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MEXICO'S PATH TOWARDS THE FREE TRADE AGREEMENT WITH THE U.S.

RUDY SANDOVAL*

I. INTRODUCTION	133
II. MEXICO'S PAST TRADE PRIORITIES	134
III. PRIOR MEXICAN TRADE	136
IV. MEXICO'S CONSTITUTIONAL FOREIGN TRADE LAWS	137
V. MEXICO'S ACCESSION TO GATT	138
VI. THE 1987 UNDERSTANDING ON TRADE AND INVESTMENT	143
VII. TRADE POLICY LEADING TOWARDS THE 1989 INVESTMENT REGULATIONS	145
VIII. THE 1989 FOREIGN INVESTMENT REGULATIONS	150
IX. RECENT "FAST-TRACK" AUTHORITY	152
A. <i>The Fast-Track Process</i>	155
B. <i>Fast-Track Objections and Hurdles</i>	156
X. CONCLUSION	158

I. INTRODUCTION

The proposed Free Trade Agreement¹ between Mexico and the

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1. Presidents Bush and Salinas agreed on June 10, 1990, to begin comprehensive preparations which will eventually lead to the negotiation of a U.S.-Mexico Free Trade Agreement (FTA). They defined an FTA as follows: a process of gradual and comprehensive elimination of trade barriers between the United States and Mexico, including: (1) the full-phased elimination of import tariffs; (2) the elimination or fullest possible reduction of non-tariff trade barriers, such as import quotas, licenses, and technical barriers to trade; (3) the establishment of clear, binding protection for intellectual property rights; (4) fair and expeditious dispute settlement procedures; and (5) other means to improve and expand the flow of goods, services, and investment between the United States and Mexico. See Kal Wagen-

United States presents complex issues in both national and international settings. Any examination of these issues requires a comprehensive understanding of the recent trade policies which have been promulgated by the Government of Mexico. These policies have radically altered the environment for international trade within Mexico and will shape the formation of any free trade agreement between the two countries. Hence, a proper analysis of the Free Trade Agreement must have, at its heart, a grasp of the precedents that will serve as a framework for a free trade agreement. Among the various developments in Mexico's trade policy which will be surveyed to gain this deeper understanding will be: Mexico's Foreign Trade Law,² Mexico's accession to the General Agreement on Tariffs and Trade (GATT),³ U.S.-Mexico Framework Agreement,⁴ the new regulations governing foreign investment in Mexico,⁵ as well as the recent "fast-track" authority that Congress gave to President Bush.⁶ This Article will briefly outline these policy changes and discuss their impact on a possible Free Trade Agreement. Preceding this discussion, a quick look at the history of Mexican trade policy, and specifically Mexican-U.S. trade, is included in order to fully understand the dramatic evolution of Mexican trade policy.

II. MEXICO'S PAST TRADE PRIORITIES

During most of the twentieth century the Government of Mexico has pursued a policy of import substitution, which strongly restricted foreign goods from being imported and, consequently, limited the access of Mexican exports to foreign markets.⁷ Aimed at protecting vulnerable Mexican industries from foreign competition, these policies included various forms of tariffs, subsidies, import licenses, quotas, and local content restrictions.⁸ These political de-

heim, *Mexico-U.S. Free Trade Agreement Is Moving Closer to Reality*, WALL ST. J., Oct. 1, 1990, at B7; see also The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified in scattered sections of 19 U.S.C.).

2. See *infra* notes 26-36 and accompanying text.

3. See *infra* notes 37-65 and accompanying text.

4. See *infra* notes 65-79 and accompanying text.

5. See *infra* notes 80-109 and accompanying text.

6. See *infra* notes 110-147.

7. Guy C. Smith, *The United States-Mexico Framework Agreement: Implications for Bilateral Trade*, 20 LAW & POL'Y INT'L BUS. 655, 661 (1989). See also Ernesto Rubio del Cueto, *Countervailing Duties Affecting United States-Mexican Trade*, 12 HOUS. J. INT'L L. 323, 333-334 (1990).

8. See del Cueto, *supra* note 7, at 325.

cisions, which valued rapid industrialization over the potential benefits of foreign trade and competition, did in fact achieve their goal of contributing to the development of a Mexican manufacturing base.⁹ Throughout most of the post-World War II period, Mexico's considerable array of import controls made it one of the most protectionist nations in Latin America.¹⁰ Understandably, Mexico's historical resistance to international trade had also been linked to its desire to avoid direct and substantial U.S. influence over its economy.¹¹

While the protectionist policies of the Mexican Government achieved their initial objective of establishing a manufacturing base, these policies were not without their shortfalls.¹² Protected from foreign competition, many Mexican industries lacked the incentive to modernize and thus were unable to challenge the industrial prowess of the developed (and many of the developing) nations.¹³ Completely dependent upon domestic demand, Mexican industry eventually faltered as the country continued to pursue its protectionist policies. Eventually, the tremendous decline in world oil prices in the early 1980s and Mexico's spiraling foreign debt,¹⁴ prompted the Government to abandon its protectionist policies and to examine avenues to usher in foreign trade.¹⁵ Guided by the belief that foreign trade was essential to future economic growth, Mexico attempted to liberalize its trade policy by opening up markets and promoting exports.¹⁶ The proximity and size of the U.S.

9. Smith, *supra* note 7, at 661.

10. *Id.* at 660-62.

11. Alejandro Ogarrio & Leonel Pereznieta Castro, *Mexico-United States Relations: Economic Integration and Foreign Investment*, 12 Hous. J. INT'L L. 223, 226 (1990).

12. See SIDNEY WEINTRAUB, THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, MEXICAN TRADE POLICY AND THE NORTH AMERICAN COMMUNITY 7-9 (Significant Issues Series) Vol. X, No. 14, 1988. See also Smith, *supra* note 7, at 661-62.

13. For example, the automotive industry is still heavily protected. This is primarily due to the extensive investments made by major car and truck manufacturers, such as General Motors, Ford, Chrysler, Nissan, and Volkswagen. Although imports are still restricted, the Decree for the Promotion and Modernization of the Automotive Industry, issued late in 1989, allows for importation of automobiles. See Decreto para el Fomento y Modernización de la Industria Automotriz, D.O., Dec. 11, 1989.

14. See Charles W. Thurston, *Mexico-U.S. Free Trade Agreement*, 386 J. OF COM. 5 (1990).

15. See Ignacio Gómez-Palacio, *The New Regulations on Foreign Investment in Mexico: A Difficult Task*, 12 Hous. J. INT'L L. 253, 255 (1990) ("President Salinas extended the liberalization policies first begun by President de la Madrid, further dismantling the system of import licensing and tariff barriers that had characterized Mexican trade policies since the 1930s").

16. See Eduardo Siqueiros, *Legal Framework for the Sale of Goods in Mexico*, 12

consumer market made it the obvious nation with whom Mexico should establish a foreign trade relationship.

III. PRIOR MEXICAN TRADE

Of all Mexican trade agreements initially negotiated, none was as economically promising as the trade relationship with the U.S. Despite the historical indifference which had characterized trade relations between the two nations,¹⁷ the U.S.-Mexican relationship was dramatically altered by 1982. A series of bilateral trade agreements and laws diminished many of Mexico's trade barriers.¹⁸ For instance, the U.S. and Mexico signed the U.S.-Mexican Understanding on Subsidies and Countervailing Duties in 1985.¹⁹ While its focus was narrow, the agreement established the groundwork for Mexico's expansion into the international arena.

By 1987, Mexico had imports valued at \$12.2 billion.²⁰ In 1988, this figure grew to \$18.9 billion, and by 1989, the figure escalated to over \$35 billion, of which \$24.7 billion were imports from the U.S. alone.²¹ Total United States-Mexico trade for 1989 surpassed \$52 billion.²² With such a large volume of imports, it is no surprise

HOUS. J. OF INT'L L. 291, 292-94 (1990).

