

3-1-1993

## U.S.-Mexico Agricultural Trade and Investment after NAFTA


Bert R. Pena

Amy Henderson

Eduardo Robles-Elias

James F. Smith

Follow this and additional works at: <https://digitalrepository.unm.edu/usmexlj>

 Part of the [International Law Commons](#), [International Trade Law Commons](#), and the [Jurisprudence Commons](#)

### Recommended Citation

Bert R. Pena, Amy Henderson, Eduardo Robles-Elias & James F. Smith, *U.S.-Mexico Agricultural Trade and Investment after NAFTA*, 1 U.S.-Mex. L.J. 259 (1993).

Available at: <https://digitalrepository.unm.edu/usmexlj/vol1/iss1/15>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in United States - Mexico Law Journal by an authorized editor of UNM Digital Repository. For more information, please contact [disc@unm.edu](mailto:disc@unm.edu).

# U.S.-MEXICO AGRICULTURAL TRADE AND INVESTMENT AFTER NAFTA

BERT R. PEÑA\* & AMY HENDERSON\*\*

## I. THE UNITED STATES AND MEXICO: AGRICULTURE AND TRADE

### *A. Agricultural Trade*

U.S.-Mexico agricultural trade has grown significantly since the mid-1980s—from \$2.3 billion in 1982 to \$5.2 billion in 1991. Mexico is the second largest supplier of agricultural products to the United States after Canada, and the third largest export market for United States agricultural products after Japan and the Soviet Union.<sup>1</sup>

Statistics indicate that the volume of agricultural trade between the United States and Mexico fluctuated during the 1980s, reflecting the evolutionary process of implementing domestic economic reform and the vagaries of agricultural factors (such as drought) in Mexico. While the total United States balance of trade with Mexico during the 1980s was negative, the agricultural balance of trade has been positive. For the decade of the 1980s, the United States enjoyed a net surplus of \$3.3 billion in agricultural trade with Mexico. Mexican agricultural exports to the United States, however, increased from about \$1 billion in 1980 to nearly \$2.3 billion in 1989. Consequently, Mexican agricultural exports to the United States experienced a more sustained pattern of gains for the decade.<sup>2</sup>

United States agricultural exports to Mexico registered steady increases during the 1980s, and have especially grown in the last two years. Total 1991 United States agricultural exports to Mexico were \$2.9 billion, a nine percent increase from 1990. Mexico's population growth, its proximity to the United States, and the availability of United States Department of Agriculture ("USDA") short-term and intermediate-term financing for exports have contributed to the growth in United States agriculture exports to Mexico. Major United States export sales to Mexico in 1991 include the following: grains (\$758 million, which accounts for almost two-fifths

---

\* Partner, Hogan & Hartson, Washington, D.C.; Chief of Staff, Committee on Agriculture, U.S. House of Representatives, 1988-90 and special counsel to the Committee, 1977-80; corporate legislative counsel, Bristol-Meyers Co., (1980-88); J.D., St. Mary's College of Law, San Antonio, Texas; admitted to the bars of Texas (1974) and Washington, D.C. (1978).

\*\* Attorney, Hogan & Hartson, Washington, D.C.; General Counsel & Legislative Coordinator, Texas Office of State-Federal Relations, Washington, D.C. (1989-1990); J.D., University of Houston Law Center; admitted to Texas bar (1989).

1. FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., MEXICO: THE MARKET FOR U.S. FOOD AND FARM PRODUCTS (1992).

2. U.S.-Mexico Trade: Impact of Liberalization in the Agricultural Sector, GAO/NSIAD-91-155, at 4 (U.S. Gen. Accounting Office Mar. 1991) [hereinafter Impact of Liberalization].

of United States exports to Mexico), meat products (\$462 million), fruits and vegetables (\$437 million), hides and fats (\$220 million), live animals (\$141 million), and dairy products (\$73 million).<sup>3</sup> High value commodity exports have risen seventy-one percent since 1986 to \$790 million, registering the highest growth rate when compared to bulk exports.<sup>4</sup>

Agricultural exports to the United States from Mexico in 1991 were valued at \$2.5 billion; exports are mainly vegetables (\$894 million), beverages (especially orange juice and beer), and specialty crops.<sup>5</sup> The growth in exports from Mexico beginning in the 1980s has been assisted by several factors. First, Mexico's exports have been aided by its status under the Generalized System of Preferences ("GSP") program.<sup>6</sup> Mexico is a major beneficiary of the GSP program, with agriculture exports of more than \$200 million in 1989.<sup>7</sup> Second, Mexico has undertaken increased responsiveness to export market opportunities. For example, Mexico's horticultural export sector has expanded from 1,036,600 metric tons of production in 1977 to 1,438,600 metric tons exported in 1990, increasing at an average annual growth rate of 3.2% (compared to the .84% growth rate for the rest of Mexico's agricultural sector).<sup>8</sup>

Finally, Mexico's food processing industry has experienced dynamic growth. Since the 1980s, Mexico's exports in food processing have been growing at an annual rate of twenty percent, compared to five percent for fresh products. Processed food exports (including beverages) grew eighty-five percent between 1982 and 1985 alone and, by 1987, their value had exceeded all other agricultural exports. Although United States investment in Mexico's food processing industry fell seventeen percent annually during the years 1983-1988, it rebounded by eighty-one percent in 1989 to \$466 million.<sup>9</sup> This trend coincides with changes in Mexico's foreign investment regulations, which now permit 100% foreign ownership.<sup>10</sup>

### B. Mexico's Agricultural Economy

Although Mexico's agricultural exports have risen, Mexico is fundamentally a food importer. Several factors account for Mexico's status as a net food importer and the resulting growth of United States agricultural

---

3. 1991 Agricultural Trade Information (Dep't Agric. 1991).

4. FOREIGN AGRIC. SERV., U.S. DEP'T AGRIC., NORTH AMERICAN FREE TRADE AGREEMENT FACT SHEET (1992).

5. 1991 Agricultural Trade Information (Dep't Agric. 1991).

6. The GSP program promotes trade and encourages economic development in over 100 developing countries by offering duty-free entry to more than 4,000 products.

7. Impact of Liberalization, *supra* note 2, at 15.

8. Roberta L. Cook et al., *Implications of the North American Free Trade Agreement (NAFTA) for the U.S. Horticultural Sector*, in NORTH AMERICAN FREE TRADE AGREEMENT: EFFECTS ON AGRICULTURE 4 (1992).

9. Laura Carlsen, *Reaping Winter's Harvest*, BUSINESS MEXICO, May 1991.

10. Regalmento de la Ley Para Promover la Inversion Mexicana y Regular la Inversion Extranjera [Regulation of Law to Promote Mexican Investment and Regulate Foreign Investment], 427 D.O. 11 (1989).

exports to Mexico. First, Mexico has a relative lack of arable land. Of Mexico's almost 772,000 mile territory, only twelve percent is arable. Mexico has 57 million arable acres (0.7 acres per person) compared to the United States' 464 million arable acres (1.9 acres per person).<sup>11</sup> Approximately one-fourth of the arable land is irrigated, while three-fourths is rain-fed. The availability of water for irrigation depends greatly on rainfall because much of Mexico's irrigation water is from surface storage. Water resources are, however, generally scarce.<sup>12</sup>

Nonetheless, during the 1950s and early 1960s, the Mexican agricultural economy experienced something of a "green revolution." Agricultural productivity grew at an average annual rate of 4.5%, while the Mexican population grew at an average annual rate of 2.9%. Agricultural investment was high and modern farming techniques were introduced. New lands were opened and irrigation was expanded. Government-supported research produced high-yielding crop varieties and enhanced farming technology associated with irrigated production.<sup>13</sup>

Beginning in the 1960s, however, Mexico's population growth rate has outstripped its rate of agricultural productivity.<sup>14</sup> The agricultural economy witnessed disinvestment as resources and capital were aimed at industrialization and focused on the production of consumer goods pursuant to Mexico's policy of import substitution.<sup>15</sup> "Roughly 40% of public spending between 1960 and 1976 went to build Mexico's industrial plant, while less than 14% went to agriculture."<sup>16</sup> During the 1980s, this divestiture continued, mostly as a result of austere budgets; the government could no longer afford to subsidize agriculture at prior levels.<sup>17</sup>

Beginning in the 1960s, Mexico engaged in a policy of extensive government involvement—rather than investment—in agriculture aimed at meeting the demographic and political imperative to increase production, maintain the standard of living of the politically important peasant population, and provide adequate food supplies at non-inflationary prices to

---

11. AGRICULTURE IN A NORTH AMERICAN FREE TRADE AGREEMENT: ANALYSIS OF LIBERALIZING TRADE BETWEEN THE UNITED STATES AND MEXICO 13 (Dep't Agric. 1992) [hereinafter ANALYSIS OF LIBERALIZING TRADE].

12. ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* 189 (1985). Water flowing from the Mississippi River alone is greater than that of all Mexico's rivers combined.

13. ANALYSIS OF LIBERALIZING TRADE, *supra* note 11, at 12.

14. CLYDE HUFBAUER & JEFFREY SCHOTT, *NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS* 281 (1992). From the 1960s through the 1970s, the average annual agricultural growth rate dropped to 2.7%, while the average annual population rate increased to 3.2%.

15. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, Pub. No. 8732, at 4-1 (U.S. Int'l Trade Comm'n Apr. 1990).

16. Thomas E. Cox, *From the U.S. To Mexico: Friendly Advice on Ending the Farm Crisis*, THE HERITAGE FOUNDATION BACKGROUNDER, Feb. 12, 1990, at 18.

