

**DEPARTMENT OF COMMERCE****International Trade Administration**

[A-201-820]

**Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) has suspended the antidumping investigation involving fresh tomatoes from Mexico. The basis for the suspension is an agreement between the Department and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico wherein each signatory producer/exporter has agreed to revise its prices to eliminate completely the injurious effects of exports of this merchandise to the United States.

**EFFECTIVE DATE:** November 1, 1996.

**FOR FURTHER INFORMATION CONTACT:** John Brinkmann or Judith Wey Rudman, Office of AD/CVD Enforcement II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th & Constitution Avenue N.W., Washington, D.C. 20230; telephone (202) 482-5288 or (202) 482-0192, respectively.

**SUPPLEMENTARY INFORMATION:****Background**

On April 18, 1996, the Department initiated an antidumping investigation under section 732 of the Tariff Act of 1930, (the Act), as amended, to determine whether imports of fresh tomatoes from Mexico are being or are likely to be sold in the United States at less than fair value (61 FR 18377, April 25, 1996). On May 16, 1996, the United States International Trade Commission (ITC) notified the Department of its affirmative preliminary injury determination. At the request of petitioners in this investigation, the Department postponed the preliminary determination until no later than October 7, 1996 (61 FR 40607, August 5, 1996). On October 7, 1996, the Department further postponed the preliminary determination until no later than October 28, 1996 (61 FR 53702, October 15, 1996).

The Commerce Department and the Mexican tomato growers initialed a proposed agreement suspending this investigation on October 10, 1996. Interested parties were informed that the Department intended to finalize the agreement on October 28, 1996, and were invited to provide written

comments on the agreement. The following interested parties filed comments with the Department on or before October 25, 1996: Desert Glory, Ltd.; petitioners; the Asociacion de Agricultura, Baja California, Mexico of San Diego, California; and the Fresh Produce Association of the Americas.

On October 28, 1996, the Department preliminarily determined that imports of fresh tomatoes from Mexico are being sold at less than fair value in the United States (see, the *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico* that is being published concurrently with this notice of suspension of the investigation).

The Department and the signatory producers/exporters of fresh tomatoes from Mexico signed the final suspension agreement on October 28, 1996.

**Scope of Investigation**

The products covered by this investigation are all fresh or chilled tomatoes (fresh tomatoes) except for cocktail tomatoes and those tomatoes which are for processing. For purposes of this investigation, cocktail tomatoes are green-house grown tomatoes, generally larger than cherry tomatoes and smaller than roma or common round tomatoes, and are harvested and packaged on-the-vine for retail sale. For purposes of this investigation, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying or the addition of chemical substances, or converting the tomato product into juices, sauces or purees. Further, imports of fresh tomatoes for processing are accompanied by an "Importer's Exempt Commodity Form" (FV-6) (within the meaning of 7 C.F.R. sections 980.501(a)(2) and 980.212(I)). Fresh tomatoes that are imported for cutting up, not further processed (e.g., tomatoes used in the preparation of fresh salsa or salad bars), and not accompanied by an FV-6 form are covered by the scope of this investigation.

All commercially-grown tomatoes sold in the United States, both for the fresh market and for processing, are classified as *Lycopersicon esculentum*. Important commercial varieties of fresh tomatoes include common round, cherry, plum, and pear tomatoes, all of which, with the exception of cocktail tomatoes, are covered by this investigation.

Tomatoes imported from Mexico covered by this investigation are classified under the following subheadings of the Harmonized Tariff Schedules of the United States (HTS),

according to the season of importation: 0702.00.20, 0702.00.40, 0702.00.60, and 9906.07.01 through 9906.07.09.

Although the HTS numbers are provided for convenience and Customs purposes, our written description of the scope of this proceeding is dispositive.

**Interested Party Comments**

Having analyzed all comments filed by interested parties, we continue to conclude that the Agreement meets the requirements of the statute. For a discussion of the Department's response to interested party comments, see the memorandum from Barbara R. Stafford to Robert S. LaRussa, Acting Assistant Secretary for Import Administration, dated October 28, 1996.

**Suspension of Investigation**

The Department consulted with the parties to the proceeding and has considered the comments submitted with respect to the proposed suspension agreement. In accordance with section 734(c) of the Act, we have determined that extraordinary circumstances are present in this case, as defined by section 734(c)(2)(A) of the Act. (See October 28, 1996, Extraordinary Circumstances Memorandum to Robert S. LaRussa).

