

DEPARTMENT OF COMMERCE**International Trade Administration**

[A-201-820]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes From Mexico

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

EFFECTIVE DATE: November 1, 1996.

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The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA).

Preliminary Determination

We preliminarily determine that fresh tomatoes from Mexico are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins are shown in the *Suspension of Liquidation* section of this notice.

Case History

Since the initiation of this investigation on April 18, 1996 (61 FR 18377, April 25, 1996 (*Initiation Notice*)), the following events have occurred:

On May 16, 1996, the United States International Trade Commission (ITC) notified the Department of Commerce (the Department) of its affirmative preliminary injury determination.

On June 4, 1996, the Department issued the antidumping duty questionnaire¹ to counsel for the following growers/exporters of fresh tomatoes to the United States: San Vincente Camalu (Camalu); Ernesto

Fernando Echavarria Salazar Grupo Solidario (Echavarria); Arturo Lomeli Villalobos S.A. de C.V. (Lomeli); Ranchos Los Pinos S. de R.L. de C.V. (RLP); Administradora Horticola Del Tamazula (Tamazula); and Agricola Yory, S. de P.R. de R.L. (Yory) (collectively "respondents").

The six mandatory respondents and three voluntary respondents submitted questionnaire responses in July 1996. The Department issued supplemental questionnaires to the mandatory respondents in July and August 1996. Responses to these supplemental questionnaires were received in August and September 1996. The voluntary responses were not analyzed. (For a discussion of the selection of respondents, see the *Selection of Respondents* and *Voluntary Respondents* sections of this notice.)

On July 26, 1996, petitioners made a timely request for a postponement of the preliminary determination for a period of no more than 30 days. Pursuant to Section 733(c)(1)(A) of the Act and section 353.15(c) of the Department's regulations, and absent compelling reasons to deny this request, the Department postponed the preliminary determination until no later than October 7, 1996 (61 FR 40607, August 5, 1996).

Based on the information contained in the questionnaire responses of Lomeli's affiliate, Eco Cultivos, S.A. de C.V. (Eco), it appeared that Eco's sole U.S. customer, Desert Glory, Ltd., (DGL), might be considered an "affiliated person," as defined under section 771(33) of the Act. Therefore, on September 9, 1996, we sent DGL a list of questions concerning its ownership and the nature of its business relationships with Eco and Lomeli. DGL's response to these questions was submitted on September 13, 1996. (For a discussion of this issue, see the *Affiliated Persons* section of this notice.) DGL submitted a request for scope clarification on September 30, 1996. Specifically, DGL requested that greenhouse grown "Desert Glory Cocktail Tomato[es]" be excluded from the scope of this investigation.

On September 13, 1996, the petitioners requested that, for all respondents, the Department compare transaction-specific export prices in the United States market to weighted-average normal values, in accordance with the "targeted dumping" provisions of section 777A(d)(1)(B) of the Act. For further discussion, see the *Targeted Dumping* section of this notice.

On October 7, 1996, the Department further postponed the preliminary determination until no later than

October 28, 1996 (see, *Notice of Postponement of Preliminary Antidumping Duty Determination: Fresh Tomatoes from Mexico*, 61 FR 53702 (October 15, 1996)). Petitioners responded to DGL's request for a scope clarification on October 10, 1996, indicating that "green-house grown 'cocktail tomatoes'" are not included in the scope of this investigation (see, *Scope of Investigation* section below).

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

Selection of Respondents

Section 777A(c)(1) of the Act states that the Department is to calculate individual dumping margins for all known exporters and producers of the subject merchandise. Section 777A(c)(2) of the Act, however, states that the Department may examine less than all exporters and producers, if there is a large number of exporters and producers. This latter provision permits us to investigate (1) a sample of exporters, producers, or types of products that is statistically valid based on the available information, or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined. In the antidumping investigations involving pasta from Italy and Turkey, for example, because of our limited resources, we did not investigate individually all known exporters. (See, *Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, 61 FR 30326 (June 14, 1996); *Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey*, 61 FR 30309 (June 14, 1996), (*Certain Pasta from Turkey*).)

In this case, because of the very large number of exporters of Mexican tomatoes, we invoked section 772A(c)(2) of the Act. We solicited comments on sampling methodologies from the Mexican government, petitioners, and potential respondents. All parties requested that we examine the producers and exporters accounting for the largest volumes of exports, rather than devising a sampling technique.

Based on the administrative resources available to work on this investigation and the number of potential affiliated companies involved, we determined that we could only analyze a total of six respondents (including their affiliates).

¹ Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the sales of the merchandise in all of its markets. Sections B and C of the questionnaire request home market sales listings and U.S. sales listings, respectively. Section D requests information on the cost of production of the foreign like product and constructed value of the merchandise under investigation.

At the time we issued the questionnaire, the information on the record demonstrated that the six largest growers/exporters and their affiliates accounted for just under 40 percent of exports, by quantity. These six companies provided an adequate representation of growers/exporters from both the Sinaloa and Baja growing regions, the two significant fresh tomato growing regions in Mexico. (See the June 12, 1996, memorandum to Barbara Stafford.)

