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VanSickle: A Compromise in the Fresh Tomato Trade Dispute
**A COMPROMISE IN THE FRESH TOMATO TRADE
DISPUTE**

*John J. VanSickle**

The most recent trade dispute with Mexico in the fresh tomato market was resolved on October 28, 1996, when Mexican growers signed a suspension agreement with the U.S. government.¹ The agreement specifies that Mexican shippers will not sell fresh tomatoes for less than 20.68 cents/pound (US\$5.17 per 25 pound equivalent) and that they will not dump tomatoes on the U.S. market.² This agreement is historic in that it is the first agreement of its kind for the produce industry. It has the potential to give both U.S. and Mexican growers access to a profitable U.S. market.

The trade dispute with Mexico has long been a problem within the produce industry. Mexico became a major player in the market following the embargo placed on Cuba in 1962.³ The removal of Cuba from the U.S. market opened a window of opportunity that Mexican growers and shippers seized. Mexico increased shipments of fresh tomatoes to the United States and eroded Florida's market share to the point where Florida producers filed their first antidumping petition in 1978.⁴ That petition was withdrawn at the urging of the Carter Administration,⁵ but was resubmitted the following year when increased imports continued to depress returns to Florida growers.⁶ The U.S. Department of Commerce (Commerce) did not identify dumping in that case when it used the third country test to show that Mexican tomatoes were not being sold in the United States below the price that Mexican tomatoes were being sold in Canada.⁷ Mexico did shift its policy toward produce imports following that decision. Mexico managed their trade over the

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1. Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 56,618 (1996) [Suspension: Fresh Tomatoes from Mexico].

2. *Id.* at 56,620.

3. John VanSickle, *Florida Tomatoes in a Global Market*, 108 PROC. FLA. TOMATO INST. 1 (1996).

4. Certain Fresh Winter Vegetables from Mexico: Termination of Antidumping Investigation, 44 Fed. Reg. 43,567 (1979).

5. *Id.*

6. Certain Fresh Winter Vegetables from Mexico: Antidumping Proceeding Notice and Tentative Determination of Sales at Not Less Than Fair Value, 44 Fed. Reg. 63,588 (1979).

7. Certain Fresh Winter Vegetable from Mexico: Final Determination of Sales at Not Less Than Fair Value, 45 Fed. Reg. 20,512 (1980).

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decade of the 1980s and early 1990s by imposing minimum quality standards that had the effect of controlling the volume of produce they shipped to U.S. and Canadian markets.⁸ While U.S. and Mexican growers experienced short periods of low prices, the intensity of competition was much less than it had been.⁹

The North American Free Trade Agreement (NAFTA),¹⁰ implemented in 1994, brought on a new chapter in the competition between Mexican and U.S. producers. Provisions of NAFTA were intended to eliminate tariff and nontariff barriers that alter the competitive position between countries.¹¹ The three major provisions relating to tomatoes were: (1) elimination of tariffs over a ten-year transition period, (2) liberalization of the transportation sector, and (3) removal of barriers to investment.¹² Through 1997, the ten-year transition period for removal of tariffs has resulted in a thirty percent decline in the tariff rate collected on Mexican tomatoes as they cross into the United States.¹³ This provision has resulted in a decline of only US\$0.15 per twenty-five pound carton equivalent in the winter market for fresh tomatoes.¹⁴ This provision has had a small impact on the comparative advantage for Mexican producers.

Liberalization of the transportation sector was to have begun in 1996, allowing direct transport of products within the bordering states of the United States and Mexico.¹⁵ Total liberalization was to have occurred in the year 2000 with direct transportation to any points within the two countries.¹⁶ This provision held the potential of eliminating the significant costs associated with off loading of produce at the border and the handling of the products by merchants set up to sell Mexican products in the United States. The first phase of this liberalization has been delayed because of concerns about the safety of Mexican trucks and security surrounding drug trafficking.¹⁷ Mexico remains the number one transshipment point for illicit drugs entering the United States. Safety inspections of 23,766 Mexican trucks at

8. VanSickle, *supra* note 3, at 1, 3.

9. *Id.*; see also Kenrick Jordan & John VanSickle, *NAFTA and Florida Tomatoes: How Will Florida Growers Survive?*, 108 PROC. FLA. STATE HORT. SOC. 297, 298 (1995).

10. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA].

11. VanSickle, *supra* note 3, at 1-2.

12. *Id.*

13. *Id.* at 2.

