

CONFLICTS IN THE WINTER VEGETABLE MARKET

Resumen

Más del noventa por ciento de las verduras o legumbres de la estación de invierno, principalmente tomates, importadas a los Estados Unidos, viene a través del puerto de entrada de Nogales, Arizona y de allí es distribuido. Debido a la creciente competencia por parte de México, Florida, el mayor productor de tomate durante el invierno, ha sufrido en los últimos diez años una reducción en el mercado del producto, equivalente a un diez y ocho por ciento. Después de haber buscado, sin ningún éxito, la imposición de una barrera no tarifaria, mediante la exigencia de reglas más estrictas sobre empaque del producto con el fin de reducir las importaciones, los cultivadores de Florida, a través de la secretaría del Tesoro, elevaron una petición al gobierno para que se iniciara una investigación sobre prácticas "antidumping" para establecer si los productores mexicanos y los distribuidores de legumbres en la estación de invierno, las están vendiendo a un precio inferior al justo, causando con ello un daño a la industria de los Estados Unidos. Si los resultados de la investigación fueran positivos, se impondría un impuesto "anti-dumping", el cual compensaría el margen entre el precio justo y el precio al cual se están vendiendo los productos en el mercado de los Estados Unidos. Sin embargo, no solo la Secretaría del Tesoro sino la de Comercio han llegado a conclusiones negativas, tanto en sus investigaciones preliminares como en las finales. Los cultivadores de Florida apelaron y la apelación fue rechazada, pero como estas decisiones no constituyen cosa juzgada, se prevén ulteriores apelaciones.

Abstract

More than ninety percent of the fresh winter vegetables, primarily tomatoes, imported into the United States come through the major Mexican port of entry at Nogales, Arizona, and are distributed from that point. Due to the increased Mexican competition, Florida, the major domestic producer of the winter tomato, has seen an eighteen percent erosion in its market share over the past decade. After unsuccessfully attempting to establish the non-tariff barrier of stricter packaging requirements to restrict imports, the Florida growers now have petitioned the United States Secretary of the Treasury to initiate an anti-dumping investigation to determine whether certain fresh winter vegetables are being sold by the

Mexican growers and their distributors at less than fair value and causing material injury to the United States industry. If the determination is positive, an anti-dumping duty may be imposed to offset the margin between the fair value and the price at which the produce is sold in the United States. Both the Treasury and Commerce Departments made negative determinations in their preliminary and final investigations. The Florida growers' appeal was dismissed without prejudice, but further appeals are anticipated.

More than ninety percent of the fresh winter vegetables imported into the United States comes through the major Mexican port of entry at Nogales, Arizona, and is distributed from that point by the members of the West Mexico Vegetable Distributors' Association of Nogales, Arizona.¹ The tomato accounts for over sixty percent of this market and has become the focal point of a trade controversy between the growers and distributors of Mexican produce and their major competitors, the Florida tomato industry.²

As the major domestic producer of the winter tomato, Florida has, in the past decade, seen an erosion of its market share from sixty-three to forty-five percent, due largely to increased competition from Mexico.³ In an effort to stem the tide, the Florida growers have alleged that the Mexican growers and their distributors are flooding the United States market with underpriced produce in an attempt to establish a monopoly.⁴ The *Union Nacional de Productores de Hortalizas* (UNPH), the Mexican growers' association, is identified as the Mexican agency whose governmental authority to regulate planting, quality and value of exports is most influential in controlling prices.⁵ The conflict between the growers is a result of the adjustment problems faced by many United States' businesses whose competitive edge has been eroded due to increased costs for land, labor, equipment and wages. In this case it has led to a renewed spirit of protectionism; however, efforts to preserve the home market are not new in the industry.

1. *Inspection Standards of Vegetable Imports: Hearings Before the Subcomm. on Foreign Agricultural Policy of the Senate Comm. on Agriculture, Nutrition and Forestry*, 95th Cong., 2d Sess., pt. II at 6, 64 (1978) [hereinafter cited as *1978 Hearings*].

2. *Id.* pt. I at 11.

3. *Id.* pt. I at 20, pt. III at 6.

4. *Id.* pt. I at 20.

5. *Id.* pt. III at 7. See also *Views of the Florida Tomato Industry: Hearings on H.R. 116 Before a Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 706-16 (1980) [hereinafter cited as *1980 Hearings*].

