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Mexico's Accession to the GATT: A Catalyst at Odds with the Outcome.

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MEXICO'S ACCESSION TO THE GATT: A CATALYST AT ODDS WITH THE OUTCOME?

JOHN M. VERNON*

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I. INTRODUCTION

The recent initialing of the North American Free Trade Agreement (NAFTA) by the trade ministers of Canada, Mexico, and the United States is a symbolic event in the continued globalization of the world economy that represents the successful conclusion of over fourteen months of formal negotiation among the three countries. Mexico and the United States have been engaged in negotiations on an informal basis for more than two years, ever since President Bush and President Salinas de Gortari issued a joint statement endorsing the idea of a bilateral agreement in June 1990.¹ Although the initialing is legally insignificant since each of the countries must formally ratify the

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1. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, THE NORTH AMERICAN FREE TRADE AGREEMENT FACT SHEET 2 (Aug. 12, 1992).

NAFTA for it to take effect, the initialing ceremony brings the countries one step closer to a new era for North American trading relationships. The United States and Canada forged the Canada-United States Free Trade Agreement almost four years ago. The trilateral NAFTA is truly revolutionary because of the participation of Mexico.

Interestingly, many acknowledge Mexico as the instigator of the entire initiative. At the initialing ceremony, Prime Minister Brian Mulroney of Canada recognized President Salinas for his "commitment to opening up and modernizing [the] country's economy and to harnessing its huge potential [which] first inspired this initiative."² Credit is certainly due Mexico. Mexico's participation in the NAFTA is the direct result of the current administration's commitment to open up and modernize Mexico's economy as quickly as possible. Under President Salinas, Mexico has divested over half of the businesses previously owned or operated by the government, tempered restrictions on foreign investment, reformed import policies, increased protection of industrial property, and abolished impediments to the transfer of technology. These reforms have contributed to the demise of Mexico's closed, protected economy and have created a gateway into Mexico that the NAFTA will enhance.

Although most of the major structural changes in Mexico's economy have taken place in the past four years under the Salinas administration, Mexico embarked on its modernization and reform path with its accession to the General Agreement on Tariffs and Trade (GATT) in 1987.³ Prior to its accession, Mexico was the thirteenth largest economy in the world and the largest market economy not a part of the GATT.⁴ Mexico's accession to the GATT was indeed an historical event. Moreover, the history behind Mexico's accession sheds some light on Mexico's progression toward improved bilateral trade relations with the United States, culminating in the initialled NAFTA text.

The NAFTA, like all historic events, raises questions as to its consequences. Upon implementation, the NAFTA will establish the larg-

2. Prime Minister Brian Mulroney, Address at the Initialing Ceremony for the North American Free Trade Agreement (Oct. 7, 1992).

3. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J., 339, 340 (1988).

4. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990).

est free-trade zone in the world: comprising 360 million people, the North American market is larger than the European Community and encompasses over 5,000 miles of territory.⁵ Like the European Community's announcement of its intention to establish a common market by the end of 1992, the symbolic initialing ceremony signaling the end of the NAFTA negotiations has raised concerns regarding the relationship between such regional trading relationships and the multilateral trading system established by the GATT, to which all participants in the NAFTA are contracting parties.

Part II of this article addresses Mexico's progression toward accession to the GATT. Part III provides an overview of the various stages in improved bilateral trade relations between the United States and Mexico and the negotiations in the multilateral Uruguay Round, all of which laid the foundation for the NAFTA. Finally, Part IV addresses the relationship of the NAFTA and the GATT in light of their probable coexistence in the future, focusing on the issue of dispute resolution.

II. MEXICO AND THE GATT

Mexico's accession to the GATT marked a departure from protectionist economic policies of the past and symbolized a commitment to continued liberalization of trade in the future.⁶ For decades, Mexico obstructed free trade. Indeed, Mexico built barriers to trade while its trading partners launched the GATT to tear down such obstacles and to liberalize trade among themselves. Mexico maintained its independence from the world-trading system for many years, finally joining the GATT almost forty years after it was opened for signature. "Since the formation of the General Agreement was strongly influenced by the United States . . . , and since many of the provisions of the General Agreement were modeled after the terms of a Reciprocal Trade Agreement with Mexico, Mexico's failure to join was richly ironic, and yet completely understandable in light of Mexico's independent foreign policy, which eschews any hint of influence by the United States."⁷

5. President George Bush, Address at the Initialing Ceremony for the North American Free Trade Agreement (Oct. 7, 1992).

6. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 *TEX. INT'L L.J.* 339, 340 (1988).