14. JOHN J. VANSICKLE ET AL., COMPETITION IN THE U.S. WINTER FRESH VEGETABLE INDUSTRY 64 (USDA, Econ. Res. Serv., Agric. Econ. Rep. No. 691, 1994).

15. VanSickle, *supra* note 3, at 2; see NAFTA, *supra* note 10, annex I (Reservations for Existing Measures and Liberalization Commitment, Schedule of the United States, Schedule of Mexico).

16. VanSickle, *supra* note 3, at 2.

17. *Id.*

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the border through August 23, 1996 resulted in 10,088 vehicles being placed "Out of Service" (OOS), or 42% of all trucks inspected.¹⁸ A total of 2766 drivers (12%) on these trucks were placed OOS.¹⁹ Mexican drivers were most often placed OOS because of invalid licenses.²⁰ Mexican vehicles were placed OOS most often because of problems with tires, lighting, brakes, suspension, wheels, and fuel systems.²¹ Negotiations continue between the Clinton Administration and Mexico to bring the NAFTA transportation provisions back on track, but so far the Clinton Administration has remained steadfast in its opposition to transportation liberalization until the safety and security issues are addressed.²² New vehicle inspection systems and high-technology drug enforcement systems are being developed to improve the confidence in Mexican vehicles entering U.S. highways. Full implementation of the NAFTA transportation provisions by the year 2000 continues to be a goal.

Investment provisions within NAFTA and policy changes in Mexico have had significant effects on the comparative advantage of Mexican producers of fresh produce. United States growers have long held an advantage in the U.S. market for fresh produce because of their proximity to the market and because of the rapid development and adoption of new technology. Investment provisions within NAFTA have given foreign investors more security and resulted in significant investment in the Mexican produce industry.²³ The advantage U.S. growers once held in technology has diminished, and this has been argued by Mexico to be one of the main reasons for their increased presence in the U.S. market.

A greater impact on competitive position has been felt because of the large peso devaluation beginning in December 1994.²⁴ Prior to NAFTA, Mexican macroeconomic policies had lowered inflation in Mexico and brought relative stability to the Mexican peso.²⁵ The peso became overvalued in the early 1990s because policymakers in Mexico controlled the rate of devaluation. The peso was allowed to float beginning in December 1994, and was devalued from 3.4 new pesos to the U.S. dollar to 6.7 new pesos to the U.S. dollar in March 1995, a devaluation of almost fifty percent.²⁶ This devaluation had two effects: first, it lowered the effective cost of production

18. Discussion with U.S. Dep't of Transportation, who monitor trucks that enter the United States.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. NAFTA, *supra* note 10, pt. 3, ch. 11 (Investment).

24. VanSickle, *supra* note 3, at 3.

25. *Id.*

26. *Id.*

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for Mexican producers, giving them an artificial advantage in the U.S. market, and second, it made it more difficult for Mexican consumers to buy the thirty percent of production that they were buying from Mexican growers prior to December 1994, which diverted much of that product to the U.S. markets.²⁷ The devaluation led to a surge of Mexican imports of fresh produce and caused lower prices for both Mexican and U.S. shippers.

Increased imports and depressed prices resulted in a petition seeking relief from increased imports of fresh tomatoes that was filed in March 1995, with the U.S. International Trade Commission (ITC) under Section 201 of the Trade Act of 1974.²⁸ A Section 201 petition allows U.S. growers to seek relief from surges of imports that cause serious injury to the U.S. industry.²⁹ Section 202(d) of the Act allows growers of perishable agricultural products to seek provisional relief pending the completion of a full 180-day ITC investigation and the 60-day Presidential review period.³⁰ An affirmative provisional relief determination requires that ITC find two conditions present: (1) on the basis of available information, increased imports of the subject article are a substantial cause of serious injury or threat thereof to the domestic industry, and (2) the serious injury is likely to be difficult to repair or cannot be timely prevented by final relief.³¹ The Trade Act of 1974 was amended in 1988 to include Section 202(d) as a concession to fresh fruit and vegetable growers.³²

The ITC ruled in the negative on the 1995 Section 201 petition because of the way in which the petitioners defined the industry.³³ The petitioners attempting to seek relief for the fresh winter tomato industry, defined the industry as those fresh tomatoes produced in the January to April market window.³⁴ The U.S. ITC refused to recognize a seasonal industry, indicating that the case had to be decided on the U.S. industry that included all domestic production grown throughout the entire year.³⁵ The ITC also found it difficult to support provisional relief on the grounds that a final determination would be just as timely as provisional relief given that relief from either outcome for the industry defined in the petition would be in the following season.³⁶ Petitioners withdrew the Section 201 petition following

27. *Id.* at 3-4.

