

DATE: September 27, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Lynn Fischer Fox
Deputy Assistant Secretary
for Policy and Negotiations

SUBJECT: Decision Memorandum: Preliminary Results of Changed
Circumstances Review and Intent to Terminate the Suspended
Investigation

SUMMARY

On January 22, 2008, the Department of Commerce (the Department) signed the current suspension agreement on fresh tomatoes with growers/exporters of Mexican tomatoes accounting for substantially all (*i.e.*, not less than 85 percent) of Mexico's tomato exports to the United States. The agreement covers all fresh or chilled tomatoes of Mexican origin, except tomatoes that are for processing.

On June 22, 2012, the U.S. petitioners in the suspended antidumping duty investigation (*i.e.*, the Florida Tomato Exchange, the Florida Tomato Growers Exchange, the Florida Fruit and Vegetable Association, the Florida Farm Bureau Federation, the Gadsen County Tomato Growers Association, Inc., the South Carolina Tomato Association, Inc., and the Ad Hoc Group of Florida, California, Georgia, Pennsylvania, South Carolina, Tennessee, and Virginia Tomato Growers (collectively, the petitioners)) filed a request for withdrawal of the petition and termination of the investigation and the suspension agreement.¹

¹ Letters were filed from all of the petitioners listed in Exhibit 5 of the April 11, 1996, supplement to the petition, except for Landseidel Farms, Inc., Byrd Foods, Inc., and J&B Tomato, Inc. The petitioners' June 22, 2012, filing included statements from the Executive Vice President of the Florida Tomato Exchange explaining that multiple attempts had been made to contact these three companies and attesting that there is no indication that these companies are still producing tomatoes. Subsequent to their June 22, 2012, filing, the petitioners identified Charles Jones Produce, LLC, as the successor to J&B Tomato. In their September 4, 2012, filing, the petitioners included a statement from Charles Jones Produce, LLC, that the company was no longer interested in the suspended investigation. In a filing on September 21, 2012, the petitioners submitted a declaration from Reggie Brown, Executive Vice President of the FTE and the FTGE, that Landseidel Farms, Inc. and Byrd Foods, Inc., no longer produce tomatoes.

On August 21, 2012, the Department published a notice of initiation of changed circumstances review to examine the petitioners' request to terminate the suspended investigation. See Fresh Tomatoes from Mexico: Notice of Initiation of Changed Circumstances Review, 77 FR 50554 (August 21, 2012) and Correction: Fresh Tomatoes From Mexico: Notice of Initiation of Changed Circumstances Review and Consideration of Termination of Suspended Investigation, 77 FR 50556 (August 21, 2012) (collectively, "Initiation Notice"). In the Initiation Notice we invited interested parties to submit comments for the Department's consideration by September 4, 2012.

As discussed in the Initiation Notice, when examining the domestic industry's interest in an order or suspended investigation, both the Tariff Act of 1930, as amended (the Act), and the Department's regulations require that "substantially all" domestic producers express a lack of interest in the order or suspension agreement in order for the Department to revoke an order or terminate a suspended investigation. See section 782(h) of the Act and 19 CFR 351.222(g). The Department has interpreted "substantially all" to represent producers accounting for at least 85 percent of U.S. production of the domestic like product. See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Changed Circumstances Review and Intent Not to Revoke, In Part, 73 FR 60241, 60242 (October 10, 2008), unchanged in Certain Orange Juice From Brazil: Final Results of Antidumping Duty Changed Circumstances Review, 74 FR 4733 (January 27, 2009). Interested parties were, therefore, requested to address the issue of industry support in their comments.

On September 4, 2012, we received comments from the Florida Tomato Exchange (FTE) and the Florida Tomato Growers Exchange (FTGE), Village Farms, Windset Farms and Houwelings Nurseries Oxnard Inc. (collectively, "domestic producers"); CAADES Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociacion Mexicana de Horticultura Protegida, A.C., Union Agrícola Regional de Sonora Productores de Hortalizas Frutas y Legtunbres, and Confederacion Nacional de Productores de Hortalizas, (collectively, "Mexican tomato growers/exporters"); San Vincente Camalu S.P.R. de R.I. (San Vincente Camalu); NatureSweet Ltd. (NatureSweet); McEntire Produce; the Fresh Produce Association of the Americas (FPAA); Wal-Mart; Grant County Foods, LLC (Grant County); the Government of Mexico; and the Texas International Produce Association (TIPA). On September 18, 2012, the Mexican tomato growers/exporters filed comments on the domestic producers' September 4, 2012, filing. On September 19, 2012, the domestic producers requested that the Mexican tomato growers/exporters' additional comments be stricken from the record. The Mexican tomato growers/exporters responded to the domestic producers' filing on September 21, 2012. On September 25, 2012, the Mexican tomato growers/exporters filed additional comments on the domestic producers' September 4, 2012, filing.