The suspension agreement provides that: (1) The subject merchandise will be sold at or above the established reference price; and (2) for each entry of each exporter, the amount by which the estimated normal value exceeds the export price (or constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or constructed export price) price for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation. We have determined that this suspension agreement will: (1) Eliminate completely the injurious effect of exports to the United States of the subject merchandise; and (2) prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico.

We have also determined that the suspension agreement can be monitored effectively and is in the public interest, pursuant to section 734(d) of the Act. (See October 21, 1996, Public Interest Memorandum to Robert S. LaRussa). We find, therefore, that the criteria for suspension of the investigation pursuant to section 734(c) of the Act have been met. The terms and conditions of the suspension agreement, signed October 28, 1996, are set forth in Appendix I to this notice.

The suspension of liquidation ordered in the preliminary affirmative determination in this case (published concurrently with this notice) shall continue in effect, subject to section 734(h)(3) of the Act. Section 734(f)(2)(B) of the Act provides that the Department may adjust the security required to reflect the effect of the Agreement. Pursuant to this provision, the Department has found that the Agreement eliminates completely the injurious effects of imports and, thus, the Department is adjusting the security required from signatories to zero. The security rates in effect for imports from non-signatory growers remain as published in our preliminary determination.

Notwithstanding the suspension agreement, the Department will continue the investigation if it receives such a request in accordance with section 734(g) of the Act within 20 days after the date of publication of this notice.

This notice is published pursuant to section 734(f)(1)(A) of the Act.

Dated: October 28, 1996.

Robert S. LaRussa,  
*Acting Assistant Secretary for Import Administration.*

#### Appendix I.—Suspension Agreement Fresh Tomatoes From Mexico

Pursuant to section 734(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1673c(c)) (“the Act”), and section 353.18 of the U.S. Department of Commerce (“the Department”) regulations (19 C.F.R. 353.18), the Department and the signatory producers/exporters of fresh tomatoes from Mexico enter into this Suspension Agreement (the “Agreement”). On the basis of this Agreement, the Department shall suspend its antidumping duty investigation, the initiation of which was published on April 25, 1996 (61 FR 18377), with respect to fresh tomatoes from Mexico, subject to the terms and provisions set out below.

#### I. Product Coverage

The merchandise subject to this Agreement is all fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin, except for cocktail tomatoes and those tomatoes which are for processing. For purposes of this Agreement, cocktail tomatoes are green-house grown tomatoes, generally larger than cherry tomatoes and smaller than roma or common round tomatoes, and are harvested and packaged on-the-vine for retail sale. For purposes of this Agreement, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying or the addition of chemical substances, or converting the tomato product into juices, sauces or purees. Imports of fresh tomatoes for processing are accompanied by an “Importer’s Exempt Commodity Form” (FV-6) (within the meaning of 7 CFR section

980.501(a)(2) and 980.212(i)). Fresh tomatoes that are imported for cutting up, not further processed (e.g., tomatoes used in the preparation of fresh salsa or salad bars), and not accompanied by an FV-6 form are covered by this Agreement.

#### II

Commercially-grown tomatoes, both for the fresh market and for processing, are classified as *Lycopersicon esculentum*. Important commercial varieties of fresh tomatoes include common round, cherry, plum, and pear tomatoes, all of which, with the exception of cocktail tomatoes, are covered by this Agreement.

Tomatoes imported from Mexico covered by this Agreement are classified under the following subheadings of the Harmonized Tariff Schedules of the United States (HTS), according to the season of importation: 0702.00.20, 0702.00.40, 0702.00.60, and 9906.07.01 through 9906.07.09. Although the HTS numbers are provided for convenience and Customs purposes, the written description of the scope of this Agreement is dispositive.

#### III. U.S. Import Coverage

The signatory producers/exporters collectively are the producers and exporters in Mexico which, during the antidumping duty investigation of the merchandise subject to the Agreement, accounted for substantially all (not less than 85 percent) of the subject merchandise imported into the United States. The Department may at any time during the period of the Agreement require additional producers/exporters in Mexico to sign the Agreement in order to ensure that not less than substantially all imports into the United States are subject to the Agreement.

#### IV. Basis for the Agreement

Each signatory producer/exporter individually agrees that, in order to prevent price suppression or undercutting, the producer/exporter will not sell, on and after the effective date of the Agreement, merchandise subject to the Agreement at prices that are less than the reference price, in accordance with Appendix A to this Agreement.