28. Fresh Winter Tomatoes, 60 Fed. Reg. 16,883 (1995); *see* 19 U.S.C. § 2252(d) (1994).

29. 19 U.S.C. § 2251.

30. *Id.* § 2252(d).

31. *Id.* § 2252(d)(1)(C).

32. Omnibus Trade and Competitiveness Act of 1988, Pub. L.100-418, § 1401(d), 102 Stat. 1107, 1129 (1988) (codified as amended at 19 U.S.C. §§ 2901-2906).

33. Fresh Winter Tomatoes, USITC Pub. 2881, Inv. No. TA-201-64 (Apr. 1995) (prov.).

34. *Id.* at I-8.

35. *Id.* at I-8 to I-14.

36. *Id.* at I-19 to I-21.

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the outcome on the provisional relief phase, feeling the outcome in the provisional phase made it difficult to win an affirmative in the final determination of the Section 201 petition.³⁷

Imports increased again in the 1995-1996 season, and prices were again depressed. A Section 201 petition was filed with the ITC³⁸ and an antidumping petition was filed with Commerce in March 1996.³⁹ These petitions sought relief for the U.S. bell pepper and fresh tomato industries, accepting the definition of a U.S. domestic industry as defined by the ITC in the 1995 *Fresh Winter Tomatoes* case.⁴⁰ The allegation of the petitions was that serious injury had been felt by the U.S. bell pepper and tomato industries and that the injury was caused by increased imports.⁴¹

Mexican producers countered the petitions with claims that while serious injury may have occurred to U.S. growers, that injury was mainly in Florida and was caused by weather problems in Florida, while changes in market shares for tomatoes were caused by increased demand for Mexico's "higher quality tomatoes" and Florida's reluctance to improve their product quality with improved technology.⁴² The ITC decided in a 4-1 vote in July 1996 that increased imports were not causing serious injury to U.S. producers.⁴³ Their opinion stated that they failed to recognize serious injury to the U.S. industry.⁴⁴ They failed to recognize serious injury even though data they collected from fresh tomato growers and shippers indicated that 75% of the growers surveyed lost money during the period of the investigation, with losses averaging 40% of sales.⁴⁵ The ITC chose to ignore these data because it had concluded that these data were, "on the whole, inconclusive," and that no injury had occurred because U.S. domestic acreage and production in 1995 were about equal to that in 1991, the first year in the period of investigation.⁴⁶ The dissenting commissioner, Commissioner Lynn Bragg, wrote in her opinion of the case, "In my view, by making a negative determination in these investigations, the [ITC] has set a standard for obtaining relief under Section 201 that is virtually impossible to satisfy."⁴⁷

The petitioners chose to move forward with an antidumping petition on fresh tomatoes even following the negative determination from ITC on the

37. *Fresh Winter Tomatoes*, 60 Fed. Reg. 25,248 (1995) (termination).

38. *Fresh Tomatoes and Bell Peppers*, 61 Fed. Reg. 13,875 (1996).

39. *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 15,968 (1996).

40. *Fresh Tomatoes and Bell Peppers*, 61 Fed. Reg. at 13,875.

41. *Id.*; *Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 15,968.

42. VanSickle, *supra* note 3, at 4-5.

43. *Fresh Tomatoes and Bell Peppers*, USITC Pub. 2985, Inv. No. TA-201-66, at I-5, I-19 (Aug. 1996).

44. *Id.* at I-5.

45. VanSickle, *supra* note 3, at 5.

46. *Fresh Tomatoes and Bell Peppers*, USITC Pub. 2985, at I-14.

47. *Id.* at I-19.

Section 201 case because the standard for judging injury in an antidumping petition is lower than in a Section 201 petition. An affirmative determination in a 201 case requires that the domestic industry must be materially injured and that the injury must be by reason of dumped imports.⁴⁸ The injury standard in a dumping case requires "harm which is not inconsequential, immaterial, or unimportant."⁴⁹ This differs significantly from the "serious injury" requirement in Section 201 cases.