We have considered the comments received by September 4, 2012 for purposes of our preliminary results, and are notifying the public of our preliminary intent to terminate the suspended investigation. If the suspended investigation is terminated in the final results of this review, the suspension agreement will also terminate, effective on the date of publication of the notice of final results of the changed circumstances review in the Federal Register. Interested

parties are invited to comment on these preliminary results. In accordance with section 351.216(e) of the Department's regulations, we will issue the final results of this changed circumstances review within 270 days of the date on which this review was initiated.

Scope of the Suspended Investigation

The merchandise subject to the suspended investigation 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 suspended investigation, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying, or the addition of chemical substances, or converting the tomato product into juices, sauces, or purees. 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 investigation.

Tomatoes imported from Mexico covered by the suspended investigation are classified under the following subheadings of the Harmonized Tariff Schedules of the United States (HTSUS), according to the season of importation: 0702 and 9906.07.01 through 9906.07.09. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope of the suspended investigation is dispositive.

Background

On January 22, 2008, the Department signed the current suspension agreement of fresh tomatoes from Mexico (2008 Suspension Agreement) with certain growers/exporters of fresh tomatoes from Mexico. See Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, 73 FR 4831 (January 28, 2008).²

On June 22, 2012, the petitioners in the suspended antidumping investigation filed a request for withdrawal of the petition and termination of the investigation and the suspension agreement (see footnote 1 above). Subsequent to their initial submission, the petitioners filed additional information on the record supporting their request. See Initiation Notice at 50555. The Mexican tomato growers/exporters signatories to the agreement oppose terminating the antidumping proceeding and the suspension agreement. During July and August 2012, the Mexican tomato growers/exporters signatories filed numerous comments opposing the petitioners' request for terminating the proceeding and the suspension agreement. See id.

² For background on this proceeding prior to signing of the 2008 Suspension Agreement, see Initiation Notice, 77 FR at 50554-55.

Interested parties filed comments for the Department's consideration in this changed circumstances review on September 4, 2012. All filings in this review are on the public record of the 2008 Suspension Agreement in Import Administration's Central Records Unit, room 7046 of the main Department of Commerce building. All filings also are available to registered users via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS) at <http://iaaccess.trade.gov>.

For purposes of these preliminary results we have considered comments filed by interested parties on the record in IA ACCESS by September 4, 2012, the deadline for providing comments established in the Initiation Notice. Comments filed after September 4, 2012, will be considered for the final results.

Discussion of Comments Received

The domestic producers urge the Department to terminate the suspended investigation and the suspension agreement as soon as possible. They assert that termination is supported by the following facts: all petitioners withdrew their petition; producers accounting for substantially all of the production of the domestic like product have indicated that they no longer have any interest in the agreement and the suspended investigation; and there have been significant changes in costs and prices and the growth of greenhouse production, rendering the agreement, which is based on 1992 – 1994 data, out-of-date. The domestic producers maintain that the Department has never declined to terminate where all petitioners withdrew or where substantially all of the domestic industry was no longer interested in the proceeding.

In their September 4, 2012, filing, the domestic producers include signed declarations from 80 U.S. tomato producers stating each producer's 2011 calendar year production of fresh tomatoes, and declaring that they have no interest in continuing the suspended investigation. Collectively, the 80 domestic producers produced over 3,188 million pounds of fresh tomatoes in 2011. The domestic producers cite to the U.S. fresh tomato production figure for calendar year 2011 of 3,538 million pounds from the U.S. Department of Agriculture's (USDA) Economic Research Service (ERS) in its "Vegetables and Pulses Yearbook Data" (Yearbook)³. The domestic producers note that the Department has routinely used USDA data in proceedings involving agricultural products. The ERS data includes domestic production of U.S. field-grown and greenhouse-grown tomatoes. Based on the ERS data, the domestic producers expressing a lack of interest in the suspended investigation account for slightly over 90 percent of U.S. domestic production of fresh tomatoes in 2011. The domestic producers assert that they have satisfied the 85 percent threshold for constituting "substantially all" domestic production under the Department's regulations and practice and, therefore, the Department should terminate the suspended investigation and the suspension agreement on an expedited basis.

In their September 4, 2012, filing, the domestic producers also submitted for the record of the changed circumstances review their original June 22, 2012, request for withdrawal of the petition

³ USDA, Vegetables and Pulses Yearbook Data (May 31, 2012) at Table 28; available at <http://usda01.library.cornell.edu/usda/ers/vegandpulsesyearbook/89011.pdf>.

and termination of the suspended investigation, their letters of withdrawal from additional producers, and additional letters from domestic industry groups, state agencies, and government officials expressing support for withdrawal of the petition and termination of the suspended investigation.