17. Cook et al., *supra* note 8, at 23. The budget for food support programs declined from \$8.3 billion in 1981 to \$3.1 billion in 1988. The agency that has primary government responsibility for agricultural and livestock research (INIFAP) was reduced by 60% between 1982 and 1989. Funding for the scientific research performed by the national agency of Science and Technology (CONACYT) has declined by one-third over the 1980s. Furthermore, the domestic supply of modern agricultural production inputs has decreased over the 1980s. Seed production, the agriculture equipment pool, and the domestic consumption of fertilizer and fungicides decreased throughout the 1980s.

its growing urban population. The primary element in Mexico's agricultural policy was guaranteed prices to producers in order to stimulate production. The government purchased basic commodities (corn, beans, wheat, rice, sorghum, soybeans, safflower, cottonseed) at support prices through CONASUPO (National Popular Subsistence Company), the regulatory agency for agricultural commodities. The government also subsidized credit, insurance, transportation and storage, fuel, and inputs such as fertilizer, seed, and irrigation.<sup>18</sup>

Government purchases of commodities to maintain support for prices were linked to an inward-looking trade policy of import licensing requirements. Import licenses essentially reflect CONASUPO-determined quotas that reflect the size of the domestic harvest and the difference between domestic production and demand. CONASUPO also acted as the primary importer and distributor of basic foodstuffs. It controlled most of the milling, processing, and marketing industries and owned numerous retail outlets. Along with price controls, these activities provided subsidized, low-cost food for Mexican consumers.<sup>19</sup>

These agricultural policies were designed to promote the overall goal of agricultural self-sufficiency and were viewed as necessary to sovereign independence.<sup>20</sup> They also served the political purpose of a cheap food policy and a de facto rural development and employment program. These policies, however, resulted in depressed Mexican agricultural productivity and contributed to Mexico's status as a net food importer. Price support levels failed to provide increases in real producer prices (adjusted for inflation) and often fell below United States and world prices,<sup>21</sup> which negatively affected the productivity of Mexico's agricultural sector.

In addition, while the policy of guaranteed prices encouraged a diversity of staple crops, it discouraged production of exportable crops in which Mexico has a comparative advantage (such as horticultural products), thus resulting in a misallocation of agricultural resources.<sup>22</sup> Finally, subsidized consumer prices did not adequately curb inflation, and food prices rose. Imports, by necessity, were increased to manage prices which contributed to political stability.<sup>23</sup>

Beginning in 1983, Mexico began the process of reforming its agricultural policies as part of its overall effort to direct the economy towards international markets, eliminate excessive regulation and state intervention in the economy, and establish an environment to stimulate investment and private sector participation. The Mexican government reduced guaranteed prices on most commodities (except for the essential staples, corn

---

18. Kenneth Schwedel, *Will the Countryside Modernize?*, BUSINESS MEXICO, July 1991.

19. U.S. International Trade Commission Publication No. 2275, at 4-5 (Apr. 1990).

20. RIDING, *supra* note 12, at 194.

21. ANALYSIS OF LIBERALIZING TRADE, *supra* note 11, at 12.

22. EMBASSY OF MEXICO, THE MODERNIZATION OF THE MEXICAN AGRICULTURAL SECTOR 7-9 (1992) (on file with the *New Mexico Law Review*).

23. Impact of Liberalization, *supra* note 2, at 23.

and dry beans), reduced the role of and budgets for agricultural parastatals (particularly CONASUPO), and called for privatization of others.<sup>24</sup>

The relative inefficiency of Mexico's agricultural productivity, however, also is deeply rooted historically in Mexico's system of land tenure. The land system is the product of the 1910-1920 Mexican Revolution. The revolutionary tenet of "Land and Liberty" was based on peasant frustration with the accumulation of land and wealth by *latifundistas* (large landholders) and the Church.<sup>25</sup> The purpose of revolutionary agrarian reform was to discourage the consolidation of land in the hands of the few. Its modern by-product, however, is *minifundismo* (production on very small parcels) and the accompanying inefficient scales of production, low productivity, and low incomes.<sup>26</sup>

The primary framework for land tenure and ownership was established in the Agrarian Reform Act of 1915 ("Ley Agraria" or "Agrarian Law") and accorded protection in the Constitution of 1917, Article 27.<sup>27</sup> There are three types of land tenure: private property ("*pequeños propietarios*"), ejido lands, and communal lands (which are the least significant). The Mexican Constitution gave landless peasants the right to petition for and receive redistributed unused land ("*ejido*" land). "*Ejidatarios*" were permitted to utilize *ejido* land by either working individually on their plots within the *ejido* or working on the entire extension of land collectively.

*Ejidatarios*, however, lacked ownership and the important rights that attach. Agrarian Law essentially prohibited *ejidatarios* from entering into commercial transactions regarding production, including contracts for crop sharing, renting, or any other arrangement that would imply indirect exploitation of the land by third parties.<sup>28</sup> *Ejidatarios* had no ability to transfer rights in land. Agrarian Law also provided that *ejido* agrarian property rights were inalienable, unencumberable, untransferable, and therefore could not be sold, assigned, leased, or mortgaged.<sup>29</sup> Any contract entered into by individuals, or any act by a political subdivision or judicial body resulting in the deprivation of agrarian rights pertaining to *ejidos*, was null and void and could result in loss of ejidal rights for the farmer.

---

24. EMBASSY OF MEXICO, THE MODERNIZATION OF THE MEXICAN AGRICULTURAL SECTOR 7-9. Numerous state-owned enterprises (such as INMECAFE, AZUCAR S.A., and TABAMEX, coffee, sugar, and tobacco parastatals) "have withdrawn from production and distribution of agricultural products, and have been privatized or are exclusively involved in research, technical assistance and information services." *Id.* FERTIMEX and PRONASE, fertilizer and seed monopolies, "are now subject to private competition and an open border." *Id.* Banrural, which made agricultural loans nationwide through 13 branch banks and hundreds of local offices has been restructured so that farmers will be generally served by commercial banks; Banrural will focus on supporting low-income farmers. These changes are expected to weed out inefficient farming units and to create a more efficient, competitive, and market-driven farm sector.

25. RIDING, *supra* note 12, at 180.

26. EMBASSY OF MEXICO, THE MODERNIZATION OF THE MEXICAN AGRICULTURAL SECTOR 11.

27. MEX. CONST. art. 27.

28. *Id.* art. 76.

29. *Id.* art. 52.

In addition, Agrarian Law prohibited hiring external labor.<sup>30</sup> This prohibition discouraged consolidation of production and its accompanying efficiency. Instead, sixty percent of *ejido* land is farmed in five-hectare-or-less plots by individual *ejidatarios*, preferring the meager security of their plots.<sup>31</sup> Furthermore, seventy percent of *ejidos* are engaged in the production of staple crops and do not have the means to transfer to more profitable exportable crops. Indeed, the number of *ejidos* producing beans and corn has increased since liberalization of the price support system for other crops, diverting additional production resources to less advantageous production and potentially neutralizing the hoped-for benefits of the reform proposal.<sup>32</sup>

There are approximately 28,000 *ejidos*, involving more than twenty percent of Mexico's population. *Ejidos* vary in size and productivity. About twenty percent of *ejidos* have a good natural resource base (i.e., have access to irrigation or are in a beneficial growing region) and are as productive as private farms. Twenty percent of *ejidatarios* are subsistence farmers, who are poor but self-sufficient and would not be as substantially affected by market liberalizations. The remaining sixty percent may have a good natural resource base but, because of credit constraints and other ejidal limitations, they are unable to maximize productivity.<sup>33</sup>

Inefficiency in the *ejido* sector has important implications for Mexico's agricultural economy. Of Mexico's total agricultural acreage, forty-eight percent is under the jurisdiction of *ejidos*. There are approximately 28,000 *ejidos*, involving more than twenty percent of the population. Of the total irrigated agricultural land in Mexico (over five million hectares), half of it is under the jurisdiction of *ejidos*.<sup>34</sup>

In January 1992, Mexico reformed the *ejido* land system to permit collateralization, rental, and potential private ownership and sale of *ejido* land.<sup>35</sup> The reformed Article 27 of the Constitution authorizes laws to establish procedures whereby *ejidatarios* may associate with each other, with the State, or with third parties. Furthermore, they may grant the use of their lands, transfer their parcel rights between themselves, and obtain ownership of individual parcels.<sup>36</sup>

Specifically, *ejidatarios* are now authorized to rent *ejido* land for a renewable term of thirty years.<sup>37</sup> Moreover, they may participate in profit-

---

30. *Id.* art. 55.

31. EMBASSY OF MEXICO, THE MODERNIZATION OF THE MEXICAN AGRICULTURAL SECTOR 11.

32. Damian Fraser, *A Second Agricultural Revolution Under Way-Land Reform*, FIN. TIMES, Oct. 25, 1991, § VI.

33. Proposed Mexican Land Tenure Reforms 3 (Dep't Agric. Jan. 1992) (Report #MX1246, on file with Foreign Agric. Service, Washington, D.C.).

34. Roberta L. Cook & Kenneth Schwedel, *Mexico Frees Agricultural Investment*, 10 U.S.-MEX. FREE TRADE 1 (1991).

35. On January 6, 1992, the Federal Gazette published amendments to Constitutional Article 27, followed by publication of the new Agrarian Law on February 26, 1992.

36. MEX. CONST. art. 27, § VIII.

37. Agrarian Law, art. 45.

sharing joint venture associations wherein private investors (foreign or domestic) contribute capital, technology, and distribution infrastructure while *ejidatarios* group together to contribute land, labor, and familiarity with Mexican agriculture.<sup>38</sup>

The 1992 reforms in many ways merely legitimized the extralegal rental arrangements that had become commonplace.<sup>39</sup> The reforms are, however, an important political and legal step toward encouraging capitalization in the *ejido* sector by injecting certainty into legal relationships with *ejidatarios*. Now that contractual relations with *ejidatarios* have been legitimized, contractual disputes with *ejidatarios* will be subject to Mexico's commercial laws. In addition, the reformed Article 27 provides authority for the creation of an agrarian court for adjudication of claims involving boundary disputes, questions of land tenure and agrarian law, and establishes a National Agrarian Registry.<sup>40</sup> The National Agrarian Registry is an agency of the Secretariat of Agrarian Reform and is responsible for recording documents relating to land ownership and the ejidal rights created in reformed Article 27.<sup>41</sup>

Significantly, the 1992 reform also formally ends the revolutionary Constitution's land distribution agrarian reform.<sup>42</sup> This has important implications for private landholders; the threat of private property expropriation has in many instances prevented private land owners from making permanent improvements on their property and from entering into long-term investment ventures.<sup>43</sup> The 1992 reforms prohibit *latifundista* landholding by affirming the limitations placed on ownership of private property, thus more securely defining private property rights. Private landholdings are subject to limitations of 100 hectares (247 acres) of irrigated land for row crops, 300 hectares (720 acres) of irrigated land for orchards, and enough land to run 500 head of livestock.<sup>44</sup>

Finally, the 1992 reforms addressed the Article 27 prohibition on corporate farming, which was one of the most significant restrictions on Mexican agricultural productivity. Previously, Article 27 permitted only

---

38. Agrarian Law, ch. II.

39. The "Vaquerias project" is the prototype for ejidal joint ventures: In 1990, PepsiCo acquired Mexican cookie-maker Gamesa for \$320 million in 1990 and formed a \$12 million profit-sharing joint venture with ejidal farmers to grow beans, wheat, and corn in Nuevo Leon, in exchange for equipment and training. The Administrations of Portillo (1976-1982) and De la Madrid (1982-1988) rejected the Gamesa proposal, but the Salinas Administration extended political support. The project, however, potentially violated the Constitution's ejidal provisions; therefore, Gamesa and the *ejidatarios* established a separate company (Dicamex) to oversee the project. Constitutionality questions persisted but are now fully settled by the present reforms.