An investigation by Commerce in the antidumping petition led to a preliminary determination in October 1996 that fresh tomatoes from Mexico were being, or were likely to be, sold in the United States at less than fair value.⁵⁰ Commerce estimated dumping margins from their investigation ranging from 4.16% to 188.45% with an average of 17.5%.⁵¹ The next step in the antidumping case would have been hearings to be held in January 1997 by ITC to determine whether sales at less than fair value have caused, or are likely to cause, material injury to the U.S. industry.⁵² A positive determination from those hearings would have resulted in antidumping duties being collected on Mexican imports of fresh tomatoes.⁵³

The Department of Commerce initiated negotiations with the Mexican growers following their preliminary determination to develop a compromise agreement that would stop sales at less than fair value.⁵⁴ These discussions resulted in the suspension agreement that was announced in October 1996 and was signed by Mexican growers representing 88% of their volume.⁵⁵ The agreement stipulates that Mexican growers will not sell fresh tomatoes for less than 20.68 cents/pound and that they will not dump tomatoes in the U.S. market with dumping margins more than 15% of that margin measured by Commerce during their investigation.⁵⁶

The suspension agreement puts the antidumping case on hold.⁵⁷ The agreement is for a five-year period.⁵⁸ Violations of the agreement can reopen the antidumping case at the point where the compromise had stopped the case.⁵⁹ This agreement is of benefit to growers and to consumers in

48. 19 U.S.C. § 2252(b)(2) (1994).

49. *Id.* § 1677.

50. Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico, 61 Fed. Reg. 56,608 (1996) [hereinafter Postponement: Fresh Tomatoes from Mexico].

51. *Id.* at 56,615.

52. *Id.*

53. *See* 19 U.S.C. § 1673d(c)(2).

54. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,608.

55. Suspension: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,618-19.

56. *Id.* at 56,618.

57. *Id.* at 56,619.

58. *Id.* at 56,620.

59. *Id.*

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both countries. Some may be skeptical about the benefits of this agreement, but it is hard to identify anything less than benefits if the agreement is allowed to succeed.

Growers and shippers of fresh tomatoes in the United States will benefit from this agreement because it should stop price-depressing surges of imports from Mexico. Mexico has been the primary source of imports that have caused low prices for U.S. producers and shippers.⁶⁰ This agreement serves as a throttle on the market to keep imports from flooding U.S. markets and depressing prices. It does not guarantee profits for producers. Production costs for U.S. producers exceed the minimum price of US\$5.17 per 25-pound carton. Production costs for Florida growers ranged from US\$7.06 to US\$8.45 per 25-pound carton in the 1994-1995 season.⁶¹ While the minimum price will not cover production cost for U.S. growers, it does assure that Mexican growers and shippers will cover their variable costs of harvesting, packing, and marketing in U.S. markets.

The agreement also assures that Mexican growers will not dump tomatoes on U.S. markets. Dumping occurs when foreign countries sell product in international markets for less than fair market value.⁶² Fair market value is determined by the price in the home country.⁶³ If that price cannot be measured, then a constructed value representing their cost of production and marketing is used to determine fair market value.⁶⁴ The dumping margins estimated by Commerce indicate that Mexico was in fact selling tomatoes in the United States for less than fair value.⁶⁵ This was not done necessarily out of malice, but often because of poor marketing practices. Mexican producers grow tomatoes and expect to sell in U.S. and Canadian markets. They grow, harvest, and pack their tomatoes and then ship them to the border without considering market conditions. Distributors at the U.S. border then sell the tomatoes and return the sales revenue after deducting their expenses. Marketing does not occur until the product reaches the border. The marketing channel for Mexican tomatoes has worked much like a pipeline without a control valve. When harvesting begins, the tomatoes are shipped to the U.S. market to be sold regardless of the volume in the marketing channel. Price should serve as a control valve, but because the price is not established until long after the product enters the U.S. market, the pipeline flows unchecked. Establishing a minimum price for Mexican

60. *Fresh Tomatoes and Bell Peppers*, USITC Pub. 2985, at II-5.

61. Scott A. Smith & Timoty G. Taylor, *Production Cost for Selected Vegetables in Florida, 1994-95*, U. FLA. INST. FOOD & AGR. SCI., EI95-1, at 21-27 (Aug. 1995).

62. See 19 U.S.C. § 1677(34).

63. See *id.* § 1677b(a)(1).

64. See *id.* § 1677b(e).

65. See *Postponement: Fresh Tomatoes from Mexico*, 61 Fed. Reg. at 56,615.

imports of fresh tomatoes should give shippers the incentive to monitor the market in order to assure the price does not drop below the minimum price. When the market approaches the minimum price, the Mexican shippers will have to either slow the flow of tomatoes they ship to the United States or dump them at the border after incurring the additional expenses of transportation to the border and handling by the border distributors. If they do neither of these and sell below the minimum price, they will violate the terms of the suspension agreement and risk imposition of antidumping duties.

