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I. INTRODUCTION

The Florida winter vegetable industry has sought for more than a quarter of a century to restrict imports of tomatoes and other winter vegetables from Mexico. Its efforts have included the filing of two antidumping petitions and two petitions for import relief under Section 201 of the Trade Act of 1974, as well as attempts to obtain legislative and administrative restrictions against imports. These efforts were rewarded for the first time in 1996, in the form of a suspension agreement entered into in the course of an antidumping investigation against Mexican tomatoes, under which the Mexican exporters have agreed not to sell to the United States below a specified price.[1] However, suspension agreements of this kind usually afford relief for only

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

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a few years, and the U.S. industry may well seek other forms of relief in the future. Also, the suspension agreement only applies to tomatoes. Although tomatoes represent by far the largest portion of winter vegetables exported from Mexico to the United States, other exports, such as cucumbers and bell peppers, are also quite significant, and the Florida industry may seek some form of relief on these products as well.

This article discusses the various import relief cases brought by the Florida winter vegetable industry and considers the likelihood of future cases under the import relief laws. It also discusses other avenues that the Florida industry might pursue to restrict Mexican imports, such as efforts to obtain federal or state legislation or administrative action imposing stricter phytosanitary, marking, or packing requirements on Mexican produce, and considers whether these actions would be compatible with the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) agreements.

II. THE IMPORT RELIEF LAWS

A. *Section 201*

1. The Law

Under Section 201 of the Trade Act of 1974,[2] sometimes known as the escape clause, a domestic industry may file a petition with the International Trade Commission (ITC) seeking a determination of whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[3] If the ITC makes a negative determination, the case is over. If the determination is affirmative, the ITC recommends to the President the type and amount of import relief (in the form of increased tariffs, quotas, or tariff-rate quotas) that it believes is necessary to remedy the injury.[4] The President is free to accept the ITC's advice, to grant some other form of import relief, or to impose no relief whatever.[5] Import relief may not be

2. 19 U.S.C. § 2251 (1994).

3. *Id.* § 2251(a). "Substantial cause" is defined as a cause that "is important and not less important than any other cause." *Id.* § 2252(b)(1)(B). "Serious injury" is defined as "a significant overall impairment in the position of a domestic industry." *Id.* § 2252(c)(6)(C). Note that unlike the other import relief laws discussed in this article, no showing of an unfair practice is required under Section 201.

4. *Id.* §§ 2252(e)-(f).

5. *Id.* § 2253(a)(3). If the President does not follow the ITC's advice, his decision can be overturned by a two-house congressional veto, in which case the ITC's recommendation goes into effect. *Id.* § 2253(c). In practice this has never happened.

imposed for more than eight years.[6] Neither the ITC's determination (affirmative or negative) nor the President's decision can be appealed to the courts on substantive grounds, although procedural defects can be challenged.[7] Under Section 312 of the NAFTA Implementation Act, import relief may not be imposed against imports from a NAFTA country unless the ITC finds that imports from that country (1) account for a "substantial share" of total imports and (2) "contribute importantly" to the serious injury.[8] There is no question that Mexico would satisfy these criteria in the case of tomatoes and other winter vegetables.

Because of the fairly high causation and injury standards under NAFTA (considerably higher than the standards under the antidumping and countervailing duty laws discussed below), the ITC has made affirmative determinations in only about half the cases that have come before it. And only half of those affirmative determinations have resulted in the imposition of import relief.[9] In other words, only about a quarter of the petitions filed are successful.

2. The Cases

The Florida winter vegetable industry has made two unsuccessful attempts to obtain relief under Section 201. In 1995, it filed a petition seeking import relief against tomatoes alone.[10] The ITC rejected the petitioner's argument that the investigation should be limited to the winter season on the ground that it had no statutory authority to limit the investigation in this way.[11] The Florida industry withdrew the petition after its

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6. *Id.* § 2253(e)(ii).

7. *See* Sneaker Circus v. Carter, 566 F.2d 396 (2d Cir. 1977).

8. 19 U.S.C. §§ 3372(a)-(b). Section 302 allows an industry to petition for import relief against imports from a NAFTA country alone. *Id.* § 3352. However, the relief is limited to a "snapback" of the tariffs to their pre-NAFTA (*i.e.*, most favored nation) level. *Id.* § 3354(c). The NAFTA tariff reductions on tomatoes and other winter vegetables have been very small to date, so that Section 302 would offer little relief to the Florida winter vegetable industry.

9. One reason for the reluctance of the President to impose import relief is that under Article XIX of GATT, whenever the United States imposes tariffs or quotas under NAFTA Section 201, it is required to compensate the exporting country or countries by lowering tariffs on other items. General Agreement on Tariffs and Trade [hereinafter GATT], Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. XIX. Failure to compensate entitles the other country or countries to retaliate against U.S. exports. *Id.* art. XIX(1). Thus, import relief for one U.S. industry usually comes at the expense of another. Mr. Eric Salonen has noted that Mexico may retaliate against bourbon whisky imports in response to U.S. restrictions imposed on broom corns imported from Mexico in the most recent Section 201 proceeding. Eric P. Salonen, Address at *The University of Florida Journal of International Law*, Fifth Annual International Business Law Symposium (Gainesville, Fla., Apr. 4, 1997).