In order to satisfy the requirements of section 734(c)(1)(B) of the Act, each signatory producer/exporter of fresh tomatoes from Mexico, individually, agrees that for each entry the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or the constructed export price) for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation, in accordance with the calculation methodologies described in Appendix B.

#### V. Monitoring of the Agreement

##### A. Import Monitoring

1. The Department will monitor entries of fresh tomatoes from Mexico to ensure compliance with Section III of this Agreement.

2. The Department will review publicly-available data and other official import data,

including, as appropriate, records maintained by the U.S. Customs Service, to determine whether there have been imports that are inconsistent with the provisions of this Agreement. The Department also will coordinate with U.S. Customs in its collection and review of data in connection with the monitoring of box-specific average weights.

##### B. Compliance Monitoring

1. The Department may require, and each signatory producer/exporter agrees to provide, confirmation, through documentation provided to the Department, that the price received on any sale subject to this Agreement was not less than the established reference price. The Department may require that such documentation be provided, and be subject to verification, within 30 days of the sale.

2. The Department may require, and each signatory producer/exporter agrees to report, on computer tape in the prescribed format and using the prescribed method of data compilation, each sale of the merchandise subject to this Agreement, either directly or indirectly to unrelated purchasers in the United States, including each adjustment applicable to each sale, as specified by the Department.

Each producer/exporter agrees to permit review and on-site inspection of all information deemed necessary by the Department to verify the reported information.

3. The Department may conduct administrative reviews under section 751 of the Act, upon request or upon its own initiative, to ensure that exports of fresh tomatoes from Mexico are at prices consistent with the terms of this Agreement. The Department may perform verifications pursuant to administrative reviews conducted under section 751 of the Act.

##### C. Shipping and Other Arrangements

1. The producers/exporters shall include as part of the documentation presented to U.S. Customs for entry of merchandise into the United States a declaration that the entry conforms with the requirement that the merchandise has been or will be sold at or above the reference price.

2. All reference prices will be expressed in U.S.\$/lb. in accordance with Appendix A. Subject to paragraph 24 of Annex 703.2 of the North American Free Trade Agreement, the quality of each entry of fresh tomatoes exported to the United States from Mexico will conform with any applicable U.S. Department of Agriculture minimum grade, size and/or quality import requirements in effect. Shipments that do not meet the requirements of this agreement will not be permitted entry into the United States.

3. Producers/exporters agree not to circumvent the Agreement. Not later than 30 days after each quarter, each signatory producer/exporter will submit a written statement to the Department certifying that all sales during the most recently completed quarter were at net prices (after rebates, backbilling, discounts for quality and other claims) at or above the reference price and were not part of or related to any act or

practice which would have the effect of hiding the real price of the fresh tomatoes being sold (e.g., a bundling arrangement, discounts/free goods/financing package, swap, or other exchange). Each producer/exporter agrees to permit full verification of its certification as the Department deems necessary.

#### D. Rejection of Submissions

The Department may reject any information submitted after the deadlines set forth in this Agreement or any information which it is unable to verify to its satisfaction. If information is not submitted in a complete and timely fashion or is not fully verifiable, the Department may calculate U.S. price based on facts otherwise available, as it determines appropriate, unless the Department determines that Section V applies.

#### E. Compliance Consultations

1. When the Department identifies, through import or compliance monitoring or otherwise, that sales may have been made at prices inconsistent with Section III of this Agreement, the Department will notify each signatory producer/exporter which it believes is responsible as well as the producer/exporter trade organizations party to this Agreement. The Department will consult with each such party for a period of up to 60 days to establish a factual basis regarding sales that may be inconsistent with Section III of this Agreement.

2. During the consultation period, the Department will examine any information which it develops or which is submitted, including information requested by the Department under Section IV.A. and B. above.

#### F. Review

If the Department is not satisfied at the conclusion of the consultation period that sales by such signatory producer/exporter are being made in compliance with this Agreement, the Department will conduct a review to determine whether this Agreement is being violated by such signatory producer/exporter. This provision does not limit or restrict the Department's authority to conduct an administrative review under section 751 of the Act and paragraph IV.B.3. of this Agreement.