The domestic producers assert that, in addition to their lack of interest in the suspended investigation, there are “other changed circumstances” sufficient to warrant termination of the suspended investigation. The domestic producers state that, in accordance with section 734(c) of the Act, the agreement must prevent price suppression or undercutting, completely eliminate the injurious effects of exports, and be more beneficial to the domestic industry than continuation of an investigation. They maintain that a suspension agreement can only be effective and satisfy the statute if it is based on current and timely data, and that is not the case with the 2008 Suspension Agreement. The domestic producers argue that the changes to the industry since 1996 are so significant as to make the current agreement incapable of achieving its statutory purposes. Specifically, the U.S. producers cite to the increase in greenhouse tomato production in the United States and Mexico and its higher cost structure, significant inflation in Mexico, the increase in the U.S. producer price index for tomatoes, changes in the dollar-peso exchange rate, the doubling of the volume of U.S. tomato imports, the doubling in volume and tripling in value of Mexican tomato imports, and the reduction in the number of acres of fresh tomatoes planted annually in the United States. With respect to the reference prices, the domestic producers contend that the reference prices are not based on current data and do not adequately account for the costs associated with greenhouse production, and they maintain that the current reference price is only 49 percent of the appropriate 2012 reference price.

In their September 4, 2012, submission, the Mexican tomato growers/exporters filed their comments previously filed on the record of the 2008 Suspension Agreement to the record of the changed circumstances review, including the numerous letters opposing termination of the suspended investigation and the agreement. The Mexican tomato growers/exporters argue that the Department lacked authority to initiate the changed circumstances review because it had not determined that changed circumstances sufficient to warrant revocation or termination may exist, *i.e.*, that producers accounting for substantially all of production of the domestic like product, had expressed a lack of interest in continuing the suspended investigation. The Mexican tomato growers/exporters maintain that the Department should vacate the Initiation Notice, terminate the review, and initiate if and when the petitioners meet the applicable standard for initiation.

The Mexican tomato growers/exporters assert that, if the Department continues with the changed circumstances review, it must allow the Mexican tomato growers/exporters to provide additional information and to rebut any information the petitioners put on the record of the proceeding, in accordance with section 351.301 of the Department’s regulations. Further, the Mexican tomato growers/exporters argue that the Department must not rush its decision, asserting that the Department should use the entire 270-day timeline allowed for conducting a changed circumstances review, when the review is contested.

On the issue of industry support, the Mexican tomato growers/exporters contend that the petitioners have not established that producers accounting for substantially all of the production

of the domestic like product have expressed a lack of interest in maintaining the suspended investigation. They argue that the petitioners bear the burden of proof in this regard. The Mexican tomato growers/exporters assert that total U.S. tomato production is much larger than the petitioners will likely indicate, arguing that the U.S. tomato industry has completely transformed over the last 16 years with the growth of protected agriculture and locally-grown produce, and that total U.S. production of fresh tomatoes is not captured by USDA statistics. The Mexican tomato growers/exporters state that the petitioners have historically relied on data from the USDA's National Agricultural Statistics Service (NASS) to determine acreage planted, average yield by state, and average value for purposes of determining industry support, but the USDA has acknowledged that this data does not capture a significant percentage of U.S. production. The Mexican tomato growers/exporters state that the NASS data is based on a sample of growers who voluntarily provide information that is not verified, it does not include production data for all 50 states, and it excludes production of cherry, grape, and greenhouse tomatoes. According to the Mexican tomato growers/exporters, other USDA sources are deficient, as the ERS makes its production estimates based on NASS data, and the USDA Market News Service data is based on voluntary reports and does not estimate production for any portion of the industry that did not report. The Mexican tomato growers/exporters cite to the USDA's satellite imaging cropland exploring service (CropScape) report for California, as evidence of the limitations of the more traditional USDA data, claiming that total U.S. production is not captured in any single USDA report. The Mexican growers/exporters argue that there are currently over 40,000 tomato growing operations in the United States. Finally, the Mexican tomato growers/exporters contend that the Department must initiate a comprehensive process to determine the most appropriate method for measuring U.S. production, including verifying the petitioners' claims of industry support.

In their September 4, 2012, submission, the Mexican tomato growers/exporters include letters from four U.S. companies stating that they are U.S. producers of fresh tomatoes, and that they are registering their strong interest in continuing the suspension agreement and the underlying investigation as well as their strong opposition to the attempt by some U.S. growers to terminate them. These U.S. growers assert that the agreement has brought stability to trade in tomatoes for the last 16 years and request that the Department use existing mechanisms to address any issues or concerns, and to keep the agreement in place.

The Mexican tomato growers/exporters argue that, even if the Department determines that substantially all of the domestic producers lack interest in continuing the suspended investigation, the Department has discretion not to terminate the suspended investigation. They state that both the statute and the regulations use the word "may" when referring to termination of a suspended investigation. According to the Mexican tomato growers/exporters, Congress intended to maintain the Department's discretion when it enacted 19 U.S.C. § 1677m (section 782 of the Act), and the Department should use that discretion in this instance. The Mexican tomato growers/exporters assert that the petitioners have not lost interest in seeking relief under the trade laws, but rather intend to file a new case. The Mexican tomato growers/exporters further contend that the petitioners' failure to state their rationale for seeking termination of the suspended investigation is per se grounds to deny their request. They maintain that there is no legitimate benefit to terminating the suspended investigation and fault the petitioners for failing

to use the mechanisms in the agreement and U.S. law, such as the administrative review process, to address their claims that the agreement is not working. The Mexican tomato growers/exporters claim that they will be harmed in numerous ways if the suspended investigation is terminated and that termination of the agreement will chill trade, waste resources, and damage the Department's credibility to enter into and maintain suspension agreements.