10. Fresh Winter Tomatoes, USTIC Pub. 2881, Inv. No. TA-201-64, at I-4 (Apr. 1995).

11. *Id.* at I-13.

request for interim relief had been rejected.[12]

A year later, the industry filed a second petition, this time covering the entire year and including bell peppers as well as tomatoes.[13] Any impact of Mexican imports on the Florida industry was of course diluted by the inclusion of tomatoes and bell peppers grown outside the winter season in other parts of the United States, such as California. By a four-to-one majority, the Commission found that the U.S. industry was not injured or threatened with injury.[14] According to the Commission, acreage planted and harvested, production, and employment had remained fairly steady.[15] However, the majority's conclusion with respect to the financial performance of the industry was rather startling. Although the net income of the U.S. growers had declined from US$36 million in 1993 to a loss of US$7.5 million (3%) in 1994 and a loss of US$22.8 million (9.6%) in 1995,[16] the majority simply stated that the financial data were, "on the whole, inconclusive."[17] The decision was harshly criticized by Secretary of Commerce Mickey Kantor and Acting U.S. Trade Representative Charlene Barshevsky,[18] possibly the only time that an ITC decision has been publicly criticized by members of the Cabinet.

It seems unlikely that the Florida industry will file another Section 201 petition in the near future. The odds against success must be high, since in the absence of a dramatic change for the worse on the part of the Florida industry, the Commission probably would be reluctant to reverse its previous negative decisions after such a short interval. Also, the financial position of the Florida industry should have improved as a result of the minimum price regime established by the antidumping suspension agreement, in which case the domestic industry would find it even more difficult to show that the industry had suffered "serious injury." Finally, the Florida industry must be aware that, even if the ITC were to recommend import relief, President Clinton would probably be reluctant to impose significant restrictions on a major item of commerce imported from a fellow NAFTA member.

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12. Fresh Winter Tomatoes, 60 Fed. Reg. 25,248 (1995).

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

14. Fresh Tomatoes and Bell Peppers, USTIC Pub. 2985, Inv. No. TA-201-66, at I-3 (Aug. 1996).

15. *Id.* at I-13.

16. *Id.* at II-25. Interim 1996 figures were even more striking. Between July 1994 and February 1995 the growers had made a profit of US$2.3 million (1.7%). *Id.* A year later, this had turned into a loss of US$41.6 million (50.4%). *Id.*

17. *Id.* at I-14.

18. *Florida Growers Lose Round One*, 3 NAFTA & INTER-AMERICAN TRADE MONITOR, July 12, 1996 (Inst. for Agric. & Trade Pol'y) <http//www.envirolink.org/seel/latp/nafta/vol3no13.html>; *see House, Senate Trade Leaders Question Kantor's Criticism of ITC*, INSIDE U.S. TRADE, July 5, 1996.

B. *Antidumping*

1. The Law

The antidumping law, Sections 731 to 739 of the Tariff Act of 1930, as amended,[19] is designed to counteract the effect of unfair import pricing by imposing additional duties on imports that are found (1) to be sold at less than normal value, and (2) to cause or threaten to cause material injury to a U.S. industry. The determination whether imports are being sold at less than normal value is made by the Department of Commerce;[20] the injury determination is made by the ITC.[21]

The antidumping law was originally aimed at international price discrimination and defined dumping simply as making sales to the United States at prices below the prices for the same or similar products in the home market (or third-country markets if the home market was too small or otherwise inappropriate for comparison).[22] This is still the primary definition of dumping.[23] However, since 1974 the law also has incorporated a sales-below-cost provision under which sales to the United States at prices below fully allocated cost of production will in effect be found to be dumped, even if they are not priced below the home-market or third-country sales.[24]

Department of Commerce and ITC determinations may be appealed to the U.S. Court of International Trade (CIT)[25] and from there to the Court of Appeals for the Federal Circuit. However, under Chapter Nineteen of NAFTA,[26] a case involving imports from Mexico or Canada may upon request instead be appealed to a Binational Panel consisting of five members drawn from a panel of experts and retired judges, which is required to apply U.S. law.[27] An appeal to the U.S. CIT or a NAFTA panel will only succeed if the reviewing body finds that the agency made an error of law or that its decision was not supported by substantial evidence.[28] Experience

19. 19 U.S.C. §§ 1673-1673h (1994).
20. *Id.* § 1673b(b)(1)(A).
21. *Id.* § 1673b(a)(1).
22. A series of adjustments are made to take account of differences in transportation and selling expenses in the two markets, as well as physical differences between the comparison products. *Id.* § 1677b(a)(6).
23. *Id.* §§ 1673, 1677b(a).
24. *Id.* § 1677b(b). Prior to 1974, sales below cost were only treated as dumped if there were no home-market or third-country sales.
25. *Id.* § 1516a(a).
26. North American Free Trade Agreement, Dec. 17, 1992, arts. 1901-1911, 32 I.L.M. 289, 682-88 [hereinafter NAFTA].
27. 19 U.S.C. § 1516a(g).
28. *Id.* § 1516a(b).

under the binational panel procedure that operated under the U.S./Canada Free Trade Agreement (USCFTA), which was incorporated into NAFTA with little change, indicates that it is considerably more favorable to respondents in U.S. cases than the CIT appeal process. The panels have been considerably more willing to reverse decisions of the Department of Commerce than has the CIT.[29] Moreover, the panels, which operate under time limits, dispose of appeals faster than the CIT, which is not subject to deadlines.[30]

