

September 9, 2019

Case No. A-201-820

Total Pages: 45

INVESTIGATION

Public Document

BY ELECTRONIC FILING

The Honorable Wilbur Ross
Secretary of Commerce

Attention: Enforcement & Compliance, Room 18022

US Department of Commerce

14th Street and Constitution Avenue, NW

Washington, DC 20230

Attention: Ms. Sally Gannon, Mr. David Cordell, Ms. Jill Buckles

2013 Suspension Agreement on Fresh Tomatoes from Mexico

Dear Secretary Ross:

On behalf of the Tomato Division of the Fresh Produce Association of the Americas (FPAA/TD), we herein submit our comments on the record in response to the initialed tomato suspension agreement from August 20, 2019.

We have served a copy of this submission on the parties listed on the attached certificate of service. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,



Lance Jungmeyer, President

U.S. Department of Commerce

Public Certificate of Service

I hereby certify that a copy of this submission is being served on September 9, 2019, via first class U.S. mail, upon the following parties:

Matthew M. Nolan, Esq.

Arent Fox LLP

1717 K Street NW

Washington, DC 20006-5344

Robert C. Cassidy, Jr., Esq.

Cassidy Levy Kent (USA) LLP

900 19th Street, NW

Suite 400

Washington, DC 20006-2110

Robert S. LaRussa, Esq

Shearman & Sterling LLP

401 9th Street, NW

Washington, DC 20004

Lawrence J. Bogard, Esq.

Neville Peterson LLP

1400 16th Street, NW Suite 350

Washington, DC 20036

Morgan J.C. Scudi, Esq.

Scudi Johnson & Ayers, LLP

5440 Morehouse Drive

Suite 4400, San Diego, CA 92121

Marco Davis, Esq

Davis & Leiman P.C.

1025 Connecticut Ave., NW

Suite 1012

Washington, DC 20036

James Hurst, Esq

Givens & Johnston PLLC

950 Echo Lance

Suite 360

Houston, Texas 77024

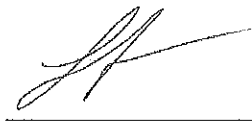
Valerie Ellis, Esq

Curtis, Mallet-Prevost, Colt &

Mosle LLP

1717 Pennsylvania Avenue, NW

Washington, DC 20006

A handwritten signature in black ink, appearing to be 'LJ', is written above a horizontal line.

Lance Jungmeyer, President

The Fresh Produce Association of the Americas Tomato Division (FPAA/TD) is taking this opportunity to submit comments on the record in response to the initialed tomato suspension agreement from August 20, 2019. We have previously outlined our concerns 18 times in 2019 on the following dates: 8/15/2019, 8/13/2019, 8/09/2019, 7/22/2019, 7/12/2019, 7/05/2019, 6/26/2019, 6/25/2019, 6/14/2019, 6/04/2019, 5/23/2019, 4/25/2019, 3/15/2019, 3/13/2019, 3/12/2019, 3/11/2019, 2/18/2019, and 2/5/2019.

This is our 19th submission voicing our concerns to Commerce and supplying supporting data to verify our concerns as to why the provisions being railroaded through are unwarranted and punitive for U.S. companies, both sellers and buyers.

While the FPAA/TD is pleased that a suspension agreement will stop the payment of duties, we are highly disappointed that the agreement does not consider the FPAA/TD's previous 18 written comments and meetings with Commerce officials pertaining to the agreement. The FPAA/TD is concerned that Commerce still intends to inspect over 92 percent of all tomatoes crossing into the United States from Mexico. Commerce also continues to push changes to Appendix D that are confusing, contradictory, revoke buyer protections codified under existing law, and are harmful for U.S. distributors that are not FTE integrated repackers and marketers.

As U.S. companies, several of our members are concerned that the FTE petitioners appear to have co-opted this process to hinder other U.S. companies from operating in the tomato industry. This has been done in ways that go beyond directly impacting domestic growers and instead help petitioners who are also selling Mexican tomatoes. FPAA/TD members believe they have not been given a fair shake in these proceedings, and many of our members have

expressed to us that the entire process has the appearance of the outcome having been predetermined by Commerce and the FTE before negotiations began. The FPAA/TD reiterates that FTE claims are false and falsely attempt to place blame on a previous tomato suspension agreement for their market issues. In Commerce's Aug. 21 memo justifying its decision, Commerce noted that The Department found that the reference prices in the 2013 agreement were sufficient to meet the legal requirements. The Department found no evidence of any violations or circumvention of any kind. Also, Commerce did not find that quality and condition issues suppressed or undercut prices in the United States, only that they "may" do so¹.

The FPAA/TD is very concerned that Commerce does not seem to have verified FTE allegations. Commerce is relying on innuendo and false information while ignoring the fact-based, supported data often from U.S. Government sources which the FPAA/TD has submitted. As an example of the agency's lack of FTE verification, Commerce is claiming that only 66 percent of tomatoes would be inspected based solely on estimates from the FTE that 70 percent of protected round shipments are tomatoes on the vine (Exhibit A). This number is wildly inaccurate. Commerce can easily fact check the number by looking at their own internal data from the quarterly submissions. That data, as well as USDA Market News data, clearly shows that 92 percent of tomatoes will be inspected under the current agreement draft. The result of this lack of independent fact-checking of FTE claims is that Commerce appears to be judge, jury, and executioner without any verifiable data to support these actions.

¹ Memorandum on August 21, 2019 from P. Lee Smit to Jeffrey I. Kessler. "The Prevention of Price Suppression or Undercutting of Price Levels in the Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico."

Commerce has seemingly refused to analyze these sweeping and onerous changes for their impact on U.S. companies. As a result, U.S. companies are being forced into the agreement with no justifiable information on the record to support the need for the above actions. The FPAA/TD has submitted hundreds of pages on the record that support the positions we have put forward, yet we have to believe that data sits largely ignored by Commerce given that the agency continues to insist upon the FTE requests that are unsupported by any official information on the record.

Many of our members are concerned that justice has not been served and that Commerce has not followed their own procedures throughout this process. Our members are also concerned that any comments we put on the record will be used against our members to make the agreement worse for them while further benefiting FTE marketers. We are hopeful that Commerce will act in accordance with their mandate to create a level playing field, not one that unduly benefits FTE petitioners.

Compliance Monitoring Concerns:

The FPAA/TD supports monitoring compliance to a suspension agreement. However, Commerce is proposing to conduct quarterly verification visits at numbers that are onerous and unjustified. On Page 6, points 7 and 8, Commerce says it will sample up to 40 Signatories and 40 Selling Agents on a quarterly basis with the option to sample more. Sampling 40 selling agents is statistically close to 100 percent of all major tomato importers. Requiring almost 100 percent of all major tomato importers to undergo quarterly audits places an undue burden on

these companies especially since there is no record of non-compliance by any of these companies in the prior history of the agreement. We ask that the number be adjusted to reflect a number more closely required under previous suspension agreement.

Appendix D Adjustment Concerns:

The FPAA/TD is concerned that currently the changes to Appendix D continue to strip away one of the most important protections in the buyer-seller relationship, the right to claim damages for loads that fail to meet requirements at destination. There is nothing beyond mere anecdotes from FTE petitioners to show that any price circumvention occurred under the version of Appendix D existing in the 2013 Suspension Agreement. As evidenced by their numerous instances of pushing inaccurate information, FTE is hardly a reliable source for information pertaining to these matters, and official processes dictate that any actions be taken on verifiable information on the record, of which there is none. For Commerce to propose this radical and extensive limitation of the rights of buyers and sellers to make adjustments is an egregious, unwarranted attack on existing law.