Voluntary Respondents

Section 782(a) of the Act states that individual rates shall be calculated for firms which voluntarily provide information, except where the number of such respondents is so large that the calculation of individual dumping margins for all such respondents would be unduly burdensome and would prevent the timely completion of the investigation. Because the Department selected the maximum number of respondents it could investigate given the available administrative resources, the Department determined that no voluntary respondents would be accepted unless one of the mandatory respondents did not participate. (See the June 12, 1996, memorandum to Barbara Stafford.)

Potential voluntary respondents were provided with specific written guidance on the Department's criteria for including a voluntary respondent in the investigation. Three voluntary respondents timely filed section A, B, C, and D questionnaire responses. We did not analyze these voluntary responses, however, as all mandatory respondents had timely filed responses and are participating in the investigation. In light of the substantial effort already required to analyze the mandatory respondents, analysis of the voluntary respondents by the Department personnel assigned to this investigation would be unduly burdensome and would preclude the timely completion of this investigation.

Affiliated Persons

Based on the information on the record, we have determined that Lomeli and Eco are affiliated through stock ownership and shared board members. In determining whether to apply a single antidumping duty margin to two or more affiliated producers, the Department considers the following factors: (1) Whether the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (2)

whether there is a significant potential for the manipulation of prices or production. The factors the Department may consider in identifying a significant potential for the manipulation of prices or production include: (1) The level of common ownership; (2) interlocking officers or directors; and (3) whether operations are intertwined, such as through the sharing of sales information, the involvement in production and pricing decisions, the sharing of facilities or employees, or the presence of significant transactions between the affiliated producers. The principles underlying these criteria have been cited with approval in recent court decisions. (See, *FAG Kugelfischer v. U.S.*, Slip Op. 96-108 (CIT July 10, 1996), citing *Nihon Cement Co. v. United States* (17 CIT 400, 425 (1993), and *Final Determination of Sales at LTFV: Antifriction Bearing (Other than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 FR 18992, 19089 (May 3, 1989); see also Section 351.401 of the *Proposed Regulations*, 61 FR 7314 (February 27, 1996).)

During the POI, all of the tomatoes produced and sold by Lomeli were field-grown tomatoes. During the same period, all tomatoes produced and sold by Eco were grown in greenhouses. Information on the record regarding the manufacturing facilities and production processes used to grow greenhouse and field-grown tomatoes indicates that the production facilities and cultivation methods required to grow greenhouse tomatoes vary significantly from those needed to grow field-grown tomatoes. Therefore, it appears that a shift in production from field-grown tomatoes to greenhouse-grown tomatoes could not be accomplished without significant and expensive retooling of production facilities. Accordingly, although the Department considers Lomeli and Eco to be affiliated parties, we have determined that these companies should not be collapsed for purposes of the preliminary determination. Therefore, we have calculated separate dumping margins and deposit rates for Lomeli and Eco.

In its July 2, 1996, section A response, Eco claimed that its sole U.S. customer, DGL, was unaffiliated. Based on the existence of an exclusive purchase and distribution agreement between Eco and DGL, and the fact that certain employees of a wholly-owned subsidiary of DGL held positions at Eco, it appeared that Eco might be considered an affiliated person as defined in section 771(33) of the Act. Therefore, on September 9, 1996, we sent DGL a list of questions concerning its ownership and the nature

of its business with Eco and Lomeli. On October 11, 1996, DGL stated that, in practice, DGL's exclusive purchase and distribution rights are limited to cocktail tomatoes, which have been excluded from the scope of this investigation (see, the *Scope of Investigation* section of this notice, below). Based on the record evidence, we have preliminarily determined that DGL does not have the ability to exercise restraint or direction over Eco's sales of subject merchandise and, therefore, does not control Eco for purposes of this investigation. Accordingly, for this preliminary determination, Eco and DGL are not considered affiliated parties within the meaning of section 771(33)(G) of the Act.

Postponement of Final Determination

Pursuant to section 735(a)(2)(A) of the Act, on October 11, 1996, five of the six mandatory respondents requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until the 135th day after the date of publication of the affirmative preliminary determination in the Federal Register. In accordance with 19 CFR 353.20(b), because our preliminary determination is affirmative, respondents accounting for a significant proportion of exports of the subject merchandise have requested postponement, and no compelling reasons for denial exist, we are postponing the final determination. Accordingly, we are extending suspension of liquidation in this case. (See *Extension of Provisional Measures* memorandum dated February 7, 1996, on file in the investigation of Certain Pasta from Italy in Room B-099 of the main Commerce building.)

Scope of Investigation

The products covered by this investigation are all fresh or chilled tomatoes (fresh tomatoes) except for cocktail tomatoes and those tomatoes which are for processing. For purposes of this investigation, cocktail tomatoes are green-house grown tomatoes, generally larger than cherry tomatoes and smaller than roma or common round tomatoes, and are harvested and packaged on-the-vine for retail sale. For purposes of this investigation, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying or the addition of chemical substances, or converting the tomato product into juices, sauces or purees. Further, imports of fresh tomatoes for processing are accompanied by an "Importer's Exempt Commodity Form" (FV-6)

(within the meaning of 7 CFR section 980.501(a)(2) and 980.212(i)). Fresh tomatoes that are imported for cutting up, not further processed (e.g., tomatoes used in the preparation of fresh salsa or salad bars), and not accompanied by an FV-6 form are covered by the scope of this investigation.

