

# UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:  
FRESH TOMATOES FROM MEXICO

) Investigation No.:  
) 731-TA-747 (FINAL)

Pages: 1 - 320  
Place: Washington, D.C.  
Date: Thursday, October 24, 2019



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4 ) (Final)

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Thursday, October 24, 2019

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Main Hearing Room (Room 101)

11

U.S. International

12

Trade Commission

13

500 E Street, S.W.

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Washington, D.C.

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The meeting commenced, pursuant to notice, at  
 9:44 a.m., before the Commissioners of the United States  
 International Trade Commission, Commissioner Rhonda K.  
 Schmidtlein, presiding.

19

APPEARANCES:

20

On behalf of the International Trade Commission:

21

COMMISSIONER RHONDA K. SCHMIDTLEIN (presiding)

22

COMMISSIONER JASON E. KEARNS

23

COMMISSIONER RANDOLPH J. STAYIN

24

COMMISSIONER AMY A. KARPEL

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1 Opening Remarks:  
2 Petitioner (Robert C. Cassidy, Jr., Cassidy Levy Kent (USA)  
3 LLP)  
4 Respondents (Thomas B. Wilner, Shearman & Sterling LLP)  
5  
6 In Support of the Imposition of Antidumping Duty Order:  
7 Cassidy Levy Kent (USA) LLP  
8 Washington, DC  
9 on behalf of  
10 Florida Tomato Exchange ("FTE")  
11 Michael W. Sullivan, Chief Executive Officer and  
12 President, Gargiulo, Inc., Treasurer and Member of the  
13 Board of Directors, FTE  
14 Anthony J. DiMare, Executive Vice President, DiMare  
15 Homestead Inc., Vice Chairman, FTE  
16 Priya Singh, General Manager and Secretary, West Coast  
17 Tomato Growers, Inc.  
18 Fred Leitz, Chief Executive Officer, Leitz Farms LLC  
19 Michael Schadler, Executive Vice President, FTE  
20  
21  
22  
23  
24  
25 -- continued --

1 In Support of the Imposition of Antidumping Order

2 (continued):

3 Deirdre Maloney, Senior International Trade Advisor,

4 Cassidy Levy Kent (USA) LLP

5 Robert C. Cassidy, Jr., James R. Cannon, Jr., Mary Jane

6 Alves, Jonathan Zielinski - Of Counsel

7

8 In Opposition to the Imposition of Antidumping Duty Order:

9 Arent Fox LLP

10 Washington, DC

11 on behalf of

12 NS Brands, Ltd.

13 Bryant Ambelang, Chief Executive Officer, NS Brands,

14 Ltd.

15 Skip Hulett, Vice President and General Counsel, NS

16 Brands, Ltd.

17 Matthew M. Nolan, Andrew Jaxa-Debicki - Of Counsel

18

19 Shearman & Sterling LLP

20 Washington, DC

21 on behalf of

22 Confederacion de Asociaciones Agricolas del Estado de

23 Sinaloa, A.C.

24 Consejo Agricola de Baja California, A.C.

25 Asociacion Mexicana de Horticultura Protegida, A.C.

1 In Opposition to the Imposition of Antidumping Duty Order

2 (continued):

3 Asociacion de Productores de Hortalizas del Yaqui y Mayo

4 Sistema Producto Tomate

5 Sergio Esquer, Chief Executive Officer, Agricola

6 Chaparral and Agroindustrias Villa Santiago

7 Lance Jungmeyer, President, Fresh Produce Association

8 of the Americas

9 Michael J. Agostini, Miago Produce

10 Charles C. Anderson, Principal, Capital Trade Inc.

11 Thomas L. Rogers, Principal, Capital Trade Inc.

12 Martin Ley, President, Fresh/Evolution

13 Eduardo de la Vega, President and Chief Executive

14 Officer, Bioparques de Occidente

15 Salvador Garcia Valdez, President, San Vincente Camalu,

16 President, Consejo Agricola de Baja California

17 Mario Robles, Director, Confederacion de Asociaciones

18 Agricolas del Estado Se Sinaloa

19 Lisa Raisner, Government Relations, Shearman &

20 Sterling LLP

21 Thomas B. Wilner, Robert S. LaRussa - Of Counsel

22

23

24

25

1 In Opposition to the Imposition of Antidumping Duty Order

2 (continued):

3 Curtis, Mallet-Prevost, Colt & Mosle LLP

4 Washington, DC

5 on behalf of

6 Agricola El Rosal

7 S.A DE C.V.

8 San Miguel Red Sun Farms SPR DE RL DE CV

9 Naturbell

10 S.P.R. DE R.L.

11 Red Sun Farms Virginia LLC

12 Jem-D International (Michigan) Inc.

13 (collectively, "Red Sun Farms")

14 Jim DiMenna, President, Red Sun Farms

15 Carlos Visconti, Chief Executive Officer, Red Sun Farms

16 Steve Macchio, Chief Financial Officer, Red Sun Farms

17 Valerie Ellis, Daniel L. Porter, Kimberly A. Reynolds -

18 Of Counsel

19

20 REBUTTAL/CLOSING REMARKS:

21 Petitioner (Mary Jane Alves, Cassidy Levy Kent (USA) LLP)

22 Respondents (Thomas B. Wilner, Shearman & Sterling LLP;

23 and Matthew M. Nolan, Arent Fox LLP)

24

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## P R O C E E D I N G S

(9:44 a.m.)

MR. BISHOP: Will the room please come to order.

COMMISSIONER SCHMIDTLEIN (presiding): Good morning. On behalf of the U.S. International Trade Commission, I welcome you to this hearing in the Final Phase of Investigation No. 731-TA-747 involving Fresh Tomatoes from Mexico.

I would like to extend a special welcome to the lawyers from the All China Lawyers Association and the International Law Institute who are here today to observe our hearing. So welcome to all of you, as well.

The purpose of this investigation is to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports of fresh tomatoes from Mexico.

Schedules setting forth the presentation of this hearing, notices of investigation, and transcript order forms are available at the public distribution table. All prepared testimony should be given to the Secretary. Please do not place testimony directly on the public distribution table.

All witnesses must be sworn in by the Secretary

1 before presenting testimony. I understand that the parties  
2 are aware of the time allocations. Any questions regarding  
3 the time allocations should be directed to the Secretary.  
4 Speakers are reminded not to refer in their remarks or  
5 answers to questions to business proprietary information.  
6 Please speak clearly into the microphones and state your  
7 name for the record for the benefit of the Court Reporter  
8 and those seated in the back of the room.

9           If you will be submitting documents that contain  
10 information you wish classified as business confidential,  
11 your requests should comply with Commission Rule 201.6.

12           Mr. Secretary, are there any preliminary matters?

13           MR. BISHOP: Yes, Madam Chairman. With your  
14 permission, we will add to today's witness list Jonathan  
15 Zielinski, counsel with Cassidy Levy Kent, to page two of  
16 the calendar. And we will also add Martin Ley, President of  
17 Fresh/Evolution to the Respondent panel on page three of the  
18 witness list.

19           Other than that, all witnesses have been sworn  
20 in. There are no other preliminary matters.

21           COMMISSIONER SCHMIDTLEIN: Alright, so ordered.

22           Let's begin with opening remarks.

23           MR. BISHOP: Opening remarks on behalf of  
24 Petitioners will be given by Robert C. Cassidy, Jr., of  
25 Cassidy Levy Kent. Mr. Cassidy, you have five minutes.

1 STATEMENT OF ROBERT C. CASSIDY, JR.

2 MR. CASSIDY: My name is Bob Cassidy, and I am a  
3 partner in the Law Firm of Cassidy Levy Kent. We represent  
4 the Florida Tomato Exchange, an association of domestic  
5 growers and producers of fresh tomatoes who are Petitioners  
6 in this investigation.

7 Our panel today will explain why imports of fresh  
8 tomatoes from Mexico have caused and threaten to cause  
9 material injury to the domestic industry.

10 But first let me tell you why we are here. This  
11 investigation began 23 years ago in 1996. Since then, there  
12 have been five suspension agreements, including the August  
13 2019 Agreement that is currently in effect.

14 The 2002, 2007, and 2013 Suspension Agreements  
15 had to be negotiated because the Mexican producers withdrew  
16 from each Agreement, forcing termination of the Agreement,  
17 resumption of the investigation, and negotiation of a new  
18 Agreement.

19 The result of these actions was improved  
20 Suspension Agreements from the point of view of the  
21 Mexicans, and avoidance of sunset reviews of the Suspension  
22 Agreements.

23 The first three Suspension Agreements did not  
24 eliminate injury to the domestic industry. Indeed, as a  
25 result the Petitioners tried to withdraw the Petition in

1 2012 to stop Mexican manipulation of the system, and the  
2 continuing injury under cover of ineffective Suspension  
3 Agreements.

4           The Department of Commerce rejected Petitioners'  
5 request and entered into the fourth Suspension Agreement in  
6 2013. Not surprisingly, injury continued under that  
7 Agreement.

8           The Department of Commerce terminated that fourth  
9 Agreement in May 2019. This investigation resumed, a new  
10 Agreement was negotiated, and went into effect in September.  
11 Petitioners hope this new Agreement will eliminate the  
12 injury, but we do not want manipulation of the system to  
13 continue.

14           It is this history of manipulation that caused  
15 Petitioners to ask, reluctantly, for continuation of the  
16 investigation to get final determinations by the Commerce  
17 Department and the Commission on the record.

18           Commerce has found significant new dumping  
19 margins based on current data. An affirmative determination  
20 by the Commission will mean that termination of the current  
21 Suspension Agreement will result in immediate imposition of  
22 antidumping duties, and it will mean that no new Suspension  
23 Agreement can be negotiated after the dumping duties are  
24 imposed.

25           Turning to the merits of the case, fresh tomato

1 imports from Mexico have been steadily displacing shipments  
2 by the U.S. industry since 1996. The Mexican industry had  
3 almost 1.6 billion pounds of excess capacity in 2018. As a  
4 result, Mexico is the largest exporter of tomatoes to the  
5 world, and the vast majority of those exports go to the  
6 United States.

7           At the beginning of this investigation in 1996,  
8 the domestic industry supplied 65 percent of the U.S.  
9 market, and the Mexicans supplied 32 percent. In 2008, the  
10 domestic industry supplied 39 percent of the U.S. market,  
11 and the Mexicans supplied 55 percent, a complete reversal of  
12 market share positions.

13           How did the Mexican industry capture such a  
14 significant market share from the domestic industry? By  
15 selling at low prices. Despite what you will hear this  
16 afternoon, the record demonstrates that all types of U.S.  
17 and Mexican fresh tomatoes are indirect competition in all  
18 channels of distribution and geographic markets.

19           Purchasers report to the Commission that both  
20 industries supply tomatoes of comparable quality, and that  
21 the U.S. and Mexican fresh tomatoes compete primarily on  
22 price. Without an effective suspension agreement with  
23 reference prices or an antidumping duty order, imports of  
24 fresh tomatoes from Mexico will continue to surge into the  
25 United States.

1 Domestic producers, who account for a minority  
2 share of the U.S. market, are price-takers and will be  
3 forced to cut prices or stop planting tomatoes. The tomato  
4 industry will lose sales, and their losses will increase.

5 For these reasons, we urge the Commission to make  
6 an affirmative determination in this investigation.

7 MR. BISHOP: Thank you, Mr. Cassidy. Opening  
8 remarks on behalf of Respondents will be given by Thomas B.  
9 Wilner of Shearman & Sterling. Mr. Wilner, you have five  
10 minutes.

11 STATEMENT OF THOMAS B. WILNER

12 MR. WILNER: Thank you.

13 We welcome the opportunity finally to show that  
14 we are not causing or threatening injury to the U.S.  
15 industry. Let me say, first of all, when you read their  
16 brief and Mr. Cassidy's statement, their entire injury  
17 argument comes down to the allegation that they have lost  
18 market share.

19 You've got to remember, in the most recent Period  
20 of Investigation their shipments and their prices were up.  
21 They go back to 1994-1995, 24 years ago, to say from then as  
22 the U.S. market for tomatoes has expanded, their portion of  
23 it has decreased.

24 But I want to say, first of all, that that cannot  
25 be the result of unfairly priced imports. The whole time

1 that happened, there were suspension agreements in effect  
2 and the Commerce Department specifically found that those  
3 suspension agreements eliminated the injurious effect of the  
4 import and eliminated the injurious price sales of Mexican  
5 tomatoes in the U.S. market.

6 Now Mr. Cassidy says, well, that's not so. It  
7 didn't do it. Well, you know under the statute if they  
8 disagreed with that, they had the statutory right to ask for  
9 a determination by your Commission to see whether the  
10 agreement eliminated the injurious effect.

11 They never asked for that. So this has got to be  
12 presumed to be correct. They had five opportunities to ask  
13 for that. They had 20 days after the agreement went in to  
14 request a review by the International Trade Commission, and  
15 they never did that. So that's got to be accepted.

16 Whatever declines they have experienced during  
17 these suspension agreements have got to be the result of  
18 something other than unfair prices. And let me tell you  
19 what's really happened in the market over the last 24 years.

20 During that time, today the U.S. producers  
21 produce the same tomato that they did 24 years ago. That's  
22 a gas-green tomato grown in the open field, picked green  
23 before it begins to ripen, sent to warehouses, and then  
24 treated with ethylene gas to turn red.

25 The Mexican producers, on the other hand, have

1 always produced a vine-ripened tomato. What they've done  
2 over the last 20 years is spent billions of dollars  
3 investing in technology to convert their growing from open  
4 field to greenhouses, hot houses, shade houses, protected  
5 agriculture. Today, 90 percent of their production is  
6 protected agriculture production. By contrast, the U.S.  
7 producers, 90 percent of their production is still in the  
8 open field. And what's happened in the market, especially  
9 the retail market, is it's shifted away from the open field  
10 gas greens to the protected agriculture product.

11 And Mr. DiMare, who is here today, has  
12 characterized it correctly. What he says--and it's up on  
13 the screen--what's happened in the tomatoes business is  
14 you've had a shift in buying practices primarily at the  
15 retail level to source more greenhouse product.

16 This in turn has caused market share loss for  
17 growers who produce open-field product. That's the story.  
18 It's as simple as that. Their open-field product isn't  
19 welcome in the retail markets now.

20 And that's not because of price. You know,  
21 unfortunately Dr. Singer can't be here today with the new  
22 schedule, but as he concluded from the data, Dr. Singer  
23 concluded, the next slide for Dr. Singer, if price were  
24 paramount in the buyer's decision-making process, the lower  
25 priced gas-green tomatoes would still dominate the market.

1 It's not because of price that they lost market share, it's  
2 because of consumer preferences.

3 As everyone will testify here today, consumers--  
4 and we all buy tomatoes now in the retail market--consumers  
5 believe that a vine-ripe, protected agriculture product is  
6 tastier. It's also safer. And that's not just a matter of  
7 perception. Because scientific studies show that consumers  
8 are right.

9 The most recent scientific study, which we put in  
10 with our brief and is an exhibit to our brief, studied this.  
11 And they found that when you ripen tomatoes off the vine  
12 like the gas-greens, it results in an inferior tomato with  
13 inferior taste. That's it. That's true. It's scientific  
14 fact now.

15 So one might ask: Why are these guys still  
16 producing the gas-green tomato? You should ask them, but I  
17 think it's because it's still the tomato favored in the food  
18 service section of the market, because it's easier to slice  
19 because it's harder.

20 And also they haven't given up supplying  
21 greenhouse tomatoes to their customers. What they are doing  
22 is buying them from Mexico. Rather than investing in the  
23 technology to grow greenhouse tomatoes, 30 percent of  
24 Mexico's tomatoes are sold to the U.S. producers who then  
25 sell them to their customers. They still are the dominant

1 supplier in the market, but they market rather than produce  
2 greenhouse tomatoes. Thank you.

3 MR. BISHOP: Thank you, Mr. Wilner.

4 MR. WILNER: And may I just say, "Go Nats!"

5 COMMISSIONER SCHMIDTLEIN: Thank you.

6 MR. BISHOP: Here, here. Thank you, Mr. Wilner.

7 Would the panel in support of the imposition of  
8 the antidumping duty order please come forward and be  
9 seated.

10 Madam Chairman, this panel has 60 minutes for  
11 their direct testimony.

12 COMMISSIONER SCHMIDTLEIN: You may begin when  
13 you're ready, Mr. Cassidy.

14 MR. CASSIDY: Commissioners, my name is Bob  
15 Cassidy and we are appearing before you this morning on  
16 behalf of the Florida Tomato Exchange, with my colleagues  
17 from Cassidy Levy Kent James Cannon, Mary Jane Alves and  
18 Deirdre Maloney. In addition, our witnesses are Mike  
19 Sullivan, CEO of Gargiulo, Inc., Tony DiMare, the Executive  
20 Vice President of DiMare Homestead, Inc., Priya Singh,  
21 General Manager and Secretary of West Coast Tomato Growers,  
22 Fred Leitz, CEO of Leitz Farms and Michael Schadler, who is  
23 the Executive Vice President of the Florida Tomato Exchange,  
24 and who will be reading a letter from a witness who appeared  
25 last time but could not make it due to the shortness of

1 notice and his name is Chad Aeanayo. Let us begin with Mike  
2 Sullivan.

3 STATEMENT OF MICHAEL W. SULLIVAN

4 MR. SULLIVAN: Good morning. I am Mike  
5 Sullivan, the president and CEO of Gargiulo, Inc.  
6 Gargiulo's been in the tomato business since the 1960's, and  
7 I have been with Gargiulo since 1996. I'm also a member of  
8 the Board of Directors of the Florida Tomato Exchange, where  
9 I currently serve as Treasurer.

10 Gargiulo has domestic farming operations in  
11 Florida, Georgia, California and Puerto Rico. Our sister  
12 company, Ag-Mart, has operations in Florida, Georgia, New  
13 Jersey and Mexico. We have packing operations in all those  
14 same states except for Georgia. The Georgia tomatoes are  
15 packed in Florida. Additionally, Ag-Mart has a distribution  
16 facility in Arizona.

17 Given our geographic diversity, we operate  
18 somewhere on a year-round basis. We harvest and sell  
19 tomatoes in California from mid-June til early October; in  
20 South Florida from November until May. In North Florida and  
21 Georgia, we produce in the months of June and October, and  
22 in Puerto Rico, January through March.

23 Our operations produce rounds, Romas, cherries  
24 and open fields. We produce both vine ripe and mature green  
25 tomatoes. We sell to wholesalers and repackers that in turn

1 sell to retail grocery stores and food service. The  
2 majority of our sales, about three quarters, are made on the  
3 open spot market. We are in all the same channels as  
4 imported tomatoes and we are selling every day.