Further, the Mexican tomato growers/exporters assert that terminating the suspended investigation is contrary to the public interest. The Mexican tomato growers/exporters cite to the Department's past public interest determinations where it has found that the agreement is in the public interest because it eliminates the injurious effects of dumping and allows Mexican tomato producers access to the U.S. market, provides price stability and market certainty, conserves Department and parties' resources, and promotes international cooperation between the United States and its NAFTA partner. In considering these factors, the Mexican tomato growers/exporters assert that the public interest overwhelmingly weighs in favor of maintaining the agreement. Moreover, the Mexican tomato growers/exporters argue that terminating the agreement will disrupt the U.S. market for tomatoes, causing prices to rise and resulting in a decrease in the quality and variety of tomatoes in the United States. They contend that terminating the agreement will have a negative impact on the U.S.-Mexico trading relationship, resulting in a trade war with Mexico that could threaten U.S. exports to Mexico and result in the loss of U.S. jobs.

On September 4, 2012, the TIPA, an association representing the majority of Texas-based importers of fresh tomatoes from Mexico, filed letters from members and associates of the TIPA stating their support for maintaining the current suspension agreement. They assert that the agreement has served the industry's interests for the past 16 years and suggest that the agreement be revised rather than terminated. The TIPA states that tomato imports are a major source of jobs and income in Texas and the Southwest, and expresses its concern that termination of the agreement will invite retaliation from Mexico.

Also on September 4, 2012, San Vicente Camalu, a Mexican tomato grower/exporter that is not a signatory to the 2008 Suspension Agreement, filed comments opposing termination of the 2008 Suspension Agreement. San Vicente Camalu contends that the petitioners have failed to meet the requirement for terminating a suspended investigation, *i.e.*, that "substantially all" (at least 85 percent) of domestic producers express a lack of interest in the order or suspended investigation.

NatureSweet, a San Antonio, Texas-based company that operates a network of greenhouse production facilities in Mexico, filed comments opposing termination of the suspended investigation and stated its support for the comments filed by the Mexican tomato growers/exporters. NatureSweet asserts that the petitioners must establish that substantially all domestic producers express a lack of interest in the suspended investigation and notes that the Department has 270 days to complete the changed circumstances review. NatureSweet urges the Department to consider the public interest in this regard, and expresses concern that termination of the suspended investigation will cause uncertainty in the market, negatively impacting the distribution network in the United States, constraining supply, and causing prices to rise.

NatureSweet maintains that the agreement has worked well for the past 16 years and asserts that, while it does not believe the agreement needs to be renegotiated, that option should be considered through the regular administrative review process before terminating the agreement and triggering trade litigation.

McEntire Produce, a U.S. produce processor, wholesaler, and tomato re-packer in Columbia, South Carolina also filed comments on September 4, 2012, opposing termination of the suspension agreement. McEntire Produce asserts that the agreement has allowed for a more orderly flow of goods at more predictable prices, and expresses concern that terminating the agreement will result in overall price increases for tomatoes, irrespective of demand.

The FPAA, an association of producers, exporters, and importers of fresh tomatoes from Mexico based in Nogales, Arizona, filed a letter on its own behalf and letters from various organizations objecting to the petitioners' request to terminate the suspended investigation and the agreement as being contrary to the "public interest." The FPAA makes arguments similar to those of the Mexican tomato growers/exporters, including with respect to the operation of the agreement over the past 16 years, the process for conducting the changed circumstances review and the issue of determining industry support, and the impact that termination would have on U.S. trade policy and U.S. jobs. The letters that the FPAA submitted on behalf of other organizations similarly address arguments made by the Mexican tomato growers/exporters, including the argument that termination is not in the public interest and will result in a trade dispute with Mexico, the need to carefully examine the issue of industry support, the argument that the Department has discretion in its final decision in this matter, a preference for renegotiating the agreement over termination, and the potential loss of U.S. jobs if the agreement is terminated.

Grant County, a wholesaler of fresh tomatoes in the United States, also filed comments for the record of the changed circumstances review on September 4, 2012. Grant County states that it purchases both U.S.-grown and Mexican-grown tomatoes, and that it must have a reliable, steady supply of high quality tomatoes. Grant County asserts that the agreement has created a stable, reliable source of tomatoes in the U.S. market for the past 16 years which has benefitted growers, importers, distributors, wholesalers, and consumers. Grant County is concerned that termination of the agreement will create uncertainty for the food service industry and consumers in an already difficult economic environment. Finally, with respect to industry support, Grant County states that there are statistics on the size of domestic production and that it wants to ensure that the Department is aware of these statistics. According to Grant County, "[t]he sector benefits from reliable statistics from the {USDA}, which indicates that U.S. production of fresh tomatoes was 3,538 million pounds in 2011." Grant County asserts that the U.S. producers requesting termination must account for 85 percent of this USDA production figure. According to Grant County, given the importance of the agreement, it is reasonable for the Department to set a high industry support benchmark before it considers terminating the agreement. Grant County further asserts that the Department should look at the broader public interest, and urges the Department to consider addressing concerns with the agreement either within the existing agreement framework or through renegotiation of the agreement.

