



A-201-820  
Investigation  
Public Document  
ITA/E&C/P&N/OP/BAU: Team

TO ALL INTERESTED PARTIES

August 15, 2019

Re: Revisions to Proposed Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico

To Whom It May Concern:

The Department of Commerce (Commerce) has been in intensive consultations with interested parties, including representatives of the Mexican tomato industry<sup>1</sup> and representatives of the U.S. tomato industry,<sup>2</sup> toward reaching a consensus on a new suspension agreement. Commerce has considered the comments submitted to date regarding this matter and has revised its July 17, 2019 proposal for a new suspension agreement.<sup>3</sup> Below we explain some of the changes to our July 17, 2019 proposal.

With regard to inspections near the border, all loads shall be subject to inspection for quality and condition defects by USDA. Commerce proposes that approximately 50 percent of incoming loads of imported tomatoes be inspected, instead of 100 percent of loads per the July 17 proposal. The importer of record must request the USDA inspection. Commerce proposes that rejected loads may either be returned to Mexico or destroyed under USDA oversight. Details of how the selection shall be conducted is subject to further consultations between Commerce and other U.S. Government agencies. In addition, one year after the effective date of the agreement, Commerce will assess whether the percentage of imported loads that are inspected near the border should be increased.

Second, Commerce proposes minor modifications to the definition of “Selling Agent” and certain tomato type definitions for clarity.

Third, Commerce continues to propose updating the box weight charts in Appendix C; however, the weighing exercises necessary for an update have not yet been scheduled. In the interim, Commerce proposes that, in general, the box weight chart in the 2013 Suspension Agreement will apply until the box weights are revised.

Fourth, Commerce proposes removing the requirement to include Buyer information in quarterly certifications, but continuing to include this requirement for the Signatories and Selling Agents

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<sup>1</sup> Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Asociación de Productores de Hortalizas del Yaqui y Mayo and Sistema Producto Tomate.

<sup>2</sup> The Florida Tomato Exchange.

<sup>3</sup> See Letter from the Department of Commerce, “Changes to Proposed Terms of Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico” (July 17, 2019).



sampled for additional information on a quarterly basis. Commerce will continue to accept signed quarterly certifications in PDF format but maintains that quantity and value data must be reported electronically using Microsoft Excel.

Commerce is attaching a draft suspension agreement text illustrating changes made since the July 17, 2019 draft suspension agreement in redline. We urge the representatives of the Mexican tomato industry to accept this proposal.

If you have any questions regarding this matter, please contact me at (202) 482-6199 or Sally C. Gannon at (202) 482-0162.

Sincerely,

A handwritten signature in blue ink, appearing to read 'P. Lee Smith', with a stylized flourish at the end.

P. Lee Smith  
Deputy Assistant Secretary  
for Policy & Negotiations  
Enforcement & Compliance

Attachments

## **AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO**

Pursuant to section 734(c) of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673c(c)), and 19 CFR 351.208 (2018),<sup>1</sup> the U.S. Department of Commerce (Commerce) and the Signatory producers/exporters of fresh tomatoes from Mexico (individually, Signatory; collectively, Signatories) enter into this Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico (Agreement).

### **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 those tomatoes which are for processing. 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. In Appendix F of this Agreement, Commerce has outlined the procedure that Signatories must follow for selling subject merchandise for processing. Fresh tomatoes that are imported for cutting up, not further processing (*e.g.*, tomatoes used in the preparation of fresh salsa or salad bars), are covered by this Agreement.

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, grape, plum, greenhouse, and pear tomatoes, all of which are covered by this Agreement.

Tomatoes imported from Mexico covered by this Agreement are classified under the following subheading of the Harmonized Tariff Schedules of the United States (HTSUS), according to the season of importation: 0702. Although this HTSUS number is provided for convenience and customs purposes, the written description of the scope of this Agreement is dispositive.

### **II. Definitions**

For purposes of the Agreement, the following definitions apply:

- A. “Anniversary Month” means the month in which the Agreement becomes effective.
- B. “Buyer” means the first unaffiliated customer in the United States that takes title of the subject merchandise.

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<sup>1</sup> The resumption of the investigation and negotiation of a new suspension agreement were conducted in accordance with Commerce’s regulations in effect at the time of the original investigation, 19 CFR 353.18 (1996). Because this Agreement constitutes a new segment of the proceeding, the Agreement is governed by the regulations currently in effect. 19 CFR 351.701; *see also San Vicente Camalu SPR de Ri v. United States*, 491 F. Supp. 2d 1186 (CIT 2007).

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- C. "Effective Date" means the date on which Commerce and the Signatories sign the Agreement.
- D. "Fresh Tomatoes" means the product described under section I, "Product Coverage," of the Agreement.
- E. "Grower Association" means a Mexican grower association whose members produce and/or export Fresh Tomatoes from Mexico and are also Signatories to this Agreement, *e.g.*, Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C.; Consejo Agrícola de Baja California, A.C.; Asociación Mexicana de Horticultura Protegida, A.C.; Asociación de Productores de Hortalizas del Yaqui y Mayo, and Sistema Producto Tomate.
- F. "Interested Party" means any person or entity that meets the definitions provided in section 771(9) of the Act.
- G. "Mexico" means the customs territory of the United Mexican States and foreign trade zones within the territory of Mexico.

~~H. "Non Organic Tomatoes" means Fresh Tomatoes *not* produced by a production system that has been certified "organic" by the U.S. Department of Agriculture and may include Round, Roma, Specialty, Stem On, and Tomatoes on the Vine Fresh Tomatoes (*see, respectively*, sections II.L, II.M, II.O, II.R, and II.T).~~

~~II.H.~~ "Organic Tomatoes" means Fresh Tomatoes produced by a production system that has been certified "organic" by the U.S. Department of Agriculture, is labelled as "organic," and may include Round, Roma, Specialty, Stem On, and Tomatoes on the Vine Fresh Tomatoes (*see, respectively*, sections II.~~L~~K, II.~~M~~L, II.~~O~~N, II.~~R~~Q, and II.~~T~~S).

~~II.I.~~ "PACA" means the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a *et seq.*).

~~K.J.~~ "Reference Price" means the minimum price at which merchandise subject to this Agreement can be sold in the United States.

~~L.K.~~ "Round" means round Fresh Tomatoes, whether mature green or vine ripe, not including any Stem On tomatoes, regardless of growing method or type of packing.

~~M.L.~~ "Roma" means roma or plum Fresh Tomatoes, whether mature green or vine ripe, not including any Stem On tomatoes, regardless of growing method or type of packing.

~~N.M.~~ "Selling Agent" means any entity (*e.g.*, importer, agent, ~~or~~ distributor, or entity meeting the definition of "commission merchant," "dealer," or "broker," as those terms are defined in section 1(b) of the PACA (7 U.S.C. 499a(b))) that facilitates the

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sale to the Buyer ~~and/or that meets the definition of “commission merchant,” “dealer,” or “broker,” as those terms are defined in section 1(b) of the PACA (7 U.S.C. 499a(b)).~~

~~O.N.~~ “Specialty” means grape, cherry, heirloom, cocktail Fresh Tomatoes, or any other tomato varietal, other than Round and Roma tomatoes, ~~except with or without Stem-On tomatoes.~~

~~P.O.~~ “Specialty – Loose” means Specialty Fresh Tomatoes not in packaging.

~~Q.P.~~ “Specialty – Packed” means Specialty Fresh Tomatoes in packaging.

~~R.Q.~~ “Stem On” means any type of Fresh Tomato, except Specialty and Tomatoes on the Vine, with some or all of the stem attached.

~~S.R.~~ “Substantially all” of the subject merchandise means exporters and producers that have accounted for not less than 85 percent by value or volume of the imports of subject merchandise.

~~T.S.~~ “Tomatoes on the Vine” means any type of Fresh Tomato, except Specialty, in which there are two or more tomatoes, typically in a cluster, with the vine attached; such tomatoes include single tomatoes of the same type that are found in the same package with the tomato clusters herein defined.

~~U.T.~~ “United States” means the customs territory of the United States of America (the 50 States, the District of Columbia, and Puerto Rico) and foreign trade zones located within the territory of the United States.

~~V.U.~~ “USDA” means the United States Department of Agriculture.

~~W.V.~~ “Violation” means noncompliance with the terms of the Agreement, whether through an act or omission, except for noncompliance that is inconsequential or inadvertent, and does not materially frustrate the purposes of the Agreement. See section VIII for examples of activities that may be deemed by Commerce to be Violations.