We stated most recently in our call with Commerce on August 14 and in the Memorandum of that conversation filed August 16 and on many other occasions both in person and in comments on the record that Commerce's insistence on proposed changes to Appendix D, as a practical matter, remove important buyer/seller protections that form the bedrock of trading in the fresh produce industry. To repeat, by USDA regulation, when a seller sells perishable

produce, the seller warrants to its buyer that the produce is in "Suitable Shipping Condition" (See, 7 C.F.R. §46.43 (j)), and that the produce will make "Good Delivery" (See, 7 C.F.R. §46.44).

If the delivered produce does not meet these requirements the seller must make the Buyer whole through payment of reparation damages. While the initialed agreement maintains some buyer protections, excluding repacking charges from allowable reimbursable expenses incurred in the act of segregating non-sellable tomatoes from the accepted tomatoes undermines protections set out in PACA law. Even in an "Acceptance Final" situation, the Buyer's remedy is to claim damages for breach of contract. (See, 7 C.F.R. §46-43(m)). Before Commerce's most recent proposal and this initialed agreement, it was unheard of to completely remove a Buyer's right to reparations for non-conforming produce.

The FPAA/TD cannot state strongly enough how sensitive a buyer's rights are in fresh produce purchases. Even though a sale is Free On Board (FOB) at the border, that sale is not finalized until product is delivered to destination. This is why PACA rights are so important in sales transactions of perishable fresh produce. The changes in the initialed agreement from Commerce's first proposal do not eliminate the antitrust concerns of this provision. The FPAA/TD still believes that the real-world implications will benefit FTE integrated marketers/repackers of Mexican tomatoes over other U.S. sellers of Mexican tomatoes. This is unacceptable as it is picking winners and losers between U.S. competitors. Will the growers in Florida be happy with an agreement that paves the way for FTE-integrated marketer/repackers to sell even more Mexican tomatoes than they do currently? FPAA/TD has surveyed

membership, and nearly 25% of Mexican tomatoes sold by these FPAA companies are being sold to FTE companies.

Appendix D Adjustment Proposals:

Page 26:

In Appendix D on Page 26, the formulas for calculating adjustments are confusing and need to be removed.

Page 27, Section A, Point 1

Under Section A. Point 1, the agreement states that when a buyer calls for an inspection, the USDA certificate should identify all quality and condition defects found in the inspection, not limited to the defects identified in paragraph 5.

The FPAA/TD strongly believes that the USDA inspection should only score what is allowed on the list for condition defects and for puffiness because that is the actionable data in the inspection. Doing otherwise would create confusion on the certificates and with buyers and sellers as they calculate adjustments. There is no reason to score defects not allowed on the charts in Appendix D as they would not factor into any transactions between buyers and sellers and are not relevant to the inspections. Scoring all conditions adds costs to the supply chain because of the additional time it will take to perform the inspection simply to collect information that is not applicable to the inspection.

Border Inspection Mechanism Concerns:

The logistical nightmare that you are about to unleash on every port of entry is unprecedented and solves or addresses no known issue. For no justifiable reason, U.S. businesses are being penalized in excess of \$270 million for an inspection requirement for no benefit (Exhibit B). In light of the spectacular pass rate illustrated by USDA's own data, Commerce's inspection program serves as a punitive action against US tomato companies selling Mexican tomatoes (EXHIBIT C). USDA inspection data that has been submitted shows a 99.76% pass rate for inspected Mexican tomatoes. This US government data clearly shows that quality is not an issue and that the costs and inevitable delays will serve as a punitive trade barrier. The FPAA/TD demands that Commerce justify the addition of over \$270 million worth of costs for no known benefit.

As the administrative agency, your decisions must be within your power to regulate, be based on substantial evidence and not be arbitrary. The August 20, 2019 agreement goes beyond Commerce's statutory authority to remedy dumping and is arbitrary in its requirements. The proposal is arbitrary because it includes an inspection provision to fix a problem that does not exist. Commerce has received dozens and dozens of letters protesting this provision. This provision as written will result in 92 percent of all tomatoes from Mexico requiring an inspection.

Per Commerce's own public statements, the agency says they have the intent to inspect a much smaller portion of tomatoes than 92 percent. In an email to The Washington Post and The

Packer Newspaper on August 21, 2019, Commerce says the accurate figure should be 66 percent of tomatoes being inspected (Exhibit A).

However, Commerce is basing the percentage of tomatoes to be inspected on inaccurate estimates from the FTE petitioners. The FTE claim is that 70 percent of protected agriculture round tomatoes are tomatoes on the vine. That number is not supported by either USDA Market News Data, Commerce's own data from the quarterly filings from the growers in Mexico, or from industry experts. This is another example of Commerce wrongly trusting FTE data without verifying its accuracy.

A simple examination into the quarterly data submitted to Commerce would show that the percent of tomatoes to be inspected will equal 92% or higher. According to the growers' associations that submit quarterly filings, the percentage of total tomatoes on the vine for 2018 is 2.16 percent. That information is on the record and readily available to Commerce.

However, it sits ignored as the agency instead chooses to rely on false information from FTE on TOV volume.

The 92 percent inspection rate is further supported by the USDA's very own Market News data². In the USDA data, the protected agriculture categories of tomatoes reported by Market

² USDA – AMS movement report of Mexican tomatoes in the U.S. in 2018
https://www.marketnews.usda.gov/mnp/fv-report?commAbr=TOM&commAbr=TOM%2C+CHER&commAbr=TOM%2C+GRP&commAbr=TOM%2C+PLUM&rowDisplayMax=25&startIndex=1&repType=movementAnnual&reportConfig=true&repTypeChanger=movementAnnual&type=movement&locChoose=location&locAbrlength=4&locAbr=MX&commodityClass=allwithoutornamental&y=7&x=50&locAbrPass=TOMATOES%7C%7CTOM--TOMATOES%2C+CHERRY%7C%7CTOM%2C+CHER--TOMATOES%2C+GRAPE+TYPE%7C%7CTOM%2C+GRP--TOMATOES%2C+PLUM+TYPE%7C%7CTOM%2C+PLUM&refine=true&step3date=true&annual=2018&refineStep4=true&organic=&packageAbbrev_TOM=&varietyName_TOM=&impExpFlag_TOM=&volume=1&environment=&_environment=1&origDistrict=&_origDistrict=1

News are Tomato Round Adapted and Tomato Round Controlled. Data from the USDA Market News for 2018 shows that Tomatoes Round Adapted were 39.88 percent of total volumes, and Tomato Round Controlled were 2.4 percent of total tomato volumes.

Tomatoes on the vine are predominantly grown in higher tech greenhouses that would be represented under the Tomato Round Controlled category. They cannot successfully be grown in what was formerly called "adapted environment" because of the nature of the fruit, the way it ripens on the vine, and the extra care it needs as the clusters mature and ripen. The 2.4 percent of total tomato volumes representing Tomato Round Controlled is in line with the 2.16 percent from the quarterly filings from the growers.