40. MEX. CONST. art. 27, § XIX. Agrarian Reform Law establishes the Office of Attorney General for Agrarian Affairs, which is charged with defending the rights of *ejido* members, communal farm members, small land holders, *ejido* residents, and agricultural workers. Agrarian Law, tit. 7. Prior to the creation of this agrarian judicial forum, ejidal property disputes were handled administratively by the Secretariat of Agrarian Reform (SRA).

41. Parties to agreements formed with *ejidatarios* before Article 27 reform must register these pre-existing agreements with the National Agrarian Registry to make them presently enforceable.

42. Agrarian Law, tit. X (repealed 1992).

43. EMBASSY OF MEXICO, THE MODERNIZATION OF THE MEXICAN AGRICULTURAL SECTOR 11.

44. MEX. CONST. art. 27, § XV.

individuals (*personas fisicas*) to own the means of agricultural production. The 1992 reforms permit stock-issuing corporations to farm (including foreign corporations, subject to certain limitations) up to a maximum landholding limit of 2,500 hectares (twenty-five times that of an individual landholder).<sup>45</sup>

Title 6 of the reformed Agrarian Law provides that a corporation which owns agricultural land must issue capital stock, called "Series T" stock, which represents the market value of the land at the time of purchase.<sup>46</sup> At least as many individuals as the number of times the lands of the corporation exceed the small individual property limits shall participate in the corporation or partnership.<sup>47</sup> At the same time, the participation of an individual in landholding corporations is cumulative; an individual may not have equity participation in more than the individual property limits when all investments are considered. Likewise, no corporation may hold more shares or corporate interest of Series T stock, either from one or several issuing corporations, than the equivalent of 2,500 hectares (twenty-five times the individual limit).<sup>48</sup> Foreign investors may own up to forty-nine percent of Series T stock.<sup>49</sup>

### C. *Existing Barriers to Agricultural Trade Between the United States and Mexico*

Tariffs are the main agricultural import barrier utilized by the United States. While United States import duties on agricultural products are relatively low, the United States maintains higher seasonal tariffs on fruit and vegetables to limit imports from Mexico during the main marketing period for United States produce. United States tariffs on horticultural products and orange juice imports range from zero to thirty-five percent ad valorem.

The United States imposes quantitative restrictions on various agricultural imports pursuant to Section 22 of the Agricultural Adjustment Act of 1933,<sup>50</sup> including sugar and sugar-containing products, cotton, peanuts, and dairy products. Section 22 authorizes quotas or fees on imported products whenever they undermine or interfere with United States domestic commodity programs, notwithstanding any trade or other international agreement.<sup>51</sup>

Mexico's unilateral trade liberalizations pursuant to its 1986 GATT membership have resulted in a reduced share of United States agricultural exports subject to Mexico's import licensing requirements and reduced minimum tariff rates. In 1991, licensing requirements on agricultural

---

45. *Id.* art. 27, § IV.

46. Agrarian Law, tit. 6, art. 126(III).

47. *Id.* tit. 6, art. 126(I).

48. *Id.* art. 129.

49. *Id.* art. 130.

50. 7 U.S.C. §§ 624 (1980).

51. The United States has received a GATT waiver that exempts Section 22 from compliance with GATT rules.

products remained on twenty-six percent of United States exports (the top ten United States agricultural exports), down from fifty-seven percent in 1988.<sup>52</sup> The 1990 tariff equivalents of the import licenses for corn and wheat, however, were estimated to be seventy-three percent and fifty percent, respectively—a considerable trade barrier.<sup>53</sup>

About forty percent of the imports from Mexico enter free of duty, and the remainder are dutiable at a trade-weighted average rate of about seven percent ad valorem. Mexico's trade-weighted tariff on United States agricultural products averages about eleven percent.<sup>54</sup> As Mexico has eliminated licensing requirements, however, it has raised tariffs in response to market disruptions in some cases.<sup>55</sup>

Both Mexico and the United States apply phytosanitary requirements (measures to protect animals and plants from diseases and pests) to domestic and imported products. Some Mexican fruit crops and livestock have faced restricted access to the United States because their history of pest infestation posed a threat to United States production.<sup>56</sup> Mexico would like more aggressive United States action in responding to improvements in Mexican production conditions and faster market access for Mexican products that no longer pose a threat.

Mexican horticultural producers argue that United States marketing orders impede trade because Mexican producers often do not receive adequate notice of changes in United States grade or standard requirements.<sup>57</sup> Marketing orders, established under the Agriculture Marketing Agreement Act of 1937,<sup>58</sup> set national guidelines for product quality, market promotion, and supply levels. The most significant items for Mexico affected by marketing orders include tomatoes, onions, avocados, grapefruit, oranges, olives, and table grapes.

Mexico similarly has plant and animal health regulations and certificate requirements that affect imports of American products and livestock.

---

52. "As of January 1991, licenses were required for a small number of commodities: corn for food use, wheat, poultry, eggs, nonfat dry milk, some cheeses, day-old chicks, potatoes, grapes, apples, peaches, coffee, barley, malt, lard, flue-cured tobacco and cigars." MARY E. BURFISHER ET AL., *TRADE IMPACTS ON THE U.S. AND SOUTHERN AGRICULTURE* 4 (1992).

53. *Id.*

54. The Likely Impact on the United States of a Free Trade Agreement with Mexico, Pub. No. 2353, at 4-3 (U.S. Int'l Trade Comm'n Feb. 1991) (report to the Committee on Ways and Means of the United States House of Representatives and the Committee on Finance of the United States Senate on Investigation No. 332-297 Under Section 332 of the Tariff Act).

55. BURFISHER ET AL., *supra* note 52, at 4.

56. Mexican avocados are completely banned from the United States due to seed weevil infestation. Mexican orchard crops have faced restricted access to the United States due to citrus canker and the prevalence of the Mediterranean and Mexican fruit flies in some growing areas. Feeder cattle imported from Mexico must be accompanied by a health certificate from a Mexican government veterinarian. Most other live animal imports from Mexico are banned because they allegedly carry diseases which do not exist in the United States. Live Mexican swine have been prohibited since 1976 due to hog cholera infection. Mexican poultry have been prohibited due to Exotic New-Castle disease, and Mexican sheep and goats have been prohibited because of scrapies. U.S.-Mexico Trade: Trends and Impediments in Agricultural Trade, GAO/NSIAD-90-85BR, at 15-16 (U.S. Gen. Accounting Office Jan. 1990) [hereinafter *Trends and Impediments*].

57. U.S. International Trade Commission Publication No. 2275, at 2-3 (Apr. 1990).

58. 6 U.S.C.A. § 608e-1 (1980).

United States exporters usually have little difficulty meeting Mexico's requirements. Unexpected changes in the requirements and lengthy administrative procedures, however, have produced problems for United States exporters in the past.<sup>59</sup> For example, in December 1991, Mexico temporarily closed its border to the importation of hogs from the United States for animal health reasons. United States agricultural policy-makers termed the action unjustified and called for an effective health and phytosanitary dispute mechanism in the North American Free Trade Agreement ("NAFTA").<sup>60</sup>

Finally, limited border processing facilities also present barriers to trade. Agricultural trade competes with commercial trade for border administrative and infrastructure resources, which can result in agricultural losses due to perishability. Inadequate rail, highway, and port facilities, and lack of adequate storage and warehousing, also act as barriers to trade and as limitations to potential growth in agricultural trade.<sup>61</sup>

## II. THE NORTH AMERICAN FREE TRADE AGREEMENT AND AGRICULTURE

### A. *Provisions of NAFTA Affecting Agriculture*

#### 1. Scope

Mexico negotiated separate agricultural market access agreements with the United States and Canada. The United States and Mexico have agreed to eliminate tariffs and non-tariff barriers in agriculture over a fifteen-year transition period. The U.S.-Mexico agricultural agreement is comprehensive. There are no exclusions.<sup>62</sup>

The NAFTA agricultural provisions contain trilateral provisions concerning internal supports, export subsidies, and dispute resolution. Trade restrictions applied by the three NAFTA countries to imports from all other countries will remain unchanged, unless modified by a subsequent GATT agreement.

#### 2. Elimination of Tariff and Non-Tariff Barriers

Non-tariff barriers (most notably Mexico's import licensing requirements and United States Section 22 import quotas) will be converted into tariffs

---

59. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, Pub. No. 2326, at 2-4 (U.S. Int'l Trade Comm'n Oct. 1990) (Phase II: Summary of Views on Prospects for Future United States-Mexico Relations).

60. See North American Free Trade Agreement, Oct. 7, 1992 draft, U.S.-Mex.-Can., art. 707 [hereinafter NAFTA].

61. Trends and Impediments, *supra* note 56, at 17.

62. Mexico and Canada reached a similar separate agreement on agricultural market access. NAFTA, *supra* note 60, annex. 704.2, § 2. Nonetheless, tariffs and non-tariff barriers between Mexico and Canada affecting trade in dairy, poultry, and eggs will be maintained. These exceptions are the product of Canada's political sensitivity to liberalization of these production-controlled products. Tariffs on sugar also will be maintained. Agricultural trade between the United States and Canada will continue to be governed by the 1989 U.S.-Canada Free Trade Agreement.