The antidumping law is by far the most commonly used import relief law. There are several reasons for this. First, in sharp contrast with Section 201, the law is designed to be applied in a non-political fashion. If the necessary findings of dumping and injury are made, the issuance of an antidumping order is mandatory, and no one in the Executive Branch has discretion to waive the application of the law.[31] Second, the injury standard is much lower than under Section 201, meaning that it is a great deal easier for petitioners to obtain affirmative injury determinations from the ITC.[32] Third, because of the very competitive nature of the U.S. market, exporters often have to sell there at lower prices than elsewhere. Also, capital-intensive producers are often forced to sell below fully-allocated costs during market downturns. This is considered normal and rational behavior, so long as the producers recover their variable costs, and would not be viewed as unfair by most businessmen. However, as explained above, in most circumstances, U.S. law treats this practice as dumping.

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29. *See generally* U.S. GAO, U.S.-CANADA FREE TRADE AGREEMENT: FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS (1995).

30. *Id.* at 57. In addition, CIT decisions can be appealed to the Court of Appeals for the Federal Circuit, which adds an additional year or more to the process. *Id.* at 23. Panel decisions can be appealed to Extraordinary Challenge Committees only under very unusual circumstances, for example, lack of jurisdiction or improper behavior by a panelist. *Id.* at 29. Only three of the more than thirty panel decisions issued under the USCFTA were subject to extraordinary challenge. John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT'L L. & BUS. 525, 542 n.71 (1995). The average length of time for completion of panel reviews under the USCFTA was 511 days. *Id.* at 542. Over the same time period, CIT appeals took an average of 734 days, and this was extended to 1210 days where cases were appealed to the Court of Appeals for the Federal Circuit. *Id.* at 542 & n.73.

31. *See, e.g.*, Southwest Fla. Winter Vegetable Growers Ass'n v. United States, 584 F. Supp. 10, 18 (Ct. Int'l Trade 1984).

32. "Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). The ITC has interpreted this as any injury that is more than de minimis. In addition, the dumped imports merely have to be a cause of material injury and do not have to be weighed against other causes. *Id.* § 1673.

2. The Cases

The Florida winter vegetable industry filed its first antidumping case in 1978.[33] The products covered were tomatoes, bell peppers, cucumbers, squash, and eggplants.[34] Because of the importance of the case to Mexico, it attracted a great deal of high-level attention in Washington.[35] Rigidities in the antidumping law seemed to make it almost certain that a traditional price comparison would result in a finding of dumping, probably at quite high margins. The petitioners were therefore persuaded to withdraw their petition pending high-level discussions between the U.S. and Mexican Governments about a possible settlement in the form of export restraints or minimum prices.[36] However, no agreement was reached, and the petition was refiled.[37]

In March 1980, the Department of Commerce issued a finding of no dumping.[38] It compared U.S. prices with prices of Mexican exports to Canada.[39] However, instead of comparing each U.S. sale with the average price to Canada — which would have been the normal procedure — the Department of Commerce based its decision on a finding that the United States and Canada constituted a unitary market for winter vegetables, since the U.S. importers sold both to Canadian and U.S. buyers and there was no

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

34. *Id.*

35. Members of the Florida congressional delegation expressed strong support for the domestic industry to the Administration. *See, e.g.*, Letter from Congressmen Bafalis, Gibbons, Fascell, Pepper, Chappell, Bennett, Young, Fuqua, Ireland, Kelly, Mica, Nelson, and Hutto to Alfred E. Kahn, Advisor to the President on Inflation (May 10, 1979). On the other side, Senators Kennedy (Mass.), Goldwater (Ariz.), Muskie (Me.), DeConcini (N.M.), and Tower (Tex.), as well as a number of Congressmen, wrote letters to the Department of the Treasury espousing the importers' position. *See* Letter from Senators Goldwater, DeConcini, Muskie, and Tower to the Department of the Treasury (June 25, 1979); Letter from Senator Kennedy to the Department of the Treasury (May 3, 1979); Letter from Congressmen Mikva, Guarini, Downey, Jones, Frenzel, Shannon, Derwinski, Richmond, Edwards, Rosenthal, O'Brien, Simon, Reuss, and Udall to the Department of the Treasury (June 13, 1979). In addition, Congressman Henry Reuss (Wis.) wrote a strong op-ed piece in the *New York Times* in support of the importers. Henry S. Reuss, *A Word on Behalf of the Mexican Tomato*, N.Y. TIMES, Apr. 22, 1979, at E19. Their concern was on behalf of consumers, who if antidumping duties were imposed might be deprived of Mexican vine-ripe tomatoes, which were considered to have more flavor than Florida mature green tomatoes. Consumers would also have had to pay higher prices for whatever tomatoes were available.

36. Termination: Certain Fresh Winter Vegetables from Mexico, 44 Fed. Reg. at 43,567.

37. 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).

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

39. *Id.* at 20,514.