17. See Ogarrio and Castro, *supra* note 11, at 226. Until 1982, Mexico had maintained a steadfast policy of inward development, which was finally relinquished due to a drastic economic crisis. *Id.* This crisis caused a 50% decrease in the standard of living throughout Mexico. *Id.*

18. See generally Foreign Trade Law, *infra* note 26; Reglamento contra prácticas desleales de Comercio Internacional [Regulations Against Unfair Trade Practices], D.O., Nov. 25, 1986, amended by Decreto por el cual se reforma y adiciona el reglamento contra prácticas desleales de comercio internacional, D.O., May 19, 1988; Decreto de promulgación del Acuerdo relativo a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio [The Antidumping Code of 1979], D.O., Apr. 21, 1988 (executed on July 24, 1989); Decreto de promulgación del Acuerdo sobre Procedimientos para el Trámite de Licencias de Importación [The Code on Import Licenses of 1979], D.O., Apr. 21, 1988 (executed on July 24, 1979); Decreto de promulgación del Acuerdo relativo a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio [Code on Customs Valuations of 1979], D.O., Apr. 25, 1988. In addition, a decree reforming the General Import Tariff, issued in April 1986, diminished trade barriers by modifying tariffs and lowering duties. See *Report of the Working Party on the Accession of Mexico* [hereinafter *Working Party Report*], para. 16, GATT Doc. L/6010 (July 15, 1986) in BASIC INSTRUMENTS AND SELECTED DOCUMENTS [hereinafter *BISD*] 33d Supp. 57, 62 (1987). See also Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 367-68 (1988).

19. See *U.S.-Mexican Understanding on Subsidies and Countervailing Duties*, 2 Int'l Trade Rep. (BNA) No. 17, at 590 (Apr. 24, 1985). See also Thurston, *supra* note 14, at 5.

20. See Siqueiros, *supra* note 16, at 291.

21. *Id.*

22. *Id.*

that Mexico has become the United States' third largest trading partner, trailing only Canada and Japan.²³ Additionally, encouraged by the rapid increases in foreign trade, direct investment between the two countries has also grown significantly.²⁴

Grave social, diplomatic, and geo-political concerns have also served to expand trade relations between the U.S. and Mexico. The sizable amount of migrating labor from Mexico to the United States, the cooperative war against drugs, and foreign policy concerns are just some of the many motives which drive the Mexican-U.S. trade alliance.²⁵ While many of the non-economic interests will not be explicitly discussed, it is not without an awareness of these additional agendas that an analysis of recent legal developments will be offered.

IV. MEXICO'S CONSTITUTIONAL FOREIGN TRADE LAWS

Two basic legal instruments protect Mexico's business community and its marketplace from unfair international trading: Mexico's Foreign Trade Law²⁶ and the regulations implementing the Foreign Trade Law.²⁷ Implemented in 1986, the Foreign Trade Law constitutes the legislative basis for all foreign trade policies and programs.²⁸ Empowering the Executive Branch with a variety of exclusive powers to control foreign commerce, the Foreign Trade Law also promotes domestic industrial stability.²⁹ In this regard,

23. *Id.*

24. David B. Hodgins, Comment, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 Hous. J. INT'L L. 361, 365 (1990). However, although foreign investment activity has increased, foreign investment into Mexico has declined in recent years. *Id.*

25. See generally Peter F. Drucker, *Mexico's Ugly Duckling - the Maquiladora*, WALL ST. J., Oct. 4, 1990, at 20.

26. Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior, D.O., Jan. 13, 1986 [hereinafter Foreign Trade Law].

27. Regulations Against Unfair Trade Practices, *supra* note 18.

28. del Cueto, *supra* note 7, at 325. The Foreign Trade Law regulates and interprets Article 131 of the Mexican Constitution. *Id.*

29. *Id.* Under Article 131:

Congress may empower the Executive Branch to raise, lower or eliminate export or import duties established by Congress itself as well as to fix new ones, restrict and forbid imports, exports and the transit of articles, when considered necessary so as to regulate foreign trade, control the country's economy, maintain domestic productions; stability or for any other purpose with the country's best interest in mind. The Executive Branch will subject its use of said powers to Congress' approval when submitting its fiscal budget each year.

the law mandates that certain criterion be met to consider an import acceptable. According to del Cueto, the law's criterion chiefly includes:

1. where domestically-produced merchandise is identical or similar to that which is being imported under unfair conditions, the domestic manufacturers have the exclusive right to defend themselves from unfair practice;³⁰
2. plaintiffs must represent at least a twenty-five percent share of domestic production;³¹
3. the procedural time limits are very brief;³²
4. the Commerce Department analyzes the decisions and participates in the conciliation process, which can ultimately lead to settlement proceedings.³³

The law specifies a variety of prohibitions against unfair practices³⁴ and grants the Commerce Department primary jurisdiction over trade disputes.³⁵ While the wide latitude provided to the Executive Branch still exemplifies Mexico's protectionist sentiment, these procedures have yet to be tested since no case has arisen requiring its application.

This brief summary of the most recently enacted Trade Law furnishes some insight into the foundation of trade policy-making in Mexico. Although the internal political basis for trade law promulgation is well known, the specific legal developments in Mexican-U.S. trade have not yet come full bloom. Yet, notwithstanding their lack of legal development, the trade laws and subsequent regulations have paved the way to a U.S.-Mexican Free Trade Agreement.

V. MEXICO'S ACCESSION TO GATT

Mexico has historically eschewed international trade in favor

Id. quoting CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, 1917 art. 131 (1981). For a Spanish copy of the Mexican Constitution see MIGUEL ACOSTA & GENARO DAVID GÓNGORA PIMENTEL, CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS (1984).

30. Foreign Trade Law, *supra* note 26, art. 10.

31. *Id.*

32. *Id.* at art. 11. There is a period of five working days, upon acceptance of a claim, to issue the provisional decisions. See also del Cueto, *supra* note 7, at 327 n. 23.

33. See Foreign Trade Law, *supra* note 26, art. 12; del Cueto, *supra* note 7, at 327.

34. del Cueto, *supra* note 7, 326.

35. Foreign Trade Law, *supra* note 26, art. 2.

of developing a domestic industrial base.³⁶ Hence, it is not surprising that Mexico initially refused to join the GATT.³⁷ In order to understand why Mexico has made dramatic efforts to reverse this history, ultimately attempting to become a major player in international trade, some background on GATT is appropriate.

Established by the developed nations of Western Europe and the United States at the end of World War II, GATT provides a comprehensive framework for global trade. While the GATT has undergone continual change since its creation,³⁸ its central tenets have remained unchanged. Initially, all members of GATT must give reciprocal Most-Favored-Nations (MFN) status to each other's products.³⁹ Second, the nations bound by GATT must not employ levies or regulations more strict than those on similar domestic products.⁴⁰ Third, GATT requires the elimination of all non-tariff barriers to foreign goods.⁴¹ That is, the use of certain barriers such as quotas and other artificial prohibitions must not be utilized by the member-states. Fourth, custom duties must not exceed the level stipulated in the last agreement.⁴² Finally, all members of GATT agree to both restrict the use of subsidies⁴³ and prohibit dumping.⁴⁴ Simply put, the governments agree not to artificially lower the cost of domestic goods through direct or indirect revenue inputs, nor will they prohibit the sale of goods in foreign markets at a price lower than cost.⁴⁵ Though numerous exceptions exist to each of these lengthy regulations, the five tenets stated

36. See *supra* note 17 and accompanying text. See also Dale Story, *Trade Politics in the Third World: A Case Study of the Mexican GATT Decision*, 36 INT'L ORG. 767, 768-70 (1982). For a discussion of Mexico's reasons for remaining outside GATT for thirty-nine years, see HOWARD F. CLINE, *THE UNITED STATES AND MEXICO* 390-91 (rev. ed. 1963); *POLITICAL SYSTEMS OF LATIN AMERICA* 29 (Martin Needler ed. 1964).

37. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948) [hereinafter GATT]. In fact, at the time the developed countries were creating the GATT system in 1947, Mexico was creating a system of import controls. See Story, *supra* note 36, at 771. Mexico was not among the twenty-three nations that were the original contracting parties to the Protocol of Accession to GATT. See English, *supra* note 18, at 366.

38. Philip H. Gold, Comment, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 INT'L TRADE L.J. 281, 285 (1982-83).

39. GATT, *supra* note 37, art. I, para. 1. MFN status simply accords recipient nations' goods the most liberal trade treatment. See English, *supra* note 18, at 342-43.

40. GATT, *supra* note 37, art. III, para. 2.

41. *Id.* art. XI.

42. *Id.* art. II, para. 1(b).

43. *Id.* art. XVI, paras. 3, 4.

44. *Id.* art. VI, para. 5.

45. See English, *supra* note 18, at 341-42.

above comprise the essential components of GATT.

Many of GATT's rules and regulations have changed due to ongoing negotiations between the member states. With a more than fourfold increase in membership,⁴⁶ such change is unavoidable. The gathering of ninety-five different countries, each with its own agenda, inevitably leads to disputes; consequently, a framework to resolve these disputes is imperative.⁴⁷ Accordingly, GATT remains the exclusive means of governing international trade by effectively limiting the practice of unfair trading.