("tariffication"). All agricultural tariffs will be phased out within fifteen years, according to the following transition schedule:<sup>63</sup>

*Transition Category A:* Immediate tariff elimination, effective January 1, 1994. Products in this category comprise almost half of current U.S.-Mexico agricultural trade. They either are already duty-free or subject to very low tariffs. About \$1.6 billion in Mexican exports, and about \$1.5 billion in U.S. exports to Mexico, will fall into this tariff-free category.<sup>64</sup> The United States will eliminate immediately sixty-one percent of its tariffs on agricultural exports from Mexico; Mexico will eliminate thirty-six percent of its tariffs on United States agricultural exports. In addition, the United States will eliminate tariffs on some items during months in which Mexican-produced products do not compete with the same products grown in the United States.<sup>65</sup>

*Transition Category B:* Five-year transition. Products in this category include items not highly sensitive but which require a market adjustment period. Generally, tariffs will be phased out in equal annual increments. The United States will place approximately \$177 million of Mexican imports in this category, six percent of Mexico's agricultural exports. Mexico will include about \$131 million in United States products, approximately three percent of United States agricultural exports.<sup>66</sup>

*Transition Category C:* Ten-year transition. These items are considered trade-sensitive. They are subject to annual incremental tariff reductions. The United States placed about \$375 million of Mexican exports in this category and Mexico included about \$875 million of United States exports.<sup>67</sup>

*Transition Category C+:* Fifteen-year transition. A fifteen-year tariff phase-out, taken in equal annual increments, is applied to products considered very sensitive. Mexico has no items in this category. The United States placed mainly selected fruits, citrus, and vegetables in the category, accounting for about \$75 million in exports from Mexico.<sup>68</sup>

*Transition Category C & Tariff Rate Quota Protection:* Fifteen-year transition with safeguard. A special set of rules based on a tariff rate quota ("TRQ") mechanism have been devised to safeguard highly import-sensitive items. The TRQ will be applied over either a ten- or fifteen-year transition period, depending on the sensitivity of the item. There are two basic types of TRQs, which have been further modified for sugar, frozen concentrate orange juice, and regular orange juice.<sup>69</sup> The first type of TRQ is formulated for commodities with existing non-tariff

---

63. NAFTA, *supra* note 60, annex 302.2.

64. *Report of the Agricultural Policy Advisory Committee for Trade (APAC) On the North American Free Trade Agreement 4* (Sept. 1992).

65. The products include cucumbers, eggplants, asparagus, melons, strawberries, cherry tomatoes, peas, and watermelons. NAFTA, *supra* note 60, annex 703.2.

66. Report of APAC, *supra* note 64, at 4.

67. *Id.*

68. *Id.*

69. *Id.*

barriers, such as Section 22 commodities<sup>70</sup> and commodities under Mexico's licensing requirements.<sup>71</sup> This TRQ is based on a duty-free quota which increases over the transition period. The over-quota tariff, which is established in NAFTA and reflects the current value of the non-tariff barrier, is phased out to zero over the ten- or fifteen-year transition period.

The second type of TRQ protection contained in the tariff schedule is formulated for commodities with existing tariffs.<sup>72</sup> For this TRQ, the quota amount reflects the present level of trade and will grow annually, generally at three percent. The amounts imported within the increasing quota amount will be subject to preferential NAFTA tariff rates, which will be phased out over the transition period. Amounts imported over-quota will be subject to the prevailing tariff at the time the agreement is signed or to the most favored nation rate, whichever is lower. The protective over-quota tariff is not phased down over the transition, but becomes zero at the end of the transition period. Within the ten-year transition Category C, the United States placed under TRQ protection about \$330 million of Mexican exports, equaling fifteen percent of Mexico's agricultural exports to the United States.<sup>73</sup> Mexico requested inclusion of seventeen items exported by the United States, valued at \$100 million.<sup>74</sup>

The United States and Mexico included their most trade-sensitive items under Category C+ TRQ protection. Mexico included corn, dry beans, and milk powder,<sup>75</sup> representing approximately \$208 million in United States exports.<sup>76</sup> Most notably, the negotiated market access for United States corn exports is 2.5 million metric tons in the first year of implementation; the over-quota tariff equals 215%, and will be reduced twenty-four percent in the first six years, then reduced to zero in the following nine years. The United States included about \$45 million in imports from Mexico in this protective category,<sup>77</sup> including sugar, peanuts, frozen concentrate orange juice ("FCOJ"), and orange juice not concentrated.

Additional special rules were negotiated for sugar and FCOJ. The quota amount of FCOJ entering the United States from Mexico—40 million gallons at fifty percent of the current most favored nation ("MFN") tariff—will not be increased over the fifteen-year transition period. The over-quota tariff on FCOJ will decline fifteen percent over the first six

---

70. *Id.* at 5. These include dairy, peanut, cotton, and sugar and sugar-containing products. See NAFTA, *supra* note 60, annex 302.2, § A (Schedule of the United States; Tariffication Parameters).

71. Report of APAC, *supra* note 64, at 5. These include most notably corn, poultry, dried beans, potatoes, eggs, barley, malt, animal fats, and milk powder. See NAFTA, *supra* note 61, annex 302.2 § B (Schedule of Mexico; Tariffication Parameters).

72. Report of APAC, *supra* note 64, at 5.

73. *Id.* These exports consist mainly of fruits and vegetables.

74. *Id.* These items consist mainly of pork, potatoes, and apples.

75. *Id.*

76. *Id.*

77. *Id.*

years, stay constant from year seven to year ten, and then will be phased out in equal installments over the remaining five years.<sup>78</sup>

Sugar from Mexico imported under the existing quota (7,258 metric tons) will immediately become duty-free and the sixteen-cent over-quota tariff will be reduced by fifteen percent during the first six years. If Mexico is projected to become a net exporter of sugar (i.e., producing more sugar than it consumes domestically), the United States will increase Mexico's share of the overall quota to the amount during years one through six, up to a maximum of 25,000 metric tons. In year seven, the United States will begin reducing the above-quota tariff on a straight line to zero over the next eight years. If Mexico is projected to be a net exporter, the United States will increase its quota to the amount by which it is a net exporter up to 150,000 metric tons. This 150,000 ton limit will be increased by ten percent each year and will be waived permanently if Mexico is a net exporter for two consecutive years. Mexico will align its tariff regime with that of the United States by the end of year six, implementing a tariff quota with rates equal to those of the United States. The United States sugar re-export program will remain in place between the United States and Mexico, permitting duty-free access where one party imports raw sugar from the other, refines it, and then re-exports it back to the producing country.<sup>79</sup>

### 3. Safeguards

The Emergency Action provisions<sup>80</sup> apply to all commodities which do not have specific tariff-rate quotas to protect against import surges during tariff phase-out. The Chapter 8 emergency action safeguard suspends further tariff reductions and re-establishes a rate not less than the MFN rate. An injured party is required to provide a written request for a proceeding to initiate emergency action; emergency action must take place within a year of the proceeding.<sup>81</sup> Generally, the action may be maintained for a maximum of three years and no actions may be brought after the transition period.<sup>82</sup> The safeguard may be used against a particular good only once during the transition period.<sup>83</sup>

### 4. Subsidies

NAFTA parties may utilize export subsidies against competition from non-NAFTA countries. NAFTA parties may introduce an export subsidy on exports of an agricultural good to another NAFTA country following three days' notice and consultations with that country. Each party maintains its right to apply countervailing duties to subsidized agricultural

---

78. NAFTA, *supra* note 60, annex 302.2, § C (Schedule of the United States; U.S. Orange Juice Tariff Reduction Schedule).

79. *Id.* annex 703.2, § A.

80. *Id.* ch. 8.

81. *Id.* art. 801, ¶ 2 (Bilateral Actions).

82. *Id.*

83. *Id.*

imports from any source, including NAFTA parties. A trilateral NAFTA Working Group on Agricultural Subsidies is established to meet at least semi-annually to review subsidy issues.<sup>84</sup> While no changes in domestic agricultural subsidies are required of any of the NAFTA countries, the Agreement does require participants to endeavor to move toward domestic policies that have "minimum or no trade distorting or production effects."<sup>85</sup>

### 5. Rules of Origin<sup>86</sup>

Rules of origin are intended to prevent non-NAFTA countries from benefiting from the preferential tariff treatment afforded by NAFTA. United States agricultural interests are particularly concerned that Mexico would be used as an export platform for products from other countries, particularly through Mexico's growing food processing industry. Generally, the agricultural rules of origin provisions utilize the U.S.-Canada Free Trade Agreement *de minimis* rule, which allows products to receive NAFTA tariff treatment as long as foreign ingredients make up less than seven percent of the value of the commodity.<sup>87</sup> Note, however, that all bulk agricultural commodities and certain processed products—including orange juice, cheese, and peanut products—are exempt from the *de minimis* provisions and 100% NAFTA origin is required. Furthermore, processing of certain products (e.g., vegetable oils, sugar) will not be sufficient to confer NAFTA origin. The rules of origin are permanent and are not given a transition status.

### 6. Marketing Orders

United States marketing orders on fruits and vegetables are maintained in NAFTA. The Agreement provides that, as between the United States and Mexico, no less favorable treatment will be given to agricultural imports than is provided for domestic agricultural products with regard to classification, grading, or marketing provisions.<sup>88</sup> A U.S.-Mexico Working Group will meet at least once a year to review the operation of grade and quality standards and to resolve issues which may arise.<sup>89</sup>

### 7. Health and Sanitary Standards<sup>90</sup>

Each NAFTA country preserves its right to establish sanitary and phytosanitary measures based on risk assessment and scientific principles which may be higher than international standards. Measures may be applied only to the extent necessary to provide a country's chosen level

---

84. *Id.* art. 705, ¶ 6 (Export Subsidies).

85. *Id.* art. 704 (Domestic Support).

86. *Id.* ch. 4.

87. *Id.* art. 405, ¶¶ 1-2 (*De Minimis*).

88. *Id.* annex 703.2, § A, pt. 23.

89. *Id.* annex 703.2, § A, pt. 25. Mexico and Canada will have a similar working group. *Id.* annex 702.3, § B, pt. 13.