Canadian tariff or other barrier on winter vegetable imports.[40] As a theoretical matter, therefore, there could be no price discrimination.[41] The Department found that this conclusion was backed by statistical evidence showing that overall price movements were the same in both markets and that the U.S. daily price was not systematically higher or lower than the Canadian price.[42] Finally, it noted that regression analysis on the U.S. and Canadian prices showed conclusively that there was no price discrimination between the United States and Canada.[43] This was the first and only time that the Department of Commerce has based a dumping determination in part on qualitative rather than quantitative evidence, and without a simple comparison of U.S. prices to normal value. The very unusual nature of the decision led to speculation that it had been influenced by political considerations, and indeed, this was one of the bases of the Florida industry's appeal to the CIT. Although the industry obtained extensive discovery that revealed intense interest in the case on the part of a number of government agencies, there was no "smoking gun" showing direct political intervention in the decisionmaking process, and the appeal was dismissed.[44]

In March 1996, the Florida growers filed a second antidumping petition, this time against tomatoes alone.[45] Applying the traditional comparison, the Department of Commerce issued a preliminary finding of dumping in November 1996, at an average margin of 17.56%.[46] At the same time, it announced that it had entered a suspension agreement[47] with the Mexican

40. *Id.*

41. *Id.* at 20,516.

42. *Id.*

43. *Id.* Regression analysis was necessary because even a simple comparison of the daily prices of a single grower to Canada and the United States could mask price differences that were the result not of price discrimination but of sales at different times of day or to destinations of different distances. The Department performed the regression analysis on as many "city-pairs" as it could find. A "city-pair" consisted of the prices of sales of the same grade made by the same importer on the same day to U.S. and Canadian cities roughly equidistant from the importer's location in Arizona. Note, *Applying Antidumping Law to Perishable Agricultural Goods*, 80 MICH. L. REV. 524, 552-57 (1982) (containing an extensive discussion of this unprecedented and never-to-be-repeated methodology).

44. *Southwest Fla. Winter Vegetable Growers Ass'n*, 584 F.Supp. at 18. The court also held that the unusual method of analysis performed by the Department of Commerce was within its broad discretion. *Id.*

45. Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 18,377 (1996).

46. 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, 56,615 (1996).

47. Suspension: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,618. The antidumping statute provides for suspension of an investigation based on an agreement between the Department of Commerce and the exporters under which the exporters undertake either (1) to cease exporting to the United States, (2) to cease dumping, or (3) to reduce the dumping margins to no more than 15% of the level found during the investigation so long as this will

producers under which they agreed not to sell to the United States below a specified reference price based on an average of the lowest average monthly price in 1992, 1993, and 1994. The agreement provides that the reference price can be changed each year if there is a significant change in the relationship between import and domestic prices.[48] Based on the agreement, the investigation was suspended.[49]

Although the Florida industry is free to file an antidumping petition against other types of winter vegetables at any time,[50] it cannot file a new petition with respect to tomatoes while the suspension agreement remains in effect. The Florida industry has no power to rescind the suspension agreement since the only parties to the agreement are the Department of Commerce and the Mexican industry. However, the Department is monitoring the agreement and will terminate it if there is evidence of substantial noncompliance.[51] If the suspension agreement is terminated, the antidumping investigation will continue from the point it had reached when the agreement was entered, that is, the preliminary determination by the Department of Commerce of sales at less than fair value.[52] After briefing by the parties and a hearing, the Department would issue its final less than fair value determination.[53] If, as is likely, this were affirmative,[54] the ITC would conclude its final injury investigation.[55] An affirmative ITC decision would result in the issuance of an antidumping order.[56]

Entry of an antidumping order against tomatoes or other winter vegetables would cause serious difficulties for the Mexican producers and their importers. The importers would be required to post cash deposits with the Customs Service at the time of entry.[57] Each year, the Mexican growers would be subject to an administrative review in which the Department of Commerce would conduct a detailed examination of their costs and prices

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eliminate the injurious effect of the dumped imports. 19 U.S.C. §§ 1673c(b)-(c). The tomato agreement falls into the latter category. No antidumping duties are levied while a suspension agreement is in effect. *Id.* § 1673c(m)(3). However, the Department of Commerce normally monitors suspension agreements quite carefully, and if it finds a violation, it can revoke the agreement, in which case the investigation continues. *Id.* § 1673c(i).

48. Suspension: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,620.

49. *Id.* at 56,618.

50. The 1978 antidumping investigation covered five types of vegetable, including tomatoes. Termination: Certain Fresh Winter Vegetables from Mexico, 44 Fed. Reg. at 43,567.

51. 19 U.S.C. § 1673c(i).

52. *Id.* § 1673c(i)(1)(B).

53. *Id.* § 1673d(a).

54. The Department of Commerce has rarely, if ever, issued a negative final less than fair value determination after having made a preliminary affirmative determination.

55. *Id.* § 1673d(b).

56. *Id.* § 1673e(b).

57. *Id.* § 1673e(a)(3).

over the previous year to determine the actual amount of duties owed on the past year's imports, and be required to set a cash deposit rate for future imports.[58] In addition to being burdensome and expensive, this process would create a great deal of uncertainty for the growers and importers. A major advantage of the suspension agreement now in effect is that the importers know in advance the minimum price at which they are required to sell. This certainty would vanish under an order since the Department would not determine a grower's production cost, against which the Department would measure its prices, until a year or more after sale. Moreover, the Department calculates margins in a less favorable way in reviews than in initial investigations. In an investigation, it compares the annual average U.S. price with normal value. Thus, a grower that has made a profit over the year would normally be found not to have dumped.[59] In a review, however, the Department normally conducts its analysis on a monthly basis. Thus, dumping duties would be assessed for every month in which the grower sold below cost, even though it made a profit over the full year.