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

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

Period of Investigation

The period of investigation (POI) is March 1, 1995, through February 29, 1996. Since the passage of the URAA, the Department has altered the period it examines in an investigation to correspond to the most recently completed four fiscal quarters before the filing of the petition (i.e., expanding the typical POI from six months to one year). This change is appropriate in light of the statutory definition of "extended period of time" for cost cases, to simplify reporting requirements and to prevent possible price manipulation by respondents after they become aware of the filing of a petition.

As indicated in the *Initiation Notice*, the petition was filed with the Department on March 29, 1996, although it was not filed with the ITC until April 1, 1996. Because the Department's current policy is to exclude the month in which the petition is filed from the POI, the submission of the petition to the Department in March called into question the inclusion of March in the POI. Information provided to the Department suggested that the pending filing of the petition was widely known and this, combined with the filing of a 201 case with the ITC on March 11, 1996, called into question the appropriateness of including March sales in our analysis. Due to the combination of these factors, we excluded the month of March from the POI.

Because we excluded March from the POI, we considered whether it was appropriate to base the POI on fiscal quarters. Information on the record indicated that accounting records and company operations in the tomato industry are maintained and tracked on a growing season basis. Because the use of fiscal quarters would not result in a reduced reporting burden for respondents, we did not adjust the POI further back in time in order to align it with fiscal quarters. For a further discussion of the selection of the POI, see the June 12, 1996, memorandum to Barbara Stafford.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by the respondent, covered by the description in the *Scope of Investigation* section, above, and sold in the home market during the POI, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise (tomatoes of the same tomato type (e.g., round, roma, etc.)) in the home market to compare to U.S. sales in the same month, we compared U.S. sales to a normal value based on constructed value. We did not compare sales of similar merchandise because the cost differences between tomato types are not associated with differences in the physical characteristics of the merchandise.

Targeted Dumping

On September 13, 1996, the petitioners requested that the Department compare the transaction-specific constructed export prices of the six mandatory respondents in the United States to weighted-average normal values, pursuant to the "targeted dumping" provisions of section 777A(d)(1)(B) of the Act. The petitioners alleged that there was a pattern of constructed export prices that differed significantly by date of sale, by region, and by customer.

To establish that the alleged patterns of prices differed "significantly," petitioners used the average U.S. prices, sorted only by product codes, as a benchmark for determining whether certain customers received prices that were below the average prices for the same packing type. The packing type reported in the respondents' U.S. sales listings consisted of "boxes." During our analysis of reported sales, it became apparent that different sizes of boxes had been reported. As a consequence of the respondents' failure to report prices in standard units, the petitioners were

deprived of meaningful unit prices with which to establish this benchmark.

Unrelated to the reporting of flawed unit prices, petitioners relied upon customers' prices that were ten percent or more below the average price for the packing type to establish that the alleged pattern of variation in prices was "significant." Petitioners did not justify their use of the ten percent benchmark in relationship to price movements for tomatoes, a perishable product. A variation in average prices of ten percent is not necessarily significant in a market in which prices can decline far more than ten percent within a given day. Moreover, fluctuation in price, in and of itself, does not establish a pattern of price differences. Finally, subsection 777A(d)(1)(B)(ii) of the Act requires that the Department must be able to establish that the pattern of price variation cannot be taken into account by comparing the weight-averaged normal values to the weight-averaged U.S. prices. The petitioners addressed this requirement in a conclusory manner, without providing an underlying rationale.

In sum, the targeted dumping allegation does not provide the Department with an adequate basis for comparing the respondents' transition-specific export prices in the United States to their weighted-average normal values. On October 1, 1996, the Department informed petitioners of these findings and indicated our willingness to consider a revised allegation that took these concerns into account.

Level of Trade

As set forth in section 773(a)(1)(B)(i) of the Act and in the SAA accompanying the URAA, at 829-831, to the extent practicable, the Department will calculate normal values based on sales at the same level of trade as the U.S. sales. When the Department is unable to find sales in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at different levels of trade.

In accordance with section 773(a)(7)(A) of the Act, if sales at different levels of trade are compared, the Department will adjust the normal value to account for the difference in level of trade if two conditions are met. First, there must be differences between the actual selling functions performed by the seller at the level of trade of the U.S. sale and at the level of trade of the normal value sale. Second, the difference in level of trade must affect price comparability as evidenced by a pattern of consistent price differences between sales at the different levels of

trade in the market in which normal value is determined.

In order to determine that there is a difference in level of trade, the Department must find that two sales have been made at different stages of marketing, or the equivalent. Different stages of marketing necessarily involve differences in selling functions, but differences in selling functions (even substantial ones) are not alone sufficient to establish a difference in the level of trade. Similarly, seller and customer descriptions (such as "distributor" and "wholesaler") are useful in identifying different levels of trade, but are insufficient to establish that there is a difference in the level of trade.