Florida has had the functional equivalent of the UNPH since 1937, the year the Agricultural Marketing Agreement Act (the Act) was formulated.⁶ The Act provided the Florida growers with an exemption from the anti-trust laws by permitting marketing agreements between the growers and the Secretary of Agriculture to ratify collective action limiting the quantity of produce which may be marketed during any specific period. The product standards also mandated through the Act are applicable to imports as well as to domestically-produced vegetables. Under the authority of the Act, the Florida Tomato Committee has unsuccessfully attempted to extend section 8 (e) of the Act to include packing regulations. The passage of this amendment would have been disadvantageous to the Mexican grower since the Mexican tomato is vine-ripened and therefore more difficult to handle, necessitating its packaging in either two- or three-layer flats. The amendment would have required a jumble-pack container more suitable to the handling requirements of the mature green Florida tomato.⁷

Potentially discriminatory product standards are not the only non-tariff barriers that have been used to attempt to shift attention from domestic adjustment problems to the restriction of imports. Anti-dumping and countervailing duty codes have been enacted to protect against the dumping of underpriced goods and the subsidization of inefficient producers.⁸ In an effort to protect against the relatively cheaper imported produce, the Florida growers petitioned the United States Secretary of the Treasury to initiate an anti-dumping investigation in order to determine whether certain fresh winter vegetables⁹

6. 7 U.S.C. § § 601-674 (1976). See also 1980 Hearings, *supra* note 5.

7. 1978 Hearings, *supra* note 1. "A mature green tomato has a completely green skin but has reached the stage where it will turn red either on or off the vine." A vine-ripened tomato is harvested "in the first stage of changing color; it is primarily green with a tinge of yellow or pink, usually at the blossom end." Both types are presumed "firm enough to withstand frequent handling during the marketing process and the time and travel necessary to get to market." *Id.* pt. III at 65. Vine-ripe tomatoes are usually place-packed in two- or three-layer flats inside fiberboard containers. Jumble-packaging is a commingling of grades and sizes in one fiberboard container, without place-packing, thus allowing a larger weight volume per container. *Id.* pt. III at 68.

8. Trade Agreements Act of 1979, 19 U.S.C. § 1673 (Supp. 1981) (repealing the Anti-dumping Act of 1921, 19 U.S.C. § 160).

9. "[T]he term 'certain fresh winter vegetables' means fresh cucumbers, eggplant, peppers, squash, and tomatoes (except cherry tomatoes), the product of Mexico, provided for in items 135.90 through 135.92, 136.20 through 136.22, 137.10, 137.50, and 137.60 through 137.63, respectively, of the Tariff Schedules of the United States, and meeting the United States Department of Agriculture minimum standards for grades as set out in 7 CFR 51.2220 through 51.2239, 51.2190 through 51.2207, 51.3270 through 51.3286, 51.4030 through 51.4062, and 51.1855 through 51.1877, respectively." 44 Fed. Reg. 63,589 (1979).

from Mexico are being sold at less than fair value.¹⁰ "Dumping" is the general term for the sale of foreign merchandise in a country's market at less than fair value, as determined by the exporter's comparable home market price, the exporter's price in a third country or the merchandise's constructed value. An anti-dumping duty may be imposed to offset the margin between the fair value and the price at which the produce is sold in the United States, if a determination is made that the sales at less than fair value are causing material injury to the industry.¹¹

In order to determine if there were sales at less than fair value, the Secretary of the Treasury used the exporter's price in a third country, in this case, Canada. This measure was used because Mexico exports all of its tomatoes, except for the culls, thereby making the comparable home market price inapplicable. Both the Treasury and Commerce Departments made negative determinations in their preliminary and final investigations.¹² The Florida growers appealed the determinations on grounds stemming partially from the repeal of the 1921 Act by the Trade Agreements Act of 1979.¹³ The appeal was dismissed without prejudice, but further appeals are anticipated by the West Mexico Vegetable Distributors' Association.¹⁴ The Florida growers may also seek to use a cost of production calculation available under the 1979 Act to determine sales at less than fair value.¹⁵ The West Mexico Vegetable Distributors' Association points out that this would require the compilation of figures based upon production variables which are not routinely available. Furthermore, the highly competitive nature of the perishable produce business makes it unlikely that its members would be forthcoming with what are regarded as trade secrets.

In conclusion, the goal of the Trade Agreements Act, i.e., to preserve competition by offering a degree of protection from artificially low import prices, has not been successfully furthered from the vantage point of the Florida growers, who, in all likelihood, will continue their campaign for some type of restriction on the importa-

10. 43 Fed. Reg. 48,753 (1978).

11. S. REP. No. 96-249, 96th Cong., 1st Sess. 423, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381.

12. 45 Fed. Reg. 20,512 (1980); 44 Fed. Reg. 63,588 - 89 (1979).

13. *Southwest Florida Winter Vegetable Growers Ass'n v. United States*, 14 Cust. B. & Dec. 4845 (Mar. 26, 1980).

14. The West Mexico Vegetable Distributors' Association acted as intervenor on the appeal and plans to continue in that capacity on the upcoming appeal. Interview with George Uribe, Secretary of the West Mexico Vegetable Distributors' Association, in Nogales, Arizona (Oct. 11, 1981).

15. *Id.*

tion of Mexican produce. Perhaps the high cost of participating in the anti-dumping proceedings, coupled with the unwillingness of both sides to reveal trade and business practices, may already have provided another non-tariff barrier to the fresh winter vegetable industry.¹⁶

—*Elisabeth Sotelo*



16. *Id.*