Given Mexico's decision to enter the international trade arena, it is not overly surprising that Mexico would attempt to pursue membership into GATT. However, Mexico's traditional antipathy towards the foreign hegemony it saw occurring through GATT did make this decision unexpected. By 1986, Mexico was the largest non-Communist market economy operating outside the auspices of GATT.⁴⁸

In November of 1985, the Mexican Secretary of Trade and Industrial Development, Hector Hernandez Cervantes, announced Mexico's desire to accede to GATT.⁴⁹ Upon receiving this notification, the members of GATT conducted a thorough analysis of Mexican foreign trade and investment law and concluded that Mexico should be admitted into the GATT.⁵⁰ In August of 1986, Mexico acceded to the General Agreement on Tariffs and Trade.⁵¹

Mexico's accession to the GATT is governed by an important set of principles which will substantially affect its trading relationship with the United States and the promulgation of any free trade agreement between the two countries. Similar to its earlier agreements with the United States, Mexico was admitted into GATT under the status of an advanced developing nation.⁵² Despite this

46. While there were only twenty-three original members to the GATT, there are now more than ninety-five members. English, *supra* note 18, at 366.

47. *Id.*

48. See *Mexico to Become 92nd Member of GATT as Government Pledges to Open Market*, 47 Wash. Fin. Rep. (BNA) No. 5, at 187 (Aug. 4, 1986).

49. See English, *supra* note 18, at 369 (citing *Accession of Mexico*, GATT Doc. L/5919 (Nov. 27, 1985) (copy on file with the Texas International Law Journal); see also Stephen P. Jacobs, *Mexico's Accession to GATT Will Benefit U.S. Business and the World Trading System*, Bus. Am., Oct. 13, 1986, at 95.

50. See *Working Party Report*, *supra* note 18, paras. 3, 84.

51. *Accession of Mexico*, GATT Doc. L/6024 (July 17, 1986), BISD, 23d Supp. 56 (1987). Mexico became the ninety-second contracting party to the GATT. See English, *supra* note 17, at 369.

52. Advanced developing countries have four characteristics: (1) increased development

status, however, Mexico's transition to a free-trade nation will be difficult because of the protectionist laws and policies which has been in place for decades.⁵³ Indeed, the regulatory framework of the GATT forces Mexico to rework the very model of economic development it has pursued.⁵⁴

Mexico had to make numerous concessions to join GATT. Initially, Mexico offered substantial across-the-board reductions on tariffs.⁵⁵ For example, Mexico announced that it had unilaterally implemented a maximum tariff of fifty percent.⁵⁶ In addition, Mexico declared that it would implement greater tariff reductions in most non-vital industries.⁵⁷ However, these barriers would be limited, and tariffs would be utilized instead of the less favorable import permits.⁵⁸ In the majority of industries, Mexico would reduce tariffs to between zero and ten percent over a thirty-month period.⁵⁹ By initiating these concessions, Mexico aimed to limit the level of negotiated concessions that it might otherwise have to make to individual GATT members. Mexico hoped that these reductions would serve as a substitute for more demanding concessions. These unilateral concessions, however are not binding and nothing prevents Mexico from re-enacting many of these higher tariff rates in the future.⁶⁰ Similarly, nothing prevents Mexico from using various levies and surcharges on bound or unbound items as long as its net level is below the level specified in the GATT policy.⁶¹

A wide variety of government-owned enterprises, government procurement, and government subsidization exists in Mexico.⁶²

resulting from rapid growth; (2) complex and diverse industrial sectors; (3) ability to affect the economies of industrial nations; and (4) productive development strategies, which include movement towards a more internationally oriented approach. See Story, *supra* note 36, at 772, citing JOHN A. MATHIESON, *THE ADVANCED DEVELOPING COUNTRIES: EMERGING ACTORS IN THE ECONOMY* 5-6 (1979).

53. See Luis Rubio, *Mexico's in Perspective: An Essay on Mexico's Economic Reform and the Political Consequences*, 12 Hous. J. INT'L L. 235, 235 (1990).

54. See Jacobs, *supra* note 49, at 9. See also *Accession of Mexico*, *supra* note 49.

55. *Working Party Report*, *supra* note 18, para. 6.

56. *Id.*

57. *Id.* Protected goods include automobiles, chemicals, pharmaceuticals, paper, firearms, few luxury goods, and to a lesser extent computers. See Siqueiros, *supra* note 16, at 293.

58. English, *supra* note 18, at 373.

59. *Working Party Report*, *supra* note 18, para. 6.

60. English, *supra* note 18, at 374.

61. *Id.* at 375.

62. These governmental services include the postal service, railways, electricity genera-

This level of direct governmental involvement in the Mexican economy will have profound implications for a trade pact between the U.S. and Mexico. Mexican businessmen see government procurement contracts as a vehicle for the Mexican government to assist and subsidize their businesses. Allowing Americans to compete with Mexican businesses on these contracts threatens a substantial source of income for these businesses. Although the GATT system fails to deal in-depth with the trade barriers that exist in government-run operations, these barriers create a constant risk for potential trade disputes and will surely be a focal point in negotiations with the U.S. over a free trade agreement. In addition, although the existence of government procurement is not expressly prohibited, it too stands as a potentially sensitive issue in future bilateral trade negotiations.

Accession into GATT has obvious and profound implications for the future of a Mexico-U.S. free trade agreement. First of all, Mexico's access to global markets heightens its competitive position vis-à-vis the United States and hence makes such an agreement all the more desirable for Mexico. Additionally, the commitment demonstrated by Mexico to free trade in its accession negotiations⁶³ helps further convince the United States of Mexico's reliability and resolve in earnestly pursuing open and fair trade. Likewise, the proliferation of foreign firms within Mexico, which will occur as a result of Mexico's accession into the GATT, makes the conclusion of a free trade agreement more desirable for the United States. Many of the bilateral agreements upon which the two nations have agreed were only possible through GATT.⁶⁴ Indeed, the 1987 Understanding on Trade and Investment was signed soon after Mexico's accession to GATT and the consultative means outlined within the GATT framework were utilized in forming that Understanding. Hence, Mexico's accession into GATT can accurately be viewed as a true basis for improved bilateral trade relations between the U.S. and Mexico.

tion, medical, education, and social assistance services. The oil refining and basic petrochemical industries are totally owned by the government. *Id.* at 386.

63. See *Working Party Report*, *supra* note 18, at para. 4.

64. See English, *supra* note 18, at 363 n. 178. The codes illustrate the type of agreement Mexico conceded at the Tokyo Round in 1979. These agreements are implemented in Mexico. The continuous implementation of these agreements made it easy for Mexico to begin the road to the FTA with the U.S. since many of the Tokyo Round agreements are the same agreements being negotiated between the U.S. and Mexico.

VI. THE 1987 UNDERSTANDING ON TRADE AND INVESTMENT

The conclusion of the Understanding on Trade and Investment,⁶⁵ also known as the United States-Mexico Framework Agreement, serves as perhaps the greatest implication for success of any U.S.-Mexico free trade agreement.

In April, 1985, United States Trade Representative William Brock and Mexican Secretary of Commerce Hector Hernandez signed a preliminary statement acknowledging their intent to negotiate a bilateral trade agreement.⁶⁶ After a series of meetings⁶⁷ between representatives from both countries, the Framework Agreement was signed in November of 1987.⁶⁸ This agreement symbolizes the first formal bilateral agreement to govern commercial relations between the two countries; additionally, it is the most comprehensive pact entered into by the respective nations because it creates a nonbinding mechanism geared toward resolving trade and investment disputes.⁶⁹ The future Free Trade Agreement will not only be modeled after this agreement but will also be based on the effects of this pact. In fact, the Framework Agreement has been instrumental in forging the integration of the economies of the two nations.⁷⁰

The Statement of Principles of the Agreement contains certain provisions that underlie the fundamental spirit of the two

65. Understanding Between the Government of the United States of America and the Government of the United Mexican States Concerning a Framework of Principles and Procedures for Consultations Regarding Trade and Investment Relations, Nov. 6, 1987, U.S.-Mex., 27 I.L.M. 439 (1988) [hereinafter Understanding].

66. Abelardo L. Valdez, *A Proposal for Establishing a United States-Mexico Co-Production Zone*, 20 LAW & POL'Y INT'L BUS. 619, 650 (1987). See Statement of Intent to Negotiate a Framework of Principles and Procedures Regarding the Trade and Investment Relations Between the United Mexican States and the United States of America (Apr. 23, 1985) [hereinafter Statement of Intent] reprinted in *Field Hearings Before Joint Economic Committee*, 100th Cong., 1st Sess. 195 (1987) [hereinafter *Field Hearings*].