90. *Id.* ch. 7, § B.

of protection and may not result in unfair discrimination or a disguised restriction on trade.<sup>91</sup>

The Agreement requires that parties provide adequate information on proposed phytosanitary measures. State and local governments, which may maintain scientifically-based health and sanitary regulations, must do the same.<sup>92</sup> Without reducing the level of protection for human, animal, or plant life, NAFTA parties must pursue equivalence of their respective sanitary and phytosanitary measures, using international standards as a basis for their sanitary and phytosanitary standards to the greatest extent practicable.<sup>93</sup>

The agreement outlines requirements regarding a party's sanitary and phytosanitary control and procedures for inspection and import approval. Generally, a party must provide another NAFTA party adequate information and advance notice of the procedure, and the Agreement establishes guidelines to ensure procedures are fair and expeditious.<sup>94</sup> A Committee on Sanitary and Phytosanitary Measures is established to facilitate standard equivalence and technical cooperation between the parties.<sup>95</sup> The Committee is authorized to consider disputes regarding a party's sanitary or phytosanitary measures that may be disguised trade barriers.<sup>96</sup>

#### 8. Commercial Dispute Resolution<sup>97</sup>

A trilateral advisory committee (the North American Free Trade Commission) is established to supervise implementation of the Agreement and to oversee dispute resolution. It will be made up of the principal trade officers of each of the three countries.<sup>98</sup> Generally, parties may resort to either the GATT or the NAFTA dispute resolution mechanism; however, once a forum is chosen it must be used to the exclusion of the other.<sup>99</sup>

When a dispute arises, the complaining party initiates consultations. Consultations on matters regarding perishable agricultural goods must commence within fifteen days of the request for consultations.<sup>100</sup> If within thirty days the dispute has not been settled between the parties, a meeting of the Commission may be called wherein it mediates and makes recommendations regarding resolution.<sup>101</sup> If within thirty days the Commission has not settled the dispute, a complaining party may request an arbitration panel.<sup>102</sup> Whenever possible, the resolution contained in the

---

91. *Id.* art. 712.

92. *Id.* art. 718.

93. *Id.* art. 714.

94. *Id.* art. 717.

95. *Id.* art. 722.

96. *Id.* art. 723.

97. *Id.* ch. 20.

98. *Id.* art. 2001.

99. *Id.* art. 2005 (GATT Dispute Settlement).

100. *Id.* art. 2006 (Consultations).

101. *Id.* art. 2007 (Commission Good Offices, Conciliation, and Mediation).

102. *Id.* art. 2008 (Request for an Arbitral Panel).

panel's report shall be non-implementation or nullification of a measure not conforming with the Agreement; failing such a resolution, compensation is available.<sup>103</sup>

The Agreement provides for alternative commercial dispute resolution and establishes an Advisory Committee on Private Commercial Disputes.<sup>104</sup> The Committee will work toward a system for resolving private commercial disputes that arise in connection with transactions in agricultural goods, with special emphasis on perishability of the goods involved.<sup>105</sup> In addition, the Agreement establishes a trilateral Committee on Agricultural Trade to monitor and consult upon the implementation of provisions in Subchapter 7 (agriculture) pertaining to market access.<sup>106</sup>

### *B. Effect of NAFTA on Agriculture in the United States and Mexico*

With certain significant exceptions, United States agriculture will benefit from NAFTA. By the end of the fifteen-year transition, annual United States agricultural exports likely will be \$1.5 to \$2.0 billion higher than they would be without NAFTA. In addition, United States gains will come without need for production adjustments or efficiency enhancement.<sup>107</sup> The United States Department of Agriculture estimates that if recent levels of protection are removed, United States agriculture exports to Mexico would increase by one-third, while Mexico's agricultural exports to the United States would expand one-fifth by the end of the implementation period.<sup>108</sup> Thus, trade in agriculture tends to favor the United States. The full benefits of expanded agricultural exports, however, are premised on Mexico's continued economic development and increased disposable income resulting from NAFTA.

The benefits of free trade in the grain and bulk commodities sector flow almost entirely to the United States. Immediate tariff-free access for 2.5 million metric tons of corn and Mexico's commitment to achieve free trade in this highly sensitive commodity is extremely beneficial to United States grain producers and also gives United States products an important advantage over other competitive grain exporting countries, except Canada. At the end of the fifteen-year transition period, United States exports of corn to Mexico will likely be about six million metric tons. This is almost fifteen percent above the level which would occur without NAFTA. United States producers of wheat, barley, and sorghum will benefit to a lesser degree.<sup>109</sup>

---

103. *Id.* art. 2018 (Implementation of Final Report).

104. *Id.* art. 707 (Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods).

105. *Id.*

106. *Id.* art. 706 (Committee on Agricultural Trade).

107. FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC. NORTH AMERICAN FREE TRADE AGREEMENT FACT SHEET (1992).

108. U.S. DEP'T OF AGRIC., AGRICULTURE IN THE NORTH AMERICAN FREE TRADE AGREEMENT: ANALYSIS OF LIBERALIZING TRADE BETWEEN THE UNITED STATES AND MEXICO 13 (1992).

109. OFFICE OF ECONOMICS, U.S. DEP'T OF AGRIC., PRELIMINARY ANALYSIS OF THE EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT ON U.S. AGRICULTURAL COMMODITIES 2-3 (1992).

In addition, United States exports of high value foods (i.e., meat and poultry products, dairy products and snack foods) are expected to increase. These projections are based on expected expansion of Mexico's developing middle class. Because the United States already has a major share of the Mexican market, further increases in United States sales depend on the growing size of this group. Increased incomes in Mexico will result in enhanced consumer tastes for a diversity of value-added products, which previously would have been subject to higher tariffs.<sup>110</sup>

Liberalization of Mexico's grain sector has the potential for substantially reducing corn prices in Mexico, which historically has held its domestic corn prices seventy percent above world prices (allowing for transport costs and quality differential) through import controls.<sup>111</sup> A recent study at the University of Pennsylvania Center for Energy and the Environment indicates that "[w]hen prices decrease, the [smaller] farmers' income drops at a rate 20% faster because of the farmers' decreased ability to finance production."<sup>112</sup> Furthermore, liberalization pits prodigious United States corn and grain producers against their less efficient Mexican counterparts, whose costs of production are markedly higher and who do not have the benefit of domestic subsidy programs.

As a result, Mexico potentially faces substantial rural worker displacement over the transition to liberalized agriculture markets and production, which has important implications for illegal immigration in the United States. Up to 700,000 workers are predicted to be displaced by agriculture modernization. This implies a migration of between one and five million people, given the average rural family size.<sup>113</sup> Mexico's essential task will be to create enough industrial jobs to absorb dislocated rural workers while also modernizing its agricultural sector with adequate infrastructure and technology and encouraging transition from staple to exportable crops. NAFTA is expected to assist this effort by lowering trade barriers for United States farm machinery, pesticides, fertilizers, and other supplies and by encouraging capital flows to Mexico, both in agriculture and throughout the economy.<sup>114</sup>

Trade in the horticultural sector is strongly in Mexico's favor. Elimination of tariffs and non-tariff barriers is expected to generate significant increases in United States imports of horticultural products from Mexico. This is primarily due to cost advantages Mexican producers have relative to United States growers and processors.<sup>115</sup> These cost advantages stem from lower labor costs, and from fewer environmental regulations and

---

110. FOREIGN AGRIC. SERVICE, U.S. DEP'T OF AGRIC., MEXICO: THE MARKET FOR U.S. FOOD AND FARM PRODUCTS 2 (1992).

111. Santiago Levy & Sweder van Wijnbergen, Transition Problems in Economic Reform: Agriculture in the Mexico-U.S. Free Trade Agreement 2 n.1 (Dec. 1991) (unpublished World Bank report; on file with *New Mexico Law Review*).

112. Mark Bernstein & Daniel Haling, *Mexico Farmers Must Own Land to Compete*, HOUSTON CHRONICLE, Feb. 21, 1992, at B11.

113. Levy & Wijnbergen, *supra* note 111, at 24.

114. Ronald Schmidt & William Gruben, *Ejido Reform and the NAFTA*, FED. RESERVE BANK OF SAN FRANCISCO WKLY LETTER, Oct. 2, 1992, at 2.

115. U.S. International Trade Commission Publication 2353, *supra* note 54, at 4-3.

worker safety protection laws than United States growers and processors face.<sup>116</sup>

Some of Mexico's horticultural production is complementary to United States production.<sup>117</sup> United States producers of citrus and winter fruits and vegetables, however, are in direct competition with their Mexican counterparts. United States producers of these products indicate that NAFTA's transition provisions do not afford adequate protection from economic injury. For example, Florida citrus producers argue that the fifteen-year transition period for tariff elimination will not allow them to recoup their substantial investment in rebuilding Florida's citrus industry in the wake of freezes in the 1980s. Over 400,000 acres of citrus have been replanted since 1988. Florida citrus growers estimate that, without ensuing price deterioration due to tariff reductions or without any natural adversities, it would take a Florida grower who financed planting sixteen to seventeen years to recover investment and twenty to twenty-one years to make a ten percent return on investment.<sup>118</sup> These producers oppose NAFTA's immediate fifty percent reduction in tariffs for current import levels of frozen concentrate orange juice imports, and urge maintaining current tariffs for twenty years.<sup>119</sup>

United States winter vegetable producers will face increased Mexican exports of cucumbers, bell peppers, fresh and frozen broccoli, fresh tomatoes, fresh asparagus, and melons. These producers argue that the fifteen year phase-out for import-sensitive vegetables should be expanded to twenty years.<sup>120</sup> In addition, Florida vegetable growers would like to see the category for import-sensitive vegetables expanded to include more items.<sup>121</sup> Finally, United States fruit and vegetable producers recommend modifying the tariff rate quota safeguard to account for decreases in prices, rather than just for increases in imports, in triggering higher protective tariffs.<sup>122</sup>

---

116. Florida workers can earn more in one hour than Mexican workers do in an entire day. In addition, Mexican producers are not saddled with other labor benefits such as high Minimum Wage laws, Social Security, Workers' Compensation, unemployment insurance, and in many cases, health insurance. Additionally, there is considerable cost of compliance to U.S. producers caused by the Migrant & Seasonal Farm Worker Protection Act, Housing and Field Sanitation regulations, the Occupational Safety & Health Act, Child Labor laws, the 1986 Immigration Reform and Control Act, Motor Carrier Safety laws, the Hazardous Communications Act and various state and federal discrimination and Human Rights Acts.

*Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means* (1990) (written statement of Frank Bouis, President, The Florida Fruit and Vegetable Association).

117. See U.S.-Mexico Trade: The Extent to Which Mexican Horticultural Exports Complement U.S. Production, GAO/NSIAD-91-94BR, (U.S. Gen. Accounting Office Mar. 1991).

118. David B. Land, Statement Before the House Committee on Agriculture 2 (Sept. 23, 1992) (transcript on file with *New Mexico Law Review*).

119. Ron Hamel, Statement Before the House Committee on Agriculture (Sept. 23, 1992) (transcript on file with *New Mexico Law Review*).

120. Jack Pope, Potential Impact on the U.S. Economy and Selected Industries of the North American Free Trade Agreement 3 (Nov. 9, 1992) (statement on behalf of the Western Growers Association to the International Trade Commission; on file with *New Mexico Law Review*).