If an antidumping order were issued, the Mexican producers and their importers could appeal both the Department of Commerce and the ITC findings underlying the order.[60] They would be well advised to use the NAFTA panel appeal process rather than appeal to the CIT, since, as explained previously,[61] the panel process is faster and would be more likely to produce a favorable result. One possible issue would be the period of investigation selected by the Department, which overlapped two seasons in the case of Sonora growers but included only a single season in the case of Baja growers.[62] This varying treatment seems unusual, and the Sonora growers — who account for the great majority of exports — were concerned that the portions of the two seasons selected by the Department reflected unusually low prices.

One question is whether an adverse decision could be attacked either in a NAFTA Chapter Nineteen appeal or in the WTO on the ground that the Department of Commerce methodology, which in essence requires a grower to make a profit every year to avoid dumping, fails to take proper account of the special characteristics of highly perishable produce, that is, extremely volatile pricing and a high proportion of sales below cost. The unpredictability of the market means that many produce growers do not expect to make a profit every season, but instead tend to make small losses over a

58. *Id.* § 1675.

59. Unless it made a higher profit on its sales in the home market, which in the case of Mexican winter vegetables seems unlikely.

60. *See id.* § 1516a.

61. *See supra* notes 29-30 and accompanying text.

62. *See* Suspension: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,618.

number of seasons that are made up for by large profits in occasional years. An attack on the Department of Commerce's methodology would not succeed in a Chapter Nineteen challenge, since the methodology is consistent with the antidumping statute, and a Chapter Nineteen panel is required to apply U.S. law.[63] A WTO challenge by the Mexican Government[64] to the methodology might have more success. Section 2.4 of the WTO Antidumping Agreement requires that a "fair comparison shall be made between the export price and the normal value."[65] It could be argued that a comparison that fails to take account of normal practices in the industry is unfair.

C. *Countervailing Duties*

The countervailing duty law, Sections 701-709 of the Tariff Act of 1930, as amended,[66] which is administered in the same way as the antidumping law, imposes additional duties on imports that are found to have benefited from certain types of government assistance and that cause or threaten to cause material injury to a U.S. industry. Virtually all kinds of government assistance, including outright grants, loans, loan guarantees, tax benefits (for example, accelerated depreciation), government equity investment, worker training assistance, and preferential freight rates are potentially countervailable if provided on terms more favorable than those available in the market. In determining whether a particular form of assistance is countervailable, the Department of Commerce draws a basic distinction between export subsidies and domestic subsidies. An export subsidy, that is, one that is paid only with respect to exports, is always countervailable.[67] A domestic subsidy, that is, one that is not linked to exports, will be countervailed if it is only provided to certain regions or is provided to a specific company or group of companies or a specific industry or group of industries.[68] On the theory that broadly based government assistance does not cause misallocation of resources, benefits provided to a broad sector of the economy ("generally available," in the Department's terminology) will not be countervailed unless the industry under investigation is a "predominant

63. *See* U.S. GAO, *supra* note 29, at 33.

64. Private parties have no right to appeal to the WTO. Thus, the Mexican growers would have to persuade the Mexican Government to bring a WTO proceeding arguing that the U.S. Government had failed to comply with the WTO Antidumping Agreement.

65. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 [hereinafter WTO Agreement], Annex 1A [hereinafter Antidumping Agreement], *reprinted in* PHILIP RAWORTH & LINDA C. REIF, THE LAW OF THE WTO 414 (Practioners DeskBook Series, 1995) [hereinafter LAW OF THE WTO].

66. 19 U.S.C. §§ 1671-1671h.

67. *Id.* §§ 1677(5)(A)-(B), (5A)(B).

68. *Id.* §§ 1677(5)(A), (5A)(D).

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user" of the assistance or receives a "disproportionately large" share of the benefits.[69] Assistance to agriculture as a whole is considered to be generally available.

Government assistance will only be countervailed if it is provided at terms that are better than those offered by the market.[70] Thus, while an outright grant will always be countervailable, a government loan at market interest rates will not be countervailed. In addition, the 1994 Uruguay Round Subsidies Agreement established certain categories of "green light" domestic subsidies that are immune from countervailing duties provided that they comply with the fairly rigorous conditions set forth in the agreement.[71]

Countervailing duty petitions are far less frequent than antidumping petitions, in part because governments have been getting out of the business of subsidizing industries. Even where government assistance is given, it is usually relatively low, so that the actual amounts of countervailing duties levied are generally quite small. The prospects for a countervailing duty proceeding against the Mexican winter vegetable industry seem remote.

D. *Others*

Section 337 of the Tariff Act of 1930 prohibits unfair methods of competition and unfair acts in the importation of articles.[72] It is most often used in cases of patent infringement and to a lesser extent, trademark and copyright violations. However, it also has been used in the past to challenge other alleged unfair acts such as passing off and predatory pricing. When a case is based on infringement of a statutory intellectual property right (patent, trademark, or copyright), it is not necessary to prove that the imports have injured a U.S. industry; in other cases injury must be shown.[73] Section 337 cases are heard by the ITC,[74] whose decisions can be appealed to the Court of Appeals for the Federal Circuit.[75] Section 337 is a popular form of relief because the ITC has the power to issue an order blocking all imports of the offending articles.[76] Unless Mexican growers are infringing patents owned by Florida interests or are engaged in other "unfair practices"[77] within the

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69. *Id.* § 1677 (5A)(D)(iii).