67. For a comprehensive discussion of the various meetings that took place, ultimately resulting in the signing of the Framework Agreement, see Valdez, *supra* note 66, at 650.

68. See Smith, *supra* note 7, at 657 ("Culminating more than two years of negotiations, the then-United States Trade Representative, Clayton Yeutter, and Mexico's then-Secretary of Commerce and Industrial Development, Hector Hernandez Cervantes, signed the U.S.-Mexico Framework Agreement on November 6, 1987.").

69. See Larry Rohter, *North American Trade Bloc? Mexico Rejects Such an Idea*, N.Y. TIMES, Nov. 24, 1988, at D1, D14; Joint Statement By U.S. Trade Representative Brock and Mexican Commerce Secretary Hernandez on Bilateral Trade, Office of the U.S. Trade Rep., Press Release No. 85/4 (Apr. 23, 1985).

70. For a discussion on the aspects of integration, see Ogarrio and Castro, *supra* note 11, at 225-29.

countries. These are:

1. the need to eliminate non-tariff barriers;
2. the detrimental effects of protectionism;
3. the impact of export earnings on the ability of Mexico to meet its foreign debt obligations;
4. the role GATT plays in the two countries' trade relationship;
5. the increased significance of services in the Mexican and U.S. economies with respect to U.S.-Mexican bilateral relations;
6. the importance of adequate protection and enforcement of intellectual property rights;
7. The role of commerce in the development of the U.S.-Mexico border region.⁷¹

Perhaps the most important aspect of the Framework Agreement is the consultative mechanism that it establishes. Allowing either nation to call for consultations, this mechanism provides a forum to address any trade and investment concerns that should arise between the two nations.⁷² Timely resolution of major concerns is ensured by an explicit timetable requiring that the consultations begin within thirty days.⁷³ Failure to resolve disputes grants either nation the right to utilize other settlement avenues, such as GATT forums.⁷⁴ Successful consultations are further ensured through an additional component, which requires the sharing of information and statistical knowledge with the trade realm.⁷⁵ More vital than the explicit components of the pact is the ability that the Framework Agreement provides for managing the trading relationship between Mexico and the United States. By establishing a bilateral forum independent of the political agendas of both countries, the Framework Agreement ensures that a timely and complete effort will be made to minimize any and all trade disagreement between the two nations. Because it is outside the consultative body of the GATT, this mechanism further benefits the two nations by narrowing consultations exclusively to issues of concern to Mexico and the United States.⁷⁶ This mechanism is es-

71. See Smith, *supra* note 7, at 658, referring to Understanding, *supra* note 65, at 439-40.

72. Understanding, *supra* note 65, at 440.

73. *Id.*

74. *Id.*

75. *Id.* at 441.

76. See Reflections About the Trade and Investment Relations Between Mexico and the United States (Aug. 19, 1988) (signed by Ambassador Peter Murphy from the Office of the U.S. Trade Representative and Mexican Undersecretary of Commerce for Foreign Trade Luis Brova Aguilar) [hereinafter Reflections Paper], cited in Smith, *supra* note 7, at 671 n.

pecially important in light of the failure of recent GATT negotiations to produce the multilateral agreements many had expected. Hence, while the Uruguay Round failed to live up to expectations—due in part to widespread disputes between the U.S. and Western European nations in agricultural affairs—the Framework Agreement allows for direct consultations, obviating many of the issues that arise in a multilateral setting.⁷⁷

More than any other single document, the Framework Agreement has served to broaden U.S.-Mexican trade relations to a point where a Free Trade Agreement has become both feasible and attractive.⁷⁸ Given the comprehensive and dramatic changes which such an agreement would require, integration should be gradually and cautiously introduced. Only through the benefit of the experiences of the Framework Agreement can the two nations hope to integrate such dramatically differing economies. The Framework Agreement will doubtlessly serve as a primary directive in shaping a Mexican-U.S. free trade agreement. Providing continued and extensive dialogues, the Framework Agreement will prove to be a vital impetus in achieving further integration.⁷⁹

VII. TRADE POLICY LEADING TOWARDS THE 1989 INVESTMENT REGULATIONS

In 1989, Mexico had the most active international trade agenda in its history.⁸⁰ During the first month of 1989, House Agri-

96.

77. See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/35/Rev. 1, Dec. 3, 1990.

78. See Guy Erb & Joseph Greenwald, *An Agenda for Talks on Trade*, J. Com., Dec. 16, 1988.

79. Smith, *supra* note 7, at 681.

80. Mexico foreign trade policy goals included:

1. encourage industrial-technological modernization through protection of intellectual property;
2. take advantage of Mexico's geographic advantages in order to promote efficient integration of export industries, particularly the *maquiladora*, or in-bond processing plants;
3. hold frequent meetings between government authorities and exporters to analyze how the government can better promote export industries;
4. replace tariff restrictions with export permits;
5. increase competitiveness through deregulations of auto transportation, railroads, aviation, telecommunications, insurance, and finance;
6. simplify the administrative process for trade, including a reduction of customs red tape and an opening of customs offices in the interior of the country;
7. assure sufficient credit for exporters on terms similar to those given exporters

culture Committee Chairman Kika de la Garza (D-Texas) pressed the Mexican government to study the feasibility of setting up a broad U.S.-Mexico trade agreement modeled after the United States-Canada free trade pact.⁸¹ However, Anne H. Houghes, deputy assistant commerce secretary for the Western Hemisphere, feared attempts at formulating an agreement with Mexico like that with Canada because the "conditions are not similar."⁸² Furthermore, Mexico's President, Carlos Salinas de Gortari, planned to expand the commercial opening developed by the previous administration.⁸³

As early as March of 1989, Commerce Secretary Jaime Serra Puche was promising new legislation to attract investment under

of countries that compete with Mexico in world markets;

8. seek greater reciprocity from other countries in return for the opening of markets in Mexico;

9. use bilateral trade agreements to improve access to foreign markets in an effort to counteract the disruption of international trade caused by the creation of regional trading blocs;

10. take complete advantage of GATT in order to carry out multilateral negotiations; and

11. because Mexico is a developing country, take better advantage of the generalized systems of preferences.

Government's Development Plan Anticipates Improved Growth, Calls for Trade Initiative, 6 Int'l Trade Rep. (BNA) No. 23, at 739 (June 7, 1989).

81. *House Agriculture Committee's De La Garza Presses Mexico to Study Broad Trade Accord*, 6 Int'l Trade Rep. (BNA) No. 8, at 239 (Feb. 22, 1989). For the text of the United States-Canada Free Trade Agreement, see Free Trade Agreement, Dec. 22, 1987, U.S.-Can., 27 I.L.M. 281.

82. *Mexico's Pressing Economic Problems Said to Rule Out North American Trade Pact*, 6 Int'l Trade Rep. (BNA) No. 12, at 364 (Mar. 22, 1989) [hereinafter *Mexico's Pressing Economic Problems*]. Houghes stated that conditions concerning tariff barriers are not similar to those of the Canadian Agreement because Mexico must contend with capital flight, inflation, and scarce credit for private sector investment before it can formally integrate its economy. *Id.*

83. *Id.* For example, the government had made thousands of exceptions to the law's 49% requirement. See *Mexican Government Plans New Measures to Attract More Investment After Slowdown*, 6 Int'l Trade Rep. (BNA) No. 12, at 365 (Mar. 22, 1989) [hereinafter *Mexican Government Plans*]. Strategic sectors, including petroleum, are reserved under constitutional law to the government, while *maquiladora*, or in-bond plants, may be 100% foreign-owned under the law. *Id.*

By August 14, 1989, Mexico's petrochemical industry further opened its opportunities to foreign investment. See *Mexican Government Eases Restrictions on Investment in Petrochemicals Sector*, 6 Int'l Trade Rep. (BNA) No. 33, at 1069 (Aug. 16, 1989). The Mexican government reduced the number of basic petrochemicals excluded from private investment from thirty-four to twenty. *Id.* In addition, "[f]oreign investors [were] allowed up to 40 percent investment in 66 different secondary petrochemicals such as polyethylene, and up to 100 percent investment in 300 to 400 others considered tertiary." *Id.* Up to this point in time, all foreign investment in Mexico's petrochemical industry had been in joint ventures which included Dupont, Union Carbide, and Shell. *Id.*

Mexico's 1973 Foreign Investment Law.⁸⁴ Additionally, Deputy Commerce Secretary Herminio Blanco added that companion reforms to restrictive patents and intellectual property laws were also forthcoming.⁸⁵