~~X.W.~~ “Working Group” means the joint working group established on August 23, 2013 between the Mexican tomato industry and the Government of Mexico for purposes of regularly monitoring and reconciling Fresh Tomatoes from Mexico export data and identifying and addressing any inconsistencies or irregularities.

Any term or phrase not defined by this section shall be defined using either a definition provided in the Act for that term or phrase, or the plain meaning of that term, as appropriate.

### III. Suspension of Investigation

As of the Effective Date, in accordance with section 734(c) of the Act and 19 CFR 351.208, Commerce will suspend its antidumping duty investigation on Fresh Tomatoes from Mexico initiated on April 18, 1996.<sup>2</sup>

#### **IV. U.S. Import Coverage**

In accordance with section 734(c)(1) of the Act, the Signatories are the producers and/or exporters in Mexico which account for substantially all of the subject merchandise imported into the United States. Commerce 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.

#### **V. Statutory Conditions for the Agreement**

In accordance with section 734(c) of the Act, Commerce has determined that extraordinary circumstances are present in this investigation because the suspension of the investigation will be more beneficial to the domestic industry than the continuation of the investigation and that the investigation is complex.

In accordance with section 734(d) of the Act, Commerce determines that the suspension of the investigation is in the public interest and that effective monitoring of the Agreement by the United States is practicable. Section 734(a)(2)(B) of the Act provides that the public interest includes the availability of supplies of the merchandise and the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry. Accordingly, if a domestic producer requests an administrative review of the status of, and compliance with, the Agreement, Commerce will take these factors into account in conducting that review. If Commerce finds that the Agreement is not working as intended in this regard, Commerce will explore all appropriate measures, including renegotiation of the terms of the Agreement to resolve the problem or measures under section 751(d)(1) of the Act.

#### **VI. Price Undertaking**

In order to satisfy the requirements of section 734(c)(1)(A) of the Act, each Signatory individually agrees that, to prevent price suppression or undercutting, it will not sell in the United States, on and after the Effective Date of the Agreement, merchandise subject to the Agreement at prices that are less than the Reference Prices established in Appendix A.

In order to satisfy the requirements of section 734(c)(1)(B) of the Act, each Signatory 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 Act and Commerce's regulations

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<sup>2</sup> See *Initiation of Antidumping Duty Investigation: Fresh Tomatoes From Mexico*, 61 FR 18377 (April 25, 1996).

and procedures, including but not limited to the calculation methodologies described in Appendix B.

## **VII. Monitoring of the Agreement**

### **A. Import Monitoring**

1. The Signatories will maintain the Working Group, which will regularly monitor and reconcile Mexican export data and identify and address any inconsistencies or irregularities. The Working Group will refer any alleged Violations (either those discovered during its monitoring exercises or those reported by Commerce) to the Mexican Government for appropriate action. For further information, please see information provided at: <https://enforcement.trade.gov/tomato>.
2. Commerce will monitor entries of Fresh Tomatoes from Mexico to ensure compliance with section VI of this Agreement.
3. Commerce will review, and place on the official record, publicly available data and other official import data, including, as appropriate, records maintained by U.S. Customs and Border Protection (CBP), to determine whether there have been imports that are inconsistent with the provisions of this Agreement.
4. Commerce will review, as appropriate, data it receives from the Working Group and through any data exchange program between U.S. and Mexican government agencies, to determine whether there have been imports that are inconsistent with the provisions of this Agreement.
5. An interagency task force between Commerce, USDA, and CBP will review data and information, as appropriate, and coordinate enforcement action, as necessary.

### **B. Compliance Monitoring**

1. Commerce may require, and each Signatory agrees to provide, confirmation, through documentation provided to Commerce, that the price received on any sale subject to this Agreement was not less than the established Reference Price. Commerce may require that such documentation be provided and be subject to verification.
2. Commerce may require, and each Signatory agrees to report in the prescribed format and using the prescribed method of data compilation, each sale of the merchandise subject to this Agreement, made either directly or indirectly to Buyers in the United States, including each adjustment applicable to each sale, as specified by Commerce. Each Signatory agrees to permit review and on-site inspection of all information deemed necessary by Commerce to verify the reported information.



3. Commerce may initiate administrative reviews under section 751(a) of the Act in the month immediately following the Anniversary Month, upon request or upon its own initiative, to ensure that exports of Fresh Tomatoes from Mexico satisfy the requirements of section 734(c)(1)(A) and (B) of the Act. Commerce may perform verifications pursuant to administrative reviews conducted under section 751 of the Act.
4. At any time it deems appropriate, and without prior notice, Commerce shall conduct verifications of parties handling Signatory merchandise (*e.g.*, Signatory producers and/or exporters and Selling Agents) to determine whether they are selling Signatory merchandise in accordance with the terms of this Agreement. Commerce shall also conduct verifications at the Grower Association level at locations and times it deems appropriate to ensure compliance with the terms of the Agreement. Commerce may conduct periodic verifications, in Mexico, at border-crossing locations, or through questionnaires issued by Commerce, to spot check compliance.
5. The Working Group shall provide to Commerce a quarterly report on all issues originating with and investigated by the Working Group or submitted by Commerce to the Working Group for investigation under the Agreement. In addition, the Working Group shall provide to Commerce an annual report on all activities undertaken, to include information on any allegation of a Violation of the Agreement, information uncovered during investigations, and the results of/resolution to the issue. Commerce shall place such reports on the official record of the Agreement.
6. Commerce and the Signatory producers/exporters shall hold periodic meetings, as necessary, *e.g.*, more frequently during the peak season, to discuss monitoring and enforcement matters.
7. Commerce shall normally sample 40 Signatories on a quarterly basis, within 30 days of the end of each quarter, from which to request detailed information related to each sale including: date on which it entered into a contract for the sale of Signatory tomatoes with each Selling Agent during that quarter; name of the Selling Agent; quantity of tomatoes to be supplied under that contract; and price of the tomatoes sold under each contract. Further, the sampled Signatories shall submit to Commerce the following information: export license number, quantity exported under that license; price of such tomatoes; importer of record for each shipment, Selling Agent(s), if any, involved in the sale; the Buyer (if known); USDA inspection reports for the required inspections at entry under section VII.C.3; and records to support any return or destruction of tomato loads pursuant to those inspections. All information must be submitted to Commerce in electronic format, including Microsoft Excel reporting of all data contained therein.
8. Through a contractual arrangement, Signatories shall require their Selling Agents



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to respond to Commerce's requests for information concerning sales of Signatory tomatoes. Commerce shall normally sample 40 Selling Agents on a quarterly basis, within 30 days of the end of each quarter, from which to request information including: the date during the quarter on which it entered into a contract for sale of Signatory tomatoes, the name of that Signatory, the quantity of tomatoes to be supplied under that contract and the price, and the pre-season letter sent by the Selling Agent to the Buyer. The sampled Selling Agent shall submit to Commerce each quarter the quantity of Signatory tomatoes it imports from each Signatory and the quantity of Signatory tomatoes it sells on behalf of each Signatory, and, as applicable, USDA inspection reports for the required inspections at entry under section VII.C.3; and records to support any return or destruction of tomato loads pursuant to those inspections. Each sampled Selling Agent shall also submit to Commerce a listing of each sale of Signatory tomatoes it makes to a Buyer during the quarter, including the name of the Buyer, quantity sold by category of tomato, and the price. All information must be submitted to Commerce in electronic format, including Microsoft Excel reporting of all data contained therein.