70. *Id.* § 1677(5)(E).

71. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 8.1-.2, WTO Agreement, *supra* note 65, Annex 1A, *reprinted in* LAW OF THE WTO, *supra* note 65, at 529.

72. 19 U.S.C. § 1337.

73. *Id.* § 1337(a).

74. *Id.* § 1337(b).

75. *Id.* § 1337(c).

76. *Id.* § 1337(d). The President can override such an order but in practice hardly ever does so.

77. *Id.* § 1337.

meaning of the statute, a Section 337 petition against Mexican winter vegetables seems unlikely.

Section 301 of the Trade Act of 1974, authorizes the executive branch to take action, including the imposition of import relief, where the actions of a foreign government violate a trade agreement or otherwise unjustifiably restrict U.S. commerce.[78] Section 301 is most often used to challenge foreign government barriers to U.S. exports. It can be used to challenge government subsidies, but the remedy — negotiations with the foreign government followed, if the negotiations are unsuccessful, by an action brought by the U.S. Government in the WTO[79] — is not nearly as effective as a countervailing duty petition, which, if successful, results in the levying of duties against the imports in question. Thus, it is unlikely that the Florida industry will file a Section 301 action to challenge any subsidies that might be provided to the Mexican industry.

III. OTHER FEDERAL RELIEF

The types of relief discussed in this section would require either legislation by Congress or discretionary action by the Administration. The Florida industry may find it difficult to muster much political support for such action because of its narrow geographic base.[80] As discussed in part III.C., the Florida industry's attempts to obtain legislation requiring the Mexican industry to comply with the packing requirements imposed by the Florida Tomato Agricultural Marketing Order made little progress in Congress. And the Florida industry was clearly "outgunned" politically during the first antidumping investigation.[81] Nevertheless, for the sake of completeness, this article briefly discusses some possible legislative or administrative remedies that the Florida industry has pursued in the past as well as some that it might pursue in the future.

A. *Marketing Restrictions*

The first attempt by the Florida tomato industry to restrict imports from Mexico was based on the Agricultural Marketing Agreement Act of 1937.[82] Section 8c of the Act permits specified groups of agricultural producers to propose to the U.S. Department of Agriculture (USDA) grade, size, and

78. *Id.* § 2411.

79. *Id.* § 2411(c).

80. The Florida industry might find it easier to obtain support from the Administration during a presidential election year. The Clinton Administration's support for the Helms-Burton legislation in 1996 — reversing its previous position — was clearly based on a desire to win Florida in the presidential race since that state has a large number of electoral votes.

81. *See supra* note 36 and accompanying text.

82. 7 U.S.C. §§ 608-608f.

quality restrictions on the marketing of agricultural products, designed to stabilize prices in times of surplus.[83] The proposals are normally approved by the USDA. Section 8e-1 of the Act imposes the same restrictions on imports in order to prevent them from undercutting the effect of the restrictions on domestic products.[84] In 1970, the Florida Tomato Committee, which had been established in 1955 under Section 8c,[85] proposed more severe restrictions on vine-ripe tomatoes — tomatoes that are picked at the so-called vine-ripe stage, when the tomatoes have just begun to turn pink and will continue to ripen naturally after picking — than those imposed on "mature greens," that is, tomatoes that are picked at a slightly earlier stage and must be treated with ethylene gas to ripen.[86] Although the restrictions, which were approved by the USDA, may have appeared neutral on their face, they would in practice have had a far greater impact on the Mexican industry than on Florida, because virtually all Mexican exports to the United States were vine-ripe, whereas a large portion of Florida's shipments were mature greens.[87] Several importers of Mexican tomatoes sued the USDA, seeking an injunction to prevent the restrictions from going into effect.[88] The U.S. District Court for the District of Columbia granted summary judgment to the USDA.[89] However, the Court of Appeals for the District of Columbia Circuit held that the importers had the right to an administrative hearing before the USDA before the restrictions could be imposed.[90] After a hearing, the case was settled upon the USDA's agreement not to implement the discriminatory regulations. Its lack of success makes it unlikely that the Florida industry will pursue this avenue again.

B. *Phytosanitary Restrictions*

The Florida growers might seek legislation that would require inspection of tomatoes and winter vegetables in Mexico before exportation to the United States and bar importation of produce that does not meet specified sanitary standards. Any such legislation would have to comply with the relevant