7. *Id.* at 367.

A. *What Is the GATT?*

In order to understand Mexico's apprehension towards joining the GATT, it is essential to understand what is the GATT. The GATT, the General Agreement on Tariffs and Trade,⁸ was established by the United States and seven other major trading partners in 1947 and made effective January 1, 1948.⁹ In fact, "[t]oday, almost all of the trading nations of the free world, accounting for over four-fifths of the world's trade, have adhered to the GATT."¹⁰ The primary document is the "General Agreement." Each party applies the document either through the "Protocol of Provisional Application" or the subsequent "Protocol of Accession." The GATT is therefore a set of documents rather than one single document.¹¹

While the GATT may refer to the treaty as established by a set of documents, it may also refer to the organization consisting of the group of contracting parties to the treaty. In sum, the GATT may refer to the treaty as documented, to the contracting parties as a group, or to both as a single concept.¹² The GATT is the framework that establishes the parameters for the trading policies and trading activities of its contracting parties.¹³ The GATT freezes tariffs at agreed levels and sets forth certain international trading rules including the "most-favored-nation principle," which requires each contracting party to afford every other country the lowest rates available to the products of any country.¹⁴ In theory, the GATT is merely an agreement among the contracting parties to meet for discussions, whether those meetings be to conduct multilateral trade negotiations or to resolve disputes. The contracting parties have completed seven rounds of multilateral tariff negotiations, and the eighth round, the Uruguay Round, is still underway.

8. General Agreement on Tariffs and Trade [GATT], *opened for signature* Oct. 30, 1947, 61 Stat. Part 5, T.I.A.S. 1700, *reprinted in International Trade Agreements*, INT'L TRADE REP. 75:0801-0828 (BNA 1987).

9. *International Trade Agreements*, INT'L TRADE REP. 75:0101 (BNA 1991).

10. *Id.*

11. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 59 (The Bobbs-Merrill Company, Inc. 1969).

12. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 340-41 (1988).

13. *Id.*

14. *See International Trade Agreements*, INT'L TRADE REP. 75:0101 (BNA 1991) (explaining scope and function of GATT).

B. *Mexico's Protectionist Trade Regime*

From 1940 to 1970, Mexico employed an import-substitution industrialization model that led to the development of one of the most protected economies in Latin America and created a burdensome bureaucracy to control foreign trade through import licenses, tariffs, tax concessions, official prices, and a protracted, case-by-case approval system.¹⁵ Mexico was in the midst of building these protective walls around its economy when the GATT was created in the mid-1940s. Mexico protected its domestic industrialization efforts during the 1940s, 1950s, and 1960s, which ironically resulted in a flow of foreign resources into Mexico but excluded foreign competition. Consequently, the industrial sector, having little incentive to invest in itself, became dangerously dependent on technological and economic resources from foreign participants.¹⁶ The Mexican government began to realize that its future growth depended, to a large degree, on active participation in international trade, a goal that would require profound policy changes in Mexico.¹⁷

In January 1979, Mexico expressed an interest in initiating negotiations for accession to the GATT.¹⁸ The working party assigned to investigate Mexico's accession to the GATT reached a positive conclusion.¹⁹ For political and economic reasons, however, President López Portillo announced in March 1980 that Mexico would delay its entry into the GATT.²⁰ Several representative political groups had

15. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); see John M. Vernon & Enrique A. Gonzalez Calvillo, *Planning for Free Trade: Taking Advantage of the Transition*, 23 ST. MARY'S L.J. 673, 678 (1992) (discussing effects of "import substitution" and "industrial integration").

16. John M. Vernon & Enrique Gonzalez Calvillo, *Planning for Free Trade: Taking Advantage of the Transition*, 23 ST. MARY'S L.J. 673, 686 (1992).

17. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 367-68 (1988).

18. *Id.* at 368. In the past, Mexico had been present as an observer at various GATT meetings and had participated in the Tokyo Round of multilateral trade negotiations where it received over 1,000 tariff concessions worth \$2.5 billion, but Mexico had never before expressed an interest in becoming a contracting party to the GATT. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 367-68 (1988).

19. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 368 (1988).