In implementing these principles in this investigation, information relevant to level of trade comparisons and adjustments was requested in our initial and supplemental questionnaires. We asked each respondent to establish any claimed levels of trade based on selling functions, and to document and explain any claims for a level of trade adjustment.

In order to determine whether separate levels of trade actually existed within or between the U.S. and the home market, we reviewed, *inter alia*, the selling activities associated with each channel of distribution reported by the respondents. In reviewing the selling functions reported by the respondents, we considered all types of selling functions, both claimed and unclaimed, that were performed. Where possible, we further examined whether the selling function was performed on a substantial portion of sales. The level of trade claims of each respondent were considered, but the ultimate decision was based on the Department's analysis of the reported selling functions.

Pursuant to section 773(a)(1)(B)(i) of the Act, and the SAA at 827, in identifying levels of trade for export price and normal value sales, we considered the selling functions reflected in the starting price, before any adjustments. For CEP sales, we considered the selling functions reflected in the price after the deduction of expenses and profit under Section 772(d) of the Act. Whenever sales within a customer group were made by or through an affiliated company or agent, we "collapsed" the affiliated parties before considering the selling functions performed. In determining whether separate levels of trade exist in this investigation, we found that no single selling function in the tomato industry was sufficient to warrant a separate level of trade (*see, Notice of Proposed Rulemaking and Request for Public Comments*, 61 FR 7307, 7348

(February 27, 1996)) (*Proposed Regulations*).

Based on our analysis of the selling functions performed by each respondent, we found that a single level of trade exists in each market. We then compared selling functions in the U.S. market and in the home market and found them to be similar. We find, therefore, that sales in the home market and in the U.S. market are at the same level of trade. (*See* October 22, 1996, Level of Trade Analysis memorandum to Barbara Stafford.)

Fair Value Comparisons

The SAA states that in determining the comparability of sales for inclusion within a particular average, "Commerce will consider factors it deems appropriate, such as * * * the class of customer involved," SAA at 842. The Department, not the respondents, determines which customers may be grouped together for product comparison purposes. *Cf., N.A.R., S.p.A. v. U.S., 741 F. Supp. 936* (CIT, 1990).

We examined the channel of distribution information reported by respondents and determined that it was not appropriate to include the class of customer as a separate comparison factor. Most respondents did not provide sufficient information that would allow us to examine the appropriateness of the respective customer code classifications based on the functions commonly associated with each category of customer. Since fresh tomatoes may be sold on consignment through unaffiliated distributors, some respondents were unable to obtain customer category information from their distributors. Therefore, since all respondents had the same level of trade in the U.S. and home markets and there was no basis for distinguishing among customer categories, the weighted-average prices were calculated and compared by product type.

To determine whether sales of tomatoes by the Mexican respondents to the United States were made at less than fair value, we compared the export price (EP) or constructed export price (CEP) to the Normal Value (NV), as described in the *Export Price and Constructed Export Price* and *Normal Value* sections of this notice. In accordance with section 777A(d)(1)(A)(i), we calculated weighted-average EPs and CEPs for comparison to weighted-average NVs.

Mexico experienced significant inflation during the POI, as measured by the wholesale price index published in International Financial Statistics and the consumer price index from the Bank of Mexico. Accordingly, to avoid the distortions caused by the effects of

significant inflation on prices and on the weighted-averages of those prices, we calculated EPs, CEPs, and NVs on a monthly average basis, rather than on a POI average basis.

Export Price and Constructed Export Price

For Eco, we calculated EP, in accordance with subsections 772 (a) and (c) of the Act because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation and CEP was not otherwise warranted based on the facts of record. We calculated CEP for all other respondents, in accordance with subsections 772(b), (c) and (d) of the Act, where sales to the first unaffiliated purchaser took place after importation into the United States. With the exception of Eco, we found that CEP is warranted for all respondents because all U.S. sales activities, including the setting of prices, take place in the United States through U.S. distributors/consignees and brokers, either affiliated or unaffiliated. (*See, Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand*, 60 FR 29553 (June 5, 1995), and *Preliminary Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand*, 60 FR 2734 (January 11, 1995).)

For all respondents, we calculated EP and CEP based on packed prices to the first unaffiliated customer in the United States. We based date of sale on shipment date to avoid the potential for distortion of cost and price comparisons that occur when there is a significant lag time between date of shipment and date of invoice within the same market and/or between the two markets.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for foreign brokerage and handling, freight expenses between the farm and the U.S. distributor's warehouse, freight insurance, export fees, brokerage and handling, U.S. inspection fees, U.S. duties, and U.S. freight. For Eco, we added the amount of import duties collected on packaging materials which were rebated upon exportation to the United States.

In accordance with section 772(d)(1) of the Act, for Tamazula, RLP, Echavarria, Lomeli, Yory and Camalu, we made deductions, where appropriate, for direct selling expenses including advertising, credit, and commissions paid to unaffiliated distributors and brokers. In addition, we deducted those indirect selling expenses that related to commercial activity in the United States. These included inventory carrying costs, certain indirect

selling expenses incurred in the home market, and the indirect selling expenses of the affiliated U.S. distributors. Where there were commissions paid to affiliated U.S. distributors, we considered the actual reported indirect selling expenses of the producer/exporter and its affiliated distributor, rather than the reported affiliated party commissions. This methodology is consistent with *Final Determination of Sales at Less than Fair Value: Fresh Cut Roses from Colombia*, 60 FR 6981 (February 6, 1995).