### **C. Inspection of Subject Merchandise at Entry**

1. All loads of subject merchandise shall be subject to inspection for quality and condition defects by USDA at the time and place such tomatoes enter the United States. The U.S. Government (USG) shall select approximately 50 percent of loads for USDA inspection. Once notified by the USG that one of its loads has been selected, ~~The~~ importer of record must request the USDA inspection, and USDA shall use official inspection instructions for determination of quality, condition, and grade to perform an unrestricted certification. USDA shall normally perform inspections within 48 hours of the official request for inspection by the importer of record that the load is available for inspection. USDA shall institute its program to inspect ~~all selected~~ subject merchandise, as specified in this paragraph, no later than six months from the Effective Date.
2. USDA will inspect and grade the subject merchandise to the following standards only, as applicable, using shipping point tolerances:
  - a. U.S. No. 1, U.S. Combination, or U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes (for shipping point tolerances see 51.1861 of the aforementioned U.S. Standards).
  - b. U.S. No. 1 or U.S. No. 2 of the U.S. Standards for Grades of Tomatoes on the Vine (for tolerances see 51.2168 of the aforementioned U.S. Standards).
  - c. U.S. No. 1 or U.S. No. 2 of the U.S. Standards for Grades of Greenhouse Tomatoes (for tolerances see 51.3348 of the aforementioned U.S. Standards).
3. If a load of Signatory tomatoes has more defects than the tolerances established in

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the USDA standards, then the entire load must be returned to Mexico, and the Signatory will pay all expenses related to the return of the load to Mexico. Proof of such return must be maintained by the importer and is subject to submission to, and verification by, Commerce, consistent with the importer's contractual obligation with the Signatory. Alternatively, the entire load of defective tomatoes may be destroyed under USDA oversight, with a USDA certificate provided to the importer as proof of destruction. Proof of such destruction must be maintained by the importer and is subject to submission to, and verification by, Commerce, consistent with the importer's contractual obligation with the Signatory.

4. Beginning six months from the effective date of the Agreement, each Signatory must ensure, through a contractual arrangement with the appropriate party, that the importer of record for all imports of Fresh Tomatoes from Mexico from the Signatory requests the USDA inspection, if selected as indicated above in section C.1. Similarly, beginning six months from the Effective Date of the Agreement, Signatories must ensure, through a contractual arrangement with the appropriate party, that all tomatoes that do not pass the USDA inspection at entry are returned to Mexico or destroyed under USDA oversight, as indicated above. Signatories must maintain proof of these contractual arrangements, provide such records to Commerce upon request, and make them available for verification by Commerce at any time. Consistent with the above, in the six months following the Effective Date of the Agreement, Signatories should endeavor for the importer of record to request USDA inspection, and should endeavor for the tomatoes that do not pass USDA inspection to be returned to Mexico or destroyed under USDA oversight.
5. Signatories and Selling Agents, as applicable, must maintain a copy of the Mexican export license, USDA inspection reports, and entry documents associated with each entry of Signatory tomatoes into the United States, as well as records to support any return or destruction of tomato loads under section VII.C.3. Signatories and Selling Agents, as applicable, must provide these records to Commerce upon request and make them available for verification by Commerce at any time.
6. Within one year from the date USDA implements its inspection program under this section VII.C (i.e., within one and a half years after the Effective Date), Commerce will assess the effectiveness of the inspection program for 50 percent of loads of subject merchandise, including data such as the percentage of loads failing inspection. After providing for interested party comment and reviewing the evidence on the official record, Commerce will determine whether the percentage of loads of imported tomatoes to be inspected should be increased.<sup>3</sup>

#### **D. Shipping and Other Arrangements**

<sup>3</sup> The deadlines specified in sections VII.C.1 and VII.C.6 will be tolled per any Commerce tolling instituted during the relevant periods.

1. All Reference Prices will be expressed in U.S. Dollars (\$) per pound (lb.) in accordance with Appendix A. All Reference Prices are FOB U.S. shipping point, *i.e.*, to the U.S. side of the U.S.-Mexico border. The Reference Price includes all palletizing and cooling charges incurred prior to shipment from the Mexican shipping point, *i.e.*, from the Mexican side of the U.S.-Mexico border. The delivered sales price to a Buyer for all Fresh Tomatoes from Mexico exported directly, or indirectly through a third country, to the United States shall include all movement and handling expenses beyond the point of entry into the United States (*e.g.*, McAllen, Nogales, or Otay Mesa) and in excess of the Reference Price, *i.e.*, the FOB U.S. shipping point price.
2. The parties to this Agreement acknowledge that, in accordance with Mexican regulations, Mexican tomato producers and non-producer exporters exporting to the United States will become Signatories to the Agreement. Signatories will fully comply with all requirements of Mexican regulations concerning identification, tracking, verification and inspection by the relevant Mexican authorities including the Ministry of Economy (SECON), the Ministry of Agriculture (SAGARPA), SAGARPA's National Food Health, Safety and Quality Service (SENASICA) and Customs. Signatory producers will be required to formally assign volumes, through SECON, sold in Mexico to another party as a condition for that party to obtain an export license. In accordance with Mexican regulations, non-compliance will result in the revocation of export privileges. In addition, exporting Fresh Tomatoes to the United States under a Signatory number different than one's own Signatory number may result in revocation of a Signatory's export license in Mexico. For further information, please see information provided at: <https://enforcement.trade.gov/tomato>.
3. Signatories agree not to take any action that would circumvent or otherwise evade, or defeat the purpose of, this Agreement. Signatories agree to undertake any measures that will help to prevent circumvention. For example, each Signatory will take the following actions:
  - a. It is the responsibility of each Signatory to ensure that each sale of its merchandise is made consistent with the requirements of this Agreement and all its Appendices. To that end, each Signatory shall enter into a contract with the Selling Agent(s), if the sale is made indirectly to the Buyer, or with the Buyer, if the sale is made directly to the Buyer, that incorporates the terms of this Agreement. This contractual arrangement must establish that the Selling Agent maintain documentation demonstrating that sales of subject merchandise are made consistent with the requirements of this Agreement. Further, if the Signatory's sale to the Buyer is made through a Selling Agent, the Selling Agent shall incorporate the terms of this Agreement into its contract with the Buyer.

It is the responsibility of each Signatory to confirm and ensure any such

Selling Agent(s) and Buyer(s) hold a valid and effective license issued pursuant to the PACA, to the extent required by the PACA.<sup>4</sup> All contractual arrangements will specify that parties in the distribution chain from the Signatory to the Buyer will maintain documentation as required by the PACA and as consistent with the requirements of the Agreement.

- b. Each Signatory will label its boxes of subject merchandise that are exported to the United States with its name, Signatory identification number, and a statement that "These Tomatoes Were Grown/Exported By a Signatory of the 2019 Suspension Agreement."<sup>5</sup> Alternatively, if the Signatory that exports the subject merchandise is different from the entity that produced the subject merchandise, it will label the boxes with its name and its Signatory identification number. Each Signatory also will label its boxes with the type of tomato being shipped in the box, *i.e.*, Round, Roma, Specialty, Stem On, or Tomatoes on the Vine.
  - c. Each Signatory will label its boxes of fresh tomatoes sold in Mexico with its name and the statement "Prohibida Su Exportacion a los EUA/Not for Export to the United States."
4. Not later than 30 days after the end of each quarter,<sup>6</sup> each Signatory must submit a certification to Commerce. Through a contractual arrangement, Signatories shall require their Selling Agents to provide information necessary for inclusion in the Signatories' quarterly certification. Each Signatory agrees to permit full verification of its certification as Commerce deems necessary. Signatories can obtain a copy of the suggested forms for submitting the quarterly certification information from Commerce's website at: <https://enforcement.trade.gov/tomato/XXXXXX>. Quarterly certifications must be submitted to Commerce in electronic format, including Microsoft Excel reporting of all data contained therein. The certification must include:
- a. A written statement to Commerce certifying that the invoice price for all sales of its Fresh Tomatoes made during the most recently completed quarter (after rebates, backbilling, discounts for quality, and other claims) were at or above the Reference Prices in effect, 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, on-site processing arrangement, commingling tomato

<sup>4</sup> This may be done by using "PACA SEARCH" on the PACA website at [www.usda.gov/paca](http://www.usda.gov/paca), or by calling the PACA National License Center Customer Service line at 1-800-495-7222, ext #1.

<sup>5</sup> Signatories may continue to use boxes with markings from the 2013 Suspension Agreement through ~~{xx date- 2019}~~ three months from the Effective Date, but they must add the type of tomato being shipped to the existing labeling on the box, *i.e.*, Round, Roma, Specialty, Stem On, or Tomatoes on the Vine.

<sup>6</sup> The quarters are December 1 - February 28, March 1 - May 31, June 1 - August 30, and September 1 - November 30.

products, discounts/free goods/financing package, end-of-year rebates, free freight, and/or a swap or other exchange), and were otherwise consistent with the terms of the Agreement.