5 About a quarter of our sales are made on a  
6 contract basis. These are seasonal contracts. For example,  
7 a seasonal contract for South Florida may cover the months  
8 of November through May, and will require weekly shipments  
9 at a fixed price to a retailer such as Walmart. When the  
10 harvest is taking place, which for us is always the case  
11 somewhere in the U.S., we are in touch with the repackers  
12 every day.

13 Prices are subject to change, but our  
14 repackers are constantly forcing us to match the low prices  
15 that are in the market from Mexican tomatoes. Although the  
16 minimum reference price for a 25 pound box is \$8.30 in the  
17 winter season, Mexican tomatoes are often offered lower. In  
18 early February and late April of just this year, our  
19 customers reported to us they could buy Mexican tomatoes for  
20 approximately four to five dollars per box.

21 Because prices can fluctuate, it is common for  
22 growers to provide price protection for a period of time.  
23 We will quote our price and agree to sell, but if the price  
24 at the end of that period falls below our agreed-upon price,  
25 we will match the lower price. Because we are selling a

1 perishable product, this is necessary in order to keep the  
2 tomatoes moving.

3                   When the suspension agreement was first  
4 negotiated in 1996, most Mexican tomatoes were shipped  
5 during the winter months. This is no longer the case.  
6 Today, imported tomatoes from Mexico are coming from  
7 locations on the mainland through the winter vegetable  
8 season, and during the summer season from Baja, and they  
9 compete directly with tomatoes grown in California.

10                   Competition is year-round. Our farming costs  
11 are rising, making it difficult for us to ship tomatoes to  
12 the Midwest and east coast out of Firebaugh, California at  
13 prices that are competitive with dumped Mexican tomatoes  
14 through San Diego, McAllen, Texas or Nogales, Arizona.  
15 California's an ideal location for growing summertime  
16 tomatoes, and it's a perfect compliment to our Florida and  
17 Puerto Rican operations. The climate and soil are perfect  
18 for growing tomatoes outdoors.

19                   But even with a natural advantage, we had to  
20 close our Oxnard, California location. In fact, the  
21 industry has been steadily declining in California. In  
22 2018, two of the largest operations in California closed.  
23 One operation had been growing tomatoes for over 70 years.  
24 I have heard that other operations may also reduce their  
25 operations and/or move to Mexico.

1                   Acreage and production are also declining in  
2 Florida. There used to be dozens of growers and now we're  
3 down to just a handful. At Gargiulo, we have lost 300  
4 workers since 2016. We pay good wages and are competitive  
5 in all the states in which we do business. Hourly wages in  
6 California are generally high. Our workers there are  
7 unionized and current wages range from a minimum of \$12 an  
8 hour in the packing houses to as high as \$30 an hour.

9                   If the imports of dumped tomatoes from Mexico  
10 continue, we will not be able to maintain these jobs. Our  
11 farms will plant fewer acres and our employment will  
12 continue to decline. Not only are we competing on price,  
13 but we are also trying new varieties and we're always trying  
14 to innovate. The snacking category is a perfect example.  
15 My grower colleagues in Mexico may be talking about their  
16 specialty tomatoes, but at the end of the day the bulk of  
17 that category is a red grape tomato that was developed in  
18 Florida in the early 2000's.

19                   At Gargiulo, we annually invest millions in to  
20 our division, BHN Seed, that develops varieties that are  
21 grown worldwide. We are constantly introducing new  
22 varieties for better flavor, disease resistance, yield and  
23 other attributes. We are developing varieties that are  
24 better at meeting consumer demand and the needs of growers  
25 who face different environmental factors in every region.

1                   Despite all of our efforts, we cannot compete  
2 at the very low price levels that are set in the market by  
3 dumped Mexican tomatoes. In recent years, we decided that  
4 we had to plant fewer acres in our packing houses that are  
5 only operating at about 80 percent of our capacity. When  
6 the suspension agreement terminated, the prices initially  
7 increased but then returned to the normal low level as  
8 imports from Mexico continued.

9                   Depressed sales values and low operating  
10 profits are not sustainable for us. If we do not get  
11 relief, real relief from dumped tomatoes imported from  
12 Mexico, we will continue to reduce acres and eventually  
13 close our farms. By way of illustration, in 2005 we farmed  
14 8,400 acres with an average employee count of approximately  
15 2,400. In 2019, we are farming 6,500 acres, with an  
16 average head count of 1,600. We hope the new suspension  
17 agreement will work. However, given the history of all the  
18 past suspension agreements, it is an open question whether  
19 it will work.

20                   We need anti-dumping duties to ensure a level  
21 playing field in case the suspension agreement fails.  
22 Otherwise, there is nothing to stop the dumped Mexican  
23 tomatoes from putting American farms out of business.  
24 Without this relief, we will not survive. Thank you for  
25 giving me this opportunity to speak, and I welcome your

1 questions.

2 MR. CASSIDY: (off mic) Our next witness will  
3 be (off mic).

4 STATEMENT OF FRED LEITZ

5 MR. LEITZ: Good morning, Commissioners. My  
6 name is Fred Leitz. I am the chief executive officer of  
7 Leitz Farms, LLC, which I run with my three brothers. We  
8 are fourth generation farmers in southwest Michigan, and we  
9 have the fifth generation working for and with us. We  
10 started growing round tomatoes on our farm in 1977, Roma  
11 tomatoes in 1997 and grape tomatoes in 1999.

12 Our tomatoes are all vine-ripened, grown on  
13 500 acres of land. We've produced about 200 to 225,000  
14 packages a year of both rounds and Romas, and another  
15 120,000 or so packages of grape tomatoes. We are one of the  
16 last fresh market tomato growers in Michigan. This is a  
17 seasonal operations. We start planting in May and we quit  
18 planting the 1st of July. We usually start harvesting  
19 tomatoes the 24th or 25th of July, and go until about the  
20 10th or 15th of October or the first killing frost.

21 All the tomatoes we grow are hand-harvested  
22 and it's a very labor intensive process from the start of  
23 seed planting in the greenhouse, to harvesting to packing  
24 and getting packages on a truck. We use packing lines to  
25 wash and sanitize and sort by size, but we manually sort

1     them out by color and quality.

2                     Because our tomatoes are vine-ripened, the  
3     quality going in the box must be perfect. A little spot  
4     today will be a big spot in three days. Our motto around  
5     the packing shed is "if in doubt, throw it out." We  
6     pre-cool all tomatoes to 60 degrees before we take them to  
7     the packing shed. If they aren't pre-cooled before being  
8     packed, they might get checkerboarded.

9                     In other words, some tomatoes will color up  
10    faster than others depending on where it was in the bush and  
11    stage of development. We want a uniform color in the  
12    shipped package. We have 232 workers including the packers.  
13    Our labor costs includes everything that every tomato  
14    producer has to do to get a finished product.

15                    In 2018, it took \$5.31 in labor cost per box  
16    to put that package of tomatoes on a truck compared to the  
17    substantially lower, and I mean substantially lower labor  
18    costs for the Mexican producers, and Mexican producers also  
19    se dumped prices to market their tomatoes. The dumping  
20    margins found by the Department of Commerce are a huge,  
21    unfair competitive burden that we cannot overcome, no matter  
22    how efficient we become.

23                    We sell 40 to 50 percent of our product  
24    essentially on the spot market. I sell it off the yard to  
25    buyers in Chicago and get it shipped there, and we also

1 internally sell and ship three to five semis a night to  
2 Detroit. My sales agent/broker sells the rest of it  
3 throughout the Midwest, New York and some other east coast  
4 destinations.

5 We sell to independent grocers, grocery store  
6 chains and wholesalers who sell to grocery stores, food  
7 service and institutional users. About 30 percent of our  
8 volume goes to food service. We used to sell in Texas and  
9 Florida but we don't any longer because we can't compete  
10 with the dumped price of the Mexican product.

11 As I said earlier, we start harvesting in  
12 July. I do the local and Chicago sales. Three weeks before  
13 we start harvest, I start looking at the markets to see what  
14 prices are. Then I'll start calling customers and letting  
15 them know when we will have product, or they'll call me up  
16 and ask when I will have product. It depends on the  
17 customer. A couple want the first product of the season  
18 shipped to them. I will arrange transportation or if they  
19 have a truck in the area, they pick up.

20 We'll talk price. I can be bullish at the  
21 start of the season, because they're wanting to get some  
22 home grown product on their shelves. Everyone's tired of  
23 what they've been getting all winter and want some local,  
24 home-grown, Midwest tomatoes. They'll stock up so they can  
25 say they have local tomatoes in the shelves.

1                   People will look for home grown because of the  
2     flavor. That's our selling, biggest selling point. That's  
3     how we market, tomatoes like you used to get out of grandpa  
4     or grandma's garden. Field grown tomatoes have a richer,  
5     acidic flavor depending on sunshine, soil type and organic  
6     matter in the soil.

7                   Once we get a couple of weeks into the harvest  
8     season, having 75 percent home grown tomatoes on the shelf  
9     is not as important as price and buyers get more  
10    price-conscious. Remember, they are paid to pay us less. I  
11    can't blame them, that's their job. They'll tell me "Well,  
12    you know the market is \$10 now so I'm not going to pay you  
13    12." "I'll give you 12, but later on you've got to make  
14    this up to me." Sometimes if the market goes up and they're  
15    not getting full supplies from somewhere else, they'll call  
16    in that favor.

17                  Or they'll tell me "This is the price coming  
18    out of Mexico. Can you meet it?" I will push them a little  
19    bit harder because our product is a better product, but they  
20    will tell me that Mexico is setting the price, or that  
21    Mexico is sending 1,600 packages on a truck and only billing  
22    for 12 to 14 hundred packages. There is no way, no way I  
23    can compete with dumped prices or games played like that.

24                  One of our customers used to come get two  
25    truckloads a week, but now he gets about a half truckload a

1 week from us. That's because he's getting most from Mexico.  
2 We always plan for good volume during the latter part of our  
3 season, which runs from the 20th of September to about the  
4 15th of October. Often, the last three weeks of our season  
5 was the most profitable, so we always plan to have a lot of  
6 volume at that time.

7                   It used to be a window where the price would  
8 go up as other production areas finished and before the  
9 Quincy area got started in Florida. But the market window  
10 isn't there like it used to be. This is 100 percent due to  
11 the dumped imports supplied out of Mexico. Our acreage has  
12 pretty much stayed the same and our production has been  
13 stable, but our revenues have been going down.

14                   Our costs are going up and our prices are  
15 going down because of the dumped imports from Mexico. I  
16 sold tomatoes cheaper last year than I've sold in probably  
17 ten years. I never thought I would sell number one tomatoes  
18 below what I sold number two tomatoes for ten years ago.  
19 Ten years ago, the dumped imports were mainly a problem for  
20 Florida growers. Now Mexican imports are a real problem in  
21 our season too, and that is because Mexico has almost  
22 tripled production during my July to October season, and  
23 that's from data reported by the USDA Market News.

24                   We started making plans 2-1/2 years ago to  
25 remove, replace and double the size of one of our packing

1 sheds, purchase modern packing equipment and move to  
2 automatic volume fill. The packing line would have  
3 electronic color, size and defect sorting. We would do that  
4 final defect sorting by hand. Product that wasn't volume  
5 filled would be hand placed, hand packed in two layer  
6 cartons.

7 I had the building plans, had made a down  
8 payment on the building, and we had a rooftop 95 kW solar  
9 generation array included to match the existing 85 kW array  
10 we put up last year. I have the packing line drawings, we  
11 had all the financing set up and we stopped it all last  
12 fall. The markets have been trending downwards the last  
13 eight years and were so poor the last two years we had to  
14 cancel our plans and hope to reevaluate later.

15 We just finished this past Tuesday our 2019  
16 season. This trend continued in 2019. This trend over the  
17 last eight years has caused a dramatic reduction in tomato  
18 acreage in the Midwest. Our brand is called None Better.  
19 We are proud of what we produce and we stand by everything  
20 100 percent. If you don't like it, bring it back and we'll  
21 either replace it or give you your money back. As I said,  
22 we currently have the fifth generation working on our farm.

23 Commissioners, my brothers and I don't want to  
24 be known as the fourth and final generation working our  
25 tomato farm. We really, really don't. Thank you for giving

1 me this opportunity to speak on behalf of my farm and the  
2 tomato industry in the U.S. I welcome your questions.

3 MR. CASSIDY: And now we will hear from Tony  
4 DiMare, Executive Vice President, DiMare Homestead, Inc.

5 STATEMENT OF ANTHONY DIMARE

6 MR. DIMARE: Good morning. My name is Tony  
7 DiMare. I am Vice President at DiMare Homestead and DiMare  
8 Ruskin, Inc. companies. I am also the current Vice Chairman  
9 of the Florida Tomato Exchange.

10 The DiMare Company is a family-owned and  
11 operated company that my grandfather and his two brothers  
12 started in Boston 90 years ago this year. I'm a third  
13 generation DiMare and have been working in the family  
14 business for 36 years. I started in the business with our  
15 Florida Packing Operations and then got involved with sales  
16 after five years into the business.

17 I am still involved in our Florida sales today  
18 on a day-to-day basis, along with overseeing all of our  
19 packing operations in Florida. I've also been involved in  
20 our farming operations in the past, scheduling planning  
21 dates, determining variety selections, and everything else  
22 related to the farming operations.

23 On the distribution side, I interact with some  
24 of our re-packing and distribution operations on a week and  
25 sometime daily basis, depending on the facility location.

1 We have growing operations in Florida and California. Our  
2 distribution and re-packing operations are located in  
3 California, Florida, Pennsylvania, and Texas.

4 Tomatoes are usually packed near the growing  
5 areas. Re-packers are located around the country near their  
6 customers. The re-packer's role is to sort, custom pack,  
7 and distribute various of types into various food service  
8 and retail-ready packs. In addition to this process,  
9 re-packers sort the product by color and size, depending on  
10 their customers' needs. We also place packed product into  
11 two-layer containers similar to what the Mexican industry  
12 packs and into single-layered 10-pound and 15-pound  
13 containers, otherwise known as flats, again, depending our  
14 customers' needs.

15 The DiMare's companies grow field-grown tomatoes  
16 or what's referred to in Mexico as open-field production.  
17 The field-grown tomatoes consists of round type, both mature  
18 green and vine ripe, cherry, grape, Roma, and yellow-meated  
19 tomatoes. The round and Roma tomatoes we grow and pack are  
20 primarily mature green in 85 to 90 percent of the production  
21 and 10 to 15 percent are vine ripened. One hundred percent  
22 of our grapes and cherries are harvested vine ripened.

23 All tomatoes compete with one another for sales,  
24 whether they picked mature green or vine ripened. By the  
25 time the product gets to the end user, you can't discern

1 whether the product was picked mature green or vine ripe.  
2 So buyers will interchange round type with Roma and vice  
3 versus, depending on price.

4           We grow tomatoes 12 months a year between our  
5 Florida and California operations. Our season in Florida  
6 starts in October and goes to June. Our California  
7 operation starts production in early May and extends to  
8 November. Our re-pack and distribution operations operate  
9 year round.

10           Mexican tomato imports continue to be sold at  
11 dumped prices year-after-year and have devastated and  
12 continue to devastate the domestic industry. Individual  
13 growers and packing operations are leaving the industry in  
14 Florida at an alarming rate. This is a result of Mexican  
15 tomatoes being dumped in the U.S. market at less than fair  
16 value. Grower/shippers in California are also leaving the  
17 industry, as recently witnessed by Pacific Tomato Growers  
18 and San Joaquin tomato growers, both very large, long-term  
19 grower/shippers in the industry. Pacific Tomato Growers was  
20 once the largest round and Roma grower in California.

21           I'll give you a good example of what has  
22 happened over the last 20 plus years to our company and  
23 really to the winter producers in the tomato industry in  
24 Florida. We, as a company, used to farm 5,000 acres of  
25 tomatoes in our Homestead operation in the ', which is our

1 winter production operation from January to April. This is  
2 also the period where Mexico's volume is at its highest  
3 levels and their pricing is at its lowest levels.

4           This current year we have less than 600 acres  
5 planted in our Homestead operation. The effect of  
6 exorbitant volumes and at times out of control crossings of  
7 Mexican imports at dumped prices has caused the acceleration  
8 in exodus of domestic producers in recent years. We planted  
9 25 percent less acreage this season in Homestead than we  
10 planted the previous season. This reduction is because of  
11 the expansion in the planted acreage in Mexico and the  
12 continued dumping of Mexican tomatoes at low price levels,  
13 which has put the domestic industry at a competitive  
14 disadvantage.

15           The USDA's reports reflect these numbers with  
16 respect to increased crossings over the years. If you look  
17 at the charts and you look at the spike in increased planted  
18 acreage in Mexico and the increased volume of crossings;  
19 particularly, during the winter months when Mexico is  
20 shipping their heaviest volumes, you will see that dumped,  
21 Mexican tomatoes are a real threat to American tomato  
22 producers. The uncontrolled heavy volumes of crossings at  
23 dumped prices has absolutely devastate the domestic  
24 industry in not only Florida, generally, but particular the  
25 winter producers from January to April when Mexico is at

1 their peak.

2 Thank you for giving me this opportunity to  
3 speak. I welcome your questions.

4 MR. CASSIDY: Our next witness will be Priya  
5 Singh, General Manager and Secretary, West Coast Tomato  
6 Growers, Inc.

7 STATEMENT OF PRIYA SINGH

8 MR. SINGH Good morning. My name is Priya  
9 Singh, and I am the General Manager of West Coast Tomato  
10 Growers, Inc. of Oceanside, California. My grandfather,  
11 Harry Singh, Sr., started the farm back in 1939 and ran our  
12 business until 1976 when my father, Harry Singh, Jr., took  
13 over the reins at age 32. In 2015, under the watchful eye  
14 of my father, the mantel was passed on to me to manage our  
15 operations.

16 I come to all of you, not as someone who merely  
17 stumbled onto farming or the produce industry by accident,  
18 but as someone who was born and raised on a farm and has, at  
19 one point or another, worked in almost every position our  
20 farm has to offer, just like my father before me, whether it  
21 was field management, pest control, managing our packing  
22 house, along with shipping, I felt that my involvement in  
23 our family farm was my duty. I have even tried my hand for  
24 a couple of years on our sales floor. I have come to  
25 realize that my personality is better suited in the fields

1 with my tomatoes rather than on the phone with the customer.

2 Our company grows vine-ripened round and Roma  
3 tomatoes on nearly 650 acres. About 70 percent of our  
4 tomatoes are sold directly to the retail grocery sector in  
5 various packing styles. We package single layers, RPC's,  
6 two-layer place packs, and volume-filled boxes, depending on  
7 what the customer desires. We were in the process of  
8 building a modern bagging line so we can accommodate our  
9 retail partners with value-add bagged Romas. We decided  
10 against this since the price points and margins were not  
11 sustainable to pursue due to cheaper options from Mexico.  
12 The remaining 30 percent balance of our tomatoes are sold to  
13 food service companies, as well as wholesalers who require  
14 tomatoes that are vine-ripened, flavorful without  
15 outstanding quality.