The totals of all USDA Market News Data from the 2018 Movement Report are:

USDA Data: 10000lb trucklot equivalents

Tomato Type	Total	Percentage of Total	Tomatoes to be Inspected
Tomato Round Open Field	23638	7.90%	7.9
Tomato Round Adapted	119004	39.88	39.88
Tomato Round Controlled	7251	2.4	
Roma Open Field	51691	17.32	17.32
Roma Adapted	73805	24.73	24.73
Roma Controlled	814	0.27	0.27
Tomato Grape*	15259	5.11	2.55
Tomato Specialty (Campari or Heirloom)	534	0.18	
Tomato Cherry	6395	2.14	
			92.65
Total:	298391		

Note that even though grape tomatoes in bulk must be inspected, because the data does not differentiate bulk and packaged grape tomatoes, that percentage of bulk is estimated at half of the total. Rounds are broken into open field, adapted, and controlled. TOV's (tomatoes on the vine) are not grown in open field or adapted environment.

TOV's would be accounted for in Tomato Round Controlled volumes, and for ease of calculation, we allow that 100 percent of Controlled Rounds are TOVs.

Based on USDA Market News Data in 10000 lb. trucklot equivalents.

Using official data, instead of the incorrect “estimates” from FTE, the actual inspection rate will be 92% of all tomatoes, not 66% as alleged in emails Commerce sent to the press.

In meetings with the FPAA/TD, Commerce has stated their intent is not to obstruct trade.

However, at a 92 percent inspection rate, that is exactly what the border inspection mechanism is designed to do. It is a punitive action demanded by FTE as a trade barrier and facilitated by Commerce. In comments to Bloomberg, Petitioner Tony DiMare reveals that the intent of FTE all along was to implement a volume-control agreement, not a price agreement. DiMare told Bloomberg the American growers didn’t get quotas they would like.³ But in essence the Border Inspections in the draft Tomato Suspension Agreement acts as a volume control.

The FPAA/TD reiterates that there is not even the appearance of solving any problems given the high quality of tomatoes from Mexico.

The Arizona Department of Agriculture, which handles USDA inspections under contract, in 2018 rejected only 3 lots of tomatoes for failed import requirements, out of more than 1,274 inspections of tomatoes. This is a mere 0.24% of inspected lots, an amount that is well below anything statistically significant (Exhibit C). It is important to note that this is for inspections on open field tomatoes only, which are more vulnerable to quality issues than tomatoes growing in protected agriculture. The percentage of tomatoes that would fail quality standards would likely be even lower than 0.24% percent if protected agriculture tomatoes were inspected. A

³ <https://www.bloomberg.com/features/2019-trump-mexico-tomato-trade-deal-migration/>

border inspection mechanism is an expensive, unwieldy proposal that solves no problems and is a thinly veiled attempt at a trade barrier. This inspection mechanism only serves to slow supply chains with the result that Mexican tomatoes will grow increasingly unsaleable as they sit awaiting inspections. Vine-ripe tomatoes ripen themselves very quickly and continue to ripen themselves as they are waiting on an inspection. Even a one-day delay will have serious implications for sellers.

For the extremely low percentage of tomatoes failing grade, it is outside the realm of reason to add a \$270 million trade barrier to the supply chain. That figure represents costs alone, and it does not account for loss of sales and other business impacts which are the inevitable result of the proposed inspection program (Exhibit B).

The delay in shipping caused by the inspection mechanism creates a disadvantage for vine ripe tomatoes, the predominant tomato type from Mexico, over the gassed green tomatoes typically grown by FTE petitioners because vine ripe tomatoes continue to ripen and turn redder once they are picked. FTE petitioners can hold gassed green tomatoes until they unnaturally "degreen" them with ethylene gas and send them to customers. The inspection delays will cause vine ripe tomatoes to color themselves out of several markets given that most customers buy on color specifications. When a tomato is too red, most customers do not want to buy it because it has reduced shelf life.

Border Inspection Mechanism Proposals:

There are some technical considerations that need to be changed in the agreement for accuracy purposes under this section.

Page 7, Section C, Point 3

Beginning on Page 7, Section C. Point 3, Commerce needs to clarify that size and color requirements for bulk grape tomatoes and roma tomatoes should be exempt from scoring on the inspection given that the standard being used is not designed for these items. If the size and color requirements of the standard grade for fresh tomatoes were applied to grape and roma tomatoes, all of those loads would fail inspection because they are not standard round tomato varieties.

Commerce also needs to add language on Section C. Point 3 on Page 7 that also clarifies that if specific standards are developed by USDA in the future for varieties that currently do not have a specific standard, such as in the case of grape and roma tomatoes, those standards would be used for inspections.

Page 8, Section C, Point 5

On Page 8, Section C. Point 5 of the agreement, the word "load" should be "lot". The language says "Similarly, upon implementation of the inspection program, Signatories must ensure, through a contractual arrangement with the appropriate party, that all loads of tomatoes that do not pass the USDA inspection are either reconditioned and re-inspected, or returned to Mexico, as indicated above." The word "load" is used again in the last sentence of this section.

When the USDA conducts an inspection, they inspect a “lot” of one item, not a load. On a tomato load there could be several lots representing tomatoes of different varieties and packing styles. For example, a grower could send a truck with three lots represented by pallets of roma tomatoes, pallets of 25 lb round tomatoes, and pallets of one-layer tomatoes, necessitating three separate inspections. Realistically one lot on a full load could pass inspection while one lot might fail. Therefore, the specific lot that failed would have to be reconditioned and re-inspected or returned to Mexico, not the entire load. The FPAA/TD asks Commerce to make the correction from the word “load” to the word “lot”.

Page 7, Section C, Point 2

On Page 7. Section C. Point 2, the last two sentences say, “A USDA inspector will normally arrive within 48 hours” or “A USDA inspector will normally arrive within 24 hours.” This should be standardized to 24 hours despite location and should say “A USDA inspection will be conducted within 24 hours of when the inspection was requested.”

Additionally, the language as it is currently written leaves the industry open to indefinite delays caused by inspector shortages, inspection employee strikes, and other unforeseen issues. The FPAA/TD strongly believes that Commerce must clarify that if an inspection is not completed within the 24 hours of when it was officially requested, that inspection requirement is waived.

As an example of the significant damage that would happen without this clarification, during a recent table grape season, inspectors walked off the job during the peak of the season, refusing to perform inspections for two days. The resulting backlog of inspections caused delays of over a week on conducting inspections as volumes continued to arrive, and delays snowballed. It is

unacceptable to leave the industry vulnerable to the economic damage that could result from situations where inspections would not be conducted within 24 hours of the inspection being requested. It would inflict undue harm on U.S. companies and would result in condition damage as tomatoes flounder while waiting for inspections.

Of further concern, vine-ripe tomatoes ripen themselves very quickly and continue to ripen themselves as they are waiting on an inspection. Not having a 24-hour cutoff for waiting on an inspection would drastically jeopardize many companies' ability to meet customer quality requirements because of the delays. Many customers do have their own quality standards and most customers buy tomatoes with specifications of a specific color of tomato/ripeness on arrival to destination. A day delay or more can quickly put a shipment out of spec with a customer's requirement for a certain color of tomato.

Leaving an indefinite amount of time for an inspection, as the current language does, is unacceptable. The FPAA/TD strongly reiterates our position that in those instances where an inspection is not performed within 24 hours after the inspection request is made to USDA, the requirement should be waived. The 24 hour clock would be tied to when an inspection is called for, not when a shipment crosses the border, which prevents any concerns that FTE had that companies would delay asking for an inspection. This is a common-sense, reasonable request to incorporate into the agreement.