121. Land, *supra* note 118, at 6.

122. Jodean Bens, Statement on Behalf of the United Fresh Fruit and Vegetable Ass'n Before the U.S. Int'l Trade Comm'n 3 (Nov. 17-19, 1992) (transcript on file with *New Mexico Law Review*).

The United States will benefit from the agreement in certain horticultural products. These products include non-citrus fruit and certain vegetables (notably potatoes), which often do not grow as well in Mexico's climate or are currently subject to high import barriers. United States fresh peach, apple, and pear exports to Mexico are expected to double by the end of the transition period.<sup>123</sup>

The ultimate impact of free trade on the import-sensitive sector of the United States horticultural industry will depend on a number of factors. The first of these factors is Mexico's ability to expand horticultural production as it scales back production of bulk commodities. Progress will be based to a large degree upon responsiveness to recent constitutional reforms. In the immediate term, the *ejido* reforms may have only limited effect on land rentals since *ejidatarios* in many areas have been renting their land for several years. In the medium term, however, more *ejidatarios* will view their land as an income-generating asset and will augment their income by renting their land and taking off-farm employment. The market for land could be flooded with offers, thus driving down rents to attractive levels. In addition, there likely will be some increase in the size of land holdings among small landowners.<sup>124</sup> Historically, individuals have successfully circumvented individual property limitations through partnerships and family holding arrangements. Limitations, however, now may be more rigorously enforced.<sup>125</sup>

Another factor to consider in Mexico's agricultural modernization is the extent to which infrastructure will be enhanced. NAFTA promotes Mexican railroad reform by permitting United States companies to own and operate terminals and other facilities as well as to finance the building and upgrading of tracks and the construction of spur lines.<sup>126</sup> Also, NAFTA will permit United States trucking companies to obtain operating authority from the Mexican government for carriage of international cargo in Mexico. The Agreement provides for transportation access to Mexican border states within three years of implementation, and to all states within six years.<sup>127</sup> Increased efficiency and decreased congestion, especially at the border, is expected.

Mexico is also engaged in privatization and capitalization of its ports. The privatization will take the form of granting concessions to allow private companies to own and operate warehouses and docks, or of permitting long-term leasing of terminals and other facilities. Puertos Mexicanos (a division of the Communications and Transportation Ministry responsible for port planning, maintenance, and construction) reports

---

123. OFFICE OF ECONOMICS, U.S. DEP'T OF AGRIC., PRELIMINARY ANALYSIS OF THE EFFECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT ON U.S. AGRICULTURAL COMMODITIES 14 (1992).

124. Proposed Mexican Land Tenure Reforms 6-7 (Dep't Agric. Jan. 1992) (Report #MX1246, on file with Foreign Agric. Service, Washington, D.C.).

125. Roberta L. Cook & Kenneth Schwedel, *Mexico Frees Agricultural Investment*, 10 U.S.-MEX. FREE TRADE 2 (1991).

126. NAFTA, *supra* note 60, annex II (Schedule of Mexico).

127. *Id.*

more than thirty-four bids for private investment. Investment is already underway at the Gulf port of Vera Cruz and the Baja port of Ensenada.<sup>128</sup>

United States sugar producers are concerned about the impact of NAFTA, particularly Mexico's potential ability to ship its total exportable surplus of sugar to the United States duty-free in year seven of the fifteen-year tariff phase-out. This would require Mexico to become a net exporter of sugar, which may be possible if Mexico converts its soft drink industry to high fructose corn syrup ("HFCS"), as the United States soft drink industry did in the 1980s. This would potentially free up at least one half million tons of sugar for export to the United States. Under a possible NAFTA scenario envisioned by a recent USDA study, Mexico's annual sugar production could increase to 5.2 million tons by 1996, while domestic consumption could fall below four million tons per year (due to use of HFCS in soft drinks). A surplus of 1.2 million metric tons could result by 1996, which nearly equals the entire 1.23 million ton United States sugar import quota for all sugar exporting countries.<sup>129</sup> Such a level of trade would have a substantial impact on the United States sugar program and possibly could require a reduction of imports from other sugar suppliers (such as Caribbean countries). These countries voiced their concern in this regard throughout NAFTA negotiations.<sup>130</sup>

The United States sugar industry is requesting several modifications of the negotiated agreement, particularly inclusion of HFCS in consumption calculations for determining "net exporter" status.<sup>131</sup> Mexico rejected this suggestion during NAFTA negotiations and the United States was unwilling to offer concessions in other areas to change Mexico's position.<sup>132</sup>

United States dairy, cotton, and peanut producers have raised competitive concerns regarding NAFTA; however, their main objection to the Agreement is the erosion of Section 22 authorities. Some agricultural policy-makers have argued that Section 22 issues instead should be negotiated in the context of GATT.<sup>133</sup> Given the NAFTA tariffication of

---

128. J. COMMERCE, Dec. 2, 1991, at 1B.

129. According to a recent study published by Cleveland Consulting Associations, 87% of 190 executives (representing 170 companies) indicated that their countries are already doing business in Mexico. Of these 170 companies, 58 are food-processing companies and 38 are Fortune 500 companies. The study found that 85% of the respondents cited access to the 81 million-person Mexican consumer market as the greatest benefit of free trade with Mexico, while only 13% listed operating efficiencies as their top priority. Charles Morris, *Americanada: Its Impact on Food*, FOOD ENGINEERING, July 1992, at 65.

130. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., LATIN AMERICA'S BIG THREE SUGAR PRODUCERS IN TRANSITION: CUBA, MEXICO, BRAZIL 20 (1992).

131. Letter from CBI Sugar Group to the Honorable Joe O'Mara, Deputy Undersecretary of Agriculture (July 13, 1992).

132. Other modifications sought by the sugar industry include: 1) calculating "surplus producer" on the basis of verifiable history instead of projection, as currently provided; 2) incorporating U.S. market access limitation; and 3) extending ten-year tariff phaseout for refined sugar and sugar containing products to fifteen-year transition. Thomas A. Hammer, Report of the Agricultural Technical Advisory Committee for Trade in Sweeteners on the North American Free Trade Agreement (Sept. 1992) (on file with *New Mexico Law Review*).

133. Ann M. Veneman, Deputy Secretary of Agriculture, Testimony Before the Senate Finance Comm. 10 (Sept. 30, 1992).

Section 22 quotas, however, these industries chiefly are concerned with strict enforcement of rules of origin to preserve the integrity of the Section 22 quotas for non-NAFTA countries.<sup>134</sup>

### III. OUTLOOK FOR INVESTMENT IN MEXICO'S AGRICULTURAL SECTOR

The most important factor driving investment in and development of Mexico's agriculture sector will be whether markets expand. Increased sales to the growing Mexican market may be an important factor in attracting foreign investment and expanding production. Direct investment in Mexico by United States processors helped boost Mexican affiliate export sales to \$1.5 billion in 1991; however, Mexican affiliate sales within Mexico were \$4.1 billion, three times higher than exports.<sup>135</sup> Thus, growing agricultural products for the Mexican market could be a key to increasing investment in agriculture by foreign corporations.

As a result of recent reforms, a foreign company may now own up to 100% of the common stock of a Mexican agricultural company and forty-nine percent of the Series T stock representing land ownership. This may provide a strong incentive for vertical integration in Mexico's growing food processing industry. However, it is not yet clear whether United States investors will take advantage of opportunities to own agricultural land in Mexico. Significantly, Mexico retains its prohibition on foreign investment in "Restricted Zone" land (50 kilometers from the coast and 100 kilometers from the border).<sup>136</sup> Critical infrastructure and some of the best horticultural production is located within the Restricted Zone where direct foreign ownership is not permitted.<sup>137</sup>

Thus far, United States agribusinesses have expressed more interest in contract farming and marketing arrangements than in land ownership.<sup>138</sup> Leasing or joint ventures provide broader opportunities for participation in the means of production and less financial commitment and risk. Foreign investors already may lease land in both the interior and the Restricted Zone without limitation on amount. In addition, trust mechanisms exist to permit foreign investors beneficial use of land in the Restricted Zone.<sup>139</sup>

---

134. Letter from E. (Kika) de la Garza, Chairman, Committee on Agriculture, U.S. House of Representatives, to the Honorable Carla Hills, United States Trade Representative (June 23, 1992). Tariffication of the Section 22 waiver would not be desirable in the bilateral (U.S.-Mexico) context. Moreover, it could set an undesirable precedent for future bilateral or plurilateral free trade negotiations with other Latin American or Caribbean countries under the proposed Enterprise for the Americas and could undermine the U.S. position in the Uruguay Round (UR).

135. Report of the Agricultural Technical Advisory Committee for Trade on the North American Free Trade Agreement 3 (Sept. 1992) (on file with the *New Mexico Law Review*).

136. MEX. CONST. art. 27, ¶ I (affirmed in NAFTA, *supra* note 60, art. 1102 (Reservation to National Treatment)).

137. Cook et al., *supra* note 8, at 9. The five most important horticulture-producing states are the border states of Baja California and Sonora, and the coastal states of Tampaulipas, Sinaloa, and Michoacan.

138. Telephone conversation with Kenneth Schwedel, American Soybean Association, Mexico City (Oct. 9, 1992).

139. NAFTA, *supra* note 60, art. 1102.

Potential foreign investors will likely balance the advantages of low-cost labor and seasonality with the disadvantages of lower productivity and lower yields.<sup>140</sup> Investors, however, may face higher than anticipated costs due to substantial up-front costs in equipment and irrigation. Many of the necessary materials must be imported and at this time are subject to tariffs. Also, government elimination of subsidies for irrigation, electricity, fuel, and fertilizer could result in higher than anticipated costs. Mexico's agricultural labor costs, however, will remain relatively low for the foreseeable future.<sup>141</sup>

The Mexican Investment Board reports that some seventy joint venture projects are currently underway, and that another thirty are under negotiation. These include the following:

- PepsiCo invested \$44 million with Sabritas (a snack food producer) in two new plants in 1991, in addition to PepsiCo's 1990 Vaquerias project with Gamesa.
- Tyson entered into a joint venture with poultry processor Grupo Trasco and C. Itoh & Co. (Grupo Trasco accounts for fourteen percent of Mexico's poultry production and is currently expanding operations with a \$100 million investment. Itoh markets about fifty percent of the processed chicken in Japan.) Tyson is providing technology and technical assistance for a \$60 million investment in chicken production by *ejido* farmers.
- Tropicana has two projects totaling \$14 million, one privately-owned and one in partnership with farmers, to produce and market oranges. Procigo, a Mexican firm, will process oranges into orange juice, which Tropicana will market in Mexico and foreign markets.
- Green Giant has initiated a \$16 million wholly-owned vertically integrated vegetable processing and packaging facility in Guanajuato.
- Ralston-Purina, which has operated feed plants in Mexico for thirty-five years, recently started a new feed plant at Monterrey and a pet food plant near Mexico City.<sup>142</sup>

While numerous joint venture projects are proceeding, many were already planned and are being undertaken by companies with a long-standing presence in Mexico. Agricultural investment new to Mexico appears to be waiting until NAFTA is implemented and the resiliency of recent reforms is proven. Mexico's investment liberalizations in the agricultural sector are seen by many as being most beneficial to Mexican agricultural investors at this time.<sup>143</sup>

Increased foreign investment in Mexican agriculture, however, is a top priority of the Salinas Administration. Mexico is seeking to make its

---

140. Tom Karst, *Laying Out The Investment Welcome Mat*, THE PACKER, Apr. 25, 1992, at 7A.

141. U.S.-Mexico Trade: Pulling Together or Pulling Apart?, at 15 (U.S. Congress Office of Tech. Assessment 1992).

142. Mexico: Your Partner for Growth, at 10-15 (May, 1992) (Mexican Investment Board Publication; on file with the *New Mexico Law Review*).