16 We sell our tomatoes under the label of  
17 Oceanside Pole, which has been known in the produce industry  
18 for 80 years. We harvest our tomatoes from mid-June through  
19 late November. My family has been farming in Oceanside for  
20 so long that our tomatoes are considered a summertime  
21 tradition in Southern California. Our reach, however, goes  
22 well beyond Southern California. We ship our tomatoes  
23 throughout the U.S., Canada, and have even exported by air  
24 to Japan in the recent past. This, in itself, is a  
25 testament to the high quality of the Oceanside Pole brand.

1                   Unfortunately, West Coast Tomato Growers is  
2 unique in that it is one of the last pole-grown and  
3 vine-ripened tomato farms in the United States, and the only  
4 vine-ripened tomato grower of volume in Southern California.  
5 This is not something that my family and I hold as a badge  
6 of honor, but as a foreshadow of what of what is to come for  
7 other farmers in any state of our union that grows tomatoes.  
8 Whether it be greenhouse grown, mature greens, or  
9 vine-ripened, the outcome will be the same if something is  
10 not done to rectify the dumping in the tomato industry.

11                   Over the years, my family has seen many other  
12 farmers in our area close their doors due to unsustainable  
13 and constantly flooded tomato markets. When preparing for  
14 our upcoming season, we always reach out to our key  
15 customers that have been with West Coast Tomato Growers for  
16 many years to get more insight on their needs. In between  
17 our conversation there is always the elephant in the room  
18 that is eventually discussed -- price.

19                   For over 15 years, we've seen our profit margins  
20 drop as our labor costs continue to grow at a frantic pace.  
21 Our wages are federally-mandated and they go up every year  
22 by approximately 6 percent. This is a challenge considering  
23 wages in Mexico have, for the most part, remained relatively  
24 the same over the years. For example, many of m y customers  
25 can get a two-layer place packed round tomato box from

1 Mexico at approximately 8.50 to \$9.00 delivered into Los  
2 Angeles. If I were to attempt to compete with Mexican  
3 prices, I would have no option but to shut down my farm  
4 since our cost is above \$11.15 a box.

5 As you can see, there really is no competition.  
6 Tomatoes from Mexico are priced so low that I am unable to  
7 price my products at levels to cover my increasing labor  
8 costs. Such a large price gap is stacked against not only  
9 us, but all farmers in the United States.

10 In September of this year, multiple retail  
11 outlets that I sell advised me they would not be working  
12 deals with us in the foreseeable future. The reason they  
13 cited was that they were getting contracted loads delivered  
14 from Central Mexico at a price far below what I can offer.  
15 They stated clearly that though my tomatoes were superior in  
16 quality and consistency, the profit margin differences were  
17 too far apart to ignore. I was asked to match the  
18 price-per-pound, but I could not take that option. In the  
19 end, my coolers were full and to create space I had to sell  
20 multiple loads of tomatoes at a substantial loss.

21 These challenges have lead me to the conclusion  
22 that I no longer have the option of exclusively growing in  
23 the United States. I'm currently working on plans to move  
24 part of our family farm to Mexico. Plans are being drawn up  
25 to grow Romas in net houses and open field currently. The

1 net house investment is necessary because of the enormous  
2 pest and disease pressure in Mexico. Though Mexican growers  
3 would say they invested in net shade and greenhouses for  
4 quality and yield advantages, the primary reason for such  
5 investment was pest and disease prevention. This  
6 technology was adopted from Spain, where tomato yellow leaf  
7 curl virus ruined tomato crops, a virus Mexico is very  
8 familiar with.

9           There is no coincidence that the decline in  
10 tomato farms in the United States correlates with the growth  
11 of tomato farms in Mexico. Ten years ago, my father had  
12 grown the farm to 1100 acres and we were producing 5.4  
13 million cases of round tomatoes for the summer season.  
14 Today, given the current conditions, we grow 650 acres of  
15 round and Roma tomatoes, selling about half of the cases as  
16 we did 10 years ago. Even though people enjoy the flavor  
17 profile of our vine-ripened tomatoes, it is hard to compete  
18 with low prices of imports from Mexico in markets further  
19 from home where we once had larger volumes sales.

20           If action is not taken promptly to ensure that  
21 Mexican tomato producers stop dumping, you will see growers  
22 out Georgia, Michigan, Virginia, Carolinas disappear, in  
23 addition to California and Florida. This is not an  
24 exaggeration and this is not just a small group of Florida  
25 farmers banning together that are gathering here today, as

1 it has been portrayed. As a California grower, I can assure  
2 you that this is not the case. This is truly an issue that  
3 should be concerning, not only to people in this room, but  
4 to every American. The probability of the United States  
5 losing all of its tomato farms is very real.

6 My family has been farming in Oceanside,  
7 California since 1939. My grandfather passed on his growing  
8 methods to my father and my father has passed them on to me.  
9 I have two sons that I hope will take to farming, as I have,  
10 so I can pass our traditions on to them. I hope my  
11 testimony can shed some light to the current situation.

12 Thank you for giving me this opportunity to  
13 speak. I welcome your questions.

14 MR. CASSIDY: And our last witness is Michael  
15 Schadler, who is Executive Vice President of the Florida  
16 Tomato Exchange.

17 STATEMENT OF MICHAEL SCHADLER

18 MR. SCHADLER: Good morning. As Mr. Cassidy  
19 mentioned earlier, I am not gonna share a testimony of my  
20 own with you this morning, but I do have a letter that was  
21 submitted by a gentleman who was planning to be a witness  
22 today, but unfortunately, could not make it. That is Chad  
23 Ianneo of SunSelect Produce in California. He did ship some  
24 of his tomatoes to us today. You can see them on your far  
25 right of the table. SunSelect was also one of the companies

1 that ITC staff toured just last month as part of the  
2 investigation. So I will now begin reading the letter.

3 "Dear Commissioners: I am writing on behalf of  
4 SunSelect Produce. We're located in Tehachapi, California,  
5 where we have sixty-four acres of greenhouse space, of which  
6 we use forty acres to grow tomatoes and twenty-four acres to  
7 grow peppers. Some of the Commission's investigative team  
8 visited our greenhouse in September.

9 "In 2018, we produced 1.9 million cases of  
10 tomatoes, which we sold primarily in the U.S. market. As a  
11 point of reference, one acre of greenhouse production is  
12 equal to ten acres of open-field production. We can produce  
13 about 900,000 tomatoes per acre.

14 "You may have heard about tomatoes on the vine,  
15 or TOVs from Mexico. That's exactly what we grow. We have  
16 the ability to grow the same varieties and similar products  
17 with the same or better quality as Mexican producers.

18 "Unfortunately, our farming costs have been  
19 increasing over the past three years. Costs associated with  
20 the labor necessary to produce forty acres of greenhouse  
21 production continue to rise. We employ 250 full-time  
22 positions, many of which require skills specific to our  
23 industry.

24 "We sell primarily to West Coast customers,  
25 although we will ship to the East Coast when customers need

1 us to. We focus on servicing retail customers with some  
2 food service and wholesale business as well.

3 "Although we try to secure consistent business  
4 every week, most of our customers buy on the spot market.  
5 Over the last three to four years, our TOV plantings  
6 remained relatively constant.

7 "We have the ability to double or triple our  
8 production to meet domestic demand. At this time, however,  
9 we have decided to suspend expansion due to low prices and  
10 the impact of increased dumped Mexican imports. We simply  
11 cannot compete with unfairly-priced Mexican imports.

12 "Although we intend to continue growing tomatoes  
13 on the vine, and peppers, we evaluate our business every  
14 year to determine the mix between the two and whether we can  
15 stay competitive in the marketplace.

16 "We want to make sure we can continue to grow the  
17 best tomatoes we can and to be able to compete in the U.S.  
18 market. Signed, Chad Ianneo, President of SunSelect  
19 Product."

20 MR. CASSIDY: And now, Commissioners, my partner,  
21 Jim Cannon will address issues raised by this case.

22 STATEMENT OF JAMES R. CANNON

23 MR. CANNON: Good morning. So, we're gonna go  
24 quickly through the slideshow. First slide orients you to  
25 Slide Number 2. So the U.S. industry produces all of these

1 varieties, greenhouse, Roma, the tomatoes not especially  
2 provided for which is round tomatoes from Mexico, grape and  
3 cherry. These are the census data, which we'll talk about a  
4 bit later. Next slide.

5           Then here's the HTS numbers which define each  
6 one. Next slide. So, you're gonna see in the array, and  
7 we'll walk you through it, but in Florida, they're producing  
8 mature green tomatoes. These are mature green tomatoes in  
9 retail packaging as they appear in the grocery store. Next  
10 slide.

11           And these are Florida Roma tomatoes as you would  
12 see them in the grocery store. Slide 6. And these are  
13 Florida tomatoes on the vine. So you see all the varieties  
14 are made in the United States, as well as in Mexico. Next  
15 Slide 7. And here are finally some vine-ripe tomatoes.

16           Slide 8. And then, there are also specialty  
17 tomatoes, so you might have green or beefsteak or yellow  
18 tomatoes. You see on this slide, left to right. Again,  
19 these are tomatoes where there's a little bit of vine on the  
20 stem and the red tomatoes. So probably greenhouse, but,  
21 next slide.

22           And the U.S. industry also produces organic  
23 tomatoes. Next slide. So here we have packaged tomatoes,  
24 such as what NatureSweet offers. NatureSweet will be  
25 appearing here today in the opposition. Their product is on

1 the left, the NatureSweet cherubs in kind of the special  
2 package. But they compete directly and right on the shelves  
3 with Sunset tomatoes or with the clamshell tomatoes, such as  
4 we have here.

5 Next slide. Here we have some Michigan  
6 vine-ripened tomatoes, so I think these are Fred's tomatoes.  
7 Fred's proud of his tomatoes and here are Fred's tomatoes.  
8 Next slide. More Michigan vine-ripe Romas. That produces  
9 round and Romas in Michigan.

10 Next slide. And then these are California  
11 greenhouse tomatoes. So these would be Chad's tomatoes.  
12 Chad who sent in the letter. He was here at in the Sunset  
13 hearing, but was unable to come today because of the quick  
14 timing of the hearing. Next slide. And here are some more  
15 greenhouse TOVs from California. Next slide. And another  
16 slide of Chad's tomatoes, outrageously fresh. And also sold  
17 in different formats, showing again, the domestic industry  
18 is selling all types in all formats and they're absolutely  
19 innovating in the market. Next slide.

20 Here we have California open-field vine-ripe  
21 tomatoes. I think these are your tomatoes, Priya, correct?  
22 So maybe from the plant tour, this'll be a familiar sight.  
23 Next slide. And here they are in bulk packs. Next slide.  
24 And here we see Mexican versus U.S. rounds. You can see on  
25 the left the Mexican beefsteak tomatoes are being sold at

1 \$.80 a pound. The Florida slicer tomatoes are being sold at  
2 \$1.99. Next slide. All right.

3                   So, you're gonna hear a lot today about  
4 greenhouse. We just want you to understand what a  
5 greenhouse is or isn't, or how it is or isn't defined. So  
6 this slide shows typical Mexican greenhouse that's fully  
7 enclosed with glass or plastic, give me a plastic cover.  
8 The next slide.

9                   You can also have a shade house, where there's  
10 simply a screen. Principally, it's of primary importance to  
11 the Mexican tomato industry that there not be pests, right?  
12 Pests are vectors of disease. You get viruses in the  
13 tomatoes, and so the greenhouse covers or the shade covers  
14 are very important there to keep out pests. Next slide.

15                   This is a color chart. The tomato-ripening  
16 guide. So you'll see in the following slides, the vine-ripe  
17 producers produce a green tomato and they pick it.  
18 Typically, in Mexico, they might be picking a 2, in Florida,  
19 they might be picking a 1. But all tomatoes go through this  
20 progression, so that they end up at the store as you see  
21 them in front of you. So next slide.

22                   So here we have some slides out of a video, which  
23 you can get on this website by Diego Ley, who I think is an  
24 uncle of one of the witnesses today. And you see his  
25 tomatoes here, just picked and packed in bulk. That's much

1 the way U.S. tomatoes look. They're green primarily with a  
2 few reds in there. Next slide please. Here again, you see  
3 his tomatoes. There they are on the sorting table,  
4 primarily green tomatoes. Okay.

5           So they will talk to you about vine-ripe tomatoes  
6 versus tomatoes in which we've added ethylene. A lot of  
7 this is about the fact that you have to ship the product  
8 further from Mexico to the customers in the United States.  
9 So if you pick them green, you're gonna have to go through  
10 customs, across the border, go to distribution, finally  
11 reach the customer. It takes longer. Our products are  
12 closer to the market. Next slide.

13           So, the purchasers, when you look at the  
14 purchasers' questionnaires, they responded pretty uniformly,  
15 this is just Table II-9 from the prehearing staff report, so  
16 you asked the question, "How do they compare? Mexican  
17 tomatoes and U.S. tomatoes?" And in the left-hand side,  
18 right down the middle column where it's highlighted, the  
19 staff report shows overwhelming responses that said Mexican  
20 and U.S. tomatoes were comparable on basically every  
21 factor. We see on price, more of the producers said Mexican  
22 prices were lower, in other words, U.S. prices are inferior  
23 to Mexican prices, meaning that they're higher than the  
24 Mexican price. But otherwise, they're comparable on every  
25 factor. Next slide.

1                   Now this is the statutory standard. The top  
2 standard is the familiar one. The bottom standard -- this  
3 is a special case, this is not a normal dumping case --  
4 we've come back after twenty-three years and we're asking  
5 the Commission to find material injury in a continued  
6 investigation. 19 U.S.C. 1673c(j) says, "In a continuing  
7 investigation, the Commission must make its determination  
8 without regard to the effect of any agreement," under  
9 subsection B or subsection C.

10                   So Commerce contemplated there would be continued  
11 cases and that you could find injury in a continued case,  
12 and indeed should, and in fact, you should ignore the  
13 effects of the agreement. So here, what were the effects of  
14 the agreement? This was not a quota. There was no  
15 quantitative restraint. And we saw a huge growth in the  
16 volume of imports. What this was, was a minimum price. And  
17 so we see mixed price effects, but we see Mexican prices, by  
18 and large, don't go below the reference price. So that is  
19 the effect the statute is focused on, and asking the  
20 Commission to take into account when you decide whether the  
21 injury occurred, or whether there's a threat of injury.  
22 Next slide.

23                   Here's the long-term trend from the original  
24 investigation, 1996, the preliminary stage, to today. Next  
25 slide. For the data to back up that slide, you can see in

1 the bottom far-right corner, the most recent three years, or  
2 if we were back in March at the Sunset, the most recent four  
3 years, however you look at it, the U.S. industry is now  
4 below 40% of the market. When this case began in 1996, the  
5 U.S. industry held 65% of the market. The Mexican industry  
6 is now, over the last three years, become more than half of  
7 the U.S. market, and that's clearly a volume effect.  
8 Volume wasn't covered by the suspension agreement, and that  
9 is actually the root of the injury. Next slide.

10 The volume effects of the imports have led to  
11 price depression. Here you see in the far-right hand in  
12 constant \$2009, from 2013 until 2015, prices were running at  
13 \$.43, \$.44 a hundred weight. Over the last three years,  
14 prices have fallen to \$.34, \$.37. So prices are far below  
15 recent levels, and in fact, Mexican imports are causing  
16 price depression in the U.S. market. Next slide.

17 These are price data plotted to show that every  
18 time over the past four times, prices have increased because  
19 of a suspension agreement, but have then rapidly declined  
20 only a few years later. Next slide. Here is the data to  
21 back up that chart. I'll look at the next slide. And here  
22 is data, public data, that show you that the Mexican prices,  
23 typically on a public basis, did fall below the reference  
24 price.

25 So they weren't maintained only at the reference

1 price, but they actually fell below it. In the confidential  
2 data, we also have in the pink sheets, we have charts  
3 showing the same thing. It's on Slide Number 3 and Slide  
4 Number 4. Those also depict incidents on your database in  
5 which the Mexican prices, people reported to you, fell below  
6 the reference price. Next slide, please.

7           Without the minimum reference prices, the  
8 increased imports will undersell the U.S. producers' prices.  
9 Your staff report shows that there are good tomatoes from  
10 both sources are good substitutes. Tomatoes are a  
11 perishable product and the sellers are price-takers. The  
12 purchasers reported that a high production volume and  
13 availability of fresh tomatoes determines price leadership  
14 in the fresh tomato market. So a high production volume,  
15 Mexico's production volume has been steadily increasing.  
16 They produce three times the volume that they need for their  
17 home market. It is targeted at the U.S. market, and that  
18 determines price leadership. And that is what's forcing  
19 prices down in the U.S. market. Next slide.

20           Here we see the USDA data, another public source,  
21 showing price leadership by the Mexican imports versus U.S.  
22 product. These are terminal market prices for U.S. Romas,  
23 we have examples in the prehearing brief. Next slide,  
24 please.

25           Again, these are underselling of U.S. round

1 tomatoes, the other very important category. Next slide,  
2 please. These are the underselling data which were  
3 published and made public in the suspension agreement case.  
4 In the pink sheets, you have the underselling data from this  
5 investigation on Slide 6. The underselling has gotten  
6 better. We have more underselling in this investigation  
7 than what you saw on the record in March. In part, because  
8 we are covering more recent time period and the Mexican  
9 product has been very aggressive. Next slide, please.

10 I think I wanna do a time check.

11 MR. BISHOP: You have fifteen minutes remaining.

12 MR. CANNON: I have fifteen?

13 MR. BISHOP: Correct, you have fifteen minutes  
14 remaining.

15 MR. CANNON: Thank you. Okay. I was up late  
16 watching the Nats' so --

17 Under the Florida marketing order, the importers  
18 have an incentive to classify their imports as greenhouse.  
19 So I saw on that first page that imports were classifying  
20 their tomatoes as greenhouse tomatoes. But you see in the  
21 record a pretty small volume of greenhouse tomatoes.

22 Part of that is because, in the Florida marketing  
23 order, they have to go through an inspection if it's an  
24 open-field round tomato. But if they're classified as a  
25 greenhouse tomato, they don't have to go through the

1 inspection. And so we see in the census data a large volume  
2 that's called greenhouses, but said greenhouse is subject to  
3 many definitions. It can be a shade house, it could be  
4 plastic, could be glass, but not a greenhouse as you might  
5 think, as we have, for example, in California, where you've  
6 got a concrete floor, you're growing hydroponically, you  
7 have temperature control, you have a glass house. That's  
8 not what we're talking about.

9           So the database has some issues with regard to  
10 the classification of tomatoes in terms of the pricing data  
11 and the shipments data. And that, I think, causes some  
12 problems.

