the most outstanding example of integrating the United States and Mexican economies appears in agricultural trade. Mexico increasingly dominates the U.S. fruit and vegetable market while the United States supplies most of Mexico's grains, oilseeds, and a significant share of Mexico's dairy and meat products. United States consumers enjoy fresh fruits and vegetables year round. Mexican consumers benefit from cheaper commodity prices when controlling inflation and public sector spending becomes critical to recovering from a severe economic depression. Given these realities, the agricultural trade disputes between the United States and Mexico seem little more than squabbles in an essentially compatible marriage. Indeed, the particularities of the multilateral or bilateral negotiations now in progress pale in comparison to these macroeconomic realities.

The sectorial dislocations this integration causes are politically attenuated on the U.S. side due in part to the demand on Mexico's foreign exchange to pay its debt to several large United States banks. Further, significant investment for Mexico's agricultural exports comes from its Northern neighbor. Indeed, these exporters often comprise joint ventures of California or Arizona businesses with Mexican firms. Protectionist measures, like country-of-origin labeling, do not materialize due to the strong domestic interest in their defeat.<sup>138</sup>

In Mexico, on the other hand, generating foreign exchange and controlling inflation take priority over food security issues. Although guaranteed prices for commodities continue to rise, the "free market" remains elusive for the commodities that Mexico imports.<sup>139</sup> One cannot expect commodities producers from rain-fed areas to compete with world prices, given their historically impoverished infrastructure. The massive subsidies that United States and European producers receive renders their potential for producing at competitive prices a nullity.

While Mexico sustains a positive trade balance with the United States in fruits and vegetables, since 1982, its agricultural trade balance

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<sup>137</sup> U.S.-Canada Free Trade Agreement. *But see* Corlad & Ohana, *The Constitutionality of Chapter Nineteen of the United States - Canada Free Trade Agreement: Article II and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989).

<sup>138</sup> See Cook, *supra* note 38, at 3.

<sup>139</sup> 6 Int'l Trade Rep. (BNA) 1452 (Nov. 11, 1989).

reveals wild fluctuations favoring the United States.

UNITED STATES — MEXICO AGRICULTURAL TRADE (1982-1988):<sup>140</sup>

<u>U.S. Exports to Mexico</u>	<u>Mexico Exports to U.S.</u>	<u>Balance</u>
1988 \$2,233,673,000	\$1,819,515,000	+ U.S. \$414 million
1987 \$1,201,831,000	\$1,866,637,000	+ Mex. \$665 million
1986 \$1,079,861,000	\$2,079,586,000	+ Mex. \$1 billion
1985 \$1,439,302,000	\$1,445,538,000	+ Mex. \$6 million
1984 \$1,992,571,000	\$1,279,000,000	+ U.S. \$714 million
1983 \$1,942,368,000	\$1,279,620,000	+ U.S. \$663 million
1982 \$1,156,272,000	\$1,158,453,000	+ Mex. \$2 million

These figures suggest that Mexico's food security issue will not disappear, and its export-led recovery plan will barely break even in the agricultural sector. Yet the related if not inevitable consequences of failing to provide basic foods to its own population, including wide spread malnutrition,<sup>141</sup> impoverishment of the rural population, and increased migration to the United States' and Mexico's urban areas, will undoubtedly continue.

In the United States, analogous reasoning that emphasizes productivity over other values is steadily eliminating the rural farm population.<sup>142</sup> Ignoring that free market forces only partially explain these re-

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<sup>140</sup> FATUS, *supra* note 39, at 48, 244. For the first six months of 1989, Mexico's SARH reported agricultural imports from the U.S. of \$1,281,530,000 and agricultural exports to the U.S. of \$916,906,000, leaving a negative trade balance of \$362,623,000. The GAO attributed this wild fluctuation to Mexico's recent droughts and debt, and to the availability of U.S. export credit. *See supra* note 72; TRENDS AND IMPEDIMENTS, *supra* note 9, at 2.

<sup>141</sup> In 1987 the National Malnutrition Institute of Mexico reported that half of the two million babies born annually suffer from malnutrition and that 60% of the deaths for children under five years old are related to nutritional deficiency. The report stated that the dominance of export crops on fertile land contributed to a deterioration in the rural population's diet and that 80 to 85% of the southern rural population was undernourished. *See Jordan, Disease Plagues Mexican Children*, L.A. Times, Oct. 18, 1987, at A1, col. 1.

<sup>142</sup> From 1935 to 1985 the number of farms in the United States has decreased from 6.8 million to 2.3 million, while the average farm size increased from 155 to 444 acres. Small family farms and rural income dropped dramatically because large operations, unlike family farms, do not sustain local communities or economies. Halicki, *Farming Against the Grain*, NATIONAL VOTER, Jan. 1988, at 4.

sults in either country,<sup>143</sup> the question remains whether the social and political costs of eliminating rural communities and increasing urban congestion make sense. While the paradigm of agricultural market integration contains obvious short-term advantages, it is a result of governmental policies and subsidies that ignore (or accept) the demise of collective rural lifestyle and values. Given that subsidies commonly appear in agriculture, both governments could shift some subsidies toward resurrecting and maintaining the small family or cooperative farm.<sup>144</sup>

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<sup>143</sup> This assertion refers to Mexico's "guaranteed" prices for commodities from the rain-fed zones, massive support to the infrastructure in the irrigation export zones, and U.S. subsidies to commodities production and their exportation.

<sup>144</sup> Barkin & Taylor, *supra* note 10, propose higher official prices for marketing grains, improved access to credit, and modernization of inputs and technology to increase such yields and to rely on these idle areas instead of imports for such production. The authors also recommend targeted subsidies to low-income households. This strategy apparently would require some resolution of the issues now posed in the Uruguay Round with respect to massive subsidies and cheap exports from developed countries. See *supra* notes 114-28 and accompanying text.