In the area of long-term planning, Mexico's Communications and Transport Ministry negotiated with a French consortium, led by the National Bank of Paris, to build an international bridge linking the northern part of Mexico with Texas.⁸⁶ In addition, the Mexican government was slowly opening itself up to foreign capital.⁸⁷ The Communications Ministry announced that non-Mexican firms would be able to set up cellular telephone operations in the country.⁸⁸

By May of 1989, the Mexican government had amassed sufficient information on international trade to begin their push towards a more liberalized investment environment. The newly announced foreign investment regulations allowed automatic approval of investments of up to 100 percent business ownership in two-thirds of the Mexican economy in many formerly restricted areas.⁸⁹ But the new regulations require foreign investors to meet six

84. *Mexican Government Plans*, *supra* note 83, at 365. Speaking before the International Business Center of New England in Boston, Mexican Attorney Juan M. Steta, after meeting with Secretary of Commerce and Development Serra, stated that the future of Mexican foreign investment policy is based in the realization that "modernization of the country's economy cannot be financed by the government . . . and therefore must rely on the private sector." *Id.* at 366. Therefore, the Mexican government had to open to the private sector a number of industries, previously handled by the government, including the subway, highway, petrochemical, and telecommunications industries. *Id.*

85. *Id.* at 365. Blanco stated that Mexico "ha[s] an obligation to modernize investment and we are ready to negotiate points of divergence" with potential investors on patents and intellectual property. *Id.*

86. *Id.*

87. *See Mexico's Government to Cede Control over Telephone Company, Officials Say*, 6 Int'l Trade Rep. (BNA) No. 22, at 707 (May 31, 1989). By the end of May, Claudio X. Gonzales, President Salinas' adviser on foreign investment, announced that the Mexican Government planned to give up its controlling interest in the state-run telephone company, known as Telmex. *Id.*

See also State-Run Telephone Company to Go Private with Foreign Investment Limited to 23 Percent, 6 Int'l Trade Rep. (BNA) No. 37, at 1198 (Sept. 20, 1989). On September 18, 1989, President Salinas announced that Telefonos de Mexico would privatize the company with foreign investors to own no more than 23%. *Id.*

88. *See Mexican Government Plans*, *supra* note 83, at 365.

89. *See Changes in Law Said to Fall Short of Reform Needed to Attract Major Foreign Investors*, 6 Int'l Trade Rep. (BNA) No. 20, at 630 (May 17, 1989). Under the new regulations, foreigners were allowed to establish twenty-year ownership trusts in those sectors, which otherwise require Mexican ownership. *Id.* at 630. The new regulations also promote foreign investment in the stock market through the establishment of trust funds with

conditions in order to have 100 percent ownership in any project without special government approval.⁹⁰ Notwithstanding its liberal tenor, the new regulations did not open the financial services sector to foreign investment because Mexico preferred to wait until the service sector negotiations with the GATT were completed.⁹¹ Mexico's international market expansion policy was also furthered by the debt settlement agreements, held in July 1989.⁹² In August, the United States-Mexico Binational Commission met in Mexico City to address issues concerning intellectual property rights, steel, and textile trades.⁹³ The meeting concluded with the signing of several agreements,⁹⁴ including a formal agreement to build a new

"neutral shares," shares that do not carry voting rights. *Id.* In addition, they centralize, but do not change, the rules for the *maquiladora*, or in-bond processing plants, where 100% ownership was already allowed. *Id.*

The regulations, however, were short of what Mexican economists were expecting. *Id.* at 629. In fact, major investment did not significantly increase over previous levels. *Id.* Although the Mexican Foreign Investment Law of 1973, which limited foreign investment to 49%, gave the Foreign Investment Commission authority to allow 100% ownership provided that the investment was judged beneficial to the country, foreign investors complained that the approval process was extremely bureaucratic and time consuming. *Id.*

90. *Id.* The six conditions are as follows: First, the maximum investment must be \$100 million; second, direct external funding must come through subscriptions of capital, external credit, or foreign funds intermediated by Mexican financial institutions; third, investments must be located outside Mexico's three major industrial cities—Mexico City, Monterrey, and Guadalajara; fourth, the accumulated foreign exchange flows must be in balance over the first three years of operations; fifth, the investment must create permanent jobs and establish training and personnel development programs for workers; and sixth, technologies used must satisfy existing environmental requirements. *Id.* Investments that do not meet any one of the above requirements may still be allowed, but they will have to go before the National Foreign Investment Commission. *Id.*

The regulations, even though they permit foreigners to invest up to 100% on a temporary basis, officially reserve certain fields, such as national air transportation, auto parts manufacturing, and fishing cooperatives, to ownership by Mexican citizens. *Id.* at 629-30.

91. *Id.* at 630. The cumulative value of foreign direct investment in Mexico through 1988 was \$24.08 billion, and the number of foreign companies with investments is 8,420. *Id.* At the time, the U.S. was the leading investor, accounting for 62.1% by value, followed by United Kingdom at 7.3%, West Germany at 6.6%, and Japan at 5.5%. *Id.*

92. See *Analysts Predict Markets for U.S. Exports Will Expand Following Bank Debt Agreements*, 6 Int'l Trade Rep. (BNA) No. 30, at 992 (July 26, 1989). The settlement provided that commercial banks holding \$53 billion of Mexico's \$107 billion foreign debt agreed to reduce either the principal by 35% or interest payments by 40%, to 6.25%. *Id.* The settlement cut the government's foreign obligations by an estimated \$19 billion, depending on which options the commercial banks holding Mexican currency chose to exercise. *Id.*

93. See *Steel Trade, Intellectual Property Rights Top Agenda Items for U.S.-Mexico Discussions*, 6 Int'l Trade Rep. (BNA) No. 32, at 1045 (Aug. 9, 1989). The fifty-two member U.S. delegation included Secretary of State James Baker, Treasury Secretary Nicholas Brady, Ambassador John D. Negroponte, Attorney General Richard Thornburgh, Secretary of Commerce Robert A. Mosbacher, U.S. Trade Representative Carla Hills, and Environmental Protection Agency Administrator William K. Reilly. *Id.* at 1046.

94. Secretary of State Baker and Mexican Foreign Minister Fernando Solana signed a

international bridge between Texas and the Mexican state of Chihuahua.⁹⁵ Two months later, President Salinas visited the White House where he and President Bush signed three agreements on trade, investments, and tourism.⁹⁶ They also signed three environmental agreements, including one pledging cooperative efforts to fight pollution in Mexico City.⁹⁷ By mandating negotiations for expanding trade and investment, the trade and investment agreements went beyond the consultations provided in the United States-Mexico Framework Agreement. They gave Mexico, for all practical purposes, preferential treatment by providing for both tariff and non-tariff barriers to be removed on a most-favored-nations basis.⁹⁸ The Action Plan accompanying the Understanding points out the products that were designated for negotiations.⁹⁹

number of agreements covering: environmental clean-up of the Colorado River, recognition of the 100 year-old U.S.-Mexican International Boundary and Water Commission, maritime search and rescue cooperation, consular cooperation involving immigration matters, and exemption of taxes on international shipping and transportation. *Id.* at 1046.

95. *Id.* (Officials of the U.S.-Mexican Binational Commission also signed agreements that could improve U.S. Mexican trade on the Texas border. They agreed to replace an old, narrow bridge from Zaragoza, Mexico, to Yaleta, near El Paso, Texas, with a new international bridge to better serve industrial parks in the area. Additional Texas-Mexico border points of entry will be completed soon at Dolores-Colombia, Los Indios-Lucio Blanco, Brownsville-Matamoros, Laredo-Nuevo Laredo, Eagle Pass-Peidas Negras, and Los Ebanos-Diaz Ordaz).

96. See *U.S.-Mexico Understanding Sets Up Process for Negotiating Expanded Trade, Investment*, 6 Int'l Trade Rep. (BNA) No. 40, at 1290 (Oct. 11, 1989). The agreement on trade, meant to create a mechanism for future trade negotiations, calls on both sides to establish working groups whose purpose would be to determine the best ways to resolve problems and negotiate solutions. *Id.* The investment agreement establishes a Joint Committee for Investment and Trade, which meets bi-annually to review the status of joint trade and promotion. *Id.* The Committee addresses and promotes investment opportunities, facilitates coordination of trade and investment events, and cooperates in assembling statistical information related to investment flows. *Id.* Finally, the third agreement is designed to expand tourism by simplifying and streamlining procedural and documentary requirements, opening border crossing points, encouraging binational cultural events, and maintaining accurate statistics on bilateral tourism. *Id.*

97. *Id.*

98. *Id.* at 1290-91.