13           Next slide. We have before you growers who are  
14 from Florida and California and Michigan. We grow in all of  
15 these states, and other states, as you heard from the  
16 testimony, but California and Florida are the two largest  
17 states. So don't be mistaken. This is not a small band of  
18 growers only in Florida. We are representative of the whole  
19 country.

20           This is an agricultural case, and the Commission  
21 now has questionnaire responses accounting for over 50  
22 percent of U.S. production. That's actually a good reporting  
23 in terms of the Commission's practice of past cases for an  
24 agricultural case, that this many small farms would come  
25 forward and provide their data.

1                   Next slide. Turning now to Mexico's capacity, I  
2 alluded to earlier the fact of basically how large they are.  
3 If you look at their production in 2018, they produced 3.8  
4 billion pounds of tomatoes. Their capacity is 5.4 billion  
5 pounds, or 1.6 billion pounds of unused capacity to show  
6 more tomatoes here.

7                   In 2019, by their own projections, in 2020 and  
8 2019, they project in 2020 they're going to increase. So  
9 they're telling you in their answers to their questionnaires  
10 that capacity is going to increase, production is going to  
11 increase, and that is a real and tangible threat to the U.S.  
12 industry.

13                   Next slide, please. Here we see the focus of  
14 Mexico's capacity is the United States. They really don't  
15 export to any other countries except the United States.  
16 That's where they ship their tomatoes. They overbuilt the  
17 domestic tomato industry to sell in this market, and that's  
18 where they've targeted.

19                   Next slide, please. Over 250 tomato growers have  
20 closed down since the industry brought this case in 1996.  
21 There's been dozens in the last 5 years. Here they are  
22 listed. The industry is here because of the impact of  
23 Mexican tomatoes on the U.S. industry. It has been tangible  
24 and serious.

25                   They have both caused injury and they threaten to

1 cause additional injury if the Commission doesn't rule in  
2 the affirmative. Thank you.

3 Do we want to hear from --

4 MR. CASSIDY: We can do show and tell

5 MR. CANNON: Yes, I think so. We have time, I  
6 believe.

7 MR. CASSIDY: Commissioners, Tony DiMare is now  
8 going to explain to you what the tomatoes in front of you  
9 are.

10 MR. DiMARE: I am going to demonstrate the  
11 interchangeability of the (off microphone) U.S. and Mexican  
12 product.

13 The first samples here on the far left are  
14 round-type tomatoes. This is a mature green from  
15 California, a 25-pound container, bulk-filled. The box next  
16 to it is an identical round-type, vine-ripe from Mexico.

17 I'll show you so you can see--(off microphone  
18 again)--what I've given him is a tomato each, one domestic,  
19 one Mexican product. You cannot discern the difference in  
20 the round-type tomato, whether it's from Mexico or U.S.  
21 produced.

22 The next product is Roma tomatoes. This first  
23 box is 25 pound volume filled Roma from California. The box  
24 next to it is Roma from Mexico. You will see the  
25 comparability of the two items, which again you can't tell

1 the difference. This is U.S. product. This is Mexican  
2 product (indicating).

3           Again, the likeness of both products,  
4 irregardless of the origin whether it's U.S. produced or  
5 Mexican produced.

6           Next we have grape tomatoes in a 12-1 clamshell  
7 retail-ready package. This item is produced in the U.S.  
8 This happens to be Florida product. And the next package is  
9 an identical, same package, same label actually. This  
10 repacker packs in his own label, Patricia label, of Mexican  
11 product. And again, you couldn't tell the difference of the  
12 origin, whether it was U.S. producer or Mexican produced,  
13 other than the country-of-origin labeling that is on the  
14 label here.

15           The country-of-origin is listed here, U.S.  
16 product, and bottom right is Mexican product. Same type.  
17 Grape tomato, retail ready pack.

18           Next we have a custom pack, 15-pound, premium,  
19 vine-ripe, U.S. produced; 15-pound vine-ripe from Mexico.  
20 Both products originated in the 25-pound bulk pack. The  
21 repacker takes this 25-pound volume fill and repacks into  
22 various custom packs. This happens to be a 15-pounder.  
23 They do a 5-pound package. They can do a 10-pound package,  
24 do a two-layer pack that was mentioned earlier in someone's  
25 testimony.

1           Again, U.S. product, Mexican product, identical  
2 in look. A lot of cases, identical in quality. This  
3 (indicating) is Mexican. This (indicating) is U.S. product.

4           Again, the other thing with the likeness of the  
5 product, irregardless again where it's produced, is the  
6 interchangeability. A lot of customers, depending on price,  
7 will substitute round-type with Roma, and vice versa,  
8 depending on price. And we run into this in the domestic  
9 industry a lot of times when cheap Romas out of Mexico come  
10 in and depress prices in the U.S.

11           You'll see major food service companies that rely  
12 on buying, for example, a round-type tomato in the U.S. at a  
13 certain price level. And when cheap, low-priced Romas come  
14 in from Mexico, they will switch because of the price  
15 disparity and move away from the round-type that they  
16 typically have as their spec and go to a cheaper Roma  
17 tomato. This causes tremendous harm to the domestic  
18 industry, and in some cases for those periods market share  
19 loss as a result of the price disparity.

20           The last package here on the far right  
21 (indicating) is a TOV, tomatoes on the vine, or referred to  
22 also as cluster tomato, the 10-pound package, greenhouse  
23 produced from a U.S. producer that was just someone read his  
24 testimony. Again, comparable to Mexican product that is  
25 grown in greenhouse or shade cloth, same type of cluster

1 tomato. This happens to be, again, California U.S.  
2 product. If you had a Mexican product, you wouldn't be able  
3 to tell the difference. Very comparable. And you'll see  
4 that a lot of times in your typical retail store. You'll  
5 see cluster, or TOVs irregardless of the origin that look  
6 very comparable.

7           Next, these happen to be vine-ripe tomatoes from  
8 Tennessee that are bagged. Again, it's just showing you  
9 that the diversity and the ability to pack and offer  
10 different retail ready packs, irregardless of where the  
11 product comes from.

12 Again, this product is from a Tennessee grower in a bag  
13 pack, retail-ready pack.

14           The last product we want to show you is a bagged  
15 Roma, a retail-ready pack. This particular product is from,  
16 let' see, this one (indicating) is from the U.S. This one  
17 (indicating) is from Mexico. Again, identical. This  
18 particular repacker packs in his label, Patricia label  
19 happens to be his label. But again, same identical product.  
20 This was Romatomatoes packed in a bag, retail ready, U.S.  
21 and Mexican product (indicating). Again, you cannot tell  
22 the difference from the product. Same exact product.

23           So again, the demonstration is to show you the  
24 diversity of the different types of tomatoes, the  
25 interchangeability. And again, this 15-pound pack here was

1 a mature green repacked out of volume pillbox here, mature  
2 green. And the 15-pound pack next to it was a Mexican vine  
3 ripe. I challenge you to tell me the difference in quality  
4 between these two here.

5           Again, you'll see if you looked at the color  
6 chart of the industry color chart of 1 to 6, this would be  
7 categorized as about a 5 color, all even color. You can't  
8 tell the difference in the origin. You can't tell the  
9 difference in quality.

10           So this is typically what you will see in a  
11 retail display. Again, very comparable irregardless of the  
12 origin. So thank you. And I will welcome any questions  
13 anybody has. Thank you.

14           MR. CASSIDY: That concludes our presentation,  
15 and we would be happy to answer any questions the Commission  
16 may have.

17           COMMISSIONER SCHMIDTLEIN: Okay, thank you very  
18 much. I would like to thank all the witnesses for being  
19 here today, and we will start with Commissioner Karpel with  
20 Commissioner questions.

21           COMMISSIONER KARPEL: Thank you. Thank you all  
22 for being here. It was good to hear your testimony.

23           I wanted to start with some questions just to  
24 clarify Mr. Cannon's presentation. You had a slide 21, and  
25 it's called "The Tomato Ripening Guide."

1                   So in this Guide, what is considered picking at  
2 mature green? Is that one, and then anything below that is  
3 considered vine-ripe?

4                   MR. CANNON: Jim Cannon. Thank you. Would one  
5 of the witnesses like to address that?

6                   MR. DiMARE: Sure, I'll address it. So mature  
7 green would be one stage. And again, looking at that chart,  
8 you obviously see different stages of maturity. And as you  
9 saw I think in one of the earlier slides in Mr. Cannon's  
10 presentation, you saw a Mexican greenhouse operation of  
11 tomatoes being harvested actually at the one and two stage.

12                   The difference in the different stages is  
13 literally the number of days left on the vine. And you  
14 could literally pick a tomato at the one stage today.  
15 Tomorrow it would be a two stage. You could pick a tomato  
16 today at a three stage. Tomorrow it would be a four or a  
17 five stage. So the difference in the maturity levels is in  
18 the number of days that that product is left on the vine.

19                   Product ripens differently. You have small  
20 tomatoes. You have big tomatoes on the vine. Irregardless  
21 of whether it's Mexico, whether it's Florida, California,  
22 whether it's protected culture or open field, every tomato  
23 goes through stages. They all start out at that one stage,  
24 the green stage, whether it's a TOV, whether it's a round  
25 type, whether it's a grape, cherry, Roma, they all start out

1 at that one stage. And the difference is the length of time  
2 that that product is left on the vine determines which  
3 stage that's in.

4 MR. SINGH: Priya Singh, California Vine Ripe  
5 Grower. I typically start our harvest at a stage three and  
6 four. That's based on where I am shipping our product. If  
7 I do ship farther, I will go at a lighter stage, and that  
8 product will--if I'm shipping towards the East Coast, or  
9 anything like that, but I'm typically harvesting at a three,  
10 four color stage.

11 MR. LEITZ: Fred Leitz, Michigan. We try to pick  
12 at a stage two, three, or four, depending on weather  
13 conditions we're starting to see develop. It's all about  
14 proximity to markets.

15 I shipped a load on Tuesday at six o'clock  
16 yesterday. At nine o'clock it was received by the receiver.  
17 So I mean my proximity to market is a lot closer, so I can  
18 pick a lot riper tomato.

19 MR. DiMARE: Tony DiMare, Florida, again. I just  
20 want to clarify also the term "vine ripe" is very confusing  
21 unless you're in the industry. You know, you really don't  
22 know what that "vine ripe" means. Vine ripe, actually, in  
23 the industry could be anywhere from the two stage color,  
24 number two, to a six stage. I think when the term vine ripe  
25 is mentioned in discussion, and most consumers if you

1 mentioned vine ripe to them, they would automatically think  
2 that every tomato is a six color.

3 Well, that's not the case in the industry because  
4 "vine ripe" is truly defined from a number two stage to a  
5 number six stage, depending on the individual grower, or how  
6 he picks it, what his customer wants. That's a lot of time  
7 what determines, and when the crop is ready, of what stage  
8 they pick that product in.

9 COMMISSIONER KARPEL: Thank you. That helps a  
10 lot. I'll start with some questions on price.

11 Well actually let me back up a little bit. Let  
12 me talk about the Suspension Agreement, or have you talk  
13 about the Suspension Agreement a bit.

14 Can you explain why we see the categories of  
15 tomatoes in the Suspension Agreement we do? We've heard a  
16 lot in your testimony and in Respondent's briefs about the  
17 difference between green and field, but we don't see that  
18 breakdown in the Suspension Agreement.

19 Can anyone speak to that?

20 MR. CASSIDY: In the suspension agreement, the  
21 new suspension agreement, we wanted to get away from the  
22 categories defined by how a tomato is grown and just get to  
23 types of tomatoes, so that as an enforcement matter, in  
24 order to narrow what reference price applied, all you have  
25 to do is look at the tomato and you will know whether it is

1 a round or a Roma or a specialty.

2 The only place where we deviated from that  
3 basic principle is organic, where of course you have to have  
4 an organic label. But essentially it is to move away from  
5 this question of is it greenhouse, is it protected  
6 agriculture, etcetera, things that there's no way to know by  
7 looking at a tomato.

8 COMMISSIONER KARPEL: Can you talk about how  
9 transparent tomato prices are in the U.S. market, and how  
10 maybe prices are set and communicated among market  
11 participants?

12 MR. CANNON: This is Jim Cannon. I think the  
13 witnesses would be good to explain from each of them, from  
14 their own perspective, how you learn about prices, your  
15 price determination. For example, that's what the question  
16 is, how you discover prices talking to customers. Please  
17 start with Tony and then Priya and Fred and Michael.

18 MR. DiMARE: Sure. You know, depending on  
19 your organization, you heard some of the testimony from  
20 certain individuals about the makeup of their sales. Some  
21 are contracted. The majority are spot sales open market.  
22 Contract pricing, you know, from an FOB or farm gate  
23 standpoint, is typically a very small percentage of our  
24 sales. In fact in DiMare's case, it's less than ten percent  
25 of our product is contract. Therefore, the balance is open

1 sales, spot market sales.

2                   And a lot of it's predicated on, and in the  
3 case of open market sales on supply and demand. We're  
4 producing a very highly perishable product that is  
5 influenced in a lot of cases by weather. Heat brings on  
6 maturity in a crop. Cold weather holds it back. Rain  
7 events obviously have a dramatic effect. Freezes have a  
8 dramatic effect, which by the way both locations are subject  
9 to, you know.

10                   Throughout a given year, you could have  
11 freezes in Mexico, you could have freezes in Florida and  
12 other areas of the country. The same thing with rain  
13 events. Nobody as a producer is immune from weather. We're  
14 all subject to weather. Whether it's Mexico, Florida,  
15 California, we all experience weather events that affect  
16 supply, and those effects have a significant play in what  
17 pricing in markets are.

18                   (Off mic comment.)

19                   MR. DiMARE: The other source of evidence  
20 that, you know, the industry relies on all of us is the  
21 USDA's Tomato Facts Report, where prices and shipments are  
22 reported on a daily basis, both on the FOB and in the  
23 terminal market end. That gives us a barometer both from  
24 day to day sales from the FOB end, farm date end, to where  
25 our product is ultimately ending up in the terminal

1 wholesale market or what that product is being distributed  
2 every day.

3                   You can look at those prices and see what  
4 product is bringing for every type, for Roma, round, grape,  
5 cherry tomatoes. Those prices are quoted every single day.  
6 So that is used as a barometer at times to help sales force  
7 determine what markets might be, and also at the same time  
8 looking at the daily volumes both domestically in the  
9 crossings coming from Mexico, to help determine what given  
10 markets are.

11                   But again, we're in a supply and demand  
12 business. If you have surges of volume, you have gluts in  
13 the marketplace, you're going to have downward pressure on  
14 pricing. When you have shortages and currently we're in a  
15 tomato shortage right now globally, Mexico, Florida, prices  
16 right now of round and Roma tomatoes are very high, and this  
17 is kind of the time of year, October-November, where the  
18 industry experiences a little bit of lull in volume.

19                   As a result, prices are high right now for  
20 both sides. So hopefully it will last a long time for both  
21 sides and we make money. But those are some of the  
22 influences and factors in determining prices.

23                   MR. SINGH: Priya Singh, California grower.  
24 In our business, about 35 to 40 percent is contracted  
25 through preseason marketing meetings that we have. So we'll

1 go to our customers, we'll discuss their needs, we'll see  
2 what kind of packaging they need and we'll determine a price  
3 for that. That being said, we do have multiple customers  
4 who do not want a contract with us, but they're going to be  
5 coming in on a weekly basis.

6 For those particular customers, it's always a  
7 price haggle. It's always what is Mexico offering, what are  
8 you willing to offer and we play that game and we go back  
9 and forth in that situation.

10 COMMISSIONER KARPEL: What do you use to  
11 inform your price negotiation? Is it supply and demand  
12 issue as Mr. DiMare was saying?

13 MR. SINGH: In our particular case, we have,  
14 you know, our costs. We look at where we've been over the  
15 last years and increases, and we speak with our customers  
16 regarding that. Again, it's always that negotiation game.  
17 They want to go down, I want to go up. But that's where we  
18 format it, you know, four-five years of data that we've  
19 experienced in our company with what we're doing.

20 MR. LEITZ: Fred Leitz, Michigan. We're very  
21 -- being a short season grower in the Midwest, we're very  
22 supply and demand oriented because we really can't make a  
23 market. We can react to a market. Like I said, at the  
24 beginning of the season I can push a little harder because  
25 everybody's wanting to start what they call a new deal.

1 Every time a new region comes into production, it's a new  
2 deal. So they're always happy when that happens.

3 But we're very supply and demand conscious,  
4 and the other thing that we really have to watch for, I  
5 think Tony had eluded to it in his testimony, was the -- you  
6 know, we'll sell it on Friday but we've got to hold their  
7 hand until Monday, depending on what other supply and demand  
8 or what other tomatoes are in the marketplace, because they  
9 might go down, they might go up.

10 They never pay us if it goes up, but they'll  
11 always want us to give a little back if the market goes down  
12 over the weekend.

13 MR. SULLIVAN: Mike Sullivan,  
14 Florida-California. I'll echo what my colleagues have said  
15 here, and in our case on the open market on a daily basis,  
16 your sales force is on the phone. They are talking to  
17 receivers all over the country and you're gathering data,  
18 and they know our communication from our farms, what our  
19 volumes are like and what position we're in.

20 Those things together go towards building the  
21 market, and you'll have people that get out there and you  
22 make a quote and you try to lead and get the best market you  
23 can get to the fruit. But a lot of times it's dictated by  
24 the weakest link or the lowest common denominator, and when  
25 that becomes the prevalent price, we're all forced into

1 matching.

2 COMMISSIONER KARPEL: My time is up.

3 COMMISSIONER SCHMIDTLEIN: Okay, thank you.

4 So I want to start with some questions about the effect of  
5 these suspension agreements, and in his opening, Mr. Wilner  
6 pointed out that there have been five suspension agreements  
7 since the original case was brought in 1996, and that no one  
8 has asked for a review of those suspension agreements. When  
9 a suspension agreement is put into place, Commerce makes a  
10 determination that that suspension agreement completely  
11 eliminates the injurious effect of the dumping is my  
12 understanding, right.

13 So I want explore a little bit the implication  
14 of the fact that no one has asked for a review of that. So  
15 my first question is in the prior years, prior to the most  
16 recent suspension agreement, let's put it at the 2019 since  
17 that's so recent, is it you all's view that those prior  
18 suspension agreements did not eliminate the injurious  
19 effects of the dumping?

20 MR. CASSIDY: Yes, and we think that the data  
21 supports that contention. I mean Commerce made  
22 determinations at each time that it put out a new suspension  
23 agreement, that it thought it would eliminate injurious  
24 effect based on the information available to it, and then  
25 that was the end of the discussion. Of course, the

1 information it had to look at was whatever was available at  
2 that point every five years. The sunset reviews never took  
3 place because of the manipulation of the system.