- b. The total quantity and value of tomatoes by tomato type sold ~~to each Buyer~~ during the most recently completed quarter (whether directly or via a Selling Agent), ~~the name of the Buyer~~, and the total condition defect sales adjustments granted, as applicable, ~~granted to each Buyer~~ pursuant to Appendix D. For any sales adjustments, the Signatory must report the number of loads on which claims for condition defects were granted, the total volume of tomatoes destroyed, the total value of claims granted, and the total value of payments made to the Buyer by the Signatory and/or Selling Agent.
- c. All USDA-issued certifications showing destruction of any defective tomatoes pursuant to Appendix D.
- d. Documentation of any return of rejected loads to Mexico, pursuant to Appendix D, and a written statement that there were no additional rejections beyond those being provided.
- e. The volume of each Signatory producer's registered production that is assigned for export through SECON.
- f. The volume of a Signatory producer's registered production that is assigned to any other party for export to the United States and the name of that party.
- g. The volume of each Signatory exporter's (e.g., a non-producer exporter) registered production assigned to it for export to the United States by a Signatory producer(s) and the name of the Signatory producer(s).
- h. A statement acknowledging the Signatory's understanding that intentional Violations of the Agreement are subject to additional civil penalties per section VIII.B of the Agreement.
- i. Alternatively, a written statement to Commerce, if the Signatory did not export Fresh Tomatoes to the United States, certifying that it made no sales to the United States during the most recently completed quarter.

#### **E. Rejection of Submissions**

Commerce may reject: 1) any information submitted after the deadlines set forth in this Agreement; 2) any submission that does not comply with the filing, format, translation, service, and certification of documents requirements under 19 CFR 351.303; 3) submissions that do not comply with the procedures for establishing

business proprietary treatment under 19 CFR 351.304; 4) submissions that do not comply with any other applicable regulations, as appropriate, or any information that it is unable to verify to its satisfaction. If information is not submitted in a complete and timely fashion or is not fully verifiable, Commerce may use facts otherwise available for the basis of its decision, as it determines appropriate, consistent with section 776 of the Act.

#### **F. Compliance Consultations**

1. When Commerce identifies, through import or compliance monitoring or otherwise, that sales may have been made at prices inconsistent with section VI of this Agreement, Commerce will notify each Signatory which it believes is responsible through their Grower Associations' counsel or directly, in the event that the Signatory is not represented by counsel. Commerce 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 VI of this Agreement.
2. During the consultation period, Commerce will examine any information that it develops or which is submitted, including information requested by Commerce under any provision of this Agreement.
3. If Commerce is not satisfied at the conclusion of the consultation period that sales by such Signatory are being made in compliance with this Agreement, Commerce may evaluate under section 751 of the Act, or section 19 CFR 351.209, whether this Agreement is being violated, as defined in section VIII.E of this Agreement, by such Signatory.

#### **G. Operations Consultations**

Commerce will consult with the Signatories regarding the operations of this Agreement. A party to the Agreement may request such consultations, as necessary.

Notwithstanding the previous paragraph, the parties may agree to revise the Reference Prices subject to consultations.

### **VIII. Violations of the Agreement**

- A. If Commerce determines that there has been a Violation of the Agreement or that the Agreement no longer meets the requirements of sections 734(c) or (d) of the Act, Commerce shall take action it determines appropriate under section 734(i) of the Act and Commerce's regulations.
- B. Pursuant to section 734(i) of the Act, Commerce will refer any intentional Violations of the Agreement to CBP. Any person who intentionally commits a Violation of the Agreement shall be subject to a civil penalty assessed in the same amount, in the same manner, and under the same procedures as the penalty imposed for a fraudulent violation



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of section 592(a) of the Act. A fraudulent violation of section 592(a) of the Act is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise. For purposes of the Agreement, the domestic value of the merchandise will be deemed to be not less than the Reference Price, as the Signatories agree not to sell the subject merchandise at prices that are less than the Reference Price or to ensure that sales of the subject merchandise are made consistent with the terms of the Agreement.

- C. In addition, Commerce will examine the activities of Signatories, Selling Agents, and any other party to a sale subject to the Agreement to determine whether any activities conducted by any party aided or abetted another party's Violation of the Agreement. If any such parties are found to have aided or abetted another party's Violation of the Agreement, they shall be subject to the same civil penalties described in section VIII.B above.

Signatories to this Agreement consent to the release of all information presented to or obtained by Commerce during the conduct of verifications to CBP and/or USDA. Further, through a contractual arrangement, Signatories shall require that the Selling Agent(s) consent to the release of all information presented to or obtained by Commerce during the conduct of verifications to CBP and/or USDA.

- D. Any Violation of the pricing or other terms of this Agreement by a PACA licensee may be deemed by the PACA Division as "unfair conduct" in accordance with the PACA.<sup>7</sup> Commerce, a Signatory, or any other interested person may file with the Secretary of Agriculture a written notification of any alleged violation of the PACA pursuant to section 6(b) of the PACA (7 U.S.C. 499f(b)). Upon receipt of a written notification, the PACA Division will examine the allegation and determine whether further investigation, issuance of a letter of warning, or administrative complaint is warranted. Failure of a PACA licensee to cooperate with an ongoing investigation can lead to suspension of license and publication thereof. When an administrative complaint is filed, a finding by an administrative law judge that a PACA licensee or an entity operating subject to license has engaged in repeated and flagrant violations of the PACA can result in the assessment of a civil penalty, or suspension or revocation of the PACA license and/or publication thereof. Ensuing licensing and employment restrictions are mandated by the PACA Division. Notice of disciplinary actions taken against a licensee or an entity subject to license is released to the public.

- E. Examples of activities which Commerce may deem to be Violations of the Agreement include:

1. Sales in which the invoice prices of subject merchandise (after rebates, backbilling, discounts for quality, and other claims) are below the Reference Price.

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<sup>7</sup> Although not a party to this Agreement, the actions of a Buyer who is a PACA licensee or is operating subject to license that aid or abet a Violation of the Agreement may constitute an unfair trade practice that violates the PACA.



2. Any act or practice which would have the effect of hiding the real price of the Fresh Tomatoes from Mexico being sold (e.g., a bundling arrangement, on-site processing, commingling tomato products, discounts/free goods financing package, end-of-year rebates, free freight, or a swap or other exchange).
3. Failure to request a USDA inspection on a load selected for inspection in accordance with section VII.C.1.
- 2.4.Failure to return to Mexico or destroy under USDA oversight any load of Fresh Tomatoes that does not pass USDA inspection in accordance with section VII.C.3.
- 3.5.Labeling boxes in a manner that is inconsistent with the labeling provisions of section VII.D.3.b above to circumvent this Agreement.
- 4.6.Sales of exports that were not properly assigned by a Signatory producer to a non-producer Signatory through SECON and are therefore inconsistent with section VII.D.2.
- 5.7.Failure to provide a quarterly certification in accordance with section VII.D.4.
- 6.8.Repeated or routine over filling of boxes beyond reasonable variations in weights for the apparent purpose of circumventing this Agreement.
- 7.9.A Signatory's failure to notify Commerce of intended shipments of Fresh Tomatoes from Mexico in boxes for which there is no average weight on the box weight chart in accordance with Appendix C.
- 8.10. Sales that are not in accordance with the terms and conditions applied by Commerce when calculating net sales prices for transactions involving adjustments due to changes in condition after shipment as detailed in Appendix D of this Agreement.
- 9.11. Selling Signatory tomatoes to Canada in a manner that is not consistent with the requirements of Appendix E of this Agreement.
- 10.12. Selling Signatory tomatoes for processing in the United States in a manner that is not consistent with the requirements of Appendix F of this Agreement.
- 11.13. Exporting Fresh Tomatoes from Mexico to the United States under a Signatory number different than one's own Signatory number.
- 12.14. Failure to comply with the terms of this Agreement.
- 13.15. Any other act or practice that Commerce finds is in violation of this Agreement.

## **IX. Other Provisions**

- A. In entering into this Agreement, the Signatories do not admit that any exports of Fresh Tomatoes from Mexico are having or have had an injurious effect on fresh tomato producers in the United States, have caused the suppression or undercutting of prices, or have been sold at less than fair value.
- B. Upon request, Commerce will advise any Signatory of Commerce's methodology for calculating its export price (or constructed export price) and normal value in accordance with the Act and Commerce's regulations and procedures, including but not limited to, the calculation methodologies described in Appendix B of this Agreement.

## **X. Disclosure and Comment**

This section provides the terms for disclosure and comment following consultations or during segments of the proceeding not involving a review under section 751 of the Act.