Where possible, monthly packing costs were recalculated using monthly indices to account for the effects of inflation. This recalculation was not possible for Lomeli, Eco and Yory since they did not provide monthly packing costs as requested by the Department. For these three respondents, we used packing costs, as reported.

Where payment dates were not reported, we used October 7, 1996, or average credit days, as appropriate, to determine credit expenses. Additionally, we made adjustments for CEP profit for all respondents except Eco in accordance with section 772 (d)(3) and (f) of the Act.

We made company-specific adjustments as follows:

Eco. We calculated Eco's EP sales based on FOB packing shed prices. We excluded from our analysis all reported sales of cocktail tomatoes because cocktail tomatoes are not included in the scope of this investigation (see the *Scope of Investigation* section of this notice above). We recalculated warranty expenses to reflect the actual factor reported in Eco's response. Credit was recalculated as follows: (1) We excluded the factoring fee from the imputed credit calculation; and (2) we recalculated the credit period for the first and second payments using the number of days reported in Eco's narrative. Finally, we calculated the factoring fee using the actual percentage derived from sample documentation provided in Eco's questionnaire responses. The factoring fee was treated as a direct selling expense.

Camalu. We calculated CEP based on FOB U.S. distributor's warehouse prices. We excluded from our analysis reported shipments of tomatoes that were given away as gifts or free samples, or shipments that had been discarded in their entirety because of poor quality. Where appropriate, we made deductions for price adjustments which were reported as rebates in the sales database. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, in

calculating the imputed credit expense and inventory carrying costs, we applied Camalu's actual U.S. dollar denominated short-term borrowing rate for the POI.

Echavarria. We calculated Echavarria's CEP sales based on FOB U.S. distributor's warehouse prices. We excluded from our calculations amounts reported separately for foreign brokerage and handling because that expense had already been included in the amount reported for foreign freight. Reported advertising expenses incurred were reclassified as indirect selling expenses because the advertising was directed at Echavarria's customers.

Lomeli. We calculated Lomeli's CEP sales based on FOB U.S. distributor's warehouse prices. For a small number of sales made through DGL, Lomeli claimed that it was unable to obtain transaction-specific sales data because DGL did not agree to provide its sales information to Lomeli. Therefore, in reporting these sales, Lomeli relied on information contained in liquidation reports received from DGL. These liquidation reports, however, could not be used in calculating CEP because the reports did not contain sufficient data to allow the Department to calculate all of the charges and adjustments incurred on the sales. Given that Lomeli attempted to obtain the transaction-specific data from DGL, the sales represent an extremely small percentage of Lomeli's total U.S. sales, and Lomeli has otherwise complied with all of the Department's requests for information, we find that Lomeli has acted to the best of its ability in this investigation and that an adverse inference is not warranted. Accordingly, we are applying the weighted-average margin calculated for all other sales to the quantity of sales sold through DGL as facts available in our preliminary determination.

Lomeli used different weight bases to convert its reported gross unit prices and charges and adjustments to a per kilogram basis for U.S. and home market sales. We determined it was necessary to select a single weight basis in order to make a fair comparison. Therefore, for all U.S. sales, we used theoretical box weights reported for home market sales, rather than the actual box weights provided in the U.S. sales listing, to convert the gross unit prices, quantities, and charges and adjustments to a per kilogram basis. The theoretical box weight was chosen because data concerning the actual box weights for certain home market box types not sold in the U.S. during the POI were not reported.

We recalculated the reported commission expenses for Lomeli's two unaffiliated distributors as follows: (1) For the first distributor, we used the actual commission percentage specified in Lomeli's contract with the distributor; and (2) for the second distributor, we used the actual commission percentage specified in the contract plus an amount for fees the distributor incurs in making sales through a third party in the United States. For those sales where a negative commission amount was reported, we set the commission equal to zero.

Because we were unable to duplicate Lomeli's calculation of the reported credit expenses, and Lomeli stated that it had no dollar denominated borrowings during the POI, we recalculated credit using the average prime rate for the POI charged by the 25 largest U.S. banks on short-term business loans, as published by the Federal Reserve Bank. We also recalculated Lomeli's reported inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, for all sales where Lomeli reported no U.S. inventory carrying costs, we have used the inventory turnover period reported for Lomeli's other transactions because Lomeli claims that it incurred the same theoretical inventory period for all U.S. distributors.

For those U.S. sales where no U.S. inspection fee was reported, we deducted the amount of the inspection fee reported for other sales made through the same distributor because Lomeli did not provide an explanation as to why inspection fees were not reported on all sales.

RLP. We calculated CEP based on FOB U.S. distributor's warehouse and delivered prices. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. Since RLP reported that it incurred a U.S. brokerage charge on its U.S. sales, but did not report this charge in its database, we recalculated the U.S. brokerage costs accordingly.