Also on September 4, 2012, Wal-Mart filed comments on the record of the changed circumstances review. As a purchaser of both domestic and Mexican tomatoes, Wal-Mart urges the Department to continue the suspension agreement. According to Wal-Mart, the agreement benefits the public interest by ensuring a stable and predictable supply of tomatoes that enables Wal-Mart to provide consistent pricing to the American consumer. Wal-Mart contends that the public interest is best served by terminating the changed circumstances review and addressing the domestic industry's concerns through the mechanisms available under the existing agreement. Wal-Mart argues that the pricing concerns of the U.S. industry can be addressed by negotiating new reference prices, thereby avoiding the uncertainty and negative price and supply effects that would result from terminating the agreement. Wal-Mart further contends that, when considering the public interest, the Department must consider changes in the industry, including the growing demand for hothouse or vine-ripened tomatoes, rather than the field-grown tomatoes grown in Florida. Wal-Mart makes arguments similar to those of the Mexican tomato growers/exporters, including with respect to the operation of the agreement over the past 16 years, the argument that termination is not in the public interest and will result in a trade dispute with Mexico, and a preference for renegotiating the agreement over termination.

The Government of Mexico (GOM) stated its opposition to termination of the suspended investigation and the agreement in its comments filed on September 4, 2012. The GOM asserts that for the past 16 years, the agreement has been an effective solution to one of the most important trade issues between Mexico and the United States. According to the GOM, the agreement has been beneficial to the U.S. market and there is no compelling reason to change the situation. The GOM maintains that termination of the agreement will harm the Mexican agricultural sector, negatively impact U.S. consumers, as they will pay higher prices, have less variety of products and face shortages, and result in job losses in the industries involved in distributing, packing, and storing Mexican tomato imports. Many of the GOM's comments are similar to those of the Mexican tomato growers/exporters, including with respect to the issue of establishing industry support, the process for conducting the changed circumstances review, the argument that the Department has discretion not to terminate the suspended investigation, and that the Department must consider whether termination is in the public interest. The GOM argues that the only mechanisms for terminating the agreement are provided for within the agreement, and that the Department cannot terminate the agreement based on a declaration of no interest by the petitioners. The GOM also asserts that the Department should consider whether terminating the agreement would be a violation of the United States' World Trade Organization (WTO) obligations. According to the GOM, by terminating the agreement based solely on the request of the petitioners, the Department would violate its WTO obligations to make an objective determination as to whether an undertaking would be appropriate. The GOM further asserts that if the U.S. producers are permitted to terminate the agreement and then re-file a petition, the Department would effectively be permitting the U.S. producers to control the outcome and form of a trade remedy, a violation of Article 18.1 of the WTO Antidumping Agreement.

Preliminary Results

Initiation

On August 21, 2012, the Department published a notice of initiation of changed circumstances review of the suspended antidumping investigation on fresh tomatoes from Mexico, pursuant to section 751(b)(1)(B) of the Act. Section 751(b)(1)(B) of the Act provides that whenever the Department receives information concerning a suspension agreement which “shows changed circumstances sufficient to warrant a review” of such agreement, the Department “shall conduct a review of . . . the agreement.”

As described in the Initiation Notice, on June 22, 2012, the petitioners in the suspended antidumping investigation filed a request for withdrawal of the petition and termination of the suspended investigation and the suspension agreement. Following this submission, the petitioners filed numerous letters of support from other domestic producers of tomatoes. The petitioners’ initial submission and the subsequent letters of support requesting withdrawal of the petition and termination of the suspended investigation and suspension agreement indicated a lack of interest in the suspended investigation by domestic producers of tomatoes. Further, at the time of the initiation of the changed circumstances review, no domestic producer had opposed petitioners’ request. Accordingly, the Department determined that it had received information showing changed circumstances sufficient to warrant a review of the suspended investigation under section 751(b) of the Act. This information was also sufficient under section 351.222(g)(2) of the Department’s regulations to support the conclusion that “changed circumstances sufficient to warrant . . . termination may exist.”⁴ Accordingly, the Department initiated a changed circumstances review to determine whether substantially all of the U.S. tomato producers have expressed a lack of interest in the suspended investigation, so that termination under sections 782(h)(2) and 751(d) of the Act may be appropriate.⁵

The Mexican tomato growers/exporters oppose the Department’s initiation of the changed circumstances review. Specifically, they argue that the changed circumstances review is “unlawful,”⁶ describing the Department’s regulations governing the basis for termination of a suspended investigation.⁷ They argue that without the evidence supporting the conditions for termination, the Department “could not have ‘decide{d} that changed circumstances sufficient to warrant a review exist,’ the required step to ‘conduct a changed circumstances review in accordance with § 351.221.’”⁸ We disagree with the Mexican growers/exporters’ interpretation of the statutory scheme and the Department’s regulations. Their argument collapses the standard

⁴ Section 351.222(g)(2) of the Department’s regulations states that, “[i]f at any time the Secretary concludes from the available information that changed circumstances sufficient to warrant . . . termination **may** exist, the Secretary **will** conduct a changed circumstances review. . .” (emphasis supplied).