99. See *id.* The designation on product areas would concentrate "on problems that arise from the time a product leaves the factory or farm until it reaches the ultimate consumer." *Id.* These products included motor vehicles, petrochemicals, pharmaceuticals, telecommunications, computers, electronics, and food processing. The "interrelated issues" would include tariffs, non-tariff barriers to trade, investment, intellectual property rights, technology, services, marketing, restraints, distribution problems, and trade remedy actions. *Id.*

VIII. THE 1989 FOREIGN INVESTMENT REGULATIONS

As indicated above, in 1989, President Carlos Salinas introduced a variety of regulations amending the Law on Foreign Investment.¹⁰⁰ These new regulations were a major shift in policy¹⁰¹ and constituted an unprecedented effort to encourage foreign investment in Mexico.¹⁰² The new Foreign Investment Law is not a vehicle for granting incentives such as tax breaks or cost reductions in energy or land.¹⁰³ Rather, the benefits granted to foreign investors basically lie in deregulation.¹⁰⁴ That is, the new regulation grants the foreign investor the right to establish a 100 percent foreign owned enterprise in Mexico without first obtaining prior approval from the National Foreign Investment Commission, provided certain conditions are met.¹⁰⁵ The new regulation attempts

100. For the text of the 1989 regulations, see Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera, D.O., May 16, 1989 [hereinafter 1989 Reg.].

The Mexican President's authority to issue regulations is well recognized in Mexico's constitutional history, doctrine, and court decisions. See Gómez-Palacio, *supra* note 15, at 258 and sources cited therein.

101. Mexico faced three major problems. First, Mexico was unable to increase its exports; for example, total exports constituted \$20,929 million in 1982, compared with US \$20,656 in 1987 and \$20,657 in 1988. See 197 INSTITUTO NACIONAL DE ESTADÍSTICA, GEOGRAFÍA E INFORMÁTICA, CUADERNO DE INFORMACIÓN OPORTUNA, Aug. 1987, at 82. Second, foreign investment decreased. For example, during Mexico's oil-booming economy, direct foreign investment increased over 17% per year, which amounted to \$2.3 and \$2.5 billion dollars in 1980 and 1981, respectively; but from 1982 to 1983, the figures dropped to \$1.6 billion to \$0.4 billion. See 21 REVISTA EXPANSIÓN No. 519, July 5, 1989, at 40. Third, Mexico had an ongoing problem of capital flight. Mexican-held bank deposits in the United States totaled roughly \$13.1 billion in 1987, according to the Federal Reserve Board. This figure is only a part of overall capital flight, since a substantial portion is invested in real estate, securities, and other unregistered assets. See ROBERT A. PASTOR & JORGE G. CASTANEDA, LIMITS TO FRIENDSHIP: THE UNITED STATES AND MEXICO 255-56 (1988).

102. The Mexican Constitution contains no provision for the promotion of foreign investment, nor does it favor foreigners. See MEX. CONST. art. 32, which provides that under equal circumstances, Mexicans will be preferred versus foreigners, for all kinds of concessions and for all jobs, appointments, and government commissions.

103. See Gómez-Palacio, *supra* note 15, at 259.

104. *Id.* Article 5 of the 1989 Regulation provides that "foreign investors may participate in any proportion in the capital stock of a corporation, . . . and will not require . . . the authorization of the Ministry." See 1989 Reg., *supra* note 100, at 14-15.

105. Gómez-Palacio, *supra* note 15, at 259. First, investments in fixed assets which are made during the preparatory stage should not exceed an amount determined by the Ministry of Commerce. Second, financial resources for such investments must come from abroad. Third, the minimum amount of paid capital stock must equal 20% of the total investment in pre-operational fixed assets. Fourth, companies should locate facilities for manufacturing or industrial operations in zones other than those with great industrial concentration. Fifth, companies must keep their accrued balance of foreign currency at least at a break-even point during the first three years of operations. Sixth, corporations must use appropriate

to entice foreign investors through three vital ends: simplification of administrative demands, heightened stability in the Mexican legal infrastructure, and less onerous limitations on direct investment.¹⁰⁶

While the new Article five enhances foreign investment opportunities and eliminates the approval requirement, it squarely contradicts that same article of the 1973 Foreign Investment Law, which requires the promotion and protection of Mexican investment.¹⁰⁷ Nonetheless, by initiating these important changes¹⁰⁸ in Mexican regulations, the Executive branch of the Mexican government is hoping to facilitate foreign investment into a country that desperately needs such capital flows.

These new regulations have helped enhance not only the climate for foreign investment but also the climate for a comprehensive Free Trade Pact between the U.S. and Mexico.¹⁰⁹ As the economic ties increase through heightened U.S. investment in Mexico, and vice versa, the viability and desirability of such an agreement becomes increasingly obvious.

technologies and comply with legal provisions on environmental protection. See Ogarrio and Castro, *supra* note 11, at 230.

106. See generally Rodolpho Sandoval, *Legal Issues with Respect to Free Trade Between United States and Mexico*, 19 INT'L J. LEGAL INFO. 91 (1991).

107. For a discussion of how the two articles are contradictory, see Gómez-Palacio, *supra* note 15, at 260 n. 32. Hope Camp, Counsel to the Ad Hoc Group on Mexican Intellectual Property, told the House Ways & Means Committee that changes to existing laws should come in the form of amendments to existing statutes rather than by regulations, because such regulations are inferior to statutes in Mexico's legal hierarchy. See *Witnesses at the ITC Predict Impact from Recent Trade Liberalization Measures*, 6 Int'l Trade Rep. (BNA) No. 48, at 1604 (Dec. 6, 1989); see also Gómez-Palacio, *supra* note 15, at 262 ("because the [1973 FIL] and other laws were approved and enacted by the legislature, they are superior to the [1989 Reg.]. Therefore, the [1989 Reg.]'s provisions which contradict the [1973 FIL] and other laws enacted by Congress appear to be technically illegal and unconstitutional.").

108. See *Mexico's Commitment to Opening Its Markets Seen in Joint Ventures Between Apparel Firms*, 6 Int'l Trade Rep. (BNA) No. 49, at 1637 (Dec. 13, 1989). Enrique Ponce de Leon, trade commissioner of the Mexican Trade Office in Dallas stated that "other changes paving the way for the agreement include a reduction in Mexico's tariffs to a minimum of 10 percent and a maximum of 20 percent and the elimination of a need for import licenses for 87 percent of the items on Mexico's tariff schedule."

109. But see C. Michael Aho, *More Bilateral Trade Agreements Would Be a Blunder: What the New President Should Do*, 22 CORNELL INT'L L.J. 25, 25-26 (1989) (stating that a free trade agreement would undercut the GATT process and harm individual nations' long-term interests).

IX. RECENT "FAST-TRACK" AUTHORITY

An important drama unfolded during the first quarter of 1991 concerning the proposed Free Trade Agreement between Mexico and the United States.¹¹⁰ This involved the balance of power¹¹¹ between the Executive branch of Government and Congress concerning the issue of "fast-track."¹¹² This section will briefly detail on the history of fast track, its operation, the objections towards it, and the results of the fight over it between President Bush and Congress.¹¹³

110. See *Bush Free-Trade Plan Causes Capitol Unrest*, EXPRESS-NEWS, Mar. 13, 1991, at 7B; *Bush Sells Mexico Trade Pact on Hill*, WASH. TIMES, Mar. 20, 1991, at C12; *Bush pide el Apoyo de los Líderes Hispanos de E.U. para el TTLC*, LA PRENSA, Mar. 22, 1991, at 1; *S.A. Delegation to Meet with Bush*, EXPRESS-NEWS, Mar. 12, 1991, at 2C; *S.A. Firm Will Market Free-Trade Agreement*, EXPRESS-NEWS, Mar. 20, 1991, at 7B; White House Letter from Shiree Sanchez, Associate Director, Office of Public Liaison, inviting the author of this paper to a White House briefing by President Bush, Mr. Michael Boskin, Chairman of the Council of Economic Advisers, Robert Mosbacher, Secretary of the Department of Commerce, and Ambassador Carla Hills, U.S. Trade Representative (Mar. 11, 1991).