4 The whole point or a major point of the  
5 exercise apparently was to terminate agreements just before  
6 the end of the fifth year, negotiate -- which would end the  
7 possibility of a sunset review, negotiate a new agreement  
8 which would start the five year clock running again and go  
9 forward.

10 COMMISSIONER SCHMIDTLEIN: But asking for  
11 review of whether the agreement completely eliminated the  
12 injurious effect is separate from a sunset review. You  
13 could have -- you could have done that for each of those at  
14 some point in time, at any point in time under those various  
15 agreements, right?

16 MR. CASSIDY: We were not representing the  
17 Florida Tomato Exchange at that time. I cannot tell you why  
18 they did what they did.

19 COMMISSIONER SCHMIDTLEIN: But you would agree  
20 though --

21 MR. CASSIDY: Theoretically, an interested  
22 party could have asked for a 75-day review, that is correct.

23 COMMISSIONER SCHMIDTLEIN: Right. So it looks  
24 a little bit inconsistent to come in now, 20-some years  
25 later, and say we were being injured that whole time and

1    yeah, we had the legal right to ask the Commission to make  
2    that kind of determination but we just didn't and we don't  
3    -- you know, and obviously you don't know why. I'm not sure  
4    any of the gentlemen sitting here can speak to that. But it  
5    looks a little bit late, right, to come in and say now that  
6    we were injured all those years ago.

7                    The reason I bring this up is because you're  
8    asking us to look back at what's happening to volume since  
9    1996, and typically in a final, you know, final  
10   investigation, which is what we're in right now, we would  
11   use a three year POI. So that's my question. Like why  
12   should we look back to 1996, when you had, anybody had the  
13   opportunity to come in and claim that they were being  
14   injured, that the agreement weren't working. No one did, so  
15   what's the basis for the Commission to do that in an  
16   opinion?

17                   MR. CASSIDY: We assumed you will look at the  
18   typical review period, which is three years. But we also  
19   assume that you would like to be oriented when you have a  
20   very strange set of facts in front of you, and this is a 23  
21   year-old investigation. It's been going on for 23 years.  
22   So we thought we'd tell you how on earth did this happen,  
23   and also show you what happened over the period.

24                   But insofar as what are you looking at in this  
25   investigation now, in its 23rd year, you should apply your

1 normal practice and take a look at the current data, just as  
2 the Commerce Department has looked at current data to reach  
3 its final determination.

4 COMMISSIONER SCHMIDTLEIN: Okay, okay. Let me  
5 -- you know, continuing on with what is the impact of the  
6 fact that this suspension agreement is in place, the next  
7 question's to really the price, right, and when you look at  
8 the pricing products, you know, we have more overselling  
9 than underselling.

10 In your brief, I understand the point that, I  
11 think I understand the point, you can correct me if I'm  
12 wrong, that when you have a suspension agreement in place,  
13 there's a discipline on the price and therefore even though  
14 there's more overselling than underselling, we should find  
15 the underselling significant because there would have been  
16 more absent that discipline.

17 And so -- and the discipline here is a  
18 reference price, right? It's not a percentage as like we  
19 would have in a normal sort of when we were looking at kind  
20 of that kind of thing, you know. We think about that in a  
21 sunset review case typically, right, where you're looking at  
22 product that's coming in. It's under order, there's a  
23 discipline effect of the order.

24 So my question is when I'm looking at that,  
25 you know, does it matter for our analysis of this though

1 whether or not the Mexicans were in contravention of the  
2 reference price? So in other words, they were already  
3 underselling, right, in some instances, some volume of  
4 underselling. They're already underselling.

5                   So where they're overselling, did that  
6 reference price really make any difference and wouldn't that  
7 have been in the -- you know, does it matter and would it  
8 only matter if in those cases they're overselling but the  
9 U.S. price is below the reference price? Are there  
10 instances of that where the Mexicans were overselling the  
11 U.S., but the U.S. price is below the reference price?

12                   So the theory would be without the reference  
13 price, right, you should have had them dropping below and  
14 potentially underselling the U.S., so there would have been  
15 more underselling absent the discipline of the suspension  
16 agreement? I didn't see where there was a handy comparison  
17 of that? I don't know if you've looked at that data? Is  
18 there in the overselling instances, were U.S. prices below  
19 the reference prices? Do you know? Have you look at that?

20                   Because otherwise if it's not, then how did  
21 that provide a discipline that would have suggested there  
22 would have been more underselling without the suspension  
23 agreement?

24                   MR. CANNON: Jim Cannon. In the first, so in  
25 the pink sheets, number 6, so our database from the staff

1 report didn't include the largest U.S. producer Lipman, who  
2 is now in the database and has been added and we've, I think  
3 talked to the staff about that. It was submitted late, but  
4 Luminous put in all of their data for their U.S. production  
5 operations.

6           You see actually in terms of number of months,  
7 it's no longer correct to say that the majority is  
8 overselling. The dataset in fact, has gotten better since  
9 the sunset review back in March in terms of underselling.  
10 Now -- in a large volume categories, round and Roma, there  
11 is obviously still an issue, and I take your point and to  
12 that point, if we look at the USDA data.

13           So, figure 3 or figure 4, okay. So, we asked the  
14 Commerce Department to terminate the censure agreement  
15 because they were violating it. And if you look at the  
16 years here, this is 2016 to 2019, so this is squarely your  
17 POI.

18           COMMISSIONER SCHMIDTLEIN: But these are Mexican  
19 AUV's, right?

20           MR. CANNON: And they were falling below.

21           COMMISSIONER SCHMIDTLEIN: Right.

22           MR. CANNON: So, if we are lower than them, and  
23 my guess is the data is going to show that we were also  
24 below them on your database.

25           COMMISSIONER SCHMIDTLEIN: Well, but what I'm

1 asking is what was U.S. -- what was the U.S. price. This is  
2 Mexican AUV's versus the reference price, right?

3 MR. CANNON: Correct.

4 COMMISSIONER SCHMIDTLEIN: So, this doesn't show  
5 us when the underselling. I mean I just had to map it out.

6 MR. CANNON: USDA has the reference price versus  
7 the Mexican price, but that is showing us -- that slide 33  
8 or 34 on the public slides, so look at slide 33 Roma's. You  
9 see that up here. The U.S. prices aren't below the Mexican  
10 prices. It's only your database that shows the overselling  
11 at all.

12 The USDA shows Mexican prices are below domestic  
13 prices. I don't know whether it's a climbing issue, a  
14 coverage issue.

15 COMMISSIONER SCHMIDTLEIN: Okay.

16 MR. CANNON: I mean this is what we're dealing  
17 with is that in two of the categories which are large --  
18 round and Roma, the USDA's data are different than what you  
19 see in your record.

20 COMMISSIONER SCHMIDTLEIN: But what -- and I'm  
21 not, you know, totally familiar with terminal prices, does  
22 that include a transportation charge in there? I mean  
23 that's different than FOB from the farm gate, right? Like  
24 you've got -- the U.S. terminal price includes some element  
25 of transportation because it's been transported to the

1 terminal.

2 MR. CANNON: Correct.

3 COMMISSIONER SCHMIDTLEIN: And then the other  
4 question is how much U.S. production and Mexican production  
5 flows through these terminal markets, do we know? I mean I  
6 know they're reporting these prices, but overall, I don't  
7 know if somebody wants to speak to that.

8 MR. CANNON: Do we want to talk to that? Any  
9 of the members? Oh, we can go into it in post-hearing.

10 COMMISSIONER SCHMIDTLEIN: Okay but let me  
11 back-up. How should we consider the fact that these prices  
12 include transportation cost?

13 MR. CANNON: There are equal at the same  
14 terminal, and so there's Mexico and there's the U.S. and so  
15 they both include transportation.

16 COMMISSIONER SCHMIDTLEIN: Right.

17 MR. CANNON: And so, you're at the same point of  
18 sale, and you're at a wholesale level, and so therefore it's  
19 head to head.

20 COMMISSIONER SCHMIDTLEIN: I assume there are  
21 terminals all around the United States, right?

22 MR. CANNON: Yes.

23 COMMISSIONER SCHMIDTLEIN: So, is this a average  
24 of those terminals, is that what they produced? Okay.

25 MR. CANNON: Yes.

1 COMMISSIONER SCHMIDTLEIN: Okay.

2 MR. CANNON: This was in our brief together with  
3 the background data showing which ports we used.

4 COMMISSIONER SCHMIDTLEIN: Right. Okay, well my  
5 time is up. We'll come back to this.

6 MR. CANNON: Okay.

7 COMMISSIONER SCHMIDTLEIN: Commissioner Kearns?

8 COMMISSIONER KEARNS: thank you, we'll come back  
9 to it right now actually.

10 MR. CANNON: Okay.

11 COMMISSIONER KEARNS: Thank you all for being  
12 here, but I'm going to guess I think I heard you say, Mr.  
13 Cannon, just a second ago, you don't know why this chart --  
14 USDA data, why it shows, I guess, predominant underselling  
15 by Mexico, whereas our product pricing data suggests  
16 otherwise, is that right?

17 MR. CANNON: Yes.

18 COMMISSIONER KEARNS: Okay, I'm going to -- can  
19 you, either now or post-hearing hazard some guesses? I  
20 don't think we're going to disregard our own data and just  
21 say, well, you know, we're not great at this. The USDA  
22 might be better.

23 MR. CANNON: I understand. Your own data do show  
24 for nearly half the volume a lot of underselling, granted  
25 it's greenhouse, but the definition of greenhouse is a --

1 it's in the eye of the beholder, and what they have defined  
2 to be a greenhouse. The census data tell you 50% of sales  
3 are greenhouse sales. Your questionnaire responses tell you  
4 that maybe a third of the sales are greenhouse. Your  
5 pricing data tell you half of that. So, that's in the pink  
6 sheet Slide Number 7, right?

7 So, we have a disconnect in the definition of the  
8 pricing products and the prices that he gave you. And we  
9 have --

10 COMMISSIONER KEARNS: Greenhouses versus open, is  
11 that right, or is there another cue that I missed?

12 MR. CANNON: Yes, yes.

13 COMMISSIONER KEARNS: Okay.

14 MR. CANNON: Yes, and we have less coverage now  
15 than we did in the sunset case in 2015 in terms of importer  
16 questionnaires coming forward to the Commission and  
17 submitting their data. We have more domestic coverage, we  
18 have increased the coverage and added producers from other  
19 states who believe they're injured, and they now account for  
20 over half the industry.

21 We have less -- fewer, importer questionnaires,  
22 so that's a factor. We also have the purchasers. If you  
23 looked at the slide, your Table 2, it was -- where did I put  
24 this, the slide on comparability which comes after -- okay,  
25 it's Slide Number 24, there we go.

1           Your purchasers said we were comparable on price,  
2 or more often the U.S. was inferior, meaning the U.S. had a  
3 higher price. So, your purchasers and your purchasers  
4 shifted their sales from the United States to Mexico. So,  
5 your own database -- there are issues, and there were issues  
6 in 1996 with the U.S. pricing too, and the Commission  
7 observed that in the original dataset.

8           And we've tried to keep the same pricing  
9 products, but as you heard in the suspension agreement, we  
10 don't anymore make any distinction between greenhouse or  
11 open field, we've just done away with that. It's about the  
12 tomato, not where it's grown. So, I'll ask Mary Jane, she  
13 might want to add to what I said.

14           MS. ALVES: Commissioner Kearns, Mary Jane Alves,  
15 Cassidy Levy Kent. I just wanted to add one additional  
16 point if I could turn to confidential Slide 7, at the top  
17 portion of that slide, you can see that we were trying to  
18 look at the data -- the pricing data in a number of  
19 different ways against the official import stats.

20           And if you look there, for the round tomato  
21 imports, you'll see that once again the census data, in  
22 terms of the quantities being imported from Mexico, do not  
23 correlate with the information that was being reported in  
24 the pricing data for rounds.

25           And in fact, somehow in both the sunset and in

1 the final, you ended up getting pricing data that only  
2 represented a share of the imports into the United States,  
3 and yet somehow the quantities in the pricing data that were  
4 reported as rounds were larger than what census data had  
5 recorded as being imported from Mexico.

6 So, again there were a number of anomalies that  
7 way that told us that there was something wrong. The  
8 pricing data somehow are still inconsistent with what we're  
9 seeing in the market, with what the witnesses are seeing  
10 with the census data, with what your purchasers are telling  
11 us. So, we just wanted to point out these anomalies.

12 COMMISSIONER KEARNS: Okay, that's very helpful,  
13 thank you. I guess going to another subject, and  
14 Commissioner Schmidtlein touched on this as well, but I  
15 thought Mr. Cannon, in your opening, if I heard you right,  
16 when you were referring to the statutory provision and so  
17 forth, that we should ignore the suspension agreement?

18 In other words, should I just be looking at --  
19 and I'm going to orient myself from pre-POI, but should I be  
20 looking at the POI as if there were no suspension agreement,  
21 and decide this case like I would any other in terms of  
22 underselling, in terms of market share loss and so forth?  
23 So, that was Slide 25.

24 COMMISSIONER KEARNS: No, I think what you said  
25 in your precedent is you have to take a count of the impact

1 of the suspension agreement. To cite a case in our brief,  
2 in which you discussed this -- exactly this provision, and  
3 how to use it.

4           But it's happened pretty rarely, and most  
5 suspension agreement cases, the continuation is asked right  
6 immediately after the suspension agreement is negotiated,  
7 and so you use your same database. There's not this -- this  
8 is the only case with this kind of huge two decade long gap  
9 in the middle. You know, statutorily, in terms of the  
10 relevance of 96, you have a preliminary decision. That's  
11 part of your record in this case.

12           And so, statutorily you -- that is evidence  
13 before you in the record 96, and we pointed to the last  
14 three years, because we recognized that's what you focus on,  
15 but in your record you have the starting point and you have  
16 the end point. And clearly that's the buying trend.

17           But when I talked about the price trend, the  
18 statutory language says, "Without regard to the effect of  
19 any agreement under Subsection B or C." So, without regard  
20 to the effect of the minimum price.

21           So, you have to consider the database without  
22 regard to the affected minimum price, which granted, in a  
23 commodity product, which is sold off of looking at USDA and  
24 negotiating with customers, that minimum price is probably  
25 going to become the market price. Certainly, when the

1 market is full of tomatoes. I didn't say it was easy. It's  
2 easier to find threat.

3 COMMISSIONER KEARNS: That much I knew, thank  
4 you. Actually, that was -- so then for threat what are we  
5 supposed to do? Are we supposed to consider, am I supposed  
6 to think the suspension agreement will be in place or not in  
7 place, because this is bit circular, right? Well, that  
8 depends on whether or not we go for negative.

9 MR. CANNON: I think for threat we consider  
10 without regard to the affected agreement. So, meaning the  
11 agreement will not be in place. So, it's harder looking  
12 backward to look at the record and assume there was no  
13 agreement. But it's easy for threat in the sense that that  
14 is exactly the analysis you do. The threat of injury, if  
15 there's no agreement in place.

16 So, what will happen -- conditions of free trade,  
17 just as you would in any other case. And you see from your  
18 own database, the Mexicans are -- their capacity is  
19 increasing. Domestic acreage is going down. They are now  
20 past the 50% point of the U.S. market, so who sets the price  
21 in a market in which more than half of the market is Mexican  
22 tomatoes?

23 COMMISSIONER KEARNS: Okay, thank you. Let's  
24 see, one other question. The greenhouse versus field issue.  
25 On page 4 of the Mexican grower's brief, they say that more

1 than 80% of Mexican tomatoes today are grown in protected  
2 agriculture environments.

3 So, as I'm looking at our pre-hearing report,  
4 that says that only about 27.6% of Mexican imports are  
5 greenhouse. So, obviously there's a big distinction between  
6 greenhouse and protected agricultural environment tomatoes.  
7 I know this is tunnels and I guess some of the netting that  
8 our witnesses put on.

9 Do we have any data on what percentage of U.S.  
10 tomatoes are protected agricultural environment tomatoes?  
11 And does it matter? Should we be looking at the difference  
12 between some netting over a tomato and no netting over a  
13 tomato?

14 MR. CANNON: Jim Cannon, so I'll let the  
15 witnesses answer this one.

16 MR. DIMARE: Yeah, Tony Dimare from California  
17 Florida. I'm not aware that there's any data showing the  
18 percentage of protected culture greenhouse product in the  
19 U.S. versus open field, not to my knowledge.

20 So, the question is there any protected culture  
21 greenhouse product grown in the U.S.? Yes, obviously he  
22 gave an example of a California operator. My company  
23 actually has 5 acres of protected culture in one of our  
24 Florida operations that we've been trialing over the last 7  
25 years.

1                   COMMISSIONER KEARNS: And that's not greenhouse,  
2 but it is otherwise protected, is that right?

3                   MR. DIMARE: Well, it's greenhouse. And that's  
4 the problem and again the confusion, I think, in the  
5 industry is there is no definition of what is greenhouse.  
6 So, the Mexicans have used that term as a marketing ploy or  
7 angle to promote their product as greenhouse whether it is  
8 shade cloth produced, plastic construction or glass.

9                   They all deem it as greenhouse because you know,  
10 the marketplace, you know, in some cases may want greenhouse  
11 product and even though it may be a low-tech shade cloth, or  
12 screen or high tunnels, they market it as greenhouse to try  
13 to get a premium and penetrate that market.

14                   But there is a greenhouse industry. In fact,  
15 you're finding out some of the Canadian producers moving  
16 operations into the U.S. in Michigan, Ohio, Virginia,  
17 Georgia.

18                   COMMISSIONER KEARNS: Yeah.

19                   MR. DIMARE: You're seeing more influx of  
20 Canadian producers coming into the U.S. growing protected  
21 culture, in a lot of cases, in most cases, in their  
22 situation are high-tech glass operations.

23                   COMMISSIONER KEARNS: Right, and I'm going to  
24 keep this short because my time's up, but so there's grown  
25 in U.S. greenhouse, but I guess at least in the case of the

1 Mexican side, what I'm seeing from the briefs is, you know,  
2 they claim 80% of their tomato potato -- their tomatoes are  
3 a protected agricultural environment, but our data show only  
4 27% is greenhouse.

5           So, obviously most of their protected tomatoes  
6 are not in greenhouses, and it sounds like that may or may  
7 not be true for the U.S. as well. We just don't have that  
8 data in our record.

9           MR. DIMARE: Yeah, and I would say most of the  
10 so-called greenhouse in the U.S. is of high-tech glass  
11 structure. A good percentage of the Mexican production is  
12 of low-tech shade cloth. You don't see a lot of glass  
13 houses in Mexico on a percentage basis.