20. Review of Trade and Investment Liberalization Measures by Mexico and Prospects

expressed opposition to Mexico's accession to the GATT. Moreover, with rising oil prices sustaining the Mexican economy, the Mexican government did not consider liberalization of trade economically necessary.²¹

C. *Mexico's Accession to the GATT*

Less than two years later, the bottom fell out of the economy in Mexico.²² Mexico faced enormous economic difficulties:

The burden of servicing the external debt, the fall in the prices of commodities, especially of oil, and the proliferation of protectionist barriers had brought about the most severe external-sector crisis in the country's modern history. For Mexico, the collapse of the oil market meant a loss on the order of 7-8 billion dollars per annum which represented approximately one-third of its export earnings and more than 12 percent of its tax revenue.²³

In exploring long-term solutions to its economic problems, Mexico determined that trade reform was critical to its prosperity. On November 26, 1985, President Miguel de la Madrid announced that Mexico would reapply for membership in the GATT.²⁴ Mexico acceded to the GATT in August 1986 after a somewhat expedited process influenced by the many GATT members that wanted Mexico to become a party to the agreement.²⁵

for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 368 (1988).

21. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990).

22. *Id.* Mexico's economic problems were directly related to the sudden and dramatic drop in the price of oil in mid-1981. *Id.*

23. See Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 368 (1988) (quoting Report of the Working Party on the Accession of Mexico, para. 4, GATT Doc. L/6010, BISD, 33d Supp. 57, 59 (1987)).

24. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990). To this day, President de la Madrid is given much of the credit for Mexico's accession to the GATT, considering its importance to the deregulation in the area of trade as well as other areas of the Mexican economy. See John M. Vernon & Enrique Gonzalez Calvillo, *Planning for Free Trade: Taking Advantage of the Transition*, 23 ST. MARY'S L.J. 673, 681-82 (1992) (noting that under President de la Madrid, Mexico took its first steps towards opening its economy).

25. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr.

Generally, when a country seeks admission to the GATT, "a working party is appointed to examine the application of accession and to submit to the GATT Council recommendations for the accession."²⁶ However, after just four sessions, which focused primarily on Mexico's foreign-trade laws, the working party recommended that Mexico be invited to accede to the GATT. Following this recommendation, the contracting parties decided on July 18, 1986, to allow Mexico to accede to the GATT. Mexico subsequently signed the protocol of accession, which became effective on August 24, 1986, making Mexico the ninety-second contracting party to the GATT.²⁷

D. *Mexico in the GATT*

Because Mexico acceded to the GATT as a developing country, it was eligible for special treatment accorded such countries in terms of compliance with GATT rules.²⁸ By acceding to the GATT, Mexico became eligible for all benefits resulting from the application of the GATT's basic principles, such as the most-favored-nation principle which contracting parties are bound to respect.²⁹ However, the contracting parties did not compel Mexico in certain circumstances to comply strictly with its obligations under the basic GATT principles. For example, Mexico was allowed to maintain its sovereignty over natural resources as provided by the Mexican Constitution, and Mexico employed certain export restrictions designed to conserve natural

1990). Mexico's relatively smooth accession is partly attributable to the groundwork laid by the bilateral trade agreements that Mexico had already made with the United States and eight developed nations and groups. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 368 (1988).

26. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990).

27. *Id.*; Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 369 (1988).

28. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990). For example, Mexico could continue to exercise sovereignty over its natural resources. *Id.*; see Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 369 (1988) (noting that Mexico's requirements for compliance are less stringent owing to its status as a developing country).

29. For a complete discussion of the principles underlying GATT, and Mexico's accession pursuant to such principles, see generally Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 341-91 (1988) (outlining underlying GATT principles and their application to Mexico's accession).

resources for social and development needs.³⁰ Naturally, because "Mexico would benefit immediately from Most-Favored-Nation treatment of its exports . . . it should be expected that Mexico would offer substantial tariff reductions and concessions as part of its accession. . . ."³¹ Mexico agreed to bind its entire tariff schedule, including industrial and agricultural products, to a 50% maximum rate as part of its accession to the GATT.³² Mexico agreed to further reduce tariffs on a majority of tariff classification headings to levels between 20 and 50% over a 30-month period.³³

In lieu of protection in the form of tariffs, Mexico would protect development programs in nine sectors using import permits. Moreover, tariff surtaxes could be applied on a temporary basis as necessary to protect such programs for a period not to exceed eight years. Such surtaxes were not to exceed 50% of the tariff rate established for a particular product and were to be reduced to zero in 8 years.³⁴ Such surtaxes would be used to give certain sectors time for adjustment, and, as Mexico assured the working party that studied its accession to the GATT, would be the exception and not the rule.³⁵

The use of an official pricing system violates the customs-valuation

30. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990). Mexico was also permitted to maintain certain protections for agriculture pursuant to its economic and social policies. *Id.*

31. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373 (1988).

32. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373 (1988). Mexico had already unilaterally established a 50% maximum tariff rate. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373-74 (1988).

33. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-1 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373 (1988).

34. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-2 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373 (1988).

35. See Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 373 (1988) (explaining transitional nature of tariff surtaxes).

provision of the GATT. Thus, the efficacy of Mexico's tariff concessions was tied to Mexico's willingness to forgo its official pricing system. While Mexico's system violated the letter as well as the spirit of the GATT, the contracting parties did not require Mexico to abandon the system because the system was authorized by law existing at the time Mexico acceded to the GATT.³⁶ However, Mexico's adoption of the GATT's antidumping and countervailing duty remedies obviated the need for official prices.³⁷ Mexico ultimately agreed that by the end of 1987 it would eliminate its official pricing system and bring its customs-valuation practices into conformity with the GATT's methodology. Accordingly, Mexico signed the Tokyo Round Customs Valuation Code in July 1987.³⁸

In addition to Mexico's significant tariff concessions, Mexico's willingness to reduce or to align non-tariff barriers was crucial to Mexico's accession to the GATT because these barriers, such as import permits and import quotas, had historically been Mexico's primary method for protecting domestic industry.³⁹ Prior to accession, Mexico indicated that it would negotiate the eventual elimination of non-tariff barriers with the contracting parties. Mexico also stated that it would continue to substitute tariff protection for import permits to the extent possible. Moreover, any non-tariff barriers would be justified pursuant to the applicable GATT provisions. To this effect, Mexico signed the Import Licensing Procedures Code in July 1987, just six months after its accession to the GATT.⁴⁰

As mentioned earlier, Mexico adopted the GATT's antidumping and countervailing duty remedies with the enactment of its Foreign

36. *Id.* at 376. Mexico was not required to abolish its pricing system because of provisions in the GATT and the Protocol of Provisional Application that provide that the relevant provisions apply only to the extent that they are not inconsistent with existing law. The pricing system that existed when Mexico acceded fell within the exception. *Id.*

37. *Id.*

38. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-2, (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 376 (1988).

39. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 378 (1988).

40. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-2 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 379 (1988).

Trade Law in 1986.⁴¹ While the Mexican law does not expressly apply the standards for assessing injury contained in the GATT provisions, Mexico assured the working party prior to accession that it would apply GATT definitions and concepts with respect to GATT contracting parties.⁴² Mexico signed the Antidumping Code of the Tokyo Round in July 1987.⁴³

Of the five Tokyo Round codes, Mexico has become a signatory to four: licensing, customs valuation, antidumping, and standards. Although Mexico has not become a signatory to the Subsidies Code, Mexico and the United States operate under an important bilateral understanding in this area.⁴⁴ This understanding was important to improved bilateral trade relations between the two countries. Mexico has expressed its intention to delay its decision on the Subsidies Code until the end of the Uruguay Round.⁴⁵

III. TRANSITION TO THE NAFTA

Many would say that Mexico's participation in the NAFTA is a consequence, although not an inevitable one, of Mexico's trade-liberalization initiatives originating with its accession to the GATT. At the very least, Mexico's accession to the GATT was a catalyst for improved trade relations with its major trading partners and particularly helpful for bilateral trade relations between Mexico and the United States. After Mexico's accession to the GATT, Mexico and the United States negotiated important bilateral trade understandings. These understandings were critical points in the road to a North American free-trade area. Moreover, the trade issues discussed with respect to these understandings are those under discussion multilaterally in the current Uruguay round of negotiations. These bilateral

41. Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior, D.O., Jan. 13, 1986, at 30-37.

42. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 384 (1988).

43. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-2 (Apr. 1990); Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 379 (1988).

44. In 1985, prior to Mexico's accession to the GATT, Mexico signed an understanding with the United States regarding subsidies and countervailing duties in 1985. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-3 (Apr. 1990).

45. *Id.*

and multilateral negotiations, which had already raised and addressed the various positions relative to contentious trade issues, laid the groundwork for the NAFTA.