Tamazula. We calculated CEP based on FOB U.S. distributor's warehouse and delivered prices. We used an average of the affiliated U.S. distributor's actual short-term borrowing rates during the POI in our credit calculation. Where negative credit expenses were reported in error, we used the average of the recalculated credit expenses.

Yory. We calculated CEP based on FOB U.S. distributor's warehouse and delivered prices. We excluded from our

analysis Canadian sales that were included in the U.S. database. We corrected the reported box weights and tomato types for certain product codes to correct for errors in the database. We recalculated Yory's credit expenses based on the company's actual borrowing rate for a U.S. dollar-denominated short-term loan during the POI. We recalculated freight insurance expenses based on the total expenses incurred and the total quantity sold for the season, on a tomato type-specific basis. Additionally, for the 1995/96 season, we revised Yory's reported export fees and commission expenses to correct for errors in the database. Since Yory reported that it incurred a repacking charge on its U.S. sales, but did not report this charge in its database, we calculated the U.S. repacking costs based on information in Yory's questionnaire response.

Normal Value

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Since we have not collapsed Lomeli and Eco (see the *Affiliated Persons* section of this notice above), separate viability tests were conducted for Lomeli and Eco. For Eco, we did not find the aggregate volume of home market sales of the foreign like product to be greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we have determined that Eco does not have a viable home market. Because Eco made no third country sales during the POI, normal value was based on constructed value, in accordance with section 773(a)(4) of the Act.

Since the aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable for all other respondents. For all respondents except Eco, we have based NV on home market sales. We calculated NV as noted in the *Price to Price Comparisons* and *Price to CV Comparisons* sections of this notice.

Cost of Production Analysis

Based on the allegation contained in the petition, the Department found reasonable grounds to believe or suspect that each respondent made sales in the home market at prices below the cost of

producing the merchandise. As a result, the Department initiated investigations to determine whether the respondents made home market sales at prices below their respective costs of production (COP) during the POI within the meaning of section 773(b) of the Act. (See, *Initiation Notice*.)

Before making any fair value comparisons, we conducted the COP analysis described below for all respondents except Eco. We did not perform a COP analysis for Eco because, as noted above, Eco did not have a viable home or third country market.

A. Calculation of COP

We calculated growing season-specific COPs based on the sum of each respondent's growing season costs for the foreign like product, plus amounts for selling, general, and administrative expenses (SG&A) and packing costs, in accordance with section 773(b)(3) of the Act. As noted above, we determined that the Mexican economy experienced significant inflation during the POI. Therefore, in order to avoid the distortive effect of significant inflation on our comparison of costs and prices, we requested that respondents submit monthly cost information for each growing season that fell within the POI. This monthly cost information was to be based on current production costs incurred during each month. This required collecting cost data for months outside the POI, as it was necessary to capture all costs for total production in an entire growing season, in order to accurately determine the per unit COP of that growing season. Using the consumer price index (CPI) published by the Bank of Mexico, we indexed each month's reported costs to end of growing season currency levels in order to compute a weighted-average growing season COP. We relied on the respondents' reported COP amounts except in the following specific instances, wherein the reported costs were determined to be improperly valued:

1. We adjusted each company's reported monthly materials consumption costs for the effect of inflation during the inventory holding period. The adjustment was based on the net inventory and accounts payable turnover period and the CPI.

2. We recomputed reported depreciation expense for each company based on the fixed asset values stated in end of growing season currency levels.

Camalu. We disallowed the reported treatment of livestock feed tomatoes as co-products of the foreign like product.

Echavarria. We disallowed Echavarria's reported other income

offset to G&A expenses and increased G&A expense to account for net foreign exchange losses.

Lomeli. We reallocated headquarters G&A costs based on the percentage of cost of sales for the tomato growing farms to the consolidated Lomeli group. Additionally, we computed Lomeli's interest expense rate using its 1995 audited consolidated constant currency financial statements, and disallowed its reported other income offset to G&A expenses.

RLP. For the months in which unusually high material costs were reported for round and cherry tomatoes, we spread these costs evenly over all preceding months in the growing season.

Tamazula. We increased general expenses to account for net foreign exchange transaction and translation losses.

Yory. We reallocated the submitted depreciation expense between products using cultivated hectares rather than the submitted methodology of relative production weight.

B. Test of Home Market Prices

We used the CPI to adjust respondents' submitted monthly cost and home market sales amounts in computing weighted-average COPs and home market sales values stated in end of growing season currency. Because tomatoes are a highly perishable agricultural product, we compared the weighted-average COP figure for each growing season to the weighted-average home market sales for the growing season to determine whether below cost sales were made in substantial quantities during each growing season. See SAA at 832 and section 773(b)(2)(c)(ii) of the Act.

Where a respondent's weighted-average home market sales value of a given product for a growing season were at prices above the respective weighted-average COP for the growing season, we did not disregard any below cost sales of that product for that growing season. In such instances, we found that the below costs sales were not made in substantial quantities. Where a respondent's weighted-average home market sales value of a given product for a growing season was less than the weighted-average COP for the same growing season, we found that below cost sales were made in substantial quantities, within the meaning of section 773(b)(2)(C)(ii) of the Act, for that growing season. We identified individual below cost transactions by indexing the weighted-average COP for the growing season back to each month within that growing season, based on

the CPI, and comparing that monthly COP to individual transaction prices within that month.