Page 7, Section C. Point 2

FPAA/TD recommends that tomato inspections be limited to open field grown round tomatoes as is the current practice under an official USDA Marketing Order. This has proven to be more than adequate to ensure that tomato quality is maintained and has shown to be extremely effective by the USDA inspection records. Open field tomatoes are much more exposed to quality and condition hazards than tomatoes grown in protected agriculture, thereby limiting inspections to those tomatoes most at risk of quality and condition defects is more justifiable. With a USDA inspection failure rate of 0.24%, this is more than adequate to maintain high quality imports.

With costs well in excess of \$200 million to US companies, it would be reasonable to assume that there is a logical rationale for the proposed inspection program in the initialed agreement, but no such rationale has been put forth by Commerce. To the contrary, US government data clearly shows that tomato quality from Mexico is extraordinarily high, with a pass rate of 99.76%. The proposed inspection program would punish US companies for no reason other than to acquiesce to the wishes of the FTE in order to impede other US competitors.

Considering the \$200+ million costs to these US companies, this is a completely unjustified action that is not designed to solve any problems.

As a reminder of our points in previous submissions and points raised by the American Trucking Association, the Border Trade Alliance and others, as it stands now, this proposal would cause crossing and trucking delays for all goods going across the border, not just tomatoes.

Additionally, the backlog of inspections that will result from this mechanism will impact all other agriculture items that must receive a quality inspection from USDA as part of a marketing order's 8e inspection requirements, including Avocados, Dates, Hazelnuts, Grapefruit, Table

Grapes, Kiwifruit, Olives, Onions, Oranges, Irish Potatoes, Pistachios, Raisins, Tomatoes, and Walnuts⁴. The ramifications will ripple across all U.S. companies involved in cross border trade.

Organic Prices:

The 40 percent higher prices on organics are unjustified and unnecessary. FTE petitioners do not grow significant volumes of organic tomatoes. The 40 percent higher pricing is a thinly veiled attempt at restricting trade of organic tomatoes and is another way for FTE to limit competition from products not predominantly grown in Florida, just like vine-ripe tomatoes. A suspension agreement is supposed to protect a domestic industry. A product that is less than 5% of total volume is not a threat to the domestic industry. This is a clear example of FTE taking political advantage above and beyond the scope of the agreement. What is the justification of such a large price increase for organic tomatoes? What problem will this solve? There is no compelling data on the record that shows organics warrant the price increases found in this agreement.

Gassed Green Tomatoes vs Vine-Ripe and Protected Agriculture Tomatoes

The FPAA/TD believes it is very important to reiterate again the vast differences in the FTE business model and that of our members who are U.S. companies that seek to provide consumers with high quality, flavorful tomatoes. FTE continues to say that flaws in the agreement impact their businesses. However, FTE fails to point out that inferior taste and quality in gassed green tomatoes and an inefficient and outdated business model are the main

⁴ USDA 8e Regulations <https://www.ams.usda.gov/rules-regulations/section8e>

challenge the FTE petitioners face in the market. Consumer preferences for vine-ripened tomatoes, including specialty tomatoes, are the driving factors in retail sourcing decisions. In this regard, gassed-green tomatoes continue to lose market share. This is a trend that is not likely to reverse.

As we discussed in our meeting on July 29, 2019, and our comments memorializing that meeting, there is a significant difference in the business model and supply chain for gas green tomatoes common to FTE petitioners and in the business model for vine-ripe and protected agriculture tomatoes common to many U.S. importers of Mexican tomatoes, Canadian growers, and U.S. growers outside of the FTE petitioners. From the varieties grown to the method of packing and distribution, the tomato industry has evolved in its use of technology, improved varieties, and better business practices. The antiquated methods of the FTE petitioners supply chain simply cannot keep up. Attempting to create a suspension agreement that artificially props up the old-fashioned ways of how FTE petitioners do business is not only bad for other U.S. companies that compete with better products, it is bad for consumers and opens up the U.S. to retaliation and legal action.

The differences are supported by an independent scientific study that shows clear differences between tomatoes ripened on the vine versus tomatoes ripened off the vine. The study, found on the National Center for Biotechnology Information, U.S. National Library of Medicine database, off-the-vine ripening of tomato fruit causes changes in the primary metabolite composition of a tomato. The study states, "results showed significant differences in the metabolic profiles of fruits ripened on- and off-the-vine. The contents of metabolites involved in primary metabolism, and conferring the palatable properties of fruits, are altered when fruits

are ripened off-the-vine. The consequence of this is the inferior quality of tomato fruits ripened off-the-vine due in part to the lower levels of fructose and glucose sucrose, which are involved in conferring the sweet taste to fruit, together with aspartate and glutamate, both implicated in UMAMI taste, and other compounds present at low concentrations.”⁵

Yet, somehow, the handful of Florida growers that comprise the FTE contend that U.S. companies that import from Mexico are to blame for their problems. It is ironic that the growers which grow the largest percentage of Florida tomatoes also own and finance some of the largest growing operations in Mexico. Many FTE petitioners also purchase significant volumes of tomatoes from other importers. The FPAA asked 35 tomato companies the volume of tomatoes that they sold to either Floridian or Canadian companies and their subsidiaries in 2018. Out of the 35 companies surveyed 57% answered (20 companies). The compiled volume of the companies that answered the survey was 642,013,919 lbs. representing 22% of the total volume the U.S. imported from Mexico in 2018 (2,983,941,199 lbs.)⁶

FPAA-surveyed members reported that 23.30% of their tomatoes were sold to Florida based or subsidiaries of Florida based companies. FPAA-surveyed members reported that 6.52% of their

⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3937827/> Instituto de Biología Molecular y Celular de Rosario (IBR-CONICET-UNR), Ocampo y Esmeralda, Predio CCT, Rosario 2000, Argentina)

⁶ USDA – AMS movement report of Mexican tomatoes in the U.S. in 2018
https://www.marketnews.usda.gov/mnp/fv-report?commAbr=TOM&commAbr=TOM%2C+CHER&commAbr=TOM%2C+GRP&commAbr=TOM%2C+PLUM&rowDisplayMax=25&startIndex=1&repType=movementAnnual&reportConfig=true&repTypeChanger=movementAnnual&type=movement&locChoose=location&locAbrlength=4&locAbr=MX&commodityClass=allwithoutornamental&y=7&x=50&locAbrPass=TOMATOES%7C%7CTOM--TOMATOES%2C+CHERRY%7C%7CTOM%2C+CHER--TOMATOES%2C+GRAPE+TYPE%7C%7CTOM%2C+GRP--TOMATOES%2C+PLUM+TYPE%7C%7CTOM%2C+PLUM&refine=true&step3date=true&annual=2018&refineStep4=true&organic=&packageAbbrev_TOM=&varietyName_TOM=&impExpFlag_TOM=&volume=1&environment=&_environment=1&origDistrict=&_origDistrict=1

tomatoes were sold to Canadian based or subsidiaries of Canadian based companies. Canada, like Mexico, grows a vine-ripened tomato that is preferred in the marketplace. FTE repackers/marketers buy tomatoes from Mexico because customers and consumers demand a better tomato. FTE repackers/marketers buy tomatoes from Mexico because, unlike they allege, higher quality vine-ripe tomatoes are not interchangeable in the marketplace with their gas green tomatoes.

Conclusion:

The FPAA/TD consistently provides fact-based data and analysis to Commerce showing why the changes to the adjustment provision, the new border inspection mechanism, and organic pricing changes are solutions to a problem that does not exist. Commerce must verify the claims being made by FTE petitioners or this process and those involved in it will forever be called into question. Acting on misinformation and lies at the detriment of U.S. companies is unacceptable.