- A. If Commerce proposes to revise the Reference Price(s) as a result of consultations under section VII.G of this Agreement, Commerce will disclose the preliminary Reference Price(s), including any calculation methodology, not less than 30 days before the date on which the price(s) would become final and effective.
- B. Not later than seven days after the date of disclosure under paragraph X.A, Interested Parties may submit written comments concerning the proposed Reference Price(s) to Commerce, not to exceed fifteen pages. After reviewing these submissions, Commerce will establish the final Reference Price(s).
- C. Interested Parties shall file all communications and other submissions made pursuant to section VII or other sections of the Agreement via Commerce's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), which is available to registered users at <https://access.trade.gov> and to all parties at the following address:

U.S. Department of Commerce  
Central Records Unit, Room B8024  
1401 Constitution Ave., NW  
Washington, DC 20230

Such communications and submissions shall be filed consistent with the requirements provided in 19 CFR 351.303.

- D. Commerce may make available to representatives of each Interested Party to the proceeding, pursuant to and consistent with 19 CFR 351.304-351.306, any business proprietary information submitted to and/or collected by Commerce pursuant to section VII of this Agreement, as well as the results of Commerce's analysis of that information.

## **XI. Duration of the Agreement**

- A. This Agreement has no scheduled termination date. Termination of the suspended investigation will be considered in accordance with the five-year review provisions of section 751(c) of the Act and 19 CFR 351.218.
- B. An individual Signatory, or Signatories, collectively, or Commerce may withdraw from this Agreement at any time. The withdrawal of Commerce or any other Signatory to the Agreement shall be effective no later than 90 days after the date written notice of withdrawal is provided to Commerce or the Signatory or Signatories, respectively.
- C. In the event of withdrawal by either Signatories who account for substantially all of the imports of Fresh Tomatoes, or by Commerce, Commerce shall terminate this Agreement. Upon termination, Commerce shall continue the investigation and follow the procedures outlined in sections 733(d)(1)(B) and (d)(2) of the Act, or 734(i)(1) of the Act, as applicable.

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Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance  
U.S. Department of Commerce

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Date

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The following parties hereby certify that the members of their organization agree to abide by all terms of the Agreement:

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(Name and Title of Certifying Official)

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(Signature of Certifying Official)

For Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C.

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Date

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(Name and Title of Certifying Official)

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(Signature of Certifying Official)

For Consejo Agrícola de Baja California, A.C.

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Date

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(Name and Title of Certifying Official)

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(Signature of Certifying Official)

For Asociación Mexicana de Horticultura Protegida, A.C.

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Date

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---

(Name and Title of Certifying Official)

---

(Signature of Certifying Official)

For Asociación de Productores de Hortalizas del Yaqui y Mayo

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Date

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(Name and Title of Certifying Official)

---

(Signature of Certifying Official)

For Sistema Producto Tomate

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Date

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## **APPENDIX A – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – REFERENCE PRICES**

Consistent with the requirements of section 734(c) of the Act, to eliminate completely the injurious effect of exports to the United States and to prevent the suppression or undercutting of price levels of domestic fresh tomatoes, the Reference Prices are as follows:

Reference Price in U.S. Dollars per pound (lb.) (FOB U.S. shipping point, <i>i.e.</i> , U.S. side of the U.S.-Mexico border) <sup>8</sup>		
Non-Organic Tomatoes	Round and Roma	0.31
	Stem On	0.50
	Tomatoes on the Vine	0.50
	Specialty - Loose	0.49
	Specialty - Packed	0.59
Organic Tomatoes	Round and Roma	0.496
	Stem On	0.80
	Tomatoes on the Vine	0.80
	Specialty – Loose	0.784
	Specialty - Packed	0.944

The Reference Price for each type of box shall be determined based on the average weights stated in the chart contained in Appendix C of the Agreement. The delivered sales price to a Buyer for all Fresh Tomatoes from Mexico exported directly, or indirectly through a third country, to the United States shall include all movement and handling expenses beyond the point of entry into the United States (*e.g.*, McAllen, Nogales, or Otay Mesa) and in excess of the Reference Price, *i.e.*, the FOB U.S. shipping point price.

<sup>8</sup> The Reference Prices will remain in effect until changed. In accordance with section VII.G of the Agreement, the Reference Prices may be revised. No revision will be considered before {XX date}.

## **APPENDIX B – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – ANALYSIS OF PRICES AT LESS THAN FAIR VALUE**

### **A. Normal Value**

The cost or price information reported to Commerce 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).

#### **1. Based on Sales Prices in the Comparison Market**

When Commerce bases 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 (EP) or constructed export price (CEP).

Calculation of NV:

Gross Unit Price

+/- Billing Adjustments

- Movement Expenses

- Discounts and Rebates

- Direct Selling Expenses

- Commissions

- Home Market Packing Expenses

= Normal Value (NV)

#### **2. Constructed Value**

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

Calculation of CV:

+ Direct Materials

+ Direct Labor

+ Factory overhead

= Cost of Manufacturing

+ Home Market SG&A\*

= Cost of Production

+ U.S. Packing



+ Profit\*  
= Constructed Value (CV)

\* SG&A and profit are based on home-market sales of the foreign like product made in the ordinary course of trade. SG&A includes financing but not movement expenses.

## B. Export Price and Constructed Export Price

EP and 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.

### Calculation of EP:

Gross Unit Price  
- Movement Expenses  
- Discounts and Rebates  
+/-Billing Adjustments  
+Packing Expenses  
+Rebated Import Duties  
= Export Price (EP)

### Calculation of CEP:

Gross Unit Price  
- Movement Expenses  
- Discounts and Rebates  
+/- Billing Adjustments  
- Direct Selling Expenses  
- Indirect Selling Expenses that relate to commercial activity in the United States  
- The cost of any further manufacture or assembly incurred in the United States  
- CEP Profit  
+ Rebated Import Duties  
- Commissions  
= Constructed Export Price (CEP)

## C. Fair Comparisons

To ensure that a fair comparison with EP or CEP is made, Commerce will make adjustments to normal value. Commerce will adjust for physical differences between the merchandise sold in the United States and the merchandise sold in the home market. For EP sales, Commerce will add in U.S. direct selling expenses, U.S. commissions<sup>9</sup> and packing expenses. For CEP sales, Commerce will subtract the amount of the CEP offset, if warranted, and add in U.S. packing

<sup>9</sup> If there are not commissions in both markets, then Commerce will apply a commission offset.

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expenses.

## APPENDIX C – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – BOX WEIGHTS

Commerce has the sole authority to make revisions to the Box Weight Charts used to apply the applicable reference price to particular box configurations. The Reference Prices for each pack style or box configuration shall be determined based on the average net weights stated in the Box Weight Charts below.

Commerce shall commence and complete a box weighing exercise within 12 months following the signature of this Agreement, and thereafter, at such times as considered appropriate by Commerce. From the Effective Date, until such time as the box weight exercise is completed, the box weights from the previous 2013 suspension agreement will be incorporated into this current agreement, with necessary additions or modifications.

All weighing exercises may occur at a U.S. Customs and Border Protection (CBP) port facility, at U.S. Selling Agent facilities, in bonded compounds, or at Signatory packhouses, at the sole discretion of Commerce. For weighing exercises conducted at a CBP port facility, Commerce will coordinate with CBP in its collection and review of data for calculating and monitoring box-specific average weights, as appropriate.

Commerce will provide 14 hours advance notice to the Signatories (through the Grower Associations' counsel or directly to the Signatories, in the event that they are not represented by counsel) of the commencement of any box weighing exercise. Subject to approval by Commerce and CBP, as appropriate, Commerce will undertake best efforts to ensure that at least two, but no more than four representatives of the Signatories are permitted access to a port or other facility to observe the box weighing exercise. Observers will be chosen by the Grower Associations. Any requests for additional observers from Signatories not represented by the Grower Associations' counsel will be considered by Commerce. In the event that no otherwise qualified observers are permitted by CBP to enter a port facility, Commerce will either delay the exercise until at least one qualified observer is present or, at its discretion, will conduct the box weighing exercise at an alternate location.<sup>10</sup>

To derive representative average net weights<sup>11</sup> for each box type in the charts below, and any configurations that may be added, Commerce will weigh twenty sample boxes from ten shippers for high-volume pack types,<sup>12</sup> a minimum of two shippers for low-volume pack types, and five

<sup>10</sup> Assuming proper notice is provided and necessary government approval is granted, it is the Signatories' responsibility to ensure that their representatives observe the box weighing exercise, or the right to observe is waived.