⁵ Section 782(h)(2) of the Act provides that the Department may terminate a suspended investigation if it determines that “producers accounting for substantially all of the production of that domestic like product, have expressed a lack of interest in the . . . suspended investigation.” Section 751(d) of the Act provides that the Department “may . . . terminate a suspended investigation, after” a changed circumstances review.

⁶ Shearman & Sterling September 4, 2012, filing at 4.

⁷ Id. at 4-5.

⁸ Id. at 5.

for initiating a changed circumstances review and the standard for ultimately concluding that changed circumstances exist. Logically, and under the statute, these two standards are different. The Mexican tomato growers/exporters' argument does not account for sections 782(h)(2) and 751(d) of the Act, nor for the fact that section 351.222(g)(2) of the regulations requires that the Department "will" initiate a changed circumstances review if it concludes that changed circumstances "may" exist.⁹

Determining whether "substantially all of the {U.S. tomato} producers . . . have expressed a lack of interest in the . . . suspended investigation" requires the collection and examination of facts regarding a large and complex industry. As indicated by section 751(d) of the Act, administrative reviews (including changed circumstances reviews) are the mechanism through which the Department makes such determinations. They permit the systematic collection of relevant evidence and give all interested parties an opportunity to comment upon that evidence, in order to protect their interests. Accordingly, the Department did not use the expedited procedure outlined in section 351.221(c)(3) of its regulations providing for the combined initiation and preliminary results of a changed circumstances review. However, the approach advocated by the Mexican tomato growers/exporters would have required the Department to determine that the conditions for termination of the suspended investigation existed before initiating the changed circumstances review. In the case of an affirmative determination, this would have rendered the changed circumstances review redundant, which cannot have been the intent of Congress in enacting those provisions.

Industry Support

As discussed in the Initiation Notice and above, in accordance with section 351.222(g)(1)(i) of the regulations, the Department may terminate a suspended investigation if it concludes that producers accounting for substantially all (i.e., 85 percent) of the production of the domestic like product to which the suspended investigation pertains have expressed a lack of interest in the suspended investigation.

The domestic producers have submitted signed declarations from 80 U.S. tomato producers accounting for slightly over 90 percent of U.S. production in 2011, based on information from USDA's ERS publication Yearbook. The Mexican tomato growers/exporters have argued that the USDA data historically used by the petitioners does not capture total U.S. fresh tomato production. However, for purposes of these preliminary results, we find that the domestic producers who have expressed a lack of interest in the suspended investigation account for substantially all, i.e., not less than 85 percent, of the production of fresh tomatoes in the United States, based on the best publicly available production data. The Mexican tomato growers/exporters have argued that the number of U.S. producers who have expressed a lack of

⁹ We further disagree that the Department's initiation is contrary to its past practice, as the Department has previously initiated changed circumstances reviews without specific evidence that domestic producers supporting revocation of an order constituted 85 percent or more of domestic production. See, e.g., Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate Products from Germany: Initiation of Countervailing Duty Changed Circumstances Reviews, 68 FR 67657 (December 3, 2003); Stainless Steel Plate in Coils from Italy: Initiation of Countervailing Duty Changed Circumstances Review and Notice of Consideration of Revocation of Order, 71 FR 328 (Jan. 4, 2006).

interest in continuing the suspended investigation represent only a small fraction of the total number of U.S. producers of fresh tomatoes, *i.e.*, 80 producers out of 40,000 producers. However, an examination of the USDA (2007) Census of Agriculture (Census Report) indicates that the size of the individual farms varies significantly. There is not a direct correlation between the number of farms and production. For example, the Census Report lists 1,429 tomato farms in North Carolina in 2007. Of those operations, 1,052 farms, or 73.6 percent, were less than one acre. Only six farms, or 0.4 percent, were 100 acres or larger. See September 27, 2012, Memorandum from Julie H. Santoboni to The File, re: USDA Tomato Data (USDA Tomato Data Memo). The statistics in the Census Report for fresh tomato production in Alabama demonstrate a similar concentration of small farms, rather than large farms capable of growing for commercial production. Of the 727 farms in Alabama growing tomatoes in the open, 509, or 70 percent, are less than one acre, 693 farms, or 95.3 percent, are less than five acres, and no tomato farms in Alabama are 100 acres or larger. Id.

Concerning the Mexican tomato growers/exporters' assertion that the total production figure as reported in the Yearbook and used by the petitioners is flawed because it only accounts for production from 16 states, we note that the ERS website states that while fresh tomatoes are produced in every state, commercial scale production is concentrated "in about 20 States." See <http://www.ers.usda.gov/topics/crops/vegetables-pulses/tomatoes.aspx#Fresh%20tomato>, filed by Shearman and Sterling at Appendix 18 of its September 4, 2012, submission. Moreover, ERS states that "California and Florida each produce fresh-market tomatoes on 30,000-40,000 acres – almost two-thirds of total U.S. fresh tomato acreage (a share that has not changed much since the 1960s)." Id. Further, an examination of the tomato acreage by state as reported in the Census Report supports that tomato production is concentrated in a handful of states. See USDA Tomato Data Memo.