Commerce must follow its own internal findings, including findings outlined in their August 21, 2019 memo that that the reference prices in the 2013 agreement were sufficient to meet the legal requirements and that they found no evidence of any violations or circumvention of any kind.

Commerce must show real justification for restricting buyers' rights and for adding over \$270 million of cost to U.S. companies through a border inspection mechanism with no evidence that it is necessary. Until now that justification has not existed. We hope that changes can be made

to the initialed agreement to better reflect what is warranted through accurate data and fairness, not through lies and innuendo from the FTE petitioners.

The FPAA is also attaching comments from interested parties that felt strongly enough to comment on this issue. Comments from the Texas International Produce Association, American Trucking Association, the Border Trade Alliance, and the American Association of Exporters and Importers are included with this submission (Exhibit D).

EXHIBIT A

From: Allison Moore
Sent: Thursday, September 5, 2019 4:22 PM
To: Erika Dominguez
Subject: PART OF EXHIBIT B
Importance: High

From: Thomas Karst <tkarst@thepacker.com>
Sent: Wednesday, August 21, 2019 10:47 AM
To: Allison Moore <amoore@freshfrommexico.com>; Lance Jungmeyer <lance@freshfrommexico.com>
Subject: FW: Correction Needed for Tomatoes Story
Importance: High

Fyi... Commerce says the 92% figure is inaccurate..

Tom

From: Vanessa Ambrosini <Vanessa.Ambrosini@trade.gov>
Sent: Wednesday, August 21, 2019 12:39 PM
To: Thomas Karst <tkarst@thepacker.com>
Cc: Manning, Kevin (Federal) <KManning@doc.gov>; Glover, Rebecca (Federal) <RGlover@doc.gov>
Subject: Correction Needed for Tomatoes Story
Importance: High

Hey Tom,

Hoping to get a correction to the 92% figure mentioned in your story:

"At the same time, the FPAA is profoundly concerned that a provision in the draft agreement appears to require inspections of up to 92% of all lots of tomatoes from Mexico at the U.S. border."

This 92% figure is inaccurate because it incorrectly includes tomatoes on the vine (TOVs), which are explicitly excluded from the near-the-border inspection requirement under the draft agreement.

Commerce estimates that the correct figure is 66%, as shown below:

Products subject to near-the-border inspections under the draft suspension agreement (shares of U.S. import volumes of tomatoes from Mexico):

- Protected romas: 26.3%
- Protected rounds, other than TOVs: 12.36%
- Open field romas: 17.1%
- Open field rounds: 8.2%
- Bulk grapes: 2.4%

Total: 66.36%

Sources: 2018 USDA Tomato Fax Report; Florida Tomato Exchange estimate that TOV production accounts for 70% of protected rounds shipments. Bulk grapes figure is based on an estimate that bulk grapes account for 50% of all grape tomato shipments.

Let us know if you have any questions and when we can expect to see the change in your story occur.

Thanks,

Vanessa Ambrosini

Press Secretary

U.S. Department of Commerce | International Trade Administration

o: 202.482.5087

c: 202.309.2688

This e-mail, together with any attachments, is for the exclusive and confidential use of the intended addressee. Unless you are the intended addressee (or authorized to receive for the intended addressee), you may not use, copy or disclose to anyone the message or any information contained in the message. If you have received this message in error, please notify the sender via e-mail immediately and delete the message from your computer without making any copies.

Begin forwarded message:

From: "Telford, Taylor" <Taylor.Telford@washpost.com>
Date: August 21, 2019 at 11:59:32 AM CDT
To: "lance@freshfrommexico.com" <lance@freshfrommexico.com>
Subject: Fw: Correction Needed for Tomatoes Story

Thank you! If it helps, here is how they outlined it for me. (See below)

From: Vanessa Ambrosini <Vanessa.Ambrosini@trade.gov>
Sent: Wednesday, August 21, 2019 12:17 PM
To: Telford, Taylor <Taylor.Telford@washpost.com>
Cc: Glover, Rebecca (Federal) <RGlover@doc.gov>; Manning, Kevin (Federal) <KManning@doc.gov>
Subject: Correction Needed for Tomatoes Story

CAUTION: EXTERNAL SENDER

Hey Taylor,

Please see the following information to correct the 92% figure mentioned in your story to the accurate 66% figure -

On background –

This 92% figure is inaccurate because it incorrectly includes tomatoes on the vine (TOVs), which are explicitly excluded from the near-the-border inspection requirement under the draft agreement.

Commerce estimates that the correct figure is 66%, as shown below:

Products subject to near-the-border inspections under the draft suspension agreement (shares of U.S. import volumes of tomatoes from Mexico):

- Protected romas: 26.3%
- Protected rounds, other than TOVs: 12.36%
- Open field romas: 17.1%
- Open field rounds: 8.2%
- Bulk grapes: 2.4%

Total: 66.36%

Sources: 2018 USDA Tomato Fax Report; Florida Tomato Exchange estimate that TOV production accounts for 70% of protected rounds shipments. Bulk grapes figure is based on an estimate that bulk grapes account for 50% of all grape tomato shipments.

Let us know if you have any questions and when we can expect to see this correction.

Thanks,

Vanessa Ambrosini

Press Secretary

U.S. Department of Commerce | International Trade Administration

o: 202.482.5087

c: 202.309.2688

EXHIBIT B

Financial Impact of Commerce Proposed Border Inspections

Conservative estimates of Commerce's proposed border inspection mechanism will cost more than \$220 million in infrastructure and approaching \$50 million in annual operating costs, at a minimum.

The following are capacity, time and cost considerations for inspections of all tomatoes through the main land ports of entry: Nogales, AZ; Pharr and Laredo, TX; and Otay Mesa, CA.

Inspections Will Increase from 9600 to 123,000 Per Year

According to the USDA Agricultural Marketing Service (AMS) in 2018 these were the following truckloads¹ crossings of all types of tomatoes:

Port of Entry	Tomato Truckloads Year Total	Tomato Truckloads on the Busiest Day of the year
Nogales	27,141	338
Pharr	30,406	192
Laredo	7,794	95
Otay Mesa	8,107	80
Total	73,448	

Source: USDA – AMS Market News

The Arizona Department of Agriculture (ADA) in 2018 reported 1,274 tomato inspections. ADA has stated that historically the heaviest month for tomato inspections has been January. In the month of January 2018, ADA reported 595 inspections of tomatoes. In the same month and year USDA-AMS reported 355 truckloads of open field round tomatoes crossing through Nogales, AZ. This means that there are 67.6% more tomato inspections than truckloads (1.676 multiplier), likely to be the result of different packaging types or brands in the same tomato truckload.

In order to estimate the number of inspections of 100% tomato imports from Mexico it was utilized the number of crossings times the inspections multiplier of 1.676 the results are as follows:

Port of Entry	Total Tomato Inspections per Year	Total Tomato Inspections on the Busiest Day of the year
Nogales	45,490	567
Pharr	50,962	322
Laredo	13,063	159
Otay Mesa	13,588	134
Total	123,103	

Source: FPAA with data from USDA-AMS and ADA

According to USDA-AMS data only 7.8% of all tomatoes imported from Mexico were round open field tomatoes. This means that in 2018 only 9,602 inspections were performed in Nogales AZ; Pharr and

¹ A Truckload is estimated as 40,000 lbs of tomatoes.