#### G. Operations Consultations

During the first anniversary month of this Agreement, the Department will consult with the signatory producers/exporters regarding the operation of the Agreement. Consultations may be requested by any party to the Agreement in any June or December following the first anniversary of the Agreement. Consistent with the statutory requirement that the Agreement prevent the suppression or undercutting of price levels of domestic fresh tomatoes, the Department may revise the reference price following consultations under this provision. In particular, the Department expects to make downward or upward adjustments to the reference price to take into account any significant changes within the most recent semi-annual period relevant to the period under consideration (December–May; June–

November). For example, the Department expects to make a downward adjustment to take into account a significant change in the relationship of domestic prices to import prices from that which existed during the base period (as referred to in Appendix A) and which is attributable to a decline in domestic prices. In evaluating the significance of any change, the Department will look both to the extent of the change and its duration. For example, a very high percentage change in the relationship may be significant even though it occurs over a brief time period.

#### VI. Violations of the Agreement

If the Department determines that the Agreement is being or has been violated or no longer meets the requirements of section 734 (c) or (d) of the Act, the Department shall take action it determines appropriate under section 734(i) of the Act and the Department's regulations.

#### VII. Other Provisions

A. In entering into this Agreement, the signatory producers/exporters do not admit that any exports of fresh tomatoes from Mexico have an injurious effect on fresh tomato producers in the United States or have been sold at less than fair value. The signatory producers/exporters also do not admit that green-house, cherry or any other particular type of tomatoes are properly considered to be within the scope of the underlying investigation.

B. The signatory producers/exporters may withdraw from this Agreement upon 60 days written notice to the Department.

C. Upon request, the Department will advise any signatory producer/exporter on the Department's methodology for calculating its export price (or constructed export price) and normal value which, for purposes of this Agreement, are described in Appendix B. Further, the Department reserves the right to modify its methodology in calculating export price (or constructed export price) and normal value.

#### VIII. Disclosure and Comment

A. If the Department proposes to revise the reference price under paragraph IV.G., not later than three months prior to the first day of each semi-annual period, the Department will disclose the results and the methodology of the Department's calculation of the preliminary reference price established for that upcoming semi-annual period.

B. Not later than 7 days after the date of disclosure under paragraph VII.A., the parties to the proceeding may submit written comments to the Department, not to exceed 15 pages. After reviewing these submissions, the Department will provide the final reference price for the upcoming semi-annual period, normally within 30 days after the date of disclosure under paragraph VII.A.

C. The Department may make available to representatives of each interested party to the proceeding, under appropriately drawn administrative protective orders, any business proprietary information submitted to the Department pursuant to Section IV. of this Agreement, as well as the results of the Department's analysis of that information.

#### IX. Termination

Absent affirmative determinations under the five-year review provisions of sections 751 and 752 of the Act, the Department expects to terminate this Agreement and the underlying investigation no later than November 1, 2001.

#### X. Effective Date

The effective date of the Agreement is the date on which it is published in the Federal Register.

*For Members of Confederacion de Asociaciones Agricolas del Estado (C.A.A.D.E.S.) and Confederacion Nacional de Productores de Hortalizas (C.N.P.H.)*

Dated: October 28, 1996.

Luis Cárdenas F.,

*Confederacion de Asociaciones Agricolas del Estado (C.A.A.D.E.S.)* \*\*\*\*\*

Dated: October 28, 1996.

Basilio Gatzionis T.,

*Confederacion Nacional de Productores de Hortalizas (C.N.P.H.)*

For U.S. Department of Commerce.

Dated: October 28, 1996.

Robert S. LaRussa,

*Acting Assistant Secretary for Import Administration.*

#### Appendix A.—Fresh Tomatoes From Mexico, Suspension Agreement

The following is the methodology the Department will use when calculating the reference price for the purposes of this Agreement.

The reference price for the initial period (effective date of Agreement through September 30, 1997) will be calculated as follows:

The Department will determine the lowest average monthly price for fresh tomatoes from Mexico in the United States during each year in the base period (calendar years 1992–1994). The Department will average these three figures to calculate one figure which will serve as the reference price for the initial period of the Agreement. As calculated pursuant to this methodology, the reference price for the initial period is \$5.17 for a 25 pound box (\$0.2068/lb.).

The reference price from the initial period will remain in effect unless modified in accordance with the provisions of paragraph IV.G.

The term "reference price" refers to the price F.O.B. Nogales/San Diego/Laredo from the first handler (importer/broker) to an unrelated purchaser. Any movement expenses beyond the three Customs district points of entry listed above must be added to the reference price and must reflect the actual price of transportation in an arms length transaction. Where imports are sold through affiliated parties, the transfer price from the importer/broker (located at the point of entry) to an affiliate must be at or above the reference price and any subsequent sale to an unaffiliated party must reflect mark-ups usual for the company during the period prior to this Agreement or normal within the industry if the relationship did not exist prior to this Agreement.