The Mexican tomato growers/exporters further fault the USDA Yearbook data used by petitioners because it excludes cherry, grape and greenhouse tomato production. First, we note that the total U.S. production figure used by the domestic producers does include hothouse (greenhouse) tomatoes, as indicated in the table heading. See Yearbook, at table 28. With respect to the exclusion of cherry and grape tomato production, table 59 of the Yearbook indicates that cherry and grape tomato shipments – which includes imports and domestic production – comprised only seven percent of total fresh tomato shipments in 2011.¹⁰ See Yearbook at Table 59 and USDA Tomato Data Memo. Given that cherry and grape tomatoes account for only seven percent of all shipments, imports and U.S. production, we do not find that the exclusion of these products from the total U.S. production figure used by the petitioners is significant.

With respect to the reference by the Mexican tomato growers/exporters to CropScape data as evidence that the Yearbook data significantly understates U.S. production, we do not find the CropScape data to be a reliable source for determining U.S. production. As noted by the Mexican tomato growers/exporters, Cropscape data does not break out tomato production into tomatoes grown for processing and those grown for the fresh market. Moreover, the Cropscape

¹⁰ The shipment data does not distinguish between U.S. production and imports.

website includes the qualifying statement that the “[p]ixel and acreage counts are not official estimates.”¹¹

The Department has routinely used USDA data in antidumping proceedings concerning agricultural products. The Department relied on USDA data when it initiated the antidumping investigation on fresh tomatoes from Mexico. See Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 FR 18377 (April 25, 1996). USDA data has also been used by the Department in numerous other cases. See, e.g., Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico, 63 FR 71886 (December 30, 1998); Notice of Initiation of Antidumping Duty Investigation: Certain Orange Juice from Brazil, 70 FR 7233 (February 11, 2005); Notice of Initiation of Antidumping Investigation: Live Swine from Canada, 69 FR 19815 (April 14, 2004); Notice of Initiation of Countervailing Duty Investigation: Live Swine from Canada, 69 FR 19818 (April 14, 2004); Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 FR 71889 (December 30, 1998); Initiation of Antidumping Duty Investigations: Spring Table Grapes from Chile and Mexico, 66 FR 26831 (May 15, 2001); Notice of Initiation of Antidumping Duty Investigations: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 67 FR 65947 (October 29, 2002). In addition, USDA data has been used by the U.S. International Trade Commission (USITC) in monitoring reports prepared for Congress on U.S. imports of tomatoes. See, e.g., USITC Monitoring of U.S. Imports of Tomatoes, Investigation No. 332-350, USITC Publication 4048, November 2008. Further, we note that Grant County proposed that USDA data be used to calculate domestic support for withdrawal of the petition. Grant County has asserted that the industry benefits from “reliable statistics from the United States Department of Agriculture” and has suggested that the U.S. production figure as reported in the Yearbook be used to calculate industry support. We note that Grant County cited to the same figure used by the domestic producers in their industry support calculation, 3,538 million pounds. See Grant County September 4, 2012, filing at page 3.

We have considered the arguments raised by interested parties and find that the USDA Yearbook is an objective and reliable source for 2011 U.S. tomato production for purposes of determining industry support in these preliminary results. While we recognize that there are limitations with the USDA data, as discussed above, we do not find that these limitations are sufficiently significant as to preclude us from using the data to calculate industry support in this instance. The USDA is the U.S. government agency charged with collecting and disseminating agricultural data and the Department consistently has relied on USDA data in U.S. antidumping and countervailing duty proceedings. Further, while the Mexican tomato growers/exporters and certain other interested parties are critical of the U.S. production data published by the USDA, they have not suggested an alternative source or a more accurate U.S. production figure. Therefore, absent a reliable alternative, we are basing our calculation of industry support for determining the lack of interest in the suspended investigation on the 2011 production figure from the USDA’s Yearbook.

¹¹ To reach this note, one must first go to the website <http://nassgeodata.gmu.edu/CropScape/>, then click the icon of a U.S. flag colored map of the United States, then select a state from the drop down menu and click “submit”. Then one must click on the bar graph icon to go to the link to obtain “Area of Interest Statistics”.