143. Telephone conversation with Bobby Richie, USDA Foreign Agriculture Service Agriculture Attache, Mexico City (Sept. 10, 1992).

agricultural sector more attractive to investors and to prepare it for freer trade under NAFTA. Through 1993, the government plans to unveil a series of sub-sector market strategies that will include phase-out of government support for some products and increased support for others. The agricultural ministry is expected to launch a program to improve market infrastructure in the country. In addition, Mexico may lower import tariffs on a variety of agricultural inputs and supplies.<sup>144</sup>

To provide support in the agriculture commercialization process, the government of Mexico has created an entity called ASERCA. ASERCA's role is to provide information on national and international prices, to link buyers and sellers, to assist producers and distributors in obtaining credit, and to assist in locating transportation and related services for agro-industry.<sup>145</sup> Also, Mexico will initiate a futures market in 1993 with support from the Mexican stock exchange and the Chicago Board of Trade.

The deregulation process in the agricultural sector may provide investment opportunities for foreign investors.<sup>146</sup> Private investment is being sought where formerly there was extensive government involvement through parastatals. Investment is being encouraged in research and development, infrastructure, production, processing, transportation, storage, and marketing.<sup>147</sup>

#### IV. CONCLUSION

Mexico's land tenure and market reforms represent not only an important economic change in Mexico's agricultural sector, but also a critical policy shift from "food security" to "food access," whether domestically produced or imported. Politically, this represents a sea-change in Mexico's agricultural policy. In Mexico, the production of corn is not only an economic activity, but is also a cultural one that has strong roots in the nation's political revolutionary history. Therefore, Mexico's agreement to liberalize further its agricultural sector in NAFTA, particularly corn production, is a bold economic and political move.

The Salinas Administration recognizes that nothing less than broad agricultural reform is in order. In his November 1989 State of the Union Address, President Salinas stated that "agricultural decline is the greatest challenge to Mexico's modernization." Mexico's agricultural economy employs over twenty percent of the nation's population but contributes less than six percent to GDP. Therefore, Mexico's effort to liberalize its agricultural sector has important implications for the success of Mexico's overall liberalization efforts. The U.S.-Mexico agricultural agreement con-

---

144. J. COMMERCE, Sept. 13, 1992, at 6A.

145. Louis Tellez, *Foreign Investment Opportunities in the Mexican Agricultural Sector*, BUSINESS MEXICO (Jan-Feb. 1992).

146. U.S. International Trade Commission Publication 2275, at 3-13 (Apr. 1990).

147. Mexico: Your Partner For Growth, *supra* note 142, at 5.

tained in NAFTA can be viewed as a vehicle to affirm past liberalizations, to promote future reforms, and to inject necessary capitalization and technology into Mexico's critical rural sector, possibly transforming it over the next generation.

## COMMENTS ON THE IMPACT OF NAFTA ON AGRICULTURE IN MEXICO

EDUARDO ROBLES-ELIAS\*

The execution of the North American Free Trade Agreement ("NAFTA"),<sup>1</sup> given the circumstances, will probably constitute a condition necessary, but not a condition sufficient, for the growth of Mexican agriculture at the expected rates. To give you an idea of the formidable problems that the Mexican government has to tackle to achieve the growth goal, I will list some of the things that the government must undertake for the purpose of making the dream come true.

First, the government will have to spend huge amounts of money in the construction of dams, on irrigation projects, and in the opening of new cultivation lands. The resources available for that purpose are meager. The government will probably experiment by concessioning some of those improvements to private investors, nationals and foreign investors alike.

Second, Mexico will have to spend considerable amounts of money in the improvement and construction of roads, especially those that connect the producing areas with the marketing and consumption centers and with the exporting outlets. This will probably not be too difficult for the government to accomplish, in light of its experience in the concessioning of roads to the private sector.

Third, the government will have to see to it that the cost of water be lowered or at least maintained at its current level for a reasonable period.

Fourth, like it or not, the government will also have to see to it that the cost of energy be at least frozen for a reasonable length of time so that the agricultural sector can recover from the staggering inflation of the last ten years, from the resulting decapitalization. This would situate Mexican agriculture in a competitive position in the environment to be brought about by NAFTA. Unfortunately, the cost of water and power has become a major outlay in the overall overhead of the business.

Fifth, the government will have to see that the management of irrigation districts be transferred to users, in order to end the centralized decision-making process that severely hurt the farmers in the past. The government must cut the red tape involved in the administration of water usage and involve the farmers in a sustained and conscientious effort to conserve as much of that valuable resource as possible. The process of transferring the management of water to daily users is now on the way, and it has yielded encouraging results as far as I have been able to investigate.

---

\* Lizarraga, Robles, Saviñon y Tapia, S.C., Hermosillo, Sonora; Chairman of Board of Trustees, University of Hermosillo; Professor of Law, University of Sonora and Instituto Tecnológico de Monterrey, 1974-1977; J.D., University of Sonora; LL.M., Harvard Law School; admitted to Mexican bar (1971).

1. Oct. 7, 1992 draft, U.S.-Can.-Mex.

Sixth, the Banco de Mexico and the Federal Treasury will have to use their regulatory power to cause the newly privatized banks to allocate substantial funds to the financing of agriculture, and to lower the current interest rates on loans to farmers so that they are comparable to the rates paid by American and Canadian farmers.

The government will have to see to it that crop insurance becomes reliable and effective. (Please note that I have not said *more* reliable and *more* effective, because the farmers complain crop insurance is absolutely unreliable and ineffective.)

Agriculture, as you know, means nothing to a national economy without a rapid, well-integrated and cost-effective transportation system. Until very recently, the transportation business was one of the most heavily regulated and restricted areas of economic activity in my country, surpassed only in those respects by the mining industry, the financial services industry, and the energy industry.

In order to avoid a reverse subsidy by the Mexican government to the American and Canadian growers, the Mexican government will have to curb inflation to a one digit annual inflation rate, similar or comparable to the rates of the United States and Canada. Mexican farmers will never raise their heads above the land level if inflation is not abated. This is an excruciating reality to which the government cannot lend deaf ears and blind eyes.

Both the government and Mexicans alike will have to make a herculean effort to fight soil erosion, the environmental degradation of soil and water caused by urban conglomerates and industries all over the country, and the desertification produced by different uses of rain forests by poor peasants, who barely survive by growing corn, chile, and beans. We must avoid the depletion of water reserves of rural communities to appease what appears to be the never quenchable thirst of cities and industries.

The government will have to do something to foster sound, uncorrupt, and fair labor relationships and practices between the landowners and the unions to be formed by land workers. The government will also have to accept the new reality that the land workers need to be organized into labor unions if large-scale agribusiness is ever going to become a reality in Mexico.

Last, but not least, the Mexican government must put a definitive end to the "agrarian reform."<sup>2</sup> The Mexican Congress, as is well known, repealed the federal law on agrarian reform about six months ago. This repeal, of course, has brought considerable relief to Mexican landowners and, in the short run, it will benefit them more than foreigners wishing to invest in the agricultural business.

I am very sorry to say that the officers of the Ministry of Agrarian Reform are still active in the search for land to expropriate and redis-

---

2. The "agrarian reform" is a euphemistic name for the permanent program for the redistribution of rural land inaugurated by the 1917 Constitution.

tribute. This is still possible, however, because the new Agrarian Law permits the continuance of proceedings started before the enactment of the new law. Whereas theoretically the time will come when all the proceedings initiated before the enactment of the new Agrarian Law will be completed, the government must take steps for the dismantling of the Ministry of Agrarian Reform, or at least for its reduction to a minimum. As soon as possible, the government must complete the redistribution proceedings and officially declare that fact, if it really wants to do away with insecurity, instability, and unproductivity in the agriculture business.

It is obvious that these guidelines to modernize Mexican agriculture will prove challenging, but they must be implemented if the government really wants to make Mexican agriculture competitive.



## COMMENTS ON NAFTA AND THE TRADE IN AGRICULTURAL PRODUCTS

JAMES F. SMITH\*

Agricultural and international trade has been distinguished in the General Agreement on Tariff and Trade ("GATT")<sup>1</sup> as an undisciplined area, one which really has not been subjected to trade rules or been liberalized. Agriculture deals with very sensitive issues of food sufficiency. Governments are intimately involved in agriculture; thus, politically, it is one of the most, if not the most, intractable areas in international trade. It has been the cause of the ongoing deadlock in the Uruguay Round. The negotiators in the North American Free Trade Agreement ("NAFTA")<sup>2</sup> were faced with those realities, and they were also faced with a variety of trade barriers, including tariff and non-tariff barriers.

The non-tariff barriers include phytosanitary regulations on both sides, import permit restrictions on the Mexican side, and quotas on the U.S. side. What the negotiators essentially did was convert the non-tariff barriers into tariffs ("tariffication"). They came up with the concept of the tariff quota rate, meaning essentially that tariffs would be immediately eliminated on approximately fifty percent of the products now traded, and otherwise they would be phased out over a period from five to ten to fifteen years. Within a certain quota (current trade flows) there would be no tariffs; over that quota, a tariff would be set which would be gradually phased out.