<sup>11</sup> Average net weights are calculated by deducting the tare weight from the average gross box weight. For each twenty-box sample, the tare weight will be calculated by weighing a minimum of two empty boxes. If the differences in the weights of the boxes exceed two-hundredths of a pound, additional boxes will be weighed to establish the tare. Irrespective of any deviation, the average weight of five boxes will be sufficient to establish the tare.

<sup>12</sup> The 25-pound box configuration is an example of a high-volume pack type.

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shippers for all other pack types. All shippers will be randomly chosen, without notice to the specific shippers.

Observers may raise bona fide challenges to the recording of the weight of a particular box at the time it is weighed and must specify the nature of the challenge.<sup>13</sup> The parties will endeavor to resolve any such challenges immediately at the time of the weighing. A box weight will not be recorded if a bona fide challenge is not resolved. No challenges to the weight of a box will be considered once its weight has been recorded.

If Commerce determines to revise an average weight figure based upon information that an average weight on the chart is no longer accurate or to provide an average weight for a box configuration not currently on the chart, Commerce will provide at least fifteen days' notice to Signatories (through the Grower Associations' counsel or directly to the Signatories, in the event that they are not represented by counsel) prior to the effective date of such revised average weights for purposes of this Agreement. Commerce will determine the revised average weight in accordance with the procedure described above.

In the event that a Signatory intends to export subject merchandise to the United States in a box for which there is no average weight on the chart, the Signatory shall notify Commerce in writing no later than five business days prior to the date of the first exportation of such boxes to the United States. Signatories can obtain a copy of the suggested form for submitting this information from Commerce's website at: <https://enforcement.trade.gov/tomato/XXXXXX>. This information must be submitted to Commerce in accordance with the filing instructions set forth in Commerce's regulations. Commerce shall allow any Interested Party to submit written comments, not to exceed ten pages, on the appropriate average weight for the box within seven days after the filing of the written notification by the Signatory, and Commerce shall inform the Signatory or its representative of the average weight for the box no later than thirty days after filing of the written notification by the Signatory. A Signatory's failure to notify Commerce of intended shipments of tomatoes in boxes for which there is no average weight on the box weight chart may constitute a Violation of the Agreement in accordance with section VIII.E.<sup>79</sup>.

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<sup>13</sup> Examples of bona fide challenges may include the non-random selection of trucks, loads or boxes, or selection of wet, damaged, or compromised boxes or pallets.

**Box-Weight Chart – Round and Roma  
Suspension of Antidumping Investigation on Fresh Tomatoes from Mexico**

**TBD**

**Box-Weight Chart – Stem On  
Suspension of Antidumping Investigation on Fresh Tomatoes from Mexico**

**TBD**

**Box-Weight Chart – Tomatoes on the Vine  
Suspension of Antidumping Investigation on Fresh Tomatoes from Mexico**

**TBD**

**Box-Weight Chart – Specialty – Loose  
Suspension of Antidumping Investigation on Fresh Tomatoes from Mexico**

**TBD**

**Box-Weight Chart – Specialty – Packed  
Suspension of Antidumping Investigation on Fresh Tomatoes from Mexico**

**TBD**

## **APPENDIX D – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO -- PROCEDURES FOR MAKING ADJUSTMENTS TO THE SALES PRICE DUE TO CERTAIN CHANGES IN CONDITION AFTER SHIPMENT**

The purpose of this appendix is to explain the procedures for making adjustments to the sales price of Signatory tomatoes due to certain changes in condition after shipment following USDA inspections at destination points (*e.g.*, receiver facilities). The net sales price of all accepted tomatoes in the load, inclusive of all price adjustments and credits (*e.g.*, destruction costs, freight expenses, repacking charges, and inspection fees, as applicable) for the partial load being rejected, shall result in a unit price that is not less than 100 percent of the applicable Reference Price established in Appendix A. Once the above-noted price adjustments and credits are deducted from the total original invoice value (original unit sales price multiplied by original quantity of tomatoes), the remaining invoice value divided by the quantity of accepted tomatoes may not result in a unit sales price not less than 100 percent of the Reference Price.

Appendix G of the Agreement outlines specific actions that Signatories should take to ensure that their efforts to abide by the Agreement are upheld in any claims taken to USDA under PACA.

To facilitate the verification of claims for changes in condition after shipment, the contracts between the Signatory and the Buyer (if no Selling Agent(s) is included in the distribution chain) or between the Signatory, Selling Agent(s), and the Buyer must establish that all documentation be completed within 15 business days after the USDA inspection, and that claims be resolved within 15 business days after the USDA inspection, unless the claim is referred to PACA for mediation. Failure to complete this documentation in a timely manner may constitute a Violation of the Agreement in accordance with section VIII.E.810. When filing quarterly certifications with Commerce in accordance with section VII.D.4, Signatories must report the number of loads on which claims for condition defects were granted, the total volume of tomatoes destroyed, the total value of claims granted, and the total value of payments made to the Buyer by the Signatory and/or Selling Agent.

Upon request from Commerce at any time, whether for sales made directly, or indirectly through a Selling Agent, to the Buyer, Signatories must provide a worksheet detailing all adjustments, expenses, and payments to the Buyer by the Signatory or Selling Agent related to such reported claims for condition defects in a given quarter, with a reconciliation to the invoice price and supporting documentation to include the CBP entry packet (if available), USDA inspection certificates, Commerce's Accounting Sales and Cost form, bills of lading, invoices, credit memos, freight invoices, reconditioning/repacking invoices, inspection fees, as well as destruction receipts, donation certificates, and or/proof of return.

### **A. USDA Inspection and Adjustments**

1. No adjustments will be made for failure to meet suitable shipping conditions unless supported by an unrestricted USDA inspection. A USDA inspection certificate reflecting the unrestricted USDA inspection must be provided to support claims for rejection of full or partial loads.

2. If the USDA inspection indicates that the load has: 1) over 8% soft/decay condition defects; 2) over 15% of any one condition defect; or 3) greater than 20% total condition defects, the receiver may reject the load or may accept a portion of the load and reject the quantity of tomatoes lost during the salvaging process. In those instances, price adjustments will be calculated as described below. For purposes of this Agreement, a condition defect is any defect listed in the chart in part A.5 below. When a load of tomatoes has condition defects in excess of those outlined above as documented on a USDA inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes.
3. No adjustments will be made for failure to meet suitable shipping conditions if the USDA inspection certificate does not indicate one of the condition thresholds outlined above.
4. The USDA inspection must be called for no more than eight hours from the time of arrival at the destination specified by the receiver and be performed in a timely fashion thereafter. If there is more than one USDA inspection on a given load, the inspection certificate corresponding to the first inspection is the one that will be used for making any adjustment to the sales price. However, if an appeal inspection is conducted which reverses the original inspection, it will supersede the first inspection, as long as the appeal inspection is requested within a reasonable amount of time not to exceed 12 hours from the first inspection.

The first receiver of the product, regardless of whether that receiver is acting on behalf of a Buyer or whether the receiver is the Buyer acting on its own right, must specify the city/metropolitan area of the destination of the product. The inspection will take place at the destination of delivery as specified prior to shipment.

No adjustments will be granted for a USDA inspection at a destination which is different from the destination specified by the first receiver of the product. In the event that the first receiver does not specify the city/metropolitan area of the destination of the product, the six-hour period within which an inspection may be requested will begin to run at such time as title to the product transfers to the unrelated purchaser, for example, upon loading of the product at the first handler's (importer's) warehouse in an FOB transaction and upon delivery of the product to the Buyer's warehouse in a delivered sale.

A person or company shall be considered a broker for a Buyer: 1) when that person or company falls within the description of types of broker operations set forth in 7 CFR 46.27; or 2) has provided a broker's memorandum of sale as set forth in 7 CFR 46.28(a). The following paragraphs apply if a broker or dealer is involved in the transaction.



A broker, unlike a dealer, does not take ownership or control of the tomatoes but arranges for delivery directly to the vendor or purchaser. Because a broker never takes ownership or control over, or title to, the tomatoes, the Buyer and not the broker may request an inspection, and only the Buyer is entitled to any resulting adjustments. The inspection would take place at the Buyer's destination, as specified in the broker's contract with the Selling Agent.