A. *1987 United States-Mexico Bilateral Framework Understanding*

The United States and Mexico began bilateral trade negotiations in the same year that Mexico reapplied to the GATT. These negotiations culminated on November 6, 1987 with the Framework of Principles and Procedures for Consultation Regarding Trade and Investment Relations (1987 Understanding).⁴⁶ The 1987 Understanding marked a milestone in improved bilateral economic relations between Mexico and the United States.⁴⁷

The [U]nderstanding emphasized the importance of liberalized trade between the two countries. . . . In particular, it highlighted the need to eliminate non-tariff barriers, the detrimental effects of protectionism, the impact of export earnings on the ability of Mexico to meet its foreign debt obligations, the role the GATT played in the bilateral trade relationship, and the increased significance of services in both countries.⁴⁸

The most significant aspect of the 1987 Understanding was the provision for a consultative mechanism to foster greater communication between the countries on trade problems. The 1987 Understanding systematized and facilitated discussion and interaction between the countries by providing a mechanism for consultation on trade problems, resolution of disputes, and negotiation regarding the removal or reduction of trade barriers. The 1987 understanding also required that consultation take place within thirty days after a request by either country. If an issue was not resolved within thirty days, either country had the option to resort to other methods of dispute resolution, including the GATT's dispute resolution procedures.⁴⁹

United States and Mexican officials held four consultations and three plenary sessions under the 1987 Understanding's framework for a year and a half starting January 1988. The representatives of each

46. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-3 (Apr. 1990).

47. Prior to this understanding, Mexico and the United States had no framework to govern commercial relations between the two countries. *Id.*

48. *Id.*

49. *Id.* at 2-4.

country addressed numerous issues in these sessions.⁵⁰ In August 1988, the two countries established working groups to permit less formal, ongoing negotiations on a number of contentious trade and investment issues.⁵¹ A result of these efforts under the 1987 Understanding was agreement on two sectoral trade accords.⁵²

B. 1989 Understanding Regarding Trade and Investment Facilitation Talks

The United States and Mexico discussed many important issues under the 1987 Understanding, and, indeed, both the NAFTA text and the current GATT negotiations include many of the same issues. The 1987 Understanding was important to improved bilateral trade relations between the United States and Mexico; however, the Understanding Between the Government of the United Mexican States and the Government of the United States of America Regarding Trade and Investment Facilitation Talks, signed on October 3, 1989 by Mexico and the United States (1989 Understanding), is perhaps more directly significant.⁵³

In contrast to the 1987 Understanding which, merely established a mechanism for addressing problems, the 1989 Understanding set up a mechanism for negotiating the expansion of trade and investment opportunities.⁵⁴ Additionally, the 1989 Understanding called for negotiations on a sectoral as well as cross-sectoral basis, including services, intellectual property rights, investment opportunities, distribution problems, and tariff and non-tariff barriers to trade.⁵⁵ Moreover, the 1989 Understanding established a novel approach for gathering, compiling, and reviewing the information necessary to conduct such nego-

50. Many of these issues arose from another significant feature of the 1987 Understanding, its "Immediate Action Agenda" which called for prompt negotiations on issues such as textiles, agriculture, investment matters, services, technology transfer and intellectual property rights protection. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-3 to 2-4 (Apr. 1990).

51. *Id.* at 2-4.

52. The first accord, signed in late 1987, dealt with two sectors, steel and alcoholic beverages. The second, signed in February 1988, addressed textile trade. *Id.* at 2-5.

53. See Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282, at 2-6 (Apr. 1990) (detailing significance of 1989 Understanding).

54. *Id.*

55. *Id.*

tiations. The 1989 Understanding provided for the creation of bi-national teams to perform these tasks rather than the national teams which each country had used in the past.⁵⁶ The thought was that this methodology would "facilitate a resolution of issues before negotiations [were even] called to the table."⁵⁷ Finally, the 1989 Understanding established a time frame for successive negotiations which served to press the signatories to address the issues.⁵⁸

C. *The Uruguay Round*

Meanwhile, as Mexico's important bilateral trade relations improved dramatically, multilateral trade negotiations under the GATT proceeded within the Uruguay Round, launched in Punta del Este, Uruguay, in September 1986.⁵⁹ The GATT presently has over one hundred contracting parties. The agenda for the Uruguay Round includes many of the issues that Mexico and the United States addressed bilaterally in reaching the 1987 and 1989 Understandings discussed above, including services, investment, intellectual property rights, textiles, and agriculture. The Uruguay Round has passed its projected 1990 conclusion date.⁶⁰ Although the Round has made progress in several areas, it is presently at a stalemate over issues related primarily to agricultural subsidies, with the United States and the European Community being the parties at odds.⁶¹

With the Uruguay Round at a standstill and the NAFTA proceeding to ratification, some commentators question how the probable NAFTA will affect the process of the Uruguay Round negotiations. The reaction of GATT officials to the NAFTA has been positive. "The Secretariat of the General Agreement on Tariffs and Trade

56. *Id.*

57. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282,, Inv. No. 332-282, at 2-6 (Apr. 1990) (quoting *Journal of Commerce*, Nov. 8, 1989).

58. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC, Pub. 2275, Inv. No. 332-282,, Inv. No. 332-282, at 2-6 (Apr. 1990).

59. Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States-Mexican Relations, USITC Pub. 2275, Inv. No. 332-282,, Inv. No. 332-282, at 2-1 (Apr. 1990).

60. *International Trade Agreements*, INT'L TRADE REP. 75:0103 (BNA 1991).

61. *Proposed North American Trade Area Does Not Threaten GATT, Dunkel Says*, INT'L TRADE DAILY (BNA), Aug. 24, 1992 (quoting GATT Director General, Arthur Dunkel, who characterized Uruguay Round as being in "a deeply disappointing situation of deadlock").

hailed conclusion of the North American Free Trade Agreement . . . as an example of the type of international trade pact which GATT itself is seeking to promote."⁶² According to the GATT officials, the NAFTA is an example of the application of Article 24 of the GATT, which allows contracting parties to establish free-trade agreements among themselves under certain criteria.⁶³ Some commentators believe that the NAFTA may foster the conclusion of the multilateral negotiations, but others believe it will prove to be a hindrance. Several delegates to the Uruguay Round have said that "NAFTA is an example of how regional trade pacts can be more effective than a globe-girdling negotiation of the type envisaged by the Uruguay Round."⁶⁴ Indeed, some predict the completion of numerous other regional trade pacts that will make the multilateral system under GATT redundant.⁶⁵

Despite its critics, all parties to the NAFTA have continued to express their commitment to a successful conclusion of the multilateral talks.⁶⁶ President Bush expressed his wish to conclude multilateral negotiations before the end of 1992.⁶⁷ It is quite possible that United States trade negotiators plan to use the NAFTA as one more chip on the table in their efforts to resolve the stalemate with the European Community over agricultural subsidies.

IV. THE NAFTA AND THE GATT IN EFFECT

Assuming that all three countries ratify the NAFTA and that the contracting parties to the GATT reach a successful conclusion to the Uruguay Round, answers to the many questions regarding the interplay of regional trade agreements and the multilateral trading system under the GATT will be forthcoming sometime after January 1, 1994,

62. *GATT Secretariat Lauds Conclusion of North American Free Trade Pact*, INT'L TRADE DAILY (BNA), Aug. 13, 1992.

63. *Id.*

64. *Id.*

65. *Id.*

66. President George Bush, Address at the Initialing Ceremony for the North American Free Trade Agreement (Oct. 7, 1992); Prime Minister Brian Mulroney, Address at the Initialing Ceremony for the North American Free Trade Agreement (Oct. 7, 1992); President Carlos Salinas de Gortari, Address at the Initialing Ceremony for the North American Free Trade Agreement (Oct. 7, 1992).

67. See *Bush Administration Hopeful of GATT "Breakthrough"*, UPI, Oct. 7, 1992, available in LEXIS, Nexis Library, UPI File (noting President Bush's wish to achieve GATT accord before presidential election).

the date on which NAFTA is scheduled to come into force.⁶⁸ At least the propriety of a North American regional trade agreement in general is unquestionable. As mentioned earlier, Article 24 of the GATT specifically authorizes regional trade agreements.⁶⁹ The primary concern among commentators is, however, the consistency of the two trade agreements.

The initialed NAFTA text attempts to foreclose any problems related to the interplay of the NAFTA and the GATT by providing that the NAFTA generally takes priority over other agreements to the extent a conflict exists.⁷⁰ Nevertheless, the NAFTA and the GATT are not separable. The parties to the NAFTA remain contracting parties to the GATT. Indeed, the NAFTA text makes reference to the GATT in five different provisions. Of these five provisions, perhaps the most important is the article on the dispute resolution forum selection.⁷¹ This provision allows the complaining party to choose a forum under the NAFTA or the appropriate forum under the GATT if a dispute could be brought under either agreement. If the third NAFTA party wishes to bring the same case in the forum other than that chosen by the complaining party, the two complaining parties will consult in an attempt to reach agreement on the forum. If the complaining parties cannot agree on the forum, the NAFTA forum is the preferable one.⁷² Once the parties select the forum, they cannot bring the case in the other forum.⁷³ A complaining party's choice of forum will depend on its assessment of the procedural as well as substantive amenability of the two choices. A determination as to substantive amenability is necessarily fact-bound, with at least as many possibilities as there are chapters in the initialed NAFTA text. Although analysis of a hypothetical party's substantive preference for either the NAFTA or the GATT forum is beyond the scope of this article, the procedural determination is not.