14           COMMISSIONER KEARNS: Okay, that's very helpful,  
15 thank you.

16           COMMISSIONER SCHMIDTLEIN: Commissioner Stayin.

17           COMMISSIONER STAYIN: Thank you. Bringing  
18 your attention to page Roman II-11, Table II-6, the  
19 purchasers ranking factors used in making their purchase  
20 decisions by U.S. purchasers and by factor, and the results  
21 were that of the three factors, they said three factors,  
22 quality, price, cost, availability, supply and then all  
23 others. Of these firms, 19 firms said that quality was  
24 most important. Price cost was then with 15 firms, and  
25 availability of supply was also by 15 firms.

1                   So it appears that in terms of purchasing  
2 factors, quality is first and then price is equal with  
3 availability as the second and third or the equally basis  
4 for determining on price. So do you have any comment upon  
5 that? It appears that availability, reliability of supply  
6 and shelf life, these may be more important than price in  
7 the purchasing decisions. Would you like to comment on that  
8 please?

9                   MS. ALVES: Commissioner Stayin, Mary Jane  
10 Alves from Cassidy Levy Kent. I'll first point to your  
11 report, but then I'll also ask the witnesses to chime in as  
12 well. If I could refer you to Table II-11, you'll see that  
13 the quality of the products, according to purchasers, is  
14 comparable. If we could also put up Table II-9 from the  
15 report, that also showed that the products from the United  
16 States and Mexico are comparable in terms of other  
17 purchasing factors as well.

18                   Where they were different did come down to  
19 price, and as you pointed out in Table II-6, price is an  
20 important factor. So if they're both industries are  
21 providing quality products and the next most important  
22 factor is price, well they're competing on price. Let me  
23 let the witnesses talk as well.

24                   MR. SINGH: Priya Singh, a California grower.  
25 Our label, Oceanside Polar, is known throughout the U.S.

1 over the last 80 years as being a very high quality packed  
2 box. As far as our retail customers are concerned, whether  
3 they're dealing with brokers, wholesalers, repackers,  
4 availability for them to get the product really has never  
5 been anything that's discussed between us. The biggest  
6 discussion point has always revolved around price.

7 COMMISSIONER STAYIN: Anybody else?

8 MR. DiMARE: Tony DiMare, California-Florida.  
9 I would concur with what Mr. Singh said. You know, quality  
10 I think is certainly equally important with all buyers. We  
11 happen to be a vertically integrated company. We buy  
12 tomatoes. Some of the other panelists have parent companies  
13 that also are on the buy side aside of growing. So  
14 certainly quality.

15 But at the end of the day, if both products  
16 irregardless of what the product in origin is is of equal  
17 quality, the next determining factor and influence as a  
18 buyer is price, and at the end of the day in negotiations,  
19 that typically dictates and influences what a given buyer,  
20 in our case if we're a buy side and a repack distribution  
21 side, we're going to certainly go with the cheaper, lower  
22 price, whether it's in Mexico's case or Florida or  
23 California.

24 COMMISSIONER STAYIN: Thank you. Let's talk a  
25 bit about weather conditions. In the report on II-6, there

1 were comments about problems that drought, wildfire in  
2 California, dealing with delayed harvest because of storms  
3 or hurricanes in Florida, can you give me some idea on how  
4 weather has affected your business? And as well as -- it  
5 doesn't say much about weather in Mexico is a factor, but  
6 maybe you can elucidate that for me as well.

7 MR. DiMARE: Sure. Again, Tony DiMare,  
8 California-Florida. As I said earlier in some of my  
9 testimony and given the presentation on the demonstration,  
10 we're all influenced by weather. I don't care whether  
11 you're Mexico, Canada, Florida or California. In fact, last  
12 year mainly in Mexico was significantly impacted by three  
13 separate storms, tropical storms and hurricanes that delayed  
14 their season, caused quality issues.

15 This is not unlike an event in our industry.  
16 Two years ago Florida was impacted, particularly southwest  
17 Florida by Hurricane Irma that came up through the center of  
18 the state and devastated southwest Florida, Immokalee-Naples  
19 area in production and created about a six week gap in the  
20 marketplace. At the same time, Mexico was impacted by  
21 weather events that affected their crops as well. So this  
22 is not uncommon. We all as producers of highly perishable  
23 items are impacted by negative weather, whether it be  
24 freezes, whether it be heat events, rain events, i.e. you  
25 know. The old saying in our industry as growers, there's

1 always too much of something. It's too wet, it's too dry,  
2 it's too cold, it's too hot. Weather always influences, and  
3 as it does, it has impacts on markets and prices.

4 COMMISSIONER STAYIN: So this happens across  
5 the board with -- both U.S. and Mexico producers all have  
6 weather conditions they're having to deal with?

7 MR. DiMARE: Absolutely, and over the years, I  
8 mean you know, you hear the Mexicans talking about weather's  
9 impacting supply and the Florida crop because of freezes and  
10 hurricanes. Well again, they're not immune to weather  
11 either. They had three major storms last year that affected  
12 their crop. I've been in the business long enough to see  
13 that they've also had freezes in the past, significant rain  
14 events other than storms that have impacted their crops as  
15 well.

16 We are all equally impacted by negative  
17 weather events at certain times of year. If you're in this  
18 business long enough like I've been in, almost 40 years,  
19 you're going to have weather events that affect not only  
20 your own production but other production across the globe.  
21 That's agriculture.

22 COMMISSIONER STAYIN: That's --

23 MR. SULLIVAN: Mike Sullivan.

24 COMMISSIONER STAYIN: And I'm -- yes, go  
25 ahead.

1                   MR. SULLIVAN: Yeah, California-Florida. I  
2 want to add to that a couple of things. One is being one of  
3 the ones that was severely impacted in southwest Florida by  
4 Irma, and I have a Puerto Rican operation that was  
5 devastated by Maria, and you know the issues that Puerto  
6 Rico has had. But that also -- not only does it eliminate a  
7 lot of volume, but weather events, not even storms but hot  
8 weather, cold, whatever, can affect the quality of the  
9 tomatoes and you may not see it even on the surface.

10                   But it can create puff and that sort of thing,  
11 so when you cut the tomato it looks like a pepper inside.  
12 It doesn't have any gel or something, and that happens a lot  
13 with tomatoes from Mexico.

14                   COMMISSIONER STAYIN: Thank you.

15                   MR. SINGH: Priya, California grower.

16                   COMMISSIONER STAYIN: Go ahead.

17                   MR. SINGH: Being from San Diego, we have some  
18 of the best weather for growing that's there. Was there a  
19 drought in California? Absolutely. Did we see it affect us  
20 as far as water and issues for our fields, no. Mexico will  
21 run plastic houses to protect them from rain. They'll run  
22 shade glass to protect them from heat. They'll run net  
23 houses to protect them from pests and disease. The same  
24 circumstances with weather that they deal with, we will deal  
25 with on this particular side as well.

1                   COMMISSIONER STAYIN: Okay, thank you. I'd  
2 like to talk about channels of distribution. On page II,  
3 Roman II-2, Table II-1, there is a reference to U.S.  
4 producers sell to packers or repackers, distributors,  
5 brokers, supermarket grocery chains, food service providers.  
6 The same questions were asked of Mexico. Packers and  
7 repackers, what is meant by that?

8                   MR. DiMARE: Again Tony DiMare,  
9 California-Florida. We happen to be a company that's  
10 vertically integrated. We not only are growers and packers,  
11 but we also have repacking and distribution operations as  
12 part of our company. Typically in the industry and the  
13 standard is grower-shippers sell a lot of their product,  
14 both Florida and Mexico by the way, to repackers.

15                   As I explained in the demonstration, the  
16 purpose of that repacker is to sort given product into  
17 various pack types for either retail or food service  
18 business, to satisfy that demand in the marketplace. So  
19 again, as part of the distribution that you eluded to,  
20 repackers are a major component of who we sell to as an  
21 industry, both U.S. and Mexico, as well as the wholesale  
22 terminal markets we also rely on.

23                   Typically in the wholesale terminal markets,  
24 they want a more finished product because they don't have  
25 the equipment or machinery set up to repack and do these

1 specialty packs. So they typically on the terminal market  
2 end selling product in a volume-filled package, you're  
3 seeing these 25 pound bulk boxes. That's typically the  
4 product of sale on the terminal market retail end.

5 COMMISSIONER STAYIN: So that's what is meant  
6 by distributors, brokers and handlers and in that chart,  
7 when you say "terminal," that's different than the  
8 repackers?

9 MR. DiMARE: It is different and brokers are  
10 even different than that. Brokers are typically a third  
11 party. It could be representing the sale of the buyer or in  
12 some cases representing both parties, the shipper and the  
13 buyer in some cases. But again, that's a separate channel  
14 or method of distribution in the industry.

15 COMMISSIONER STAYIN: So there's the packers  
16 and repackers, sell right to them or distributors, brokers  
17 or handlers, and then food service providers. Are there  
18 sales directly to them, or do they go through the repackers?  
19 I'm trying to understand where the direct sale is? On my  
20 chart it shows packer or repackers or distributors, brokers  
21 or supermarkets, you know.

22 MR. DiMARE: Yeah. So there's two parts of  
23 the business. From the packing house and we're selling to  
24 primarily repackers and packers, wholesale terminal market  
25 operators. Independent from that, repackers and again we

1 happen to be in the repack/distribution business as a  
2 company, but there are a lot of major repack/distributors,  
3 independent ones, that don't have growing relationships. At  
4 the repack/distribution level that are selling direct to  
5 food service, i.e. Cisco, McDonald's, Burger King, Wendy's,  
6 and they're also selling to retail customers such as  
7 Walmart or Kroger or Whole Foods.

8                   That's the difference between the  
9 grower/packer sales and the repack/distributor sales.  
10 Because we as grower/packers don't have the ability to  
11 repack, we don't have the equipment to repack necessarily  
12 into specialty packs, we have to rely on that repacker,  
13 whose customer base typically is made up of food service  
14 operators, both broadliners such as Cisco or restaurant  
15 chains and retail customers. So that's the difference in  
16 the breakdown typically of a grower/packer's book of  
17 business and a repacker/distributor's book of business.

18                   COMMISSIONER STAYIN: Okay.

19                   MR. SULLIVAN: Mike Sullivan,  
20 California-Florida. I'll add to that that even if we pack  
21 something in a retail ready package like an RPC, a  
22 returnable plastic container, that a lot of times will get  
23 sold through a repacker. Although they are not touching it  
24 as far as repacking, they do have the logistics for  
25 distribution.

1                   So those repackers, in addition to tomatoes,  
2 might handle a lot of other commodities. So when they  
3 distribute to food service venues or to retailers, they'll  
4 send tomatoes and peppers and cucumbers and whatever else  
5 they might have. So a lot of cases we're selling through  
6 the repacker to those retailers to those food service  
7 venues.

8                   The contract you referred to, we as growers  
9 know where those tomatoes are going, but the distribution  
10 channel takes them through a repacker like Walmart may know  
11 they're getting a Gargiulo tomato, but they know they're  
12 getting it through a repacker somewhere, but the contract  
13 flows down to us.

14                   COMMISSIONER STAYIN: So they're buying it  
15 from the repacker?

16                   MR. SULLIVAN: Yes.

17                   COMMISSIONER STAYIN: You sell it the  
18 repacker, they're buying it from them?

19                   MR. SULLIVAN: Yes sir.       COMMISSIONER  
20 STAYIN: Okay, thank you.

21                   MR. SINGH: Priya Singh, California grower.

22                   COMMISSIONER STAYIN: Excuse me, go ahead.

23                   MR. SINGH: The majority of my sales are  
24 direct sales into retail. I am going into Albertsons,  
25 Safeways, Krogers, Walmarts, Costcos, just about every

1 single one of them. However, I do have specific customers  
2 farther north that will use a broker. They're already  
3 locked in. They're already doing business with them. That  
4 broker will come purchase from me and deliver to that  
5 Albertsons in northern D.C., northern California/D.C.

6 I also have a repacker that will purchase  
7 product from us, that will deliver to food service. They  
8 don't need to repack it. They don't need to do anything,  
9 but that business is already set in stone for them. They'll  
10 purchase it from me and it will deliver to that customer.

11 COMMISSIONER STAYIN: Okay, thank you all very  
12 much.

13 MR. LEITZ: Fred Leitz from Michigan. Adding  
14 onto that, I do load loads directly onto trucks going to a  
15 major chain. But I don't handle the sale. I let my sales  
16 agent/broker handle the sales and the transportation, just  
17 to keep it -- we don't have time to do everything. So a lot  
18 of that is because we don't have time to do all the  
19 distribution and stuff. Let them take care of the billing,  
20 receiving payment and paying me.

21 COMMISSIONER STAYIN: Right. Thank you very  
22 much. My time is up.

23 COMMISSIONER SCHMIDTLEIN: Commissioner  
24 Karpel.

25 COMMISSIONER KARPEL: Okay, so this relates to

1 some of the questions you were discussing with Commissioner  
2 Kearns and Commissioner Schmidtlein. And so, I'm looking at  
3 some of the non-proprietary pricing data in Section V of the  
4 staff report and comparing that to reference prices in the  
5 2013 and the 2019 suspension agreements, which are so  
6 summarized in the staff report.

7           It appears to me, and correct me if I'm wrong,  
8 but that there are U.S. producers selling tomatoes below the  
9 reference price in many instances. Do you agree that's  
10 happening and if so, why?

11           MR. SINGH: In my experience, year-after-year,  
12 looking at our sales, I have never experienced a customer of  
13 mine tell me that they're purchasing -- that they are  
14 willing to purchase -- they're getting my product cheaper  
15 basically than Mexico. I've never experienced them at a  
16 higher price than I've been at.

17           MR. CANNON: Any other witnesses want to comment  
18 on this?

19           So, I'll venture a comment or a couple of  
20 observations. Your coverage is less than what you had even  
21 in March and is poor in terms of your pricing data, so  
22 you're not necessarily seeing the Mexican prices and the  
23 extent to which they were below reference price. We saw  
24 from a public slide, even census data, to show Mexican  
25 prices below the reference price. Your database also

1 doesn't take into account re-sales by brokers. So, if a  
2 broker takes a load and is the first customer and then  
3 re-sells it, he can sell at any price. And so in the market  
4 there's a volume of tomatoes that have been handled,  
5 re-packed, or not handled at all, just flipped by a broker,  
6 which are sold at lower price and the domestic producers  
7 have to compete with that. And so, they are, in some cases,  
8 forced to reduce their prices below the reference price  
9 because they're competing with the sheer volume of Mexican  
10 tomatoes in the U.S. market, which are -- they're perishable  
11 and they've traded hands.

12               So, they might've moved from that initial stage,  
13 that first sale in which the suspension agreement applies,  
14 to a downstream sale where it no longer applies and the  
15 product's being sold more cheaply. And it's a perishable  
16 product. It has to move quickly, so that volume will  
17 depress U.S. prices. And if you eliminate the suspension  
18 agreement and there is no relief, then what will happen is  
19 this distribution change will flatten out like you see in  
20 other cases.

21               In other cases you see less distribution, more  
22 direct shipments. It's a trend in business, right? There's  
23 more direct shipments to Walmart. They don't usually buy  
24 through re-packers or distributors or brokers. You see more  
25 here, not less, in part, because of the suspension

1 agreement, so it has operated for 20 years and distorted the  
2 market so that the first purchasers are buying at the  
3 referenced price, but below that, they are not. The sheer  
4 volume of Mexican imports is depressing U.S. prices and that  
5 is what will happen if the suspension agreement is  
6 terminated or if we don't have a dumping duty Order to take  
7 its place.

8 MR. SULLIVAN: To follow up on that, that's the  
9 very example I cited in my opening of a case even earlier  
10 this year where downstream sales is generally alluded to.  
11 We're at less than the reference price and then we're forced  
12 to match it because we got a perishable that has to move or  
13 it's going to decay in my building. So, in order to get it  
14 to move, I have to match that lower price and that's why you  
15 will see those prices at below the reference price.

16 MR. LEITZ: We call that burying a load  
17 sometimes. I mean you don't like to take that type of price  
18 and sometimes it'll go to another person that buys it and  
19 they hold on for it too long and they have to bury that  
20 load. I mean sell it under price just to get rid of it.  
21 That way they don't have to dump it.

22 COMMISSIONER KARPEL: Just a follow up on that,  
23 in terms of a broker may be purchasing product and then  
24 having to sell it quickly because it's perishable and then  
25 selling it at a lesser price than that broker bought it for,

1 how often can that be going on without those brokers all  
2 going out of business? I mean at some point -- if it  
3 happening, it seems like it couldn't be a persistent issue  
4 without those brokers losing their business. Can you  
5 respond to that?

6 MR. CANNON: Do the witnesses have any comment  
7 on that? No? Okay.

8 So, a reason that the suspension agreement has  
9 not worked has been the lack of any discipline on the  
10 overall tomato market and the volume of tomatoes coming into  
11 the U.S., which has obviously caused volume effects,  
12 displaced domestic shipments, and driven prices down from  
13 their level.

14 Can individual brokers long survive if a  
15 majority of their sales are at low prices? It depends on  
16 their basis of doing business. If they're consignment  
17 brokers taking a commission, then they move the product at  
18 whatever they can get because they get a percentage of the  
19 price, right?

20 If they actually own and re-sell the product,  
21 break the chain and break the suspension agreement, if you  
22 look at the trend in the monthly prices you see that during  
23 the summer months -- during particular months they're very  
24 high prices, so they need to be a year-round seller. I  
25 think our price chart with USDA, so maybe it was Number 34

1 -- 33.

2                   See the peaks certain quarters prices are very  
3 large and so by steady staying in the market you make money  
4 one day. You lose money another day. You evaluate yourself  
5 on your business over the year -- and there are peaks in the  
6 market. There are also -- these brokers are selling all  
7 kinds of vegetables -- avocados, peppers. Vegetables which  
8 are not -- which are declining also in the U.S. And so, if  
9 you ask me about an individual business model, then that's  
10 -- I think on our record that's about the best we can do.

11                   MR. SULLIVAN: I will add to that. The previous  
12 suspension agreements did not include border inspections and  
13 that was one area that could be abused in previous  
14 suspension agreements, but now we got that in because it  
15 left a loophole where you could send tomatoes in of lower  
16 quality, get them inspected in the U.S. and legally sell  
17 them below the reference price and you knew they were bad  
18 coming in, and that happened a lot. And so under this new  
19 agreement, there are provisions against that happening, in  
20 addition to having border inspections, which should stop  
21 that low quality from crossing in.

22                   MR. LEITZ: And in my testimony, I stated where  
23 I had some buyers in Chicago would get a load of Mexican  
24 tomatoes and were told just to bill us for two-thirds or  
25 three-quarters and just say the rest were substandard and

1 this new suspension agreement will stop that kind of stuff.