When a dealer is involved in the sale, the destination of delivery stated in the contract is where the inspection is to take place. If the dealer does not specify the destination of delivery, the default destination of delivery is the warehouse of the Selling Agent. With respect to a load of tomatoes that is owned or controlled by a dealer, it is the responsibility of the dealer to request an inspection of the tomatoes in his possession in a timely manner, if he deems it necessary. If the dealer does not request an inspection in a timely manner (*i.e.*, within eight hours from the time of arrival at the destination specified by the dealer) and resells the tomatoes to a third party, which does request an inspection, the dealer is then responsible for all costs and adjustments pertaining to the inspection and the condition or quality of the tomatoes.

5. Under this Agreement, adjustments to the sales price of Signatory tomatoes will be permitted for all condition defects. The term "condition defect" is intended to have the same definition recognized by USDA's Specialty Crops Inspection Division and, therefore, covers the following items:

Condition Defects
1) Abnormal Coloring
2) Abnormally Soft and Watery Fruit
3) Blossom End Discoloration
4) Bruises
5) Chilling Injury
6) Cuts and Broken Skins (unhealed)
7) Discolored Seed Areas
8) Freezing and Freezing Injury
9) Insect/Worm Injury (alive when present)
10) Internal Discoloration
11) Moldy and/or Decayed Stems
12) Nailhead Spot
13) Shriveling
14) Skin Checks
15) Soft/Decay
16) Soil Spot
17) Surface Discoloration (Silvery-White and Gold Fleck)
18) Sunburn
19) Sunken Discolored Areas
20) Waxy Blister

21) White Core
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6. In calculating the transaction price for loads subject to an adjustment claim for condition defects, as defined above, the tomatoes classified as DEFECTIVE will be treated as rejected and as not having been sold.

#### B. Contractual Terms for Rejection of Partial Loads

If the load contains condition defects greater than those outlined above and the receiver does not reject the entire load of tomatoes, Commerce will factor certain adjustments into the transaction price, provided that the following conditions apply:

1. The price invoiced to and paid by the Buyer for the accepted tomatoes must not fall below the Reference Price. That is, once the below-detailed expenses are deducted from the total invoice value, the remaining total invoice value divided by the total remaining quantity of accepted tomatoes which are sold must be at or above the Reference Price.
2. The Signatory or Selling Agent, as applicable, may reimburse the Buyer for actual destruction costs associated with the DEFECTIVE tomatoes.
3. The Signatory or Selling Agent, as applicable, may reimburse the Buyer for the portion of freight expenses allocated to the DEFECTIVE tomatoes.
4. If the Signatory or Selling Agent, as applicable, follows the guidelines outlined below, it may reimburse the Buyer for repacking charges directly associated with salvaging and reconditioning the load.
  - a. If the salvaging and reconditioning activity is performed by a party unaffiliated with the Buyer, the fee charged for the service may be reimbursed if the Buyer can provide evidence for such costs (*i.e.*, specifically, proof-of-payment documentation for the invoice from the repacker).
  - b. If the salvaging and reconditioning activity is performed by the Buyer or a party affiliated with the Buyer, the direct labor costs or, in lieu thereof, one-half of the ordinary and customary repacking charges may be reimbursed. To substantiate such costs, the Buyer or party affiliated with the Buyer must provide detailed records of the labor cost incurred for repacking or, where applicable, evidence of the ordinary and customary repacking costs.
5. The Signatory or Selling Agent, as applicable, may reimburse the Buyer for the inspection fees listed on the USDA inspection certificate.
6. Any reimbursements from, by, or on behalf of the Signatory or Selling Agent, as applicable, that are not specifically mentioned in items B.2, B.3, B.4, or B.5 above, or that are not properly documented, will be factored into the calculation

of the price for the accepted tomatoes.

7. The Buyer may not resell the DEFECTIVE tomatoes either directly or through third parties.<sup>2</sup> Such tomatoes must be destroyed under USDA oversight, with a USDA certificate provided to the Buyer as proof of destruction. Proof of such destruction must be maintained by the Buyer and is subject to submission to, and verification by, Commerce.
8. In addition, for each transaction involving adjustments due to changes in condition after shipment the Signatory or Selling Agent, as applicable, must obtain/maintain the following documents/information:
  - Shipper name;
  - Shipping manifest;
  - Details of the shipper invoice, including invoice number, date, brand, tomato type, quantity (boxes), and value;
  - Documentation supporting the freight expenses incurred for the original shipment;
  - USDA inspection certificate;
  - Detailed listing of the expenses incurred in salvaging the non-DEFECTIVE tomatoes and documentation supporting the expenses;
  - Description of the destruction process and documentation from the landfill;
  - USDA destruction certificate;
  - Proof-of-payment documentation for any destruction costs;
  - A statement that “No monies or other compensation were received for the destroyed tomatoes;”
  - Signature of a responsible official at the receiver.

#### C. Contractual Terms for Rejection of Full Loads

In cases where the Buyer has rejected the full load of tomatoes based on condition defects, the Signatory or Selling Agent, as applicable, may choose to have the entire load destroyed or returned. If the entire load is destroyed, the Signatory or Selling Agent, as applicable, will require the receiver to provide the documentation noted above under B.8 for partial-load rejections. Further, the Signatory or Selling Agent, as applicable, may reimburse the Buyer for ordinary and customary expenses that the Buyer incurred with respect to the load, including those expenses associated with the destruction process, as long as the Signatory or Selling Agent, as applicable, obtains the support documentation specified above under B.8. Commerce will treat such transactions as “non-sales” provided that adequate support documentation is available.

Alternatively, the Signatory or Selling Agent, as applicable, may sell the entire rejected load to another Buyer (the “Final Buyer”). In that case, the price paid must be not less than the Reference Price plus all costs incurred (*e.g.*, transportation, commissions, etc.) from the FOB U.S. shipping point, *i.e.*, U.S. side of the U.S.-Mexico border to the Final Buyer. If the Final

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<sup>2</sup>Tomatoes for processing must be handled in accordance with the guidelines set forth in Appendix F of the Agreement.

Buyer finds that the load contains condition defects greater than those outlined above, it shall follow the directions stated above with respect to rejection of partial loads.

The Buyer may reject the full load of tomatoes if the load contains more than 35 percent condition defects based on a USDA inspection certificate. Additionally, the Signatory (both in cases of direct sales as well as in cases of indirect sales through a Selling Agent(s)) must pay all expenses related to the return of the entire load to Mexico. Such rejected loads may not be sold, donated, or destroyed in the United States. Commerce may request at any time, and Signatories agree to provide, any and all documentation related to such rejections.

#### D. Contractual Terms for Partial vs. Unrestricted Load Inspections

As explained in part A.1 above, Commerce will only allow adjustments to the transaction price for condition defects if the USDA inspection is unrestricted. During the time between the call for inspection and the arrival of the USDA inspector, the Buyer might sell part of the load and, therefore, by the time the USDA inspector arrives, that part is not available for inspection. If the USDA inspector is allowed full access to the partial load, Commerce will consider this an unrestricted partial-load inspection. Alternatively, if the USDA inspector is not allowed full access to the partial load, Commerce will deem it a restricted inspection. No adjustments will be made for failure to meet suitable shipping conditions if the USDA inspection is restricted. For purposes of this Agreement, when calculating an adjustment for failure to meet suitable shipping conditions where an unrestricted partial-load inspection has taken place, only the portion of the load inspected is eligible for adjustment. The portion of the load that the Buyer sold prior to the inspection will not be eligible for an adjustment based on the USDA inspection.

For example, before the USDA inspector arrives, the Buyer sells 140 boxes of 5x5s from a load identified as 160 5x5s on the invoice. When the USDA inspector arrives, the Buyer requesting the inspection provides full access to the partial load within its possession. The inspector finds that the partial load of 20 5x5s has soft/decay condition defects of 25 percent and notes this on this inspection certificate. Under the Agreement, only the 20 5x5s are eligible for an adjustment for failure to meet suitable shipping conditions, and the 140 5x5s that the Buyer already sold will not be eligible for an adjustment based on the USDA inspection.

**APPENDIX E – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – CONTRACTUAL ARRANGEMENT FOR DOCUMENTING SALES OF SIGNATORY MERCHANDISE TO CANADA**

Where a Signatory or Selling Agent enters Fresh Tomatoes into the United States for consumption and then re-exports the subject merchandise to Canada, this appendix applies. The purpose of this appendix is to: 1) outline the process that each Signatory to this Agreement must follow to ensure that the Signatory or Selling Agent properly documents sales to Canada as such and 2) ensure that the Signatory notifies the Canadian customer that any resales of its merchandise from Canada into the United States must be in accordance with the terms of this Agreement.