Laredo, TX; and Otay Mesa, CA. compared to 123,103 inspections that will be required at a 100% inspection rate of all tomatoes

Additional Investments of Infrastructure of \$220 Million Will Be Required

Industry standards estimate about 600sq. feet to store 1 load of tomatoes for inspection. In order to perform an inspection a load of tomatoes must be stage taking an additional 20% of space by separating the tomato pallets and have ample inspection area, this creates a staging factor of 1.2. Because Commerce has not specified what happens in the event USDA is unable to inspect, the model below accommodates the capacity to store 3 days-worth of tomato truckloads.

The total required space to hold and inspect tomatoes at the border is estimated as follows:

Port of Entry	Truckloads	Space (sq. feet) = (Truckloads)*(1.2 staging factor)*(500sq.ft)*(3days)
Nogales	338	730,080
Pharr	192	414,720
Laredo	95	205,200
Otay Mesa	80	172,800
Total	705	1,522,800

Source: FPAA with data from USDA-AMS

The investment on holding facilities for tomatoes will be as follows:

Port of Entry	Cost of Construction per Sq. Ft.	Sq. Ft. Required	Total Investment= (Cost)*(Sq.Ft. required)
Nogales	\$110.00	730,080	\$80,308,800.00
Pharr	\$175.00	414,720	\$72,576,000.00
Laredo	\$175.00	205,200	\$35,910,000.00
Otay Mesa	\$175.00	172,800	\$30,240,000.00
Total		1,522,800	\$219,034,800.00

Source: FPAA with data from local construction companies

This is based on the construction's costs of building one warehouse. When multiple facilities are being built at the same time – as would be the case here – these costs will increase considerably.

Inspection Fees and Cost of Delays Will Increase Exponentially

Each tomato inspection has a cost of \$210. The total cost of the industry for a year of tomato inspections will be as follows:

Port of Entry	Total Inspections per year = (Truckload) * (Inspection multiplier)	Inspections Cost = (Total inspections) * (\$210)
Nogales	45,490	\$9,552,867.46
Pharr	50,962	\$10,702,055.49
Laredo	13,063	\$2,743,268.45
Otay Mesa	13,588	\$2,853,435.63
Total	123,103	\$25,851,627.04

Source: FPAA and <https://content.govdelivery.com/accounts/USDAAMS/bulletins/241f340>

It takes 4 warehouse employees for staging a tomato truckload. This means that for each inspection there will be 4 warehouse employees assigned to the inspection process. The following are the employees and investment requirements of the industry in order to accommodate tomato inspections:

Port of Entry	Total Inspections per year = (Truckload) * (Inspection multiplier)	Minimum Wage	Warehouse employees' cost per inspection (Included OT cost)	Total Cost of Warehouse employees (Total Year Inspections* Warehouse)
Nogales	45,490	\$12.00	\$198.00	\$9,006,989.32
Pharr	50,962	\$7.15	\$117.98	\$6,012,261.89
Laredo	13,063	\$7.15	\$117.98	\$1,541,129.03
Otay Mesa	13,588	\$13.50	\$222.75	\$3,026,679.94
Total	123,103			\$19,587,060.18

Source: FPAA with data from DOL. Minimum wages for Arizona and California are set to increase to those reported in the table in 2020.

EXHIBIT C

Allison Moore

From: Shau Booker <sbooker@azda.gov>
Sent: Tuesday, July 09, 2019 11:53 AM
To: Allison Moore
Cc: Lance Jungmeyer; Luis De La Ossa; Wladyszewski, Alexander - AMS; OConnor, Nathan - AMS; Souza, Tony - AMS; Tickner, Nate - AMS
Subject: Tomato Inspections

Allison,

Here are the totals for number of Tomato Inspections since 2017. Unfortunately, we were not able to acquire the number of tomatoes that failed import requirements from 2017. I hope these numbers help.

Year	Total Inspections	Failed Import Requirements
2017	2,239	Unavailable
2018	1,274	3
2019*	320	2

*From October 10th 2018-March 20th 2019

Best Regards,

Shau L. Booker

Program Manager/ Operations Administrator

Arizona Dept. of Agriculture

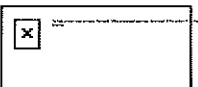
2771 N. Grand Ave.

Nogales, AZ 85621

Ph: 520-281-0783

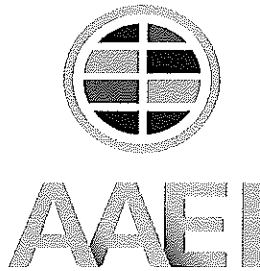
Fax: 520-281-0790

sbooker@azda.gov



Quality from the land to you.

EXHIBIT D



We Make Global Trade Happen

September 9, 2019

Via: ACCESS

P. Lee Smith, Deputy Assistant Secretary
for Policy & Negotiations
Enforcement & Compliance
International Trade Administration
U.S. Department of Commerce
Washington, DC 20230

Re: Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico
Docket No.: A-201-820

Dear Deputy Assistant Secretary Lee:

On behalf of the American Association of Exporters and Importers (AAEI), we respectfully submit the comments below for consideration concerning the Commerce Department's Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico dated August 20, 2019.

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of customs brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and Customs and Border Protection issues. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as the technical experts regarding the day-to-day facilitation of trade, including the administration of and compliance with the customs and export control laws of the United States.

American Association
of Exporters and Importers

1717 K Street, NW, Suite 1120
Washington, DC 20006

(202) 857-8009 main
(202) 857-7843 fax

www.aaei.org

General Comments

AAEI appreciates the opportunity to comment on this Draft Advance Notice on Fresh Tomatoes from Mexico. As a trade association representing companies who export from and import goods to the United States, we have a number of concerns about the draft agreement which will impact the facilitation of perishable goods.

Specific Comments

1. Impact on Trade with Mexico

We are concerned about the impact this piece of the tomato deal will have on not only tomato imports, but also all other export/import items between the U.S. and Mexico. Trade between the U.S. and Mexico is multi-faceted. It would be unacceptable for overall freight capacity, or port throughput, to decrease as a result of new regulations on tomatoes, such as the Border Inspection Mechanism.

2. Border Inspection Mechanism

Commerce has proposed having the U.S. Department of Agriculture (USDA) inspections occur in a period of "normally no more than 48 hours." For a perishable item, this is an unacceptable amount of time to wait. Even if inspections can occur on a 24-hour basis, this still means that loaded trailers are waiting in the parking lots to be unloaded. This prevents the trailer and tractor from going back to Mexico for other shipments. This unnecessarily strains the system freight capacity and will result in delays and increased costs across a range of industries.

Border inspections unfortunately become a barrier to trade for all items. There is no data to support the need for quality inspections. Only five (5) out of more than 1,200 loads of round field tomatoes inspected in Arizona last year were found to be out of USDA grade. From a risk management perspective, this is an enormous waste of resources.

About 7.8% of all tomato loads from Mexico were inspected in the most recent year. Expanding to approximately 92% of loads is a nearly 12-fold increase. This will require a massive increase in hiring of government personnel.

The trade community's experience with the federal government's efforts with a near 100% review of cargo does not auger well for this Border Inspection Mechanism. After carefully crafting the SAFE Port Act of 2006, P.L. 109-347 (October 13, 2006) to balance the interests of all segments of the trade community, Congress enacted the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53 (August 3, 2007) which required that "100 percent of the cargo containers originating outside the United States and unloaded at a United States seaport undergo a screening to identify high-risk containers." See, 6 U.S.C. § 982(a). Because 100 percent screening of containers is impractical (e.g., due to physical limitations at the ports, concerns about equipment registering false positives, and other logistical impediments), every Secretary of Homeland Security the statute was enacted has notified Congress that an extension of this requirement is necessary due to difficulty in overcoming these impediments.