Further on the issue of industry support, in their September 4, 2012, filing, the Mexican tomato growers/exporters included letters from four U.S. companies stating that they are U.S. producers of fresh tomatoes, registering their strong opposition to terminating the suspension agreement and the underlying investigation. None of the four companies provided production data. A web search of the companies indicated that the companies are not likely to account for 15 percent of U.S. tomato production. Therefore, we find that these companies' statements do not call into question that substantially all of the U.S. industry's lack of interest in the suspended investigation. (See September 27, 2012 memorandum from the file from Julie H. Santoboni, "Changed Circumstances Review/Fresh Tomatoes from Mexico Domestic Producer Opposition.") Further, we note that the Department has revoked an order where there was no opposition or where opposition accounted for less than 15 percent of U.S. production. See e.g., Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate Products from Germany: Final Results of Countervailing Duty Changed Circumstances Reviews and Revocation of the Orders, in Whole, 69 FR 17131 (April 1, 2004) ("Because the Department did not receive objections to the request for revocation of these orders from domestic producers accounting for more than 15 percent of production of the domestic like product ..., we conclude that producers accounting for substantially all of the production of the domestic like products to which these orders pertain lack interest in the relief provided by these orders."); Stainless Steel Plate in Coils from Italy: Preliminary Results of Countervailing Duty Changed Circumstances Review and Intent to Revoke Order, 71 FR 7736 (February 14, 2006) ("Unless the Department receives opposition ... from domestic producers whose production totals more than 15 percent of the domestic like product, the Department will revoke the order on SSPC in its final results of this review.") (unchanged in final results, 71 FR 15380 (March 28, 2006) (stating that the Department did not receive any comments in response to its initiation notice or preliminary results)).

Public Interest

The Mexican tomato growers/exporters also argue that, if the Department determines that substantially all of the domestic producers lack interest in continuing the suspended investigation, it retains discretion not to terminate the suspended investigation. We agree that the statute does not *require* the Department to terminate an investigation based on the lack of industry support. Nevertheless, we do not believe that Congress designed the statutory scheme to force domestic industries to accept remedies (or continued remedies) from unfairly traded imports if they are not interested (or no longer interested) in such remedies. The provisions of section 782(h) and 751(d) of the Act make this clear.

The Mexican tomato growers/exporters also imply that they have rights under the suspension agreement that would be compromised by terminating the suspended investigation without their consent. The Mexican tomato growers/exporters do, indeed, have rights under the suspension agreement. However, the statute does not grant foreign respondents the right to have antidumping proceedings against them continued. As such, we disagree with the implication that the Department gave the Mexican tomato growers/exporters such a right by negotiating the suspension agreement. The Department lacks authority to provide the Mexican tomato growers/exporters with rights beyond those contained in the statute.

The Mexican tomato growers/exporters also argue that, because the suspension agreement was entered into pursuant to section 734(c) of the Act, which requires a public interest finding, it would be “improper” for the Department to terminate the suspended investigation (and, with it, the suspension agreement) without finding termination to be in the public interest.¹² We disagree. The public interest finding was a necessary, but not sufficient, condition of entering into the suspension agreement under section 734(c) of the Act. Finding the suspension agreement to be in the public interest did not require the Department to enter into the agreement, but only permitted it to do so. Conversely, finding continuation of the agreement to be in the public interest would not necessarily require the Department to maintain the agreement.

The Mexican tomato growers/exporters’ argument also confuses the conditions for entering into a suspension agreement with those for termination of an investigation, and specifically a suspended investigation. The statute does not require a public interest determination in order to initiate a proceeding (e.g., an antidumping investigation) or to terminate an investigation or suspended investigation or revoke an order when the domestic industry lacks interest in continuing the proceeding or keeping the remedy in place. The public interest requirement is simply a condition for departing from the usual relief provided by an affirmative determination in an antidumping proceeding – the application of antidumping duties under an order.

Furthermore, we note that section 782(h) of the Act provides that the Department may terminate an investigation or a suspended investigation if substantially all of the domestic industry has expressed a lack of interest in the continuance of the investigation. There is no indication in this provision of the statute, section 751(b) and (d) of the Act, or the Department’s regulations that a “public interest” determination is required or relevant to such a termination.

Given the above, we disagree with the GOM’s claim that the Department would violate its WTO obligations if the 2008 Suspension Agreement is terminated without following the procedures established in the agreement. Although the 2008 Suspension Agreement provides for termination of the agreement, the procedures therein are not the only mechanism by which the suspension agreement may properly terminate. The Department is charged with complying with the provisions of the Act, which is consistent with the WTO obligations of the United States. As explained in the Initiation Notice, the Act provides for termination of a suspended investigation through a changed circumstances review (or an annual review) if substantially all of the domestic producers express a lack of interest in the suspended investigation. See 751(d) and 782(h) of the Act. Thus, if the Department concludes that substantially all of the domestic tomato producers have no interest in the suspended tomatoes investigation, it may properly terminate the suspended investigation in the final results of this review. The corollary of such a determination is that the Department may also properly terminate a suspension agreement if it terminates the underlying suspended investigation. We do not believe that Congress designed a statutory scheme that would allow the Department to terminate the suspended investigation but not also terminate the suspension agreement in the event that the domestic industry has no interest in the

¹² Shearman & Sterling September 4, 2012, filing at 33. See also the Government of Mexico’s September 4, 2012, filing at 7-9.

remedy. The Department therefore finds that termination of the suspension agreement in the event that the suspended investigation is terminated is consistent with the provisions of the Act, and accordingly, with the United States' obligations under the Antidumping Agreement.

Recommendation

We recommend accepting the analysis detailed above for these preliminary results.

Agree

Disagree

Paul Piquado
Assistant Secretary
for Import Administration

(Date)