Where below cost sales were found to have been made in substantial quantities within a growing season, we also found that those sales were made within an extended period of time because each growing season constituted an extended period of time, in accordance with section 773(b)(2)(B) of the Act.

Pursuant to section 773(b)(2)(D) of Act, we also examined whether the individual transaction prices which were found to be below cost provided for recovery of costs within a reasonable period of time. As noted above, because tomatoes are a perishable agricultural product, we determined that the relevant period for examining costs in this investigation is on a growing season basis and applied the cost test accordingly. Specifically, in determining whether prices were sufficient to recover cost within a reasonable period of time, we compared individual below cost sales prices with the growing season average cost.

C. Results of COP Test

We found that, for certain tomato types and growing seasons, respondents' home market sales were sold at prices below the COP within an extended period of time and in substantial quantities. Further, because (i) home market prices were compared to an average growing season COP and (ii) we view the growing season as a "reasonable period of time", we did not find that the prices for these sales provided for the recovery of costs within a reasonable period of time. We therefore excluded these sales from our analysis and used the remaining above cost sales as the basis for determining NV, in accordance with 773(b)(1). For those tomato types for which there were no above cost sales in a given month in the ordinary course of trade, we compared constructed export prices to CV.

D. Calculation of CV

We calculated growing season CVs for each respondent in accordance with Section 773(e)(1) of the Act, which indicates that CV shall be based on the sum of each respondent's growing costs for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. For each respondent, we indexed the reported monthly growing costs to the end of POI currency level in order to compute weighted-average POI growing costs. With the exception of Eco, we based SG&A and profit on the actual amounts incurred and realized by

the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the home market, in accordance with section 773(e)(2)(A). Since the home market is not viable for Eco, we calculated profit and indirect selling expenses in accordance with section 773(e)(2)(A) using an alternative methodology. Specifically, we calculated Eco's profit and indirect selling expenses as described in Section 773(e)(2)(B)(ii). That is, we used the weighted-average profit and indirect selling expenses experienced by the other respondents in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the home market. In addition, for each respondent we used U.S. packing costs as described in the *Export Price and Constructed Export Price* section of this notice, above.

E. Price-to-Price Comparisons

For those product comparisons for which there were sales at prices above the COP, we based NV on home market prices. We based date of sale on shipment date, as discussed in the *Export Price and Constructed Export Price* section above. For all respondents we made deductions, where appropriate, from the starting price for inland freight, insurance, and other transportation expenses. In addition, we made circumstance of sale adjustments for direct expenses, where appropriate, in accordance with section 773(a)(6)(C)(iii) of the Act. Where payment dates were not reported, we used October 7, 1996, or average credit days, as appropriate, to determine credit expenses.

For all respondents, we adjusted for commissions, where appropriate. Where the home market commissions were paid to affiliated parties, we first determined whether the commissions were made at arm's length by comparing these commissions to commissions paid or charged to unaffiliated parties under the same terms. If these commissions were determined to be at arm's length, we treated these commissions in the same manner as unaffiliated commissions in the calculation methodology described below.

Where commissions were paid on some, but not all, home market sales used to calculate NV, and U.S. commissions were greater than home market commissions, we calculated the weighted-average of home market indirect selling expenses (including only those indirect expenses not associated with an affiliated distributor) attributable to those sales on which no

commissions were paid. If U.S. commissions were greater than the sum of the home market commissions and home market indirect selling expenses, we deducted the weighted-average home market indirect selling expenses from NV. Otherwise, we adjusted NV for the difference between U.S. and home market commissions. Where no commissions were paid on a home market sale used to calculate NV, we deducted the lesser of either (1) the weighted-average amount of commission paid on a U.S. sale for a particular product, or (2) the weighted-average amount of indirect selling expenses paid on the home market sales for a particular product. Where commissions were paid on all home market sales used to calculate NV, we adjusted NV by the lesser of either (1) the amount of the commission paid on the home market sale, or (2) the weighted average of indirect selling expenses paid on U.S. sales.

As discussed above, we preliminarily determined that each respondent's U.S. sales and home market sales are made at the same level of trade. As stated in the SAA, at page 160: "Only where different functions at different levels of trade are established under Section 773(a)(7)(A)(i) [and a level of trade adjustment is not appropriate] will Commerce make a constructed export price offset adjustment under Section 773(a)(7)(B)." Accordingly, we did not grant respondents' request for a CEP offset.

In accordance with section 773(a)(6)(B), we deducted home market packing costs and added U.S. packing costs for all respondents. Where possible, monthly packing costs were recalculated using monthly indices to account for the effects of inflation. This recalculation was not possible for Lomeli and Yory since they did not provide monthly packing costs as requested by the Department. For these two respondents, we made the adverse assumption that the reported packing costs were stated in end of season currency and indexed those costs to the month of sale.