Let me give you my prediction on what is going to happen with NAFTA. We have heard that NAFTA is the lawyers' full employment act of the 1990s. I predict that most of the employment will be in agriculture because most of the disputes in this Agreement are going to be in the agricultural area. I say that for several reasons. Since 1947, forty-five percent of all GATT disputes have been over agriculture, and many of these over subsidies. There are no agreed upon rules on subsidies in NAFTA. Domestic subsidies and export subsidies are subject only to vague restraints. The negotiators deferred resolution of this problem to

---

\* Professor, University of California at Davis; Editor, *DERECHO CONSTITUCIONAL COMPARADO: MEXICO-ESTADOS UNIDOS* (2 vols. U.N.A.M., 1990); Author, *United States-Mexico Agricultural Trade*, 23 U.C. DAVIS L. REV. 431 (1990); Author (with M. Whitney), *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D. L. REV. 567 (1992); Author, *Aspectos jurídicos del GATT y del comercio exterior estado unidense*, Estados Unidos, Cuadernos Semestrales, U.N.A.M. (1986); Visiting Professor, Acatlan National Autonomous University (1986-87); Fulbright Scholar, Institute of Legal Research, U.N.A.M. (1985-86) and Uruguay (1991); B.S., Arizona State University, Tempe; J.D., University of California at Berkeley; admitted to bar of California (1968).

1. Apr. 10, 1947, 55 U.N.T.S. 194, reprinted in *BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3* (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT].

2. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

the Uruguay Round. But, given the lack of agreement over domestic and export subsidies, we can expect continuing disputes in that area.

Until NAFTA, Mexico and the United States have not had a great many disputes with respect to countervailing duties, subsidies, and dumping in the agricultural area. The disputes have mostly been in the manufacturing sector. Now that tariffication has occurred, however, and now that those tariffs will be reduced, it seems inevitable that we will see an increase in countervailing duty and anti-dumping disputes.

Another problem area involves emergency or safeguard measures. It appears that the NAFTA negotiators felt that by making these emergency provisions unilateral they would avoid disputes. This may be wishful thinking. These are very highly politicized and sensitive areas.

Finally, the sanitary and phytosanitary measures have caused a great many disputes between the United States and Mexico, and it seems likely that these disputes will continue. They will be resolved in Chapter 20, the overall institutional provision.

#### *A. Chapter 20*

For a trade agreement to be successful it must have effective dispute settlement mechanisms, or at least mechanisms that will evolve towards that end. The U.S.-Canada Free Trade Agreement ("FTA")<sup>3</sup> provides for binding arbitration on safeguard disputes. Binding arbitration has been totally eliminated in NAFTA. NAFTA has more emphasis on negotiated settlements.

Chapter 20 of NAFTA is more of a negotiation model; it is not a rule adjudication model. The parties sit down, given their overall economic relationship, and determine resolutions to issues based on non-binding recommendations of "arbitral panels." It is important to remember what makes arbitration or rule adjudication binding and what does not. Something is not binding if it is merely states the recommendations of an arbitral panel. Such recommended decisions are not binding on the national courts, so they are indeed subject to negotiation. As a matter of fact, Chapter 20 goes out of its way to make that point clear, by pointing out that the recommendations of the arbitral panel go to the parties and not even to the commission. This is political decisionmaking.

Compare this to GATT. What we have seen in GATT over the years is a steady evolution from a negotiation to a rule adjudication model. That was particularly true during the first four years of the Uruguay Round. From 1986 to 1990, the GATT parties developed a number of procedural reforms to strengthen the adjudicatory process. The Dunkel Text<sup>4</sup> codifies these and goes even further, creating automatic panel establishments and a permanent appellate body with review powers and

---

3. Jan. 2, 1988, U.S.-Can., *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 353 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter FTA].

4. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, UR-91-0185, GATT Secretariat (Dec. 20, 1991).

authorization of retaliatory implementation, unless there is a negative consensus against implementation. These measures have not yet been adopted by GATT yet, because the Uruguay Round is stalemated, but apparently the United States, the European Community, and Japan have gone along with that Dunkel Text on dispute settlement mechanism. If the Uruguay Round gets back on track, we will have a model that would be more attractive for really making this sort of thing work.

I will make one other comment about the Canadian Agreement. In Canada, under the FTA, the first dispute that was resolved was over the salmon and herring landing requirement. Essentially, the Canadians believed that salmon and herring should be one hundred percent landed in Canada and that it could not be exported to the United States. That was found to be violative of GATT, which is incorporated by the FTA. The arbitral panel was a panel of experts which offered a recommended solution. The solution was basically resolved by the panel itself, which eventually worked out and negotiated a solution whereby Canada could continue to have their landing requirement, but only for seventy-five percent. The interesting thing in terms of dispute settlement mechanism is that the panel was made up of two trade experts, two fisheries experts, and one lawyer. Under NAFTA, the only way to have experts on the panel, and I am distinguishing this from the scientific review board that is described in Chapter 20, would be to choose experts who are nationals of the other party to the dispute. You could not choose your own experts under the new formula. That would make the kind of negotiating solution that we saw in the herring case more difficult.

### *B. Chapter 19*

My other remarks have to do with unfair trade practices, namely anti-dumping duties and countervailing duties. This has been a very contentious area between the United States, Canada, and Mexico. Trade experts from both Canada and Mexico have complained bitterly about "administered protection" (International Trade Commission and International Trade Administration). They have argued that the imposition of countervailing duties and anti-dumping duties was just a form of legalized protectionism. The FTA would have never become a reality without the compromise measure of a binational panel to resolve these disputes. Mexico, at least informally through various writings of its representatives, made it very clear that in NAFTA it wanted nothing less than what Canada had achieved; namely, binational panels for unfair trade practices cases. Due in large part to leaked preliminary drafts of NAFTA, it now appears that the United States tried to eliminate binational panels from unfair trade practices. But in the final version of NAFTA, Chapter 19 reappeared word for word, except for the inclusion of the special committee provision,<sup>5</sup> just as it was negotiated with Canada. That is a very important

---

5. NAFTA, *supra* note 2, art. 1905.

achievement for Mexico, because it, like Canada, had now obtained a procedural exception to the administration of our unfair trade practice laws.

I want to just give you one case example of how significant that is, and to show how this thing plays itself out politically. This example is the celebrated fresh chilled or frozen pork case. The United States pork industry was very concerned about competition from the Canadian pork industry, so it took the opportunity to file an action with the International Trade Administration ("ITA"), arguing that subsidies to swine were also subsidies to pork and should be countervailed. That was round one. The pork industry lost. The ITA ruled against them and said "pork is not swine." The National Pork Council, therefore, went to Congress and said that it did not like that result and asked to please change the law. In 1984, Congress complied, with the 1984 definition of upstream subsidies to include swine in the legal definition of a subsidy. Canada then took the United States to GATT on this question and won. The United States, under the GATT rules as they then existed, then blocked implementation of that panel decision. Then along came the FTA, and the issue was again litigated. This time the United States Pork Council won on the "upstream subsidy" point before the ITA, because the law had been changed. The Pork Council also won the issue of "material injury" on a split vote of the International Trade Commission. The case then went before the Binational Panel. What the Panel did was very interesting. On the one hand, it stated that it is supposed to apply domestic law and that domestic law in the United States is superior to GATT, because the later law in time prevails. Therefore, the Panel stated that the upstream subsidy provision, although it may very well have been in violation of GATT, was to be upheld. On the other hand, the Panel found that there was no material injury, and there developed a vitriolic series of opinions.

In any event, Canada won. The Pork Council, however, filed an extraordinary challenge. Three retired judges were convened to find out whether there was not a gross departure from the norms of a fair procedure, a fairly narrow standard. They had no problem in finding no such departure and ruled in Canada's favor. The chilled pork case demonstrates how a very well-heeled protectionist lobby won their battle in Congress but lost the legal war.

Harmonization should be the goal of free trade agreements. That is ultimately what is going to make it work, even if it is a long term evolutionary process. Chapter 19 has now been amended to eliminate the effort on the part of the parties to negotiate a new set of rules giving a common definition to dumping and to subsidies, which have proven to be the new tools of protection. While the abandonment of the goal of harmonization is understandable given the apparent consensus that Chapter 19 should be made permanent, the substitution of procedural harmonization for substantive trade law harmonization may prove short sighted. Again, harmonization of substantive forms and binding adju-

dication are the best legal structures to assure that NAFTA will be the blueprint for the successful economic integration envisioned by the drafters.



## DISCUSSION OF NAFTA AND AGRICULTURE

QUESTION: Do you agree with Mr. Pena's observation that the benefits that the North American Free Trade Agreement ("NAFTA") might provide to Mexican agriculture will require an end to the *ejido* program and, more particularly, do you feel that it is an absolute necessity that the *ejidos* be allowed to be sold to foreign investors?

ANSWER, *Lic. Robles-Elias*: The termination of the agrarian reform is and will prove necessary for the competitiveness of Mexican agriculture under NAFTA. There is no question about that. The *ejido*, however, will survive for a while, but its role will gradually change. On the other hand, I do not think that it is an absolute necessity that the *ejidos* be allowed to be sold to foreign investors for Mexican agriculture to benefit from NAFTA. The *ejidatarios* will joint venture their lands with foreign entrepreneurs or enter into other kinds of associations with them, but they will not be permitted, at least during the foreseeable future, to sell their lands to foreign investors. The *ejido* might eventually disappear as a form of land tenure, but this is not likely to happen in the near future. We must bear in mind that the 1910 civil war, and the conditions that brought it about, are still very sensitive issues in the Mexican historical memory and in the minds of today's Mexicans.

QUESTION: Despite the NAFTA silence on subsidies, do the NAFTA agriculture provisions resolve any problems in the GATT agriculture policy?

ANSWER, *Lic. Robles-Elias*: No, absolutely not, it is a clear punt. Domestic subsidies are not touched and there is little language about export subsidies. If you are going to do an export subsidy against another NAFTA partner, you have to give them some notice before you do it, and then if you are going to do an export subsidy that will impact to counteract another non-NAFTA importer in a NAFTA country, then you are supposed to consult with the importing party to try and get them to impose the trade restriction in order to obviate your sending in the subsidized export. The short answer is "no," there is absolutely no attempt to give discipline to liberalize agriculture with respect to subsidies. I do not criticize the NAFTA negotiators for that; I think it is clear that the problem is between the European Economic Community and the United States, and that is what we are hoping will be resolved.