2 MR. CANNON: That was an error of me, and thank  
3 you for reminding me, Mike and Fred. There is a change from  
4 the 2013 suspension agreement until the new 2019 suspension  
5 agreement to what's called Appendix D. And so, the  
6 adjustments that can be made to the price to an imported  
7 price have been limited and they are no longer really  
8 allowed any more to go below the reference price. But under  
9 the old agreement, they were allowed to make adjustments,  
10 which not only could they go below the reference price,  
11 legally, they could go actually go to a negative number.  
12 And indeed, we gave some evidence of our producers shipping  
13 Mexican imports and giving credit back to the customer.  
14 Now, why doesn't that show up in your pricing data? For  
15 that, I'm sort of at a loss, but that is not what is being  
16 reported to you and yet that is the reality under the  
17 suspension agreement and in the market.

18 COMMISSIONER KARPEL: Okay. Let's see how to  
19 phrase this argument. I guess I'm -- I've heard what you  
20 said back to an earlier round of comments I had about  
21 transparency in pricing in the market. USDA is publishing,  
22 you're engaging with purchasers of all sorts, and they're  
23 engaging with buyers -- producers of all sorts or  
24 distributors of all sorts. Given you have that, given what  
25 we see in terms of the financial data of the industry;

1 particularly, looking at the cost of goods sold to the net  
2 sales ratio, and then I'm looking again at the pricing data  
3 we have in Section V and I guess I'm sort of scratching my  
4 head why? Given the transparency about prices -- why what  
5 we know about the cost to net sales ratio, why we are seeing  
6 U.S. prices that we're seeing in the pricing data, and  
7 seeing the overselling we're seeing? Something doesn't seem  
8 to add up and I think Mr. Cannon you're alluding to that.  
9 There's something wrong with the dataset. But I'm wondering  
10 if we take the dataset that we have is there something we  
11 can infer that if we have transparency about prices, if we  
12 have a need to you know increase price to cover cost and we  
13 have pricing data which shows us the U.S. price is still in  
14 many cases lower than the import price, what'd we make of  
15 that? Are there any inferences we should be drawing?

16 MR. CANNON: You're combining several things.  
17 Indeed, there is transparency. They all learn about market  
18 prices. They cited USDA. They also cited dealing directly  
19 daily with customers. These are long, well-established  
20 customers and they learn what the prices are. You can see  
21 in the pricing data that even in the volumes of open field  
22 in which you're finding overselling -- well, first, the  
23 prices are moving largely together, overselling or not.  
24 And you have underselling on half of the prices, so you have  
25 a mixed record of underselling. In a commodity that's not

1 surprising. What is surprising is that in Romas and rounds  
2 you are seeing more overselling than you would expect;  
3 particularly, given that's the heartland of the market.  
4 It's 85 percent of the market.

5           Some of that is the noise in the data from  
6 what's called a greenhouse or not. Okay. Some of that is  
7 the small sample size we have of importers. Okay. The fact  
8 that you don't see underselling is actually tempered a  
9 little bit by what happened in the last few months. After  
10 reporting to you in their sunset questionnaires at the  
11 sunset case in March, which your period of review ended in  
12 September, we actually see a little bit more underselling in  
13 the months after that when they sent in some product.

14           What that tells you, at least on your dataset on  
15 the most recent, latest data, you're seeing some  
16 underselling, a sign of threat. What you are hearing from  
17 the witnesses is that the Mexican prices are lower than  
18 these prices. You hear it from the purchasers in your  
19 questionnaire. You see it in the tables of  
20 comprehensibility and judge it in a large volume commodity  
21 market it is only rational that the prices are going to tend  
22 to the same level and that is what you are hearing from the  
23 witnesses.

24           So, I think you can absolutely infer that there  
25 is some level of problem with your pricing data in this case

1 and you don't need pricing data in this case. And on top of  
2 that, you don't need pricing data in any case, frankly. You  
3 can make an affirmative determination on volume effects.  
4 The statute doesn't require everything. You see the impact  
5 on the profitability of the industry in that they are  
6 persistently losing money. You see the long list of growers  
7 going out of business, right? So, the statute on top of  
8 that tells you take care with the data that were affected  
9 by the suspension agreement.

10                   And which data were those? It was the pricing  
11 data that were affected by that reference price. So, short  
12 of saying that people are lying about their prices, you can  
13 infer that. You can infer that what is being reported to  
14 you is the first-level price. There were other levels of  
15 prices below that. There's a volume of perishable product  
16 in the market that has to move and it's being moved at those  
17 low prices. So, yes, you can infer that -- long winded,  
18 sorry.

19                   COMMISSIONER KARPEL: I guess my question was,  
20 as I'm looking at this pricing data, for example, in Table  
21 V-5. Why aren't U.S. producers charging more, if they  
22 could, because apparently, according to this data, their  
23 priced lower than the Mexican product? So, couldn't they  
24 raise it some to meet the Mexican product? And then, I'm  
25 sure your answer is, no, we can't do that because we're

1 having a downward pricing pressure from the Mexican product  
2 and there would be a large incentive for the domestic  
3 producers to increase their price, right, because they  
4 aren't meeting their costs. They aren't covering their  
5 costs with what they're selling. So, I guess I was looking  
6 at that. Like my question is why are they selling at this  
7 price? I hear your concerns about the dataset, but that was  
8 really at the heart of my question.

9 MR. SULLIVAN: If we could sell them for more,  
10 we would. The fact of the matter is we're matching the  
11 prices and trying to set the price that people will match  
12 with us that's in the market. And as we've looked up here,  
13 a tomato is a tomato and whatever that market is out there  
14 that's the maximum we're going to get. Believe me, we would  
15 love to be able to charge more, but when you're selling all  
16 into the same market to the same receivers, to the same  
17 retailers, the number that's out there that you have to  
18 match is what you're forced into.

19 MR. CANNON: I mean, we will point out that the  
20 pricing data in the staff report don't include the largest  
21 U.S. producer, Lipman, which when you add it in, it's in Tab  
22 4 to our brief, you do get some more instances of  
23 underselling, particularly in the late periods most  
24 recently.

25 COMMISSIONER SCHMIDTLEIN: All right, thank you.

1 Okay. So with regard to this chart, can you -- you can do  
2 this in the post-hearing if you want, but -- confirm to us  
3 the parameters that you used to compile this, right?  
4 Because we've looked at the USDA terminal website, and  
5 obviously you have to make a few choices in terms of coming  
6 up with U.S. round price. So if you could do that so we  
7 could reconstruct the --

8 MR. CANNON: Yes, Commissioner Schmidtlein, we'll  
9 do that.

10 COMMISSIONER SCHMIDTLEIN: Okay. And then, for  
11 me at least, I think it would be helpful to map onto our  
12 pricing data what was going on with U.S. prices -- what  
13 reference price, I should say, in comparison to the prices  
14 that have been reported --

15 MR. CANNON: Yeah, so in other words, adding  
16 another column into the tables that would show  
17 reference-wise, is that --

18 COMMISSIONER SCHMIDTLEIN: Yeah, so we can see  
19 where the U.S. prices, for me, like, where the U.S. price is  
20 compared to where the reference price.

21 MR. CANNON: Now, we can do that and we will.  
22 That will be the 2013 agreement, not the 2019 agreement.

23 COMMISSIONER SCHMIDTLEIN: Right.

24 MR. CANNON: Which under the terms of that does  
25 not allow for prices to actually go below the reference

1 price, as was permitted under the old agreement. And --

2 COMMISSIONER SCHMIDTLEIN: Doesn't allow U.S.  
3 prices to go below the reference price?

4 MR. CANNON: It doesn't allow Mexican prices to  
5 go below the reference price.

6 COMMISSIONER SCHMIDTLEIN: Right. But what I'm  
7 curious is, where were U.S. prices in reference to the  
8 reference price? During the POI?

9 MR. CANNON: All right. And you want us to map  
10 that against your database or against USDA?

11 COMMISSIONER SCHMIDTLEIN: Well, you've got the  
12 reference price on here for the USDA, right?

13 MR. CANNON: Yes. It's on this chart.

14 COMMISSIONER SCHMIDTLEIN: That's right. So for  
15 the pricing product.

16 MR. CANNON: Okay.

17 COMMISSIONER SCHMIDTLEIN: So Figures 3 and 4,  
18 which is what I think was compiled from the questionnaire  
19 data, right?

20 MR. CANNON: Yeah.

21 COMMISSIONER SCHMIDTLEIN: Which is where the  
22 pricing products come from. I think that would be helpful.  
23 I mean I know you see problems with the pricing products,  
24 but I wonder if you have any insight into, I guess, not  
25 inconsistency, but something that looks odd to me, when you

1 look at Products 5 and 6, which are the cherry/grape  
2 tomatoes, 5 is open-field and adaptive environment, and 6 is  
3 greenhouse and controlled environment. And so the same  
4 tomatoes, right, just different method of growing?

5           And in one instance in Product 6, U.S. price goes  
6 up at the end? At the end of the full three years, and then  
7 including '19. And in Product 5, U.S. price goes down.  
8 Again, both cherry/grape tomatoes. So that's my first  
9 question. How is it that the U.S. price went up fairly  
10 substantially in Product 6 and the U.S. price for  
11 cherry/grape open-field adaptive went down. Do you have any  
12 insight into that? Why would they? They're competing with  
13 each other.

14           MR. CANNON: So you're looking at Tables V-7 and  
15 V-8?

16           COMMISSIONER SCHMIDTLEIN: Yes.

17           MR. CANNON: And you're looking at the U.S. price  
18 and, I'm sorry, 5 is grape?

19           COMMISSIONER SCHMIDTLEIN: Open-field adaptive  
20 environment for cherry/grape.

21           MR. CANNON: Oh.

22           COMMISSIONER SCHMIDTLEIN: And 6 is greenhouse,  
23 controlled environment for cherry/grape, right? So you all  
24 have said, tomatoes-to-tomatoes, they're all competing. No  
25 matter how they're grown.

1           MR. CANNON: And you can see from the quantities  
2 that typically, you're seeing more greenhouse quantities,  
3 that product, March through August, and lower quantities in  
4 other months. There's a kind of a high quantity there, that  
5 last three months. I will have to ask Chad, who couldn't be  
6 here, the greenhouse grower about that. But there's -- I  
7 see the anomaly that you're talking about --

8           COMMISSIONER SCHMIDTLEIN: Yeah, right, and then  
9 how do they compete with each other? And then my second  
10 question is, given the difference in price is just, you  
11 know, both between the U.S. price that they're getting for  
12 greenhouse controlled environment and the Mexican price for  
13 that, versus the Mexican price for open-field adaptive --  
14 how do they -- you know, these are competing. The prices  
15 are so different. And there's a fair quantity coming in  
16 from Mexico under the greenhouse controlled environment,  
17 right?

18           MR. CANNON: Not this particular --

19           COMMISSIONER SCHMIDTLEIN: So they're all  
20 competing --

21           MR. CANNON: -- variety of grape, this is  
22 actually pretty small quantities. I mean, look at the  
23 quantities here compared to --

24           COMMISSIONER SCHMIDTLEIN: But relative to the  
25 method of growing. So if you look at the Mexican quantities

1 coming in under greenhouse controlled environment, and you  
2 look at what's coming in under open-field, I mean it's  
3 shifted somewhat, but they're not, they're not that far off.  
4 I mean there's a couple of months where, yeah, one is lower  
5 than the other or so forth. But substantial amount coming  
6 in from Mexico, again, in this category, right? I know it's  
7 a small category, but why is our pricing data showing such a  
8 difference in price, when they compete with each other? I  
9 just wonder if you have any insight into that.

10 MR. CANNON: We will answer that in our  
11 post-hearing brief, Commissioner.

12 COMMISSIONER SCHMIDTLEIN: Okay. All right.

13 MR. CANNON: No, I don't have any insight into  
14 that. And I don't --

15 COMMISSIONER SCHMIDTLEIN: Okay.

16 MR. CANNON: -- know that anyone here is a  
17 greenhouse grower, so --

18 COMMISSIONER SCHMIDTLEIN: Okay. I know they  
19 don't have access to the confidential information, so -- but  
20 that just -- again, and I guess this goes to the question  
21 that Commissioner Karpel was asking about, in some ways,  
22 which is, you know, price transmission and price  
23 transparency, right? And I'm not sure if this has been  
24 asked in terms of, do the prices of the different types of  
25 tomatoes, like the price of round affect the price of

1 cherry/grape? I assume the price of round affects the price  
2 of plum Roma and vice versa? I see you shaking your heads  
3 --

4 MR. CANNON: I believe -- this is Jim Cannon -- I  
5 believe Mr. DiMare testified to that in his --

6 COMMISSIONER SCHMIDTLEIN: Right.

7 MR. CANNON: -- already in his demonstration,  
8 right, Tony?

9 COMMISSIONER SCHMIDTLEIN: Yeah.

10 MR. DIMARE: Yes, that is correct. I mean one  
11 impacts the other from time to time equally.

12 COMMISSIONER SCHMIDTLEIN: Okay. And would the  
13 price of those tomatoes affect the price of cherry/grape?

14 MR. DIMARE: Typically not in cherry/grape.  
15 Round type and Roma type kind of more interchangeable when  
16 another versus grape or cherry type. And just one point as  
17 it relates to grape and cherry volume. Cherry production,  
18 both U.S. and Mexico, is a very small percentage. In fact,  
19 the smallest percentage of the category. In other words,  
20 grape tomato type is a much larger percentage than cherry  
21 type overall.

22 COMMISSIONER SCHMIDTLEIN: Okay.

23 MR. CANNON: Jim Cannon. So just two other  
24 points. Slide 2, these are the imports, you can see, but  
25 this is directional. Your last two categories, grape is

1 5.2%. Cherry is less than a percent of the market, right?  
2 85% or more is round and Romas. Now, the other point is,  
3 looking at your pricing data, the reason we're having to  
4 talk about it is it's in brackets, all of it, right? So  
5 what does that say? It means that maybe three or less  
6 people responded. So I --

7 COMMISSIONER SCHMIDTLEIN: Yeah, for the  
8 controlled environment, it's bracketed. The open-field,  
9 it's not.

10 MR. CANNON: Correct.

11 COMMISSIONER SCHMIDTLEIN: But I'm asking a  
12 question about the relative comparison, so, okay. Okay.  
13 All right. This was discussed a little bit. I'm sorry if I  
14 didn't catch the answer, but we have these categories of  
15 distributors and packers/repackers. Do we know who those  
16 people are selling to? So how much -- is there any way for  
17 us to know how much product from distributors and packers  
18 and repackers are going to food service versus retail versus  
19 grocery store--I guess grocery store is retail--or, you  
20 know, other end users?

21 MR. DIMARE: Commissioner, Tony DiMare,  
22 California, Florida. It depends on the given companies book  
23 a business. But typically, a repacker distributors' makeup  
24 is both food service, i.e., as I said earlier, could be a  
25 Cisco, could be a Borden Foods, uh, retail, could be a

1 Walmart, Kroger, and again, it depends on the individual  
2 companies book a business. Could be 50-50. Some cases,  
3 maybe it might be 60-40, food service to retail. So all  
4 depends on the individual companies book a business.

5 MR. CANNON: Jim Cannon. So in your staff  
6 report, if you're talking about Table 2-1, you don't have  
7 responses from a robust sample of distributors. You have  
8 some purchaser responses, there were quite a few, but you  
9 don't have repackers, for example, there wasn't a  
10 questionnaire. And so unless they're an integrated packer  
11 such as Tony, you don't have data. Nor do you have a way to  
12 tell if a broker, for example, then resold it to a repacker.  
13 So the Mexican imports, for example, may enter through  
14 distributors or brokers, but actually end up in a repacker.

15 COMMISSIONER SCHMIDTLEIN: Okay. So in your pink  
16 Exhibit 5, where you break out the market share and the  
17 different channels, that's based on questionnaires?

18 MR. CANNON: Yes. We took the -- I think --

19 COMMISSIONER SCHMIDTLEIN: It says questionnaire  
20 responses exhibits --

21 MR. CANNON: -- Table C-1 and we added Lipman.

22 COMMISSIONER SCHMIDTLEIN: Okay.

23 MS. ALVES: We did and --

24 COMMISSIONER SCHMIDTLEIN: Okay.

25 MS. ALVES: -- and we were focusing on the

1 relative shares. We took out the repackers and the  
2 distributors and instead we focused on the relative shares  
3 between the United States and Mexico in the other two  
4 channels of distribution, for food service and then for  
5 retail grocery. And so those are the relative shares.

6 COMMISSIONER SCHMIDTLEIN: Okay.

7 MS. ALVES: Given that the distributors and the  
8 repackers are selling to both of those segments --

9 COMMISSIONER SCHMIDTLEIN: Right.

10 MS. ALVES: -- we were looking at, what would the  
11 relative shares be.

12 COMMISSIONER SCHMIDTLEIN: So distributors and  
13 repackers typically buy just from either U.S. producer, U.S.  
14 grower or Mexican, or do they buy from both?

15 MS. ALVES: I'll let the witnesses respond, but  
16 yes, they buy from both.

17 COMMISSIONER SCHMIDTLEIN: Yeah.

18 MR. SULLIVAN: Mike Sullivan, Gargiulo. Yes,  
19 they buy from both.

20 COMMISSIONER SCHMIDTLEIN: Okay.

21 MR. CANNON: I think in March we had Aris as a  
22 witness, who was a repacker, and he testified to that, that  
23 he bought both Mexican and U.S.

24 MR. SCHADLER: Yeah, and just a point of  
25 clarification--Michael Schadler, Florida Tomato

1 Exchange--so, you know, the samples that you see here before  
2 you, we tried to exemplify. And in fact, we sourced all of  
3 these samples, except for the tomatoes on the vine, through  
4 Aris Pappas, who's a local repacker.

5           And so the point we wanted to make here is that  
6 when you're a repacker, you're sourcing tomatoes from  
7 wherever you can get them, you know, that meet your  
8 standards and that meet the best price you can get, and then  
9 you're delivering to your customer. So, for example, Mr.  
10 Pappas would be buying tomatoes from American growers and  
11 from Mexican growers, and you can see here, he's got these  
12 bulk boxes, which are twenty-five pound boxes. That's often  
13 the type of boxes he will buy and then he will take them and  
14 repack them into a more retail-ready or consumer pack.

15           So for instance, when you see these bagged  
16 tomatoes in front of the boxes--I can't see them, but you  
17 can see them--he made the point. He's got his same brand of  
18 Roma tomatoes in that Patricia label. Some of them are  
19 Mexican tomatoes, some of them are American tomatoes, but  
20 it's the exact same product. And you have some stores that  
21 are just saying, "Give me the product, I need it. It does  
22 not matter what the origin is."