We made company-specific adjustments for price-to-price comparisons as follows:

Camalu. We calculated NV based on packed, FOB packing shed or delivered prices to unaffiliated customers. We recalculated Camalu's reported home market imputed credit expenses by applying monthly peso-denominated short-term interest rates obtained from public information because Camalu did not have peso-denominated borrowings during the POI. Additionally, we

recalculated Camalu's reported indirect selling expenses.

Echavarria. We calculated NV based on packed, FOB packing shed or delivered prices to unaffiliated customers. We excluded from our analysis sales of tomatoes that Echavarria categorized as sales of culls. We used the indirect selling expense per box reported in Echavarria's July 22, 1996, submission, because the indirect selling expense recalculated in the September 5, 1996, response contained errors which resulted in an overstatement of the indirect selling expense amount.

Lomeli. We based NV on packed, FOB packing shed and home market distributor's warehouse prices to unaffiliated customers. Since we are not collapsing Eco and Lomeli, we are treating Lomeli as an affiliated home market distributor of Eco. Therefore, we excluded all sales of merchandise which Lomeli purchased from Eco from Lomeli's home market sales database. In addition, we excluded all zero priced and/or zero quantity transactions from our calculations for the preliminary determination because the quantity of sales involved was insignificant and Lomeli did not provide the Department with evidence indicating that these transactions represent actual sales made in the ordinary course of trade.

We recalculated Lomeli's reported credit expense as follows: (1) We used actual monthly short-term borrowing rates available to Mexican growers, in lieu of the average interest rate reported for each growing season, because Mexico experienced high inflation during the POI; and (2) for those sales with missing payment dates, we used the average credit days for all transactions with a reported shipment and payment date. The average credit days was used, rather than October 7, 1996, because Lomeli contends that these sales were made by a farm that does not track actual payment dates in its normal accounting records.

We recalculated Lomeli's inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, as noted above, we applied the monthly short-term borrowing rates in lieu of the growing season averages.

Lomeli assigned a bulk packing cost to its sales of merchandise packed in four-layer boxes. However, because merchandise packed in four-layer boxes is not considered bulk packaging and Lomeli has provided no explanation for assigning a bulk packing rate to these sales, we have applied the ratio of the difference in packing costs reported for two-layer and three-layer boxes to the

reported packing cost for three-layer boxes. This has allowed the Department to derive an estimated packing cost for four-layer boxes for its preliminary determination.

RLP. We calculated NV based on packed, FOB warehouses or delivered prices to unaffiliated customers. We recalculated RLP's reported home market imputed credit expenses by applying peso-denominated short-term interest rates obtained from public information because RLP did not have peso-denominated borrowings during the POI. Inventory carrying costs were recalculated based on the actual cost of manufacture of the inventory, rather than the selling price.

Tamazula. We calculated NV based on packed, FOB packing shed or delivered prices to unaffiliated customers. Where payment dates were missing, we used the average credit period for the growing season to calculate credit expenses. Where Tamazula had peso-denominated borrowings during the growing season, we used the actual interest rate in our credit calculation. For the growing seasons where Tamazula did not have actual borrowings, we used public monthly peso-denominated short-term interest rates. We excluded zero quantity transactions and an insignificant amount of "sample sales" from our calculations.

Yory. We calculated NV based on packed, delivered prices to unaffiliated customers. We revised Yory's reported credit expenses based on new credit ratios submitted on September 19 and 25, 1996.

Price to CV Comparisons

For Eco, where we compared CV to EP, we added the U.S. product-specific direct selling expenses. For all other respondents, where we compared CV to constructed export prices, we made deductions for the weighted-average home market direct selling expenses. Where appropriate, we adjusted for the difference between U.S. commissions and home market indirect selling expenses.

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank. However, the Federal Reserve Bank does not track or publish exchange rates for the Mexican peso. We made currency conversions based on the actual daily exchange rates from the Dow Jones News/Retrieval on-line system.

Verification

As provided in section 782(i) of the Act, we will verify all information

determined to be acceptable for use in making our final determination.

Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the Customs Service to suspend liquidation of all entries of fresh tomatoes from Mexico, that are entered, or withdrawn from warehouse for consumption, on or after the date of publication of this notice in the Federal Register. We are also instructing the Customs Service to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the normal value exceeds the export price, as indicated in the chart below. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
Camalu	4.16
Echavarria	11.89
Lomeli	26.97
Eco-Cultivos	188.45
RLP	10.26
Tamazula	28.30
Yory	11.95
All Others	17.56

Pursuant to section 735(c)(5)(A) of the Act, the Department has excluded all zero and *de minimis* weighted-average dumping margins and margins determined entirely under section 776 of the Act, from the calculation of the All Others rate.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than February 7, 1997, and rebuttal briefs, no later than February 12, 1997. A list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. Such summary should be limited to five pages total, including footnotes. In accordance with section 774 of the Act, we will hold a public hearing, if requested, to

afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on February 18, 1997, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is

requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room B-099, within ten days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If this investigation proceeds normally, we will make our

final determination no later than 135 days after the publication of this notice in the Federal Register.

This determination is published pursuant to section 733(f) of the Act.

Dated: October 28, 1996.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

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