The suspension agreement should cause Mexican shippers to consider market conditions before shipping produce to destination markets. Minimum price guarantees should cause them to monitor the market and control the flow of produce before incurring the added expense of transportation and handling. In addition, the agreement not to dump product should cause them to consider Mexican domestic markets before shipping directly to the border. In effect, the agreement should benefit Mexican producers by insuring that they do not sell product below the variable costs of harvesting, packing, and marketing. It also forces them to consider alternative markets and gives them an opportunity to capitalize on the best markets available for their products.

U.S. and Mexican consumers also should benefit from this agreement. U.S. consumers should benefit because it provides an opportunity for both U.S. and Mexican producers to remain in the market. Having both U.S. and Mexican producers remain in the market should provide consumers with continuity and choice, something that would not be available if one source were unable to continue. A significant downsizing of the U.S. industry was imminent without some form of compromise. The agreement was reached too late in the planning horizon for many Florida growers, who lacked faith that a fair agreement could be reached. As a result, tomato plantings in Florida were down nearly twenty-five percent in 1996.⁶⁶ The successful implementation of this agreement should remove some of the risk U.S. growers face in the production of fresh tomatoes.

Mexican consumers also should benefit from this agreement. For most Mexican producers, the Mexican domestic market has been the market of second choice, a residual market. Supplies in Mexico have been constrained because of this practice, resulting in higher prices for Mexican consumers. Forcing Mexican shippers to consider the domestic market should result in more continuity of supplies for Mexican consumers and lower the prices that they must pay.

This agreement is rare in that benefits should come to all producers and consumers of fresh tomatoes. Removing risk from the market will foster a more efficient production and marketing system. The agreement provides

66. FLORIDA TOMATO COMMITTEE, ANNUAL REPORT 1996-1997, at 44 (1997).

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space for growers and shippers to develop and adopt new technologies to improve their efficiency and quality of product.

This agreement is fair in that no producer will be a loser. The benefits for Mexican shippers that will result from improved marketing practices are not to their disadvantage. Florida growers continued the initiative toward more efficient marketing practices by imposing provisions on their own industry similar to those that the agreement imposes on Mexican shippers.⁶⁷ The Florida Tomato Growers Exchange adopted a minimum effective floor price of US\$5.35 per 25-pound carton for all tomatoes they ship.⁶⁸ The Florida Tomato Growers Exchange is a cooperative of Florida growers whose members produce more than ninety percent of the volume of fresh tomatoes shipped from Florida.⁶⁹ Each grower sells their tomatoes through the Exchange which provides them an opportunity to reap the benefits of improved marketing practices and guarantees that Florida will do its part in providing a more stable market for growers and consumers.⁷⁰ California growers adopted a similar policy for the 1997 season.⁷¹

The changes that are necessary, however, do not stop at this level. The principles of this suspension agreement should work and will benefit all producers and consumers. It is time to call a truce in the Great Tomato War between Mexico and Florida. After experiencing growth during the 1980s, demand for fresh tomatoes has remained flat over the decade of the 1990s.⁷² The fresh tomato industry needs to work on programs to expand the demand for fresh tomatoes in U.S. and foreign markets. Being among the largest suppliers in the world, Mexican and U.S. growers and shippers should work together to refuel the growth in demand for their products. The suspension agreement can and should lead to more cooperation between them. There always will be competition in this market, but growers and shippers should capitalize on the resource advantages they control and work to enlarge the pie to be split between competitors. Mexico most likely will continue to hold an advantage with cheaper labor, but U.S. producers hold advantages with proximity and technology development. Florida growers are located in one of the best markets in the world for fresh produce, allowing them to take advantage of lower marketing costs. Florida growers also have institutions in place to develop and implement new technologies that capitalize on their resource advantages.

The major advantage of this agreement is that it provides an opportunity

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. VanSickle, *supra* note 3, at 5.

for growers and shippers from the United States and Mexico to give consumers adequate supplies of high-quality product at reasonable prices. Everyone wins with this agreement. It may be time to call this battle a draw and move on to bigger and better fights, such as the battle to increase demand for fresh tomatoes. That is a battle that also will benefit everybody.