The reference price for each type of box shall be determined based on the average weights used by U.S. Customs at the port of Nogales, AZ for duty assessment purposes, with the initial weights being those in use as of December 8, 1995. For example, if U.S. Customs determines that the average weight of a 3-layer, 6X6 box of tomatoes is 30 pounds, the reference price for that box will be equal to 30/25 times the reference price then in effect. If, either on its own or through consultations with the Department, U.S. Customs determines to revise an average weight figure, the Department will provide 15 days notice to signatory producers/exporters (through the producer/exporter trade organizations party to this Agreement) prior to such revised average weights becoming effective for purposes of this Agreement.

In the event that a signatory producer/exporter intends to export subject merchandise to the United States in a box for which U.S. Customs has not assigned an average weight, the signatory producer/exporter shall notify the Department in writing no later than 45 days prior to the date of the first export of such boxes to the United States. The notification shall include a complete description of the size of the box, and the intended packing form (i.e., 4X4, 5X5, loose pack, etc.). The Department shall allow any interested party to submit written comments, not to exceed 10 pages, on the appropriate average weight for the box within 7 days after the filing of the written notification by the signatory producer/exporter, and the Department shall inform the signatory producer/exporter of the average weight for the box no later than 30 days after filing of the written notification by the signatory producer/exporter.

Appendix B.—Fresh Tomatoes From Mexico, Suspension Agreement

#### *Normal Value*

The cost or price information reported to the Department that will form the basis of the normal value (NV) calculations for purposes of the Agreement must be comprehensive in nature and based on a reliable accounting system (e.g., a system based on well-established standards and can be tied either to the audited financial statements or to the

tax return filed with the Mexican government).

#### *Sales Price*

When we base normal value on sales prices, such prices will be the prices at which the foreign like product is first sold for consumption in the comparison market, in the usual commercial quantities and in the ordinary course of trade. Also, to the extent practicable, the comparison shall be made at the same level of trade as the export price or constructed export price.

#### *Constructed Value*

When normal value is based on constructed value, we will compute growing season specific constructed values (CVs) based on the sum of each respondent's growing costs for each type of tomato, plus amounts for selling, general and administrative expenses, U.S. packing costs and profit. We will collect this cost data for an entire growing season in order to accurately determine the per unit CV of that growing season.

#### *Export Price and Constructed Export Price*

Export price (EP) and constructed export price (CEP) refer to the two types of calculated prices for merchandise imported into the United States. Both EP and CEP are based on the price at which the subject merchandise is first sold to a person not affiliated with the foreign producer or exporter.

#### *Fair Comparisons*

To ensure that a fair comparison with NV is made, the Department will make adjustments to the price to the first unaffiliated customer in calculating the export price or constructed export price. For both EP and CEP the Department will add packing costs, if not already included in the price, rebated import duties, and, if applicable, certain countervailing duties. For both EP and CEP, the Department will deduct transportation costs, and export taxes or duties. In calculating CEP, the Department will make additional deductions for commissions, direct selling expenses incurred in selling the merchandise under investigation in the United States, the cost of any further manufacture or assembly

performed in the United States, and a portion of profit. In addition, the Department will deduct indirect selling expenses that relate to commercial activity in the United States.

#### *Normal Value*

Calculation of CV

Direct Materials  
+Direct Labor  
+Factory overhead

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=Cost of Manufacturing  
+Home Market SG & A \*

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=Cost of Production  
+Profit \*

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=Constructed Value (CV)

\* SG & A and profit are based on home market sales of a foreign like product made in the ordinary course of trade.

Calculation of Comparison Price:

The calculation of normal value will vary depending on whether the comparison is price-to-EP or price-to-CEP.

*Export Price (EP) and Constructed Export Price (CEP)*

Calculation of EP

Gross Unit Price  
– Movement Expenses  
– Discounts and Rebates

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=Export Price (EP)

Calculation of CEP

Gross Unit Price  
– Movement Expenses  
– Discounts and Rebates  
– Direct Selling Expenses  
– Indirect Selling Expenses that relate to commercial activity in the U.S.  
– The cost of any further manufacture or assembly incurred in the U.S.  
– CEP Profit

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=Constructed Export Price (CEP)

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