To document sales of Mexican tomatoes to Canada properly, this Agreement requires that such transactions be made pursuant to a contractual arrangement where each Signatory maintains, or requires that the Selling Agent that facilitates the sale to Canada maintains, the following information in its files:

1. Signatory name and Signatory number;
2. Shipping manifest;
3. An invoice identifying sale date, brand, tomato type, quantity (boxes), and value; and
4. Entry documentation from Canadian Customs (*i.e.*, Landing Form (Form B3) or the Canada Customs Coding Form).

If a Signatory to the Agreement or its Selling Agent does not document a sale to Canada in accordance with the procedures outlined above, Commerce will consider the transaction a U.S. sale. Failure to properly document a sale to Canada may constitute a Violation of the Agreement in accordance with section VIII.E.911.

Signatories must ensure that the Canadian customer is notified that any resale of the Signatory merchandise from Canada into the United States must be in accordance with the terms of the Agreement and that any movement or handling expenses beyond the point of entry into the United States must be added to the Reference Price, *i.e.*, the FOB U.S. shipping point price, and must reflect the actual cost for an arm's-length transaction. Signatories can obtain from Commerce's website a copy of the suggested form for providing such notification. See "Form for Notifying Canadian Customer That Resales of Signatory Merchandise Into the United States Are Covered by the Terms of the 2019 Suspension Agreement" at <https://enforcement.trade.gov/tomato/XXXXXX>. Further, through contractual arrangement each Signatory must maintain, or require that the Selling Agent maintains, evidence in its files to document that the Canadian customer was notified that any resales of the Signatory merchandise from Canada into the United States must be in accordance with the terms of the Agreement.

**APPENDIX F – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – PROCEDURE SIGNATORIES MUST FOLLOW FOR SELLING SUBJECT MERCHANDISE FOR PROCESSING**

Sales to the United States of Signatory tomatoes for processing must be:

1. Sold directly to a processor (in other words, the first purchaser in the United States of tomatoes for processing must be an actual processor);
2. Accompanied by an “Importer’s Exempt Commodity Form” – Form FV-6, within the meaning of 7 CFR section 980.501(a)(2) and 980.212(i), should be used for all tomatoes for processing that are covered by the Federal Marketing Order 966 (Marketing Order); tomatoes for processing that are not covered by the Marketing Order (*e.g.*, romas, grape tomatoes, greenhouse tomatoes, and any tomatoes that are entered during the part of the year that the Marketing Order is not in effect) must be accompanied by the “2019 Suspension Agreement - Tomatoes for Processing Exemption Form”. The exempt commodity form must be maintained by the importer and presented to CBP upon request and both the Signatory or Selling Agent, as applicable, and the processor must maintain a copy of the form.
3. Shipped in a packing form that is not typical of tomatoes for the fresh market (*e.g.*, bulk containers in excess of 50 lbs.) – examples of typical fresh-market packing forms are identified in the Box-Weight Chart in Appendix C of the Agreement; and
4. Clearly labeled on the packaging as “Tomatoes for Processing.”

Signatories can obtain from Commerce’s website an example of the “2019 Suspension Agreement - Tomatoes for Processing Exemption Form”. See <https://enforcement.trade.gov/tomato/XXXXXX>. If a party in the United States facilitates the transaction, through contractual arrangement each Signatory must require that the party follow the procedures outlined above. Failure to properly document sales to processors may constitute a Violation of the Agreement in accordance with section VIII.E.712.

Sales of Signatory merchandise to a processor after importation into the United States are a Violation of the Agreement in accordance with section VIII.E.102.

**APPENDIX G – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – SPECIFIC ACTIONS THAT SIGNATORIES SHOULD TAKE TO ENSURE THAT THEIR EFFORTS TO ABIDE BY THE AGREEMENT ARE UPHELD IN ANY CLAIMS TAKEN TO THE U.S. DEPARTMENT OF AGRICULTURE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT**

This appendix provides guidance on the specific actions Signatories can take to ensure that their efforts to abide by the Agreement are upheld in any claims taken to USDA under PACA.

Payment disputes arising under the Agreement are actionable and/or able to be resolved under the PACA dispute resolution procedure. The PACA Division will uphold actions taken by a Signatory or a Signatory's representative (collectively, Signatory) to comply with the Agreement to the extent that the sales contract for the transaction at issue establishes that the sale is subject to the terms of the Agreement.

In other words, if, prior to making the sale, the Signatory, or the Selling Agent acting on behalf of the Signatory through a contractual arrangement, informs the customer (*i.e.*, the Buyer) that the sale is subject to the terms of the Agreement and identifies those terms, the PACA Division will recognize the identified terms of the Agreement as integral to the sales contract. In particular, Signatories should inform their customers that their contractual agreement to allow defect claim adjustments is limited in accordance with the Agreement, including:

- \* Claims for adjustments must be supported by an unrestricted USDA inspection called for no more than eight hours from the time of arrival at the receiver and performed in a timely fashion thereafter.
- \* The USDA inspection must find that the condition defects exceed the thresholds outlined in Appendix D above.
- \* Any price adjustments will be limited to the actual percentage of condition defects as documented by a USDA inspection certificate.
- \* The price adjustments will be limited to actual destruction costs, the allocated freight expense, and salvaging and reconditioning expenses calculated in accordance with Appendix D above.
- \* The customer may not resell any DEFECTIVE tomatoes. Instead, they must be destroyed, returned, or donated to a non-profit food bank. Signatories should provide a copy of the Agreement to any customer which may be unfamiliar with its terms or which has questions about those terms.

The process by which a Signatory could provide evidence to the PACA Division that its sales contracts were made subject to the terms of the Agreement including, in particular, those terms listed above is outlined below.

- \* The Signatory should maintain written documentation demonstrating that it had informed its customers, and the customers accepted, that the sales were subject to the



terms of the Agreement prior to issuing the invoice. A signed contract to that effect would be the best evidence of that fact; however, a purchase by the customer after being informed of the relevance of the Agreement is evidence of acceptance.

\* The Signatory should send letters to its customers via registered mail, return receipt requested, overnight mail, or e-mail with a confirmation received from the recipient, informing the customers that, as a Signatory to the Agreement, all of the Signatory's sales are subject to the terms of the Agreement and that, by purchasing from them, the Buyer agrees to those terms. The letter should also indicate that the Signatory's sales personnel do not have authority to alter the terms of the Agreement.

\* In addition, the Signatory should include a statement on its order confirmation sheets that its contract with the buyer is subject to the terms of the Agreement as detailed in the Signatory's "pre-season" letter and maintain a copy of the order confirmations and fax receipts demonstrating that they were sent to the customer prior to making the sale. If the sale is to a first-time purchaser that did not receive a "pre-season" letter, a letter should be supplied to the buyer prior to making a sale.

PACA does not require any one particular form of written documentation but USDA officials have confirmed that, if Signatories maintain written evidence demonstrating that their customers were informed that their sales were made subject to the terms of the Agreement prior to sale, PACA will recognize those terms as part of the sales contract.

\*\*\*AUGUST 15, 2019 DRAFT FOR SUSPENSION AGREEMENT CONSULTATIONS PURPOSES ONLY\*\*\*

## **APPENDIX H – AGREEMENT SUSPENDING THE ANTIDUMPING DUTY INVESTIGATION ON FRESH TOMATOES FROM MEXICO – PROCEDURES FOR REPORTING ALLEGED VIOLATIONS OR CIRCUMVENTION OF THE AGREEMENT**

Appendix H enables persons with knowledge of suspected Violations<sup>14</sup> of the Agreement to inform Commerce by e-mailing the below form to Commerce officials. The form and any factual information provided will be placed on the record of the proceeding by Commerce officials. The person submitting the form and factual information to Commerce is, pursuant to 19 CFR 351.303(g), required to include a certification of factual information, and should use the applicable certification formats provided therein. All submissions, if business proprietary treatment for certain information is claimed under Commerce's regulations, must be accompanied by a public version, in accordance with the requirements of 19 CFR 351.304.

**NAME OF PERSON MAKING REPORT:**

**COMPANY AFFILIATION:**

**PHONE NUMBER:**

**E-MAIL ADDRESS:**

**ALLEGED VIOLATION:**

(Please attach any documents to this report and add blank pages if needed)

<sup>14</sup> See sections II.W and VIII.E of the Agreement.