111. See Mark A. Phariss, *FTA Fast-Track Authority at Risk*, MEX. TRADE LETTER, Apr. 30, 1991, at 1, stating that:

Congressional opposition to the FTA is now growing, and it is no longer certain that Congress will extend "fast-track" authority to the FTA by the June 1st deadline. Failure by Congress to grant fast-track authority to the FTA—a procedure by which Congress agrees to forego its right to amend the negotiated FTA—would most likely kill the FTA negotiations. Either chamber of Congress can defeat fast-track authority by a simple majority vote.

See also 8 Int'l Trade Rep. (BNA) No. 11, at 391 (Mar. 13, 1991) (Representative Sander M. Levin states that the fast-track procedure, which requires Congress to approve or reject trade agreements without amendment, shifts the "balance of power" from Congress to the administration.).

112. See generally *Forward to President Bush's Report to Congress on the Extension of Fast-Track Procedures for Trade Negotiation Legislation, Along with 1991 Trade Policy Agenda*, 8 Int'l Trade Rep. (BNA) No. 10, at 368 (Mar. 6, 1991) [hereinafter *Forward*]. Fast-track procedures are located in the Omnibus Trade & Competitiveness Act, 19 U.S.C. §§ 2902-04 (1988); see also *Sen. Bensten, Others on Finance Committee Back Extension of 'Fast-Track' Authority*, 8 Int'l Trade Rep. (BNA) No. 12, at 421 (Mar. 20, 1991) [hereinafter *Sen. Bensten*] ("[the fast track procedure] requires Congress to approve or reject any negotiated trade agreement without amendment. It will be automatically extended until May 31, 1993, unless the House or the Senate adopts a resolution of disapproval by June 1.").

113. See Phariss, *supra* note 111, at 1.

Serious concern over Congressional opposition first became public on March 7th of this year. On that day, two influential members of Congress and supporters of fast-track authority—Senator Lloyd Bensten, Chairman of the Senate Finance Committee, and Representative Dan Rostenkowski, Chairman of the House Ways and Means Committee—wrote President Bush to inform him that fast-track authority for the FTA "will not be easy."

Id. The loss of congressional support for the FTA began with opposition by organized labor. The AFL/CIO, UAW, and other labor unions have expressed fears that a free trade agree-

During the early part of this century, Congress and the Executive recognized that the negotiation and implementation of trade agreements require special cooperation between the two branches.¹¹⁴ Following the Smoot-Hawley Tariff Act¹¹⁵ of 1930 and the subsequent Depression,¹¹⁶ both Congress and the President realized that only by working closely together in the exercise of their constitutional responsibilities could the two branches effectively bring down foreign barriers to United States trade and open opportunities for U.S. products and services in the international marketplace.¹¹⁷

The new arrangement was manifested in the Reciprocal Trade Agreements Act of 1934,¹¹⁸ which gave the President authority to not only conclude tariff-cutting agreements,¹¹⁹ but also implemented them by proclamation without the need for subsequent legislation.¹²⁰ During the following years, when the principal barriers to trade were tariffs, this arrangement proved highly successful and was responsible for the tariff reductions that promoted post-World War II economic growth.¹²¹ As countries began to rely less on tariff protection and more on non-tariff trade barriers, the scope of trade negotiations broadened, and the fast-track procedures were created by Congress as the necessary complement to this broader trade agenda.

Congress's inclusion of fast track procedures in trade legislation is not a recent phenomenon.¹²² While giving Congress the as-

ment with Mexico will result in lower wages, reduced benefits, and a loss of jobs for American manufacturing workers. These fears are based on the belief that manufacturing companies will move their operations to Mexico to take advantage of the substantial wage difference between American and Mexican labor. *Id.*

114. See 137 Cong. Rec. E1953 (daily ed. May 29, 1991) (statement of Rep. Lee H. Hamilton) ("Trade agreements are difficult to handle under our system of government. The President's negotiators commit the U.S. in an agreement to change its laws, but only Congress can enact those changes. U.S. negotiators have found foreign governments reluctant to negotiate because the possibility of congressional amendments gives the U.S. a second chance to obtain concessions"); see also *Forward*, *supra* note 112; White House Briefing; *supra* note 110.

115. Tariff of 1930, 46 Stat. 590 (1930).

116. For a recent interpretation of the Great Depression, see JOHN K. GALBRAITH, *THE GREAT CRASH 1929* (1988).

117. *Forward*, *supra* note 112, at 368.

118. Reciprocal Trade Agreement Act, 48 Stat. 943 (1934).

119. *Id.* § 350(a)(1).

120. *Id.* § 350(a)(2).

121. *Forward*, *supra* note 112, at 368.

122. See The Trade Act of 1974, 19 U.S.C. § 2101 (1974); The Trade Agreements Act of 1979, 19 U.S.C. § 2501 (1979).

surance of meaningful participation throughout the negotiating process,¹²³ fast track also provides certain guarantees essential to the successful negotiation of trade agreements,¹²⁴ namely, a vote on implementing legislation within a fixed period of time¹²⁵ and a promise of no congressional amendments to the legislation after the negotiations are complete between the Executive and the negotiating country.¹²⁶

These procedures reflect an understanding between the Executive and Congress that trade agreements, in which results in one area are often linked to results in others, are particularly vulnerable to multiple amendments following the negotiations. Such amendments could unravel the entire negotiated agreements.¹²⁷

Through the fast track, Congress gives the President the same bargaining power possessed by his counterparts: the ability to assure his negotiating partners that the agreement reached internationally would be the agreement voted on at home.¹²⁸ Without fast track, the President cannot give Mexico that assurance. Without that assurance, Mexico will be reluctant to negotiate with the United States and, therefore, will not make the concessions necessary to reach an agreement with the United States. Understandably, no foreign government will be willing to reveal its bottom line in the negotiations knowing that the bargain could be re-opened by Congress at a later date.¹²⁹

On the basis of the established fast track procedures, the United States has negotiated and implemented three trade agreements, each of which an overwhelming majority approved: both rounds of GATT negotiations,¹³⁰ the Free-Trade Agreement with Israel,¹³¹ and the Free Trade Agreement with Canada.¹³²

123. Omnibus Trade & Competitiveness Act, *supra* note 112, at § 2902 (d).

124. *Forward*, *supra* note 112, at 368.

125. Omnibus Trade & Competitiveness Act, *supra* note 112, at § 2903 (a)(1)(A).

126. *Id.* § 2903(b).

127. U.S. Trade Representative, Carla Hills, has stated that with fast track, other countries will not be willing to come to the negotiation table, noting that any agreement reached without fast-track could be subject to change. See *President Bush Set to Ask Congress to Extend 'Fast-Track' Authority as GATT Talks Resume*, 8 Int'l Trade Rep. (BNA) No. 9, at 296 (Feb. 27, 1991).

128. *Rep. Dorgan Introduces Resolution Opposing President's Bid for Fast-Track Extension*, 8 Int'l Trade Rep. (BNA) No. 10, at 342 (Mar. 6, 1991).

129. *Id.*

130. Trade Agreements Act of 1979, *supra* note 122, at § 2503(a), (c).

131. United States-Israel Free Trade Area Implementation Act of 1985, 99 Stat. 82 (1985).

A. *The Fast-Track Process*

The fast track procedures preserve Congress's role during the negotiation, approval, and implementation of trade agreements.¹³³ To ensure congressional and private sector input, the fast track statute contains extensive notification and consultation requirements.¹³⁴ In fact, Congress is involved in each step of the negotiations process, from initiations through implementation.

To use the fast track for any agreement, bilateral or multilateral, the President must notify Congress ninety calendar days before signature.¹³⁵ By the time the President gives his ninety-day notification, private sector advisory committees must report their views on the agreement to both Congress and the President. For bilateral agreements, Congress must be given advance notice of the negotiations.¹³⁶ During the following sixty legislative working days, either the Senate Finance or House Ways & Means Committee can vote to deny fast track treatment.¹³⁷

Once an agreement is reached, Congress and the Administration work in close consultation to formulate the implementing legislation. The process involves the full participation of all committees on jurisdiction, not only those committees traditionally consulted in setting trade negotiation objectives. If the agreement and its implementing legislation are still not acceptable, they can be rejected by a majority vote of either house.¹³⁸

By incorporating fast track into the 1988 Act, Congress expressly contemplated that an extension of the provision beyond June, 1991, might be necessary and appropriate in order for the President to effectively pursue the U.S. trade policy objectives set out in the Act.¹³⁹

132. United States-Canada Free Trade Agreement Implementation Act of 1988, 102 Stat. 1851 (1988).

133. Omnibus Trade & Competitiveness Act, *supra* note 112, § 2902(d).

134. *See, e.g., Id.* §§ 2903(a)(1)(A), (B), and (a)(2).

135. *Id.* § 2903(a)(1)(A).