A dispute resolution procedure is set out primarily in one chapter

68. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Ch. 22, art. 2203 (text revised Sept. 6, 1992).

69. General Agreement on Tariffs and Trade [GATT], *opened for signature* Oct. 30, 1947, art. 24, 61 Stat. Part 5, T.I.A.S. 1700, *reprinted in International Trade Agreements*, INT'L TRADE REP. 75:0815-0816 (BNA 1987).

70. NAFTA ch. 1, art. 103.

71. *See id.* ch. 20, art. 2005, § 1 (providing for settlement negotiations under either GATT or NAFTA Forum).

72. *Id.* ch. 20, art. 2005, § 2.

73. *Id.* ch. 20, art. 2005, § 5.

of the NAFTA.⁷⁴ The NAFTA provides that a complaining party may request to have the disputed matter heard by an arbitral panel.⁷⁵ The third country may join as a complaining party, as indicated above, or may limit its participation to oral or written submissions.⁷⁶ The panel will typically make findings of fact, a determination as to the propriety of the contested action under the NAFTA, and recommendations for resolution.⁷⁷ The NAFTA provides specific procedures for panel selection to ensure impartiality.⁷⁸ The five-member panels are chosen from a trilaterally agreed-upon roster of experts, including persons from non-NAFTA countries.⁷⁹ The chair of the panel is selected first, either by agreement of the disputing parties or by designation of one of the disputing parties who is chosen by lot.⁸⁰ Each side then selects two panelists who are citizens of the opposing party or parties.⁸¹ The objective of the NAFTA dispute-resolution procedures is to provide for fair and unbiased review of and recommendation for the resolution of a contested action. Ideally, after receiving the panel's final report and recommendations the disputing parties will agree on the appropriate resolution of the dispute.⁸² If the parties are unable to resolve the dispute, the complaining party may suspend the application of equivalent benefits until the issue is resolved.⁸³

The objective underlying the GATT's dispute-resolution procedures is the same as that of the NAFTA. Although the GATT's procedures are quite similar to those under the NAFTA, the GATT

74. NAFTA ch. 20. Chapter 20 provides, "[t]he parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation." *Id.* ch. 20, art. 2003.

75. *Id.* ch. 20, art. 2008. Generally, a party may request arbitration if the matter is not resolved within thirty days of review. *Id.* ch. 20, art. 2008, § 1(a).

76. *Id.* ch. 20, art. 2008, § 3, ch. 20, art. 2013.

77. *Id.* ch. 20, arts. 2016, 2017.

78. NAFTA ch. 20, arts. 2009-2011.

79. *See id.* ch. 20, art. 2009 (providing that members be chosen on basis of objectivity, reliability, and judgment). Article 2009 does not restrict the roster to nationalists of NAFTA member countries. *See id.* ch. 20, art. 2009, § 2(b) (requiring that members be "independent"). Moreover, Article 2011 clearly contemplates the participation of non-NAFTA member nationalists on panels. *See id.* ch. 20, art. 2011, § 2 (providing for panel selection when more than two parties in dispute).

80. *Id.* ch. 20, art. 2011, §§ 1(b), 2(b).

81. *Id.* ch. 20, art. 2011, §§ 1(c), 2(c).

82. NAFTA ch. 20, art. 2018.

83. *Id.* ch. 20, art. 2019.

lacks certain fundamentals necessary to the expedient resolution of disputes, fundamentals which the drafters of the NAFTA did include. A recent case brought within the GATT's dispute-resolution parameters serves as an example of dispute resolution under the GATT and illustrates its shortcomings.