83. *Id.* § 608c(6).
84. *Id.* § 608e-1.
85. *Id.* § 608c(7)(c).
86. Walter Holm & Co. v. Hardin, 318 F. Supp. 521, 522-23 (D.D.C. 1970).
87. *Id.* at 523. A tape recording of a Florida Tomato Committee meeting at which the proposal was approved made clear that the real purpose of the restrictions was to limit imports from Mexico. The tape recording, which was produced during discovery, was played during the District Court hearing. The judge commented that in all his years on the bench no one had played a tape recording in his court before. Within a few years Judge Sirica was to hear a great many tape recordings in a more celebrated case.
88. *Id.* at 522.
89. *Id.* at 523.
90. Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

provisions of Chapter 7, Section B, of NAFTA.[91] Under these provisions, any sanitary or phytosanitary measure adopted by a party must be based on scientific principles and on an appropriate risk assessment.[92] It may not arbitrarily or unjustifiably discriminate between the goods of the party and the goods of another party, that is, it could not favor U.S. over Mexican produce.[93] The measure must be applied only to the extent necessary to achieve "its appropriate levels of protection."[94] Under Chapter Twenty of NAFTA, the Mexican Government could challenge any measure adopted by Congress for failure to comply with these requirements.[95] Any congressional action that was not backed up with adequate scientific data would be extremely vulnerable to such a challenge. If Mexico were to win a Chapter Twenty proceeding, it would be entitled to retaliate against U.S. imports unless the United States rescinded the legislation or offered some other form of compensation satisfactory to Mexico.[96]

The Mexican Government could also challenge the U.S. provision under Article 5(5) of the Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measures, which imposes similar requirements to Chapter 7 of NAFTA.[97] However, under Article 2005 of NAFTA, the United States could insist that the matter be dealt with under the NAFTA dispute resolution procedure.[98]

C. *Packing Restrictions*

The Florida industry has made a number of attempts to exploit the difference between vine-ripe tomatoes and mature greens through legislation that would have required the Mexico growers to pack their tomatoes in the same fashion as the Florida growers.[99] Because mature green tomatoes are

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91. NAFTA, *supra* note 26, arts. 709-724.
92. *Id.* art. 712(3).
93. *Id.* art. 712(4).
94. *Id.* art. 712(2).
95. *See id.* arts. 2001-2022. Private parties may not invoke the Chapter Twenty dispute resolution mechanism. Thus, the Mexican industry would have to persuade the Mexican Government to act on its behalf.
96. *Id.* art. 2018.
97. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 5, WTO Agreement, *supra* note 65, Annex 1A, *reprinted in* LAW OF THE WTO, *supra* note 65, at 271. In the first dispute under this agreement, brought by the United States, a WTO panel recently invalidated the EU ban on imports of beef produced with growth-inducing hormones on the ground that it was not based on adequate scientific evidence. GATT Dispute Panel Report on U.S. Complaint Concerning EU-Hormone Ban, WT/D527/R/USA (Aug. 18, 1997).
98. NAFTA, *supra* note 26, art. 2005.
99. *See, e.g.*, H.R. 116, 96th Cong. (1979). Testimony for and against the bill was presented during hearings before the Subcommittee on Trade of the House Ways and Means Committee. *Certain Tariff and Trade Bills: Hearings on H.R. 116 Before the Subcomm. on*

relatively hard and do not damage easily, they are usually shipped loose in cartons. Vine-ripe tomatoes, on the other hand, bruise easily, and are therefore shipped in standard "place-packs," in which the tomatoes are fitted together snugly to avoid movement. Until 1973, the size standards laid down by the USDA were based on the place-pack container, for example, "6 by 7" tomatoes were those in a size range that allowed them to be place-packed with six tomatoes in a row running the width of the box and seven in a row running the length of the box. However, in 1973, the USDA changed the size designations for tomatoes in a way that meant that place-packing now required mingling of contiguous sizes of tomato. The Florida Tomato Committee had promulgated a marketing order that required all tomatoes packed in a particular carton to be of the same size, so that the new size designations effectively prohibited place-packing of tomatoes covered by the order. However, the USDA took the position that Section 8e of the Agricultural Marketing Agreement Act of 1937[100] did not require domestic packing restrictions to be applied to imports.[101]

The legislation proposed by the Florida industry would have applied the packing restrictions of the marketing order to imports, so that Mexican vine-ripe could no longer be place-packed in the traditional form. This legislation would have required the Mexican growers either to shift their exports to mature greens — thereby losing a marketing advantage — or at considerable expense, to develop a new form of packaging. The Florida industry's argument that the mingling of different sizes in place-packs was confusing to consumers was undercut by the fact that place-packing had been accepted in the industry for many years and vine-ripe tomatoes from other parts of the United States, such as California, were shipped in place-packs without complaints from consumers. Indeed, the Consumers Union and the Consumers Federation of America went on record in opposition to the proposed legislation.[102] The proposed legislation, also opposed by various Executive Branch agencies, including the USDA AND the Treasury and State Departments, made no progress.

In view of its lack of success, it seems unlikely that the industry will choose to commit resources for another legislative push. However, the industry might urge the USDA to change its long-standing position and hold that Section 8e of the Agricultural Marketing Act does apply to packing restrictions in marketing orders. If the USDA were to act in this way,

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Trade of the Comm. on Ways & Means, 96th Cong. 336-574, 707-16 (1980) [hereinafter *Hearings*].

100. 7 U.S.C. § 608e; *see supra* text accompanying note 84.

101. *Hearings*, *supra* note 99, at 346 (testimony of Rep. Fred W. Richmond (quoting Agriculture Secretary Bergland)).

102. *See id.* at 377-78.

importers could challenge the action in U.S. courts on the ground that it is inconsistent with the statute and the USDA's original interpretation is correct.

If such a restriction were imposed by regulation and upheld by the U.S. courts, or if it were imposed by Congress, Mexico could seek redress under Chapter Twenty of NAFTA[103] by claiming that the restriction violated Article 301 of the Agreement, which requires each party to provide national treatment to the goods of other parties.[104] The United States most likely would respond that Mexican imports are receiving national treatment since Florida tomatoes are subject to the same restrictions. However, Mexico could counter that in Florida's case the restriction is in effect self-imposed, and that in any event, it does not apply to tomatoes produced in other parts of the United States.