Commerce, in its July 17 letter about proposed changes to the tomato suspension agreement, stated that "This procedure will be a practical and straightforward method for inspecting tomato loads upon entry that does not involve an additional process or administrative burden with respect to a sampling methodology that would otherwise be necessary in the scenario of less-than-100-percent inspections."

The above is incorrect. USDA and its state partners will have to spend 6 months hiring and training new inspectors to handle the vastly increased inspection load.

It is estimated that the cost to industry of having these inspections will add \$25 million a year. The cost for industry to increase warehouse space in order to handle the inspections is \$220 million. Both of these are outlined in the attachment, which FPAA included as an exhibit in its filing on tomatoes June 12 (see also attached).

Various business associations, including American Trucking Association, have voiced their concerns. See pages 21-29 of the FPAA to Commerce.

Commerce should not allow a Border Inspection Mechanism that even with recent changes approaches a near-100% inspection regiment. The carryover threat to other industries is real and would be a step backward as we contemplate moving forward in the new USMCA.

3. Other considerations

We appreciate the opportunity to lend our expertise to Commerce officials to discuss these issues in more detail.

Sincerely,

A handwritten signature in black ink, appearing to read "Marianne Rowden".

Marianne Rowden
President & CEO



AMERICAN TRUCKING ASSOCIATIONS

950 N. Glebe Road ★ Suite 210 ★ Arlington, VA ★ 22203-4181
www.trucking.org



Bob Costello
Chief Economist & Senior Vice President

Case No. A-201-820
Segment: Investigation
Security Classification: Public Document

September 5, 2019

Mr. P. Lee Smith
Deputy Assistant Secretary for Policy & Negotiations
U.S. Department of Commerce
International Trade Administration
Washington, D.C. 20230

Dear Mr. Smith:

The American Trucking Associations (ATA), the largest national trade association for the trucking industry, applauds the U.S. Department of Commerce and representatives for the Mexican tomato producers/exporters for reaching an agreement that will preserve duty-free tomato trade between the United States and Mexico. However, despite the merits of the draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico, ATA is concerned about a new inspection mandate included in the agreement that could prompt significant bottlenecks at ports of entry and contribute to sustained border congestion.

ATA recognizes the importance of U.S. Department of Agriculture (USDA) agricultural inspections as a necessary activity that promotes the safety of the American food supply. ATA also appreciates that laws and regulations relating to agricultural safety are essential, but maintains that such laws and regulations must also be practical. As such, we are concerned about the practical implications of the inspection mandate outlined on page 7 of the Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico (August 20, 2019). The mandate states that certain loads of subject merchandise “shall be subject to a USDA inspection for quality and condition defects near the border after entering the United States.”

The proposed quality and condition inspection mandate would prompt a substantial increase in USDA inspections of Mexican-grown tomatoes without sufficient justification. The stated purpose of the inspection mandate—“for quality and condition defects”—does not represent a targeted response to identified security, safety, or health concerns. Moreover, increasing the frequency of USDA inspections undermines recent efforts by federal agencies like U.S. Customs and Border Protection to streamline efficiencies at ports of entry. Over 17,000 truck crossings occur every day along our southern border, and increased delays at ports of entry would have devastating consequences for all our members engaged in cross-border business, not just those hauling tomatoes.

TRUCKING 
Moves America Forward

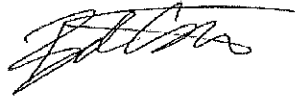
703-838-1799 ★ bcostello@trucking.org

Mr. P. Lee Smith
Page 2
September 5, 2019

Case No. A-201-820
Segment: Investigation
Security Classification: Public Document

ATA urges the U.S. Department of Commerce and representatives for the Mexican tomato producers/exporters to consider the large-scale, downstream impact that the new USDA inspection mandate would have on the trucking industry, operations at ports of entry, and the broader trade community. Similarly, we urge both parties to adopt an alternative solution that is commiserate with identified risk and associated burden.

Sincerely,



Bob Costello
Chief Economist & SVP
International Trade Policy and Cross-Border Operations



901 Business Park Drive, Suite 500
Mission, Texas 78572
Phone: (956) 581-8632 ★ Fax: (956) 581-3912
www.texipa.org

September 9, 2019

Deputy Assistant Secretary P. Lee Smith
c/o United States Department of Commerce
International Trade Administration
Washington, DC 20230

RE: Comments for "Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico"

Dear Deputy Assistant Secretary P. Lee Smith,

On behalf of the Texas International Produce Association (TIPA), a group that holds a close association with the Fresh Produce Association of the Americas (FPAA), I would like to submit comments regarding the Draft Suspension Agreement on Fresh Tomatoes from Mexico (Agreement) that is due for final signatures on September 19, 2019.

As you may know, Texas is the first point of arrival for more than half of all the fresh tomatoes imported from Mexico. As such, many of the Texas International Produce Association (TIPA) member companies are involved with the Mexican tomato trade as the importer of record, second handlers (aka brokers), repackers, wholesale, foodservice, and/or retail grocery vendors. As the section of industry which will be using and abiding by the terms of the Agreement daily, TIPA felt it necessary to share comments following our review of the draft Agreement.

#1) Pages 7 and 8, Section C "*Inspection of Subject Merchandise*": Throughout this section, the word "load" is used intermittently to refer to a sub-set of tomatoes subject to the agreement. Unfortunately, that word is too general and may create issues not intended by this agreement.

For example, Page 8, subsection 4, paragraph 2: *Alternatively, in the event of return to Mexico, the entire load must be returned to Mexico or destroyed under USDA oversight,...*

The word "load" should be changed to the word "lot." Since many importers handle multiple varieties of tomatoes, it is not uncommon that a truck from Mexico bound for the U.S. will have more than one variety as part of the *load*. However, each of the varieties will be inspected separately as *lots* (due to the different grade requirements for each variety). As such, it is possible that one variety of tomato will pass inspection and thus qualify to be sold further upstream in the US. Meanwhile, the second variety – yet still on the same truck – would not pass inspection standards, and therefore would be subject to the conditions above. But because the wording in the Agreement says *load*, it is possible that enforcement agents may construe execution of the Agreement to be that ALL *lots*, regardless of being like varieties or not, must be returned to Mexico or destroyed because they are part of the same *load*.

On Page 7, subsection 1, the word “loads” is used throughout the paragraph, yet should read “varieties” to avoid similar confusions as outlined in the above example.

#2) Appendix C, pages 23 through 25 “Box Weights”: As the U.S. Department of Agriculture currently executes authority over box weights for fresh produce, the further investigation by Commerce to complete an exercise sampling weights of Mexican tomatoes appears unnecessary. Refer to the USDA *United States Standards for Grades of Fresh Tomatoes* for specific minimums and maximums on weight as it applies to tomatoes, or consult with USDA for further guidance on disputes concerning weights.

As a mechanism already exists to ensure compliance with U.S. weight label instructions, Commerce should consider simply maintaining the existing weight chart from the previous 2013 Tomato Suspension Agreement and implement that existing chart into the 2019 Agreement. By doing this, it creates continuity and stability in the marketplace so that all entities have a fair and level understanding of the costs of each tomato variety being imported from Mexico.

#3) Appendix D, Section A, subsection 5, pages 28 and 29 referring to Condition and Quality Defects: The proposed Agreement introduces four condition defects (Abnormal Coloring, Blossom End Discoloration, Soil Spot, and Surface Discoloration) as well as the Quality Defect, Puffiness, that were not previously part of past Agreements. However, the Appendix does not outline why the change in position.