136. *Id.* § 2902(c)(3)(C)(i).

137. *Id.* §§ 2903(b)(1)(B)(ii), (b)(5)(b).

138. *Id.*

139. The negotiation period was to be extended to May 31, 1993 unless the House or the Senate were to adopt a resolution of disapproval by June 1, 1991. *Id.* § 2903(b)(1)(B)(i), (ii). Indeed, the Senate did adopt such a resolution on May 24, 1991. *See infra* note 145 and accompanying text.

B. *Fast Track Objections and Hurdles*

The objections over fast track are basically objections over the proposed Free Trade Agreement.¹⁴⁰ That is, the opponents of the Agreement reasoned that if they were successful in obstructing fast-track, they would essentially be able to defeat the Agreement.¹⁴¹

140. Organized labor mounted a strong campaign to persuade Congress to block an extension, arguing that the proposed U.S.-Mexico Free Trade Agreement will cost U.S. workers up to 1.5 million jobs. See *President Bush Urges U.S. Business Leaders to Press Congress to Support 'Fast-Track'*, 8 Int'l Trade Rep. (BNA) No. 15, at 522 (Apr. 10, 1991); see also *LaFalce Opposes Fast-Track Authority for U.S.-Mexico Free Trade Agreement*, 8 Int'l Trade Rep. (BNA) No. 6, at 203 (Feb. 6, 1991) (in which Representative John LaFalce stated "I fear that a hastily concluded trade agreement could have immediate adverse consequences for American industry and labor without producing significant long-term reciprocal trade benefits for the U.S. economy"); *Public Interest Groups Continue to Oppose Fast-Track Extension for FTA Negotiations*, 8 Int'l Trade Rep. (BNA) No. 16, at 580 (Apr. 17, 1991) (Environmental and other public interest groups also campaigned against extension of the fast-track authority, claiming that environmental concerns would not be addressed adequately if fast-track was used).

141. *Sen. Bensten*, *supra* note 112, at 422 (At a Senate Foreign Relations subcommittee hearing on the U.S.-Mexico Free Trade Agreement, Senator Jesse Helms charged the Administrations' request for fast-track extension is tantamount to asking Congress to approve trade agreements before they are negotiated). He claimed that the negotiators devised a 'secret plan' to sacrifice the U.S. textile, auto, and steel industries in multilateral trade negotiations. *Id.* According to Representative Byron L. Dorgan, "the Constitution gives Congress alone the right and responsibility to regulate foreign Commerce. Fast-track treatment represents an abdication of this constitutional authority to regulate foreign commerce." See *Sen. Hollings Introduces Resolution to Kill 'Fast-Track' Trade Procedure*, 8 Int'l Trade Rep. (BNA) No. 12, at 423 (Mar. 20, 1991).

In a memorandum to President Bush, Congressman Richard Gephardt, House Majority Leader, outlined some of his concerns and objections:

ESCAPE CLAUSE: . . . it is important that a comprehensive escape clause provision be included as part of the negotiation framework that can act as a stop-gap measure to stem the loss of jobs and business opportunities if there is a hemorrhaging in any one sector.

RULES OF ORIGIN: . . . we must not allow Mexico to become an export platform for the products of third countries to flood our markets. . . . We must have a very strict rule of origin standard regarding production in Mexico.

TRANSITION: . . . transition relief measures should be examined that will allow companies adversely affected by [the FTA] to receive government help in finding new markets for their products and converting to new lines of business.

WAGE DISPARITY: . . . the question [is] how we address the substantial wage and standard of living disparity that exists between our two countries. Our goal must be to raise the wages and standard of living of Mexicans, not lower our own.

ENVIRONMENT: I would ask that environmental issues be included on the negotiating agenda.

WORKERS RIGHTS: Among the provisions an [FTA] should include are respect for freedom of association; respect for the right to organize and bargain collectively; prohibition of the use of any form of forced or compulsory labor . . .

On March 1, 1991, President Bush asked the Congress for an extension of the fast-track which would otherwise expire on June 1, 1991.¹⁴² Four days later, Representative Byron L. Dorgan introduced a resolution which, if approved by the House, would deny President Bush's request for a two-year extension.¹⁴³ On May 1, as a result of a request from Dan Rostenkowski, Chairman of the House Ways and Means Committee, and Senator Lloyd Bentsen, Chairman of the Senate Finance Committee, the President submitted a seventy page "action plan"¹⁴⁴ to Congress.

On May 24, 1991, after the dust had settled and the votes were counted, the Senate voted to extend fast-track authority for another two years.¹⁴⁵ By a vote of fifty-nine to thirty-six, the Senate rejected a resolution, introduced by Senator Ernest Hollings, that would have denied President Bush's request for a two-year extension.¹⁴⁶ The day before, the House had also endorsed fast-track procedures by voting 231-192 to reject a resolution offered by Rep-

establishment of a minimum age for the employment of children; acceptable conditions with respect to wages and hours of work.

LABOR MOBILITY: . . . I am very concerned about the prospect of substantial numbers of Mexican workers entering the U.S. labor market, even if only on a temporary basis. [Procedures must be set up to address these issues.]

HUMAN RIGHTS: We must also use the [FTA] negotiations as a means of support for the Salinas government to make further efforts to curb human rights abuses.

Letter from Congressman Richard Gephardt, House Majority Leader, to President Bush (Mar. 27, 1991).

142. See *Sen. Bentsen, supra* note 112, at 421. President Bush, in requesting the fast-track extension said that the administration would use the procedure to negotiate the GATT and North American trade agreements, as well as to fulfill the trade objective of the administrations; so-called Enterprise for the Americas Initiative involving countries in Latin America. Congress had until June 1, 1991 to stop the process, or the fast-track authority would be automatically extended for two additional years to May 31, 1993. See *Fast-Track Process for Trade Agreement Threatens Environmental Laws, Groups Warn*, 8 Int'l Trade Rep. (BNA) No. 19, at 698 (May 8, 1991). Prior to Bush's March 1 request, some proponents of the fast-track who had previously met with the Secretary of Commerce of Mexico, Mr. Serra Puche, and had presented position papers to the Mexico City Mexican Chamber of Commerce, were invited to the White House by the President for a Free Trade Agreement and Fast Track briefing. See Rudy Sandoval, *Mexican Americans Voice Stake-Holders Interest on the FTA in Mexico*, LA PRENSA, Feb. 22, 1991, at 2; *Sen. Bensten, supra* note 112, at 423.

143. See *Rep. Dorgan, supra*, note 128, at 342. Co-sponsoring the resolution were Reps. Jim Jontz, Mary Russo, Lawrence J. Smith, Barney Frank, Pat Williams, David R. Obey, and Vic Fazio.

144. See *Selected White House Documents Released May 1, 1991, on Negotiations of North America Free Trade Agreement*, 8 Int'l Trade Rep. (BNA), at 713 (May 8, 1991).

145. See *Senate and House Vote to Extend Fast-Track for North American FTA, Uruguay Round Talks*, 8 Int'l Trade Rep. (BNA) No. 22, at 802 (May 29, 1991).

146. *Id.*

representative Byron Dorgan that would have disapproved Bush's request for an extension of fast-track procedure.¹⁴⁷ With such fast-track authority in place, a successful free trade agreement appears likely to emerge.

X. CONCLUSION

No discussion of the proposed Free Trade Agreement between the U.S. and Mexico can begin without a sound understanding of the recent dramatic developments that have occurred in the trading relationship between Mexico and the U.S. An analysis of the comprehensive alterations in Mexico's foreign trade policy provides a more complete grasp of the environment in which future integration will occur. Such a grasp requires a thorough examination of the body of law which will serve as a foundation for the proposed Mexico-U.S. Free Trade Agreement. These precedents help elucidate not only the impetus for a free trade pact but also the model for such a pact. Thus, the foundation has been laid for a successful Free Trade Agreement.

Mexico has broken with the past and has embraced the future not only in theory and policy, but also in practice. Old protectionist infrastructures in Mexico continue to crumble and fade into history while new ideas emerge to reach across the legal boundaries of two countries and two neighbors that have been strangers to each other for over one hundred years. It is a perfect match. Mexico, with its rich minerals and labor resources, and the United States with its advanced technologies and capital resources can bring about one of the most dramatic economic activities in their history.

But the implementation of the Free Trade Agreement will not be easy, for there are still many obstacles, including the difference in social, political, economic, and judicial systems. These dilemmas will eventually be resolved, for those who will make the potential opportunities become reality are still emerging from the ranks of the international business and legal community.

147. *Id.*