Mexico also could claim that even if the restriction did not violate the national treatment requirement, Mexico's benefits under NAFTA were being "nullified or impaired" by the restriction.[105] Annex 2004 of NAFTA allows a party to utilize the Chapter Twenty dispute settlement mechanism whenever it considers that its benefits under the agreement are "being nullified or impaired as a result of [action by another party that is] . . . not inconsistent" with the Agreement.[106] In other words, it is not necessary for a party to establish a violation of the Agreement in order to obtain relief or the right to retaliate where it can demonstrate that benefits it expected under the Agreement, that is, increased trade resulting from the elimination of tariffs, have been adversely affected by the action of another party. Mexico could bring a similar challenge in the WTO to the restriction, arguing that the requirement violated the national treatment requirement of Article II of GATT and that in any event, it nullified or impaired benefits under GATT.[107]

D. *Marking Requirements*

The Florida winter vegetable industry also might seek a change in the labeling laws that would require each individual tomato to bear a label designating Mexico as the place of origin. Annex 311 to NAFTA allows parties to require goods imported from another party to bear a "country of origin marking."[108] However, Paragraph 5 of the Annex requires that the marking requirements be waived under certain circumstances, for example, where the product is "incapable of being marked," "cannot be marked except

103. NAFTA, *supra* note 26, arts. 2001-2022.
104. *Id.* art. 301.
105. *Id.* art. 2004, annex 2004.
106. *Id.* annex 2004.
107. GATT, *supra* note 9, art. II.
108. NAFTA, *supra* note 26, annex 311.

at a cost that [would discourage importation]," or "cannot be marked without materially impairing its function or substantially detracting from its appearance."[109]

Depending on its precise requirements, a labeling provision might arguably violate Paragraph 5,[110] in which case Mexico could bring a NAFTA Chapter Twenty proceeding against the United States. However, because tomatoes are currently sold in supermarkets in the United States with individual stickers attached, this challenge might be difficult to sustain. In any event, as already mentioned, there is a fairly strong consumer perception in the United States that vine-ripe Mexican tomatoes have more flavor than Florida mature greens, so a labeling requirement might actually increase sales of Mexican tomatoes.

IV. STATE ACTION

It has been suggested that the Florida winter vegetable industry might seek state legislation, especially in Florida, requiring inspection at state borders for compliance with state and federal labeling, packaging, phytosanitary, and other rules. This would not appear to be a major threat. In the absence of evidence that Mexican winter vegetables pose a health hazard, it is difficult to see why any state other than Florida itself would have an interest in taking action that might limit imports and increase prices for consumers. Florida, of course, is not a significant market for Mexican winter produce.

If Florida or another state were to pass legislation that infringed on a provision of NAFTA, Mexico could request the United States to bring an action against the state under Section 102(b)(2) of the NAFTA Implementation Act, seeking a declaration that the state legislation was invalid as being inconsistent with NAFTA.[111] If the U.S. Government failed to do so, Mexico could bring a challenge under Chapter Twenty, asserting that the United States had failed to comply with Article 105 of NAFTA, which

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109. *Id.* annex 311, para. 5.

110. *Id.* It also might contravene Article IX of GATT, which requires country-of-origin making requirements to "permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost." GATT, *supra* note 9, art. IX.

111. 19 U.S.C. § 3312(b)(2). The Mexican growers and their importers could not themselves bring suit in a U.S. court to invalidate the legislation, since Section 102(c) of the NAFTA Implementation Act provides that no one other than the U.S. Government can challenge a state action as being inconsistent with NAFTA. *Id.* § 3312(c). Section 102(b)(2)(A) of the Uruguay Round Agreements Act similarly bars private challenges to state action that may be inconsistent with the Uruguay Round Agreements. *Id.* § 3512(b)(2). Various pre-Uruguay Round decisions had invalidated state laws as being inconsistent with GATT. *See, e.g.*, Baldwin-Lima-Hamilton Corp. v. Superior Court, 25 Cal. Rptr. 798 (Cal. Dist. Ct. App. 1962); Hawaii v. Ho, 41 Haw. 565 (1957).

requires the parties "to ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments."[112]

V. CONCLUSION

The antidumping law poses a greater threat to the Mexican winter vegetable industry than any of the other possible remedies discussed in this article. Dumping and injury are relatively easy to prove, and the burdens imposed by an antidumping order are substantial, to say nothing of the uncertainty that an order creates. Tomatoes are protected from the imposition of antidumping duties so long as the suspension agreement remains in effect. However, the Mexican growers may find that the minimum price imposed by the agreement makes it impossible for them to compete in the U.S. market, in which case they will presumably abrogate the agreement. In any case, the U.S. Department of Commerce, at some point, may determine that the agreement has been violated even without deliberate abrogation by the Mexican growers. In this event, if the ITC finds injury and an antidumping order is entered, the growers and their importers will be subjected to the uncertainty and expense of a burdensome annual review process. And there is nothing to prevent the Florida winter vegetable industry from filing an antidumping petition against other winter vegetables at any time.

112. NAFTA, *supra* note 26, art. 105.