By including the additional stipulations, the Agreement does not limit the presence of fresh tomatoes from Mexico in the marketplace as might have been intended. Adjustments to inspection standards at the time of arrival would be more in line with that intent. Unfortunately, the proposed changes instead make it easier for consignees or upstream destinations to refuse the product and instead puts more pressure to lower the prices of Mexican tomatoes, which may be viewed as contrary to the intent of the agreement.

We recommend the four condition defects and the “puffiness” quality defect be removed from Appendix D.

#4) Appendix D, Section A, subsection 2: *... or 3) greater than 20% total quality and 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.*

Similar to the above scenario, the increased criteria stipulations at destination do not limit the presence of Mexican tomatoes in the marketplace. It does however broaden the tools and limits by which the receiver may negotiate to lower the price of the Mexican tomatoes.

In previous Agreements, this point of the rules permitted only condition defects. We would recommend the language be amended to again include ONLY condition defects in that 20% figure.

#5) Appendix D, Section B “Contractual Terms for Rejection of Partial Loads”: The current language limits adjustments to USDA inspection fees and freight expenses for the defective tomatoes. The language however fails to include reference to factors such as reconditioning, dumping or other associated handling costs.

Fresh produce rejections are not the same as other commodities due to the perishable nature of the commodity. Due to the nature of fresh produce, if a load is out of grade certain allowances are provided to the consignee so that they can “recondition” the load into grade before the fresh produce deteriorates completely. This process commonly involves additional labor to sort and discard the good from the bad, as well as the disposal cost and potential lost sales (at times requiring short buys to cover the time until the reconditioning is complete).

If not, it becomes financially impossible for a receiver to bring a load into grade AND return the Reference Price for any distressed or defective tomatoes. This scenario is a guarantee that nearly all wholesale and terminal market vendors – those entities responsible for providing product to independent grocers, local restaurants or other smaller, hyper-regional entities – will cease carrying Mexican tomatoes. Foodservice and restaurant providers will also move away from Mexican tomatoes without similar protections to recoup losses. Without changes to these guidelines, the new adjustment process would dramatically reduce the number of entities able to sustain the loss associated with keeping a distressed load, limiting to only a handful of large, corporate retail grocery stores.

If this new Agreement requires the consignee to guarantee a return at Reference Price, then additional factors and deductions must be permitted in the adjustment process.

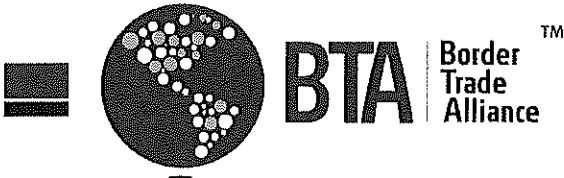
We applaud and commend the Department of Commerce for their hard work and commitment to this case. The many TIPA members involved in handling Mexican tomatoes look forward to the implementation of a new agreement and the ability to return the industry to sense of normalcy. In agriculture, the ability to plan months or years in advance is absolutely crucial due to the long cycle of planning, planting, growing, harvesting, packing, and transporting. Instability, or worse inconsistency, in the marketplace creates confusion that translates into both supply and demand inequalities since a missed planting or the wrong crop at the wrong time can wreak havoc on the fresh produce markets.

That said, we hope Commerce will consider these comments for amendments to the final Agreement in the interest of not only the American businesses relying on Mexican tomatoes, but also the American consumers who have come to love, recognize and depend on this product in their daily lives. Should Commerce or yourself have any questions or concerns regarding this letter, I welcome you to contact me at 956-581-8632 or via email at dante.galeazzi@texipa.org.

Respectfully,



Dante L. Galeazzi
CEO/President
Texas International Produce Association



September 9, 2019

Mr. P. Lee Smith
Deputy Assistant Secretary for Policy & Negotiations
U.S. Department of Commerce
International Trade Administration
Washington, D.C. 20230

RE: Case No. A-201-820

Dear Mr. Smith:

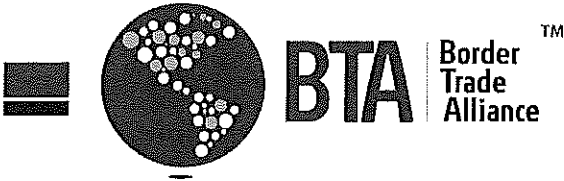
The Border Trade Alliance (BTA), an organization of public and private sector stakeholders involved in cross-border trade at the United States-Mexico and U.S.-Canada borders, welcomes the opportunity to provide comments regarding Case. No. A-201-820, the Draft Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico.

The BTA in comments provided to the Department of Commerce dated July 10, 2019, expressed its strong concerns about any new fresh tomato import inspection protocol that would reduce freight capacity and thus increase costs for all goods—not just agricultural—imported or exported, as well as result in border congestion and delays that prevent just-in-time delivery for our organization's members who are a central part of the \$424 billion in freight that crossed the U.S.-Mexico border by truck in 2018, a 10.2 percent increase over 2017.

Further, in a letter to the Department dated March 6, 2019 signed by dozens of interested parties, including the BTA, we shared our desire that the administration engage in a negotiation with its counterparts in Mexico to preserve duty-free trade as reflected in the Tomato Suspension Agreement and to commit to ensuring that harm not be inflicted on our domestic agriculture industry, the agricultural supply chain, or on the 30,000 U.S. jobs and nearly \$3 billion in U.S. GDP generated by the importation of tomatoes.

We maintain these positions today, which is why we applaud the Department for its diligent work over the last several months to preserve duty-free fresh tomato trade between the U.S. and Mexico, as has been the case for decades. As we and our colleagues in the trade community have made clear, imposing duties on fresh tomato imports would not only have hurt U.S. competitiveness, but it would have run completely counter to the spirit of binational cooperation imbued in the North American Free Trade Agreement and now the United States-Mexico-Canada Agreement, and would have severely complicated the new agreement's fate as it awaits congressional consideration.

Continued



Page 2, Case No. A-201-820

However, the BTA is equally concerned about the establishment of a new non-tariff, not-duty barrier to trade in fresh tomatoes, which is why we cannot support a new inspection protocol that will result in bottlenecks at U.S.-Mexico ports of entry, increased border-area congestion, and diminished product freshness, quality and shelf-life, all of which will result in higher costs that will be passed on to U.S. consumers.

The BTA readily acknowledges the need for thorough inspections at the nation's border ports of entry, and the need to preserve the phytosanitary integrity of the U.S. food supply. The proposed U.S. Department of Agriculture "quality and condition" inspection mandate, however, does not identify a specific security, safety, or health concern the administration is attempting to address. Further, the inspection proposal runs counter to concerted efforts by U.S. Customs and Border Protection to streamline the border inspection processes and to better concentrate limited border agency resources on those shipments and conveyances that deserve more invasive inspection.

The Border Trade Alliance urges the Department and its counterparts in Mexico to consider the negative impact the proposed new USDA inspection mandate would have on the trade community, border communities, and U.S. consumers' ability to shop for and enjoy fresh tomatoes imported from Mexico.

The BTA thanks the Department for the opportunity to provide these comments and for its successful efforts not to impose new permanent duties on fresh tomato imports. We remain hopeful that the proposed shortcomings regarding the inspection of tomatoes can be addressed in a manner that assures a positive outcome for stakeholders in both countries.

Sincerely,

Britton Clarke
President