The case has been the source of considerable controversy.⁸⁴ Mexico brought this high-profile case under the GATT's procedures to contest United States import prohibitions on certain tuna under the United States Marine Mammal Protection Act.⁸⁵ The GATT provides that a complaining party may refer a particular matter to the contracting parties as a whole if efforts to resolve a complaint between the parties concerned are unsuccessful.⁸⁶ In actuality, a representative panel is chosen to investigate the complaint. If the parties do not settle the matter in the interim, the panel makes a report of its findings, recommendations, and rationales.⁸⁷ In this case, the panel determined that the United States tuna embargo constituted an impermissible quantitative restriction under the GATT and recommended that the United States bring its practices into conformity with the GATT.⁸⁸ Since publication of the GATT panel report, Mexico and the United States have been trying to resolve their disagreement without further GATT proceedings.⁸⁹ Should current negotiations between Mexico and the United States be unsuccessful, the only remedy available is the procedure labeled "Nullification or Impairment."⁹⁰ This provision allows the contracting parties to authorize a contracting party to suspend certain concessions or other obligations

84. See *EC, Others Pressure U.S., Mexico to Accept GATT Yellowfin Tuna Report*, INT'L ENV'T DAILY (BNA), Mar. 20, 1992 (providing brief background of yellowfin tuna controversy).

85. *Id.* The United States embargo of Mexican Tuna was prompted by Mexico's use of purse-seine nets, determined to kill too many dolphins. *Id.*

86. GATT art. 23.

87. Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 361 (1988).

88. *GATT Official Assesses Tuna Decision's Impact on Link Between Environment, Trade*, INT'L TRADE DAILY (BNA), Oct. 18, 1991. GATT officials emphasized, "a contracting party cannot unilaterally decide what is best for the international community." *Id.*

89. *EC, Others Pressure U.S., Mexico to Accept GATT Yellowfin Tuna Report*, INT'L ENV'T DAILY (BNA), Mar. 20, 1992 (noting Mexican, United States unwillingness to accept GATT panel's preliminary finding). Both the United States and Mexico have stated that ongoing bilateral talks will best serve to solve the yellowfin tuna dispute. *Id.*

90. GATT art. 23.

under the GATT as the party deems appropriate.⁹¹

In general, the GATT dispute-resolution procedures are not highly regarded. In fact, the agenda at the Uruguay Round has included attempting to perfect dispute settlement procedures and creating additional remedies.⁹² The drafters of the NAFTA attempted to address the shortcomings of the GATT's dispute-resolution mechanisms, the most significant of which is the lack of a specific time frame for the different stages of a dispute. Although the stages for dispute resolution under the NAFTA are similar to those under the GATT, the NAFTA sets forth three specific time periods for each stage of the process: (1) the panel must present its initial report within ninety days of panel selection; (2) the parties must respond to the panel within fourteen days of receiving the initial report; and (3) the panel must submit its final report within thirty days of submission of its initial report.

Perhaps more important is the thirty-day time period, running from receipt of the panel's final report, within which time the disputing countries must reach agreement as to how to resolve the dispute. If the countries do not reach agreement within these thirty days or another, mutually agreed-upon time period, the complaining party may suspend its obligations to the other party. A specific time period for resolving the dispute after issuance of the panel's final report puts pressure on the parties to do so. If this kind of pressure existed under GATT procedures, the tuna controversy between Mexico and the United States would likely be resolved today.

V. CONCLUSION

Mexico has come a long way in its efforts to liberalize trade. Accession to the GATT was the turning point for Mexico's departure from its protectionist trade policies of the past. This move symbolized Mexico's commitment to liberalization and modernization. Accession to the GATT was critical to improving trade relations between Mex-

91. See *id.* (allowing for suspension of concessions). This remedy has been employed only once. See Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 360 & n.151 (1988) (discussing Netherlands' imposition of retaliatory, quantitative restrictions on wheat importation from United States). The reluctance to use the "Nullification or Impairment" remedy is understandable since the resulting barriers to trade are contrary to the GATT's goals. *Id.* at 360-61.

92. See Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 393 (1988) (listing key topics of Uruguay Round).

ico and its trading partners, particularly between Mexico and the United States. Indeed, in 1986, the very year Mexico reapplied to the GATT, Mexico and the United States embarked on the road towards the free trade proposed under the initialed NAFTA text. These negotiations led to a series of bilateral trade understandings between the countries that proved that freer trade could be negotiated, and thus laid the foundation for the NAFTA.

The probable coexistence of the NAFTA and the GATT raises numerous questions that will be answered in time. Inconsistencies between the two agreements may be brought to light. Nevertheless, with respect to disputes that may arise between the parties to the NAFTA, adequate procedures are spelled out in the NAFTA for their resolution. The NAFTA preserves the applicability of the GATT's dispute-resolution procedures to disputes arising between parties to the NAFTA by allowing the complaining party to choose between the NAFTA and the GATT. This provision reflects the NAFTA's respect for the multilateral trading system and the belief of the parties to the NAFTA that regional trading agreements may exist within the forty-year-old multilateral trading system established by the GATT.