23           And in the same scenario, we have these flats  
24 here, where you have the -- and that's more of a  
25 retail-ready pack, that retailers will go and they'll put

1 them directly on the shelf in these Panta Paks, the  
2 fifteen-pounders. And the California tomatoes were  
3 harvested as mature, green tomatoes and the Mexican  
4 tomatoes were vine-ripes, and the particular retailer he  
5 sells this product to, or retailers, just say, "Give me that  
6 product." They don't care how he sources it, they want the  
7 product.

8           There might be retailers that say, "I only want a  
9 vine-ripe," other retailers say, or other customers might  
10 say, "I prefer a mature green," for various reasons. And  
11 some will just say, "Give me the product, it doesn't matter  
12 to me."

13           COMMISSIONER SCHMIDTLEIN: Okay, all right, thank  
14 you. My time is up for now. Commissioner Kearns.

15           COMMISSIONER KEARNS: Thank you. Just wanted to  
16 talk a little bit more about the reference price. So I  
17 think, as you're hearing from us, I think there's a tendency  
18 to assume that prices above the reference price must be  
19 non-injurious. And I think, to some extent, you all have  
20 already talked about how, well, when there's circumvention  
21 or violation of the suspension agreement, that assumption  
22 obviously wouldn't hold, and you said that with respect  
23 to--or in answering some of the questions that Commissioner  
24 Karpel had--and I might come back to that.

25           But I also wanted to talk about whether it's

1 right to assume that prices for subject imports above the  
2 reference price are non-injurious, apart from the question  
3 of, you know, circumventing agreement.

4           You all have suggested that prices are very  
5 volatile generally, because of weather and so forth, which I  
6 think is then kind of inconsistent with the notion of the  
7 reference price system where, you know, for the past twenty  
8 years, more or less, the price is supposed to be set here  
9 and I think it adjusts for seasons a little bit, but  
10 generally, it's pretty much set to be the same thing year  
11 after year.

12           So I guess, it seems like those two things are  
13 inconsistent. You may have situations where, in a free  
14 market, without dumping and without a suspension agreement,  
15 you would expect the price of the Mexican product and the  
16 price of the U.S. product to go up, but maybe it didn't go  
17 up for Mexico. So, for example, if there's a big drought in  
18 Mexico, normally, that would mean there's less supply of  
19 Mexican tomatoes and price would go up well above the  
20 reference price.

21           But we may not be seeing that. We may see them  
22 saying, "Well, look, I'm just gonna stick to the reference  
23 price," if that makes sense. So I guess my question is, I  
24 mean -- first question is, is that right? Is that one way  
25 to look at why we shouldn't just trust that the reference

1 price means there's non-injurious importation here? Is it  
2 because there should be situations where the price should be  
3 going up above the reference price and it isn't?

4 MR. DiMARE: Tony DiMare, California-Florida. A  
5 couple of things. A lot of the volume from Mexico is  
6 contracted. And a lot of the contracts have been based off  
7 the reference price of the \$8.30 on a 25-pounder, and some  
8 case at \$8.95 or \$9, all predicated off that reference  
9 price.

10 And you take the current situation today, right  
11 now, as I alluded to earlier, you have a very high tomato  
12 market in both Mexico and the United States, because the  
13 shortage of supply and gaps with the areas transitioning in  
14 production.

15 The tomato market today is anywhere from \$16 to  
16 \$20. Depending on size of Romas, it's very comparable. Yet  
17 there are a lot of contracts out of Mexico right now at \$9  
18 prices. Those grower's shippers that are committed to those  
19 contracts are bound by that contract.

20 I know I wouldn't want to be stuck and bound by a  
21 \$9 contract knowing that you have an opportunity in the  
22 marketplace today to get \$16 or \$20. And that's part of  
23 what happened.

24 Again, the reference price only comes into play  
25 when you get to the reference price. You're nowhere near it

1 now, so the gaming, the circumvention, the second and third  
2 sales are not, you know, are not going on where they're less  
3 than the reference price.

4           It's only when you get to that level that gaming  
5 is going on. And I look at it this way: You look at the  
6 peak volume in Mexico, you know, January on, January through  
7 March, the peak numbers, and you get down to that reference  
8 price. And let's say, for example, on Roma tomatoes you've  
9 got 100 loads crossing a day, reported as USDA Tomato Facts  
10 Report. You have the reference price on USDA Tomato Facts  
11 Report at \$8.30 a box on 25-pound Roma.

12           Next week, all of a sudden that volume increases  
13 to 150 loads a day. When you look at the pricing, the  
14 pricing never changes because they continue to quote that  
15 reference price as to not violate the standard that's been  
16 established.

17           And that's when you start hearing of these  
18 stories of the second and third sales and prices, as someone  
19 said earlier, and customers are going to be reporting back  
20 to us. You know, we can buy Mexican product for \$4 or \$5.  
21 It only stands to reason, if you understand economics, if  
22 you've got a 30 or 40 percent increase in supply and the  
23 reference price was already at the minimum, with this  
24 increase that's going to put downward pressure on pricing,  
25 and that's when the gaming goes on. It's not going to

1 happen now. It's only when it gets to that level that these  
2 games and circumventions, second and third sales go on that  
3 affect not only U.S. producers but affect equally the  
4 legitimate Mexican producers.

5 Don't think it's just us getting hurt all the  
6 time. This impacts the legitimate Mexican operators who are  
7 being impacted by sales from their competitors at less than  
8 the minimum reference price.

9 So I think that is important to note.

10 MR. CANNON: So this is Jim Cannon, if I could  
11 just add, and not to steal any thunder from Tony. So, two  
12 points.

13 First, the reference price is not injurious.  
14 That's like a legal argument that the Respondents are  
15 making. Alright? So the statement that they're quoting was  
16 a statement by the Commerce Department, or a finding that  
17 they made in 2013. The finding was then in a court case  
18 quoted, they quoted, from 2016.

19 That finding does not inform a decision now, in  
20 2019, whether the agreement worked. It was a predictive  
21 statement, or aspirational, or it was a hope. The Agreement  
22 didn't work. We negotiated a new Agreement. We hope the  
23 new Agreement will work.

24 Now they can't go below the reference price, and  
25 we have inspections at the border and we hope this will fix

1 it and we will have an agreement. But if it doesn't work,  
2 we don't want to go through this constant withdrawing all  
3 the signatories, forcing us to have to do a new agreement,  
4 come back and do a new investigation, prevent sunset  
5 reviews.

6 If they want to withdraw, we want to have a  
7 dumping order in place. That's why we've been forced to  
8 come here, because of their pattern of conduct in the past.  
9 That's my first point.

10 My second point is: When you look at the pricing  
11 data, USDA or your data, so just look at your Table V-3.  
12 Prices fluctuate. That's why we got it monthly and not  
13 quarterly. There is a great deal of fluctuation.

14 I think what the reference price does is it sort  
15 of cuts off the bottom, so that the import prices to the  
16 first sales stop when they get down to the reference price--  
17 at least the ones who responded to the questionnaire and  
18 reported to you what their prices were.

19 And so that's the months where you're seeing, you  
20 know, overselling. So if you look, you know, at the table I  
21 was talking about, Table V-3, which is plumbs, open field,  
22 you see August, September, October, November. That's where  
23 you have underselling. You see the--you know, since the  
24 2019, now that we're in this new period, after your  
25 suspension agreement case was over you see some

1 underselling.

2           So those prices are indicative of what's going to  
3 happen. And they also inform you when you take this look  
4 that the law asks you to do, which is how do I adjust the  
5 database for the effects of the Suspension Agreement?

6           One thing you can do is look at your record and  
7 see that there was underselling.

8           And finally, I should add another point, your  
9 point is exactly right. Just because there was a reference  
10 price doesn't mean prices above the reference price weren't  
11 injurious. They could be injuring us throughout the period.  
12 And in fact Commerce found, despite all of this, they're  
13 actually dumping more. The new margin is now over 30--the  
14 all-country margin is over 20 percent. In 1996, it was over  
15 17 percent.

16           So despite the fact that there's been a  
17 Suspension Agreement all these years, they're actually  
18 dumping on their own data. This isn't the China case with  
19 adverse facts available; this is straight-up that was their  
20 data. Thanks.

21           COMMISSIONER KEARNS: Okay, thank you. That's  
22 all very helpful.

23           And, Mr. DiMare, I think you made a good point  
24 about the contracts. But I guess I'd be curious. If you  
25 all can, posthearing, come up with, you know, to see if

1 there's anything else that you can point to as to why we  
2 should have expected higher Mexican pricing above the  
3 reference price and that didn't happen, or it didn't happen  
4 as much as it should have happened.

5           So like I said, I mean if there was a drought in  
6 Mexico or something like that, we would expect the price to  
7 go way up and maybe it didn't because all they care about  
8 is, you know, is looking at the reference price. That would  
9 be helpful.

10           I hear you all from your other answers, as well.  
11 But I think if you guys can point to examples like that  
12 more, that would be helpful, too.

13           And so I wanted to turn real quickly to, you  
14 know, your answers to Commissioner Karpel. And I had the  
15 same question she had, which is, well, it's not a good  
16 long-term business model if you're that selling agent, to  
17 just say well I'm going to constantly buy high and sell low.  
18 Like I wouldn't think that's going to work that long. I  
19 think you answered that fairly well.

20           But one thing I thought I heard you say is, not  
21 only could they--so first of all, just to be clear, so if  
22 you have a substandard tomato, you can charge whatever you  
23 want to on those tomatoes under the Suspension Agreement,  
24 right?

25           MR. CANNON: So under the 2013 Suspension

1 Agreement, which was in effect during this period, the  
2 Commerce Department allowed rebates for certain adjustments  
3 to the tomatoes. So the most obvious one is, if some of  
4 them were defective, you could send them to a repacker. And  
5 you could then get a rebate from your foreign seller,  
6 effectively reducing your price for the cost of repacking,  
7 for the destruction charge for any tomatoes that had to be  
8 destroyed. And so your seller in Mexico, or the first  
9 seller across the border in the U.S., was allowed to give  
10 credits back to his customer rebates, wholesale price  
11 adjustments in the commerce world.

12                 So that would bring the net cost down to the  
13 buyer.

14                 COMMISSIONER KEARNS: Okay, thank you.

15                 MR. CANNON: Now your pricing data--

16                 COMMISSIONER KEARNS: And did you also say  
17 earlier, and maybe this was just sort of hypothetical, but  
18 that you could actually have a negative price on that  
19 product?

20                 MR. CANNON: Yes, you could have so many  
21 adjustments in the form of repacking charge and freight, and  
22 so little volume. So if 80 percent of your volume got  
23 destroyed, only 20 percent was useable, you actually could  
24 have a negative number.

25                 So you then would have to do some kind of

1 accounting entry with your customer to either give them  
2 another sale at a lower price, or give them an actual  
3 credit--

4 COMMISSIONER KEARNS: And I wouldn't think--

5 MR. CANNON: --we have that in our records of our  
6 importer clients, where we show negative adjustments to our  
7 customers.

8 COMMISSIONER KEARNS: Okay, if you could point us  
9 to that, that would be helpful. I was just about to ask,  
10 like I wouldn't think you all were in a position to have the  
11 information, but if you would give us examples of that.  
12 Because then I think that would suggest, right, that in fact  
13 what's going on is you're essentially subsidizing the other  
14 product in some sense, right? You're saying you're going  
15 to charge the reference price, but--and no lower, but  
16 basically what's happening is with these tomatoes over here  
17 you're allowing for a price below the reference price on  
18 the standard level tomatoes?

19 MR. CANNON: Correct. Absolutely. That's  
20 absolutely what's happening.

21 COMMISSIONER KEARNS: If you could point us to  
22 that, that would be helpful. Thank you.

23 MR. CANNON: We will do that.

24 COMMISSIONER KEARNS: Okay.

25 COMMISSIONER SCHMIDTLEIN: Commissioner Stayin?

1                   COMMISSIONER STAYIN: Yes. Just to raise a  
2 couple of questions that the Mexican producers have  
3 mentioned, they talk about the vine-ripe and the mature  
4 green tomato. The allegation is that the U.S. tomato  
5 growers sell their tomatoes mature green. And then these  
6 tomatoes are taken by a repacker, I suppose, and are  
7 sprayed with some kind of a chemical spray to make them look  
8 nice and red.

9                   And, that the Mexican product is vine-ripe. So  
10 the Mexican product of the same kind of tomato that the U.S.  
11 price--I'm sorry, the U.S. tomato is a mature green and is  
12 sold that way so that by the time it gets to wherever it's  
13 going it's going to be nice and red.

14                   And the Mexicans, they sell it vine-ripe and they  
15 don't have to spray it with anything. And then the taste of  
16 the vine-ripe Mexican tomato is superior to the mature green  
17 tomato when it's ultimately purchased. And that's why  
18 American purchasers in the grocery stores want the Mexican  
19 vine-ripe.

20                   Tell me about this.

21                   MR. DiMARE: Tony DiMare, California-Florida.  
22 And I will argue that our product eats superior to the  
23 Mexican product, and probably within ourselves we would  
24 probably tell you that my product eats better, the previous  
25 product eats better than mine. Taste is very subjective, as

1 we know.

2 As you saw in the chart earlier, in the industry  
3 vine-ripe could be that two-stage, which we call a breaker  
4 stage, which is where a lot of the volume of vine-ripes in  
5 Mexico are picked at that stage.

6 Also, 10 to 15 percent, as I said in testimony,  
7 on average of what we produce is of vine ripe. So we  
8 produce both. The product that we ship from the mature  
9 green stage, when we ship it is about a four to five color,  
10 similar to what the color is on this box that I demonstrated  
11 earlier.

12 No different from the flat right next to it,  
13 which is a Mexican vine-ripe. Both color stage. So  
14 although the product is harvested mature green, when we  
15 ripen it and I'll clarify the process. Tomatoes contain a  
16 natural byproduct called ethylene, as does avocados and  
17 banana. What we're doing is enhancing. The process is  
18 literally you're taking a liquid form through a generator,  
19 converting it into a gas, the ethylene, which is not  
20 harmful, about 100-150 parts per million is introduced to  
21 speed up the ripening process. In some cases, enhancing the  
22 product.

23 But as the product is ready to ship, it is no  
24 different in color stage as a mature green, and it of a  
25 vine-ripe, whether it's Mexican vine-ripe or our own

1 vine-ripes that we pack.

2           So, again, you can argue, you know, quality,  
3 one's superior than the other, at the end of the day they're  
4 not. And again, I challenge anybody to tell me which  
5 product, in appearance, is any different from the next. And  
6 again, taste is subjective. Maybe we should have taste test  
7 and taste. And you'll find that, depending on the growing  
8 region's soil type, variety, taste will be influenced by  
9 those components.

10           The TOV is going to taste different than that  
11 round type, as it will taste different from that grape  
12 tomato, as it will taste different from the Roma tomato.  
13 Every type has a little different, and every type, depending  
14 on the region's soil type and variety, will differ in taste.  
15 And again, it's very subjective. What you might think  
16 tastes good, I don't, and vice versa. You know, just  
17 depending on an individual's taste.

18           COMMISSIONER STAYIN: So--Go ahead, please.

19           MR. SINGH: Priya Singh, California grower. I am  
20 a vine-ripe grower in San Diego, California. We grow about  
21 3 million cases of Romas and round vine-ripened tomatoes.  
22 I'll give you a perfect example of one of my customer bases,  
23 just one, which is Albertson's.

24           I distribute a substantial amount of VCUs for  
25 Albertson's. In the Northwest there is one VC, however, who

1 has made it very clear that they prefer to stick with a  
2 mature green tomato. For whatever reason, believe me, I'm  
3 trying to get that business. But they prefer to deal with  
4 the mature green tomato in their retail stores to their  
5 specific customers.

6 So though I may have some farther south, some  
7 DC's, I can't seem to get into that particular distribution  
8 center who has let me know that they are a mature green  
9 seller.

10 At the same time, when we talk about more mature  
11 greens that go into repackers, as Tony has demonstrated  
12 here, those mature green tomatoes are being repacked. They  
13 are being put into single-layer flat boxes, and other types  
14 of boxes that are going to retailers, regardless. And those  
15 retailers are moving that product, as well.

16 COMMISSIONER STAYIN: There's an allegation  
17 that the mature green is -- the sliceability of a mature  
18 green is superior to the vine ripe, and that's why some  
19 purchasers will want to buy the mature green as opposed to  
20 the vine ripe. Is there anything to that?

21 MR. DiMARE: Yeah, Tony DiMare again,  
22 California-Florida. That is correct. In a lot of your fast  
23 food restaurants, i.e. Burger King or Wendy's, McDonald's  
24 that are slicing tomato prefer the mature green because of  
25 their firmness and durability through the slicing process.

1 So that is true.

2 COMMISSIONER STAYIN: So the mature green,  
3 when it arrives, will be -- it is going to be -- I  
4 understand the sliceability and why because I've cut them.  
5 But the vine ripe itself, I guess -- so you're going to have  
6 a differentiation in terms of the purchasers of mature green  
7 and vine ripe. There are going to be purchasers who prefer  
8 it.

9 As you were saying, the hamburger places,  
10 etcetera, and so the competition. It's a channel, a channel  
11 of trade and the question is the competition in that area,  
12 is the vine ripe not able to compete in that particular  
13 channel?

14 MR. SINGH: Priya Singh, California grower.  
15 In the past, as Tony had mentioned, for me to get into food  
16 service as a vine ripened grower was more difficult. I was  
17 more, I was predominantly retail. I have seen an increase  
18 on food service business on my side as well. As a tomato  
19 grower, we consistently do trials with various varieties,  
20 looking for tomatoes that are firm, you know consisting of  
21 good color, good flavor, etcetera, etcetera. So there you  
22 do have customers who predominantly will go to a mature  
23 green for the sliceability aspect of it.

24 That has been the history of it. You do see  
25 now that, as we have seen lately in the last five years, we

1 have increased our food service business. So we are  
2 competing directly for that, for that business.

3 MR. SULLIVAN: Mike Sullivan,  
4 California-Florida. I just want to echo what Priya is  
5 saying. In some of the fast food chains, they're buying  
6 more and more from Mexico, taking the vine ripers instead of  
7 the mature greens. That's -- Wendy's is one. I mean  
8 there's others out there, Subway, In and Out Burger. All  
9 those guys use vine ripers.

10 COMMISSIONER STAYIN: So then the distinction  
11 isn't that great, that you're going to be able to compete in  
12 that particular channel with vine ripe, not just -- mature  
13 green doesn't have the dominant position. Vine ripe can go  
14 in. It can compete in that channel?

15 MR. SULLIVAN: Yes sir. It can go in. It can  
16 compete. I would say still I would agree that right now  
17 today, I think mature green probably has the dominant  
18 position in there. But as Priya alluded to, that's  
19 changing.

20 COMMISSIONER STAYIN: Another question. Just  
21 take another channel --

22 MR. CANNON: Commissioner Stayin, Jim Cannon.

23 COMMISSIONER STAYIN: Yes.

24 MR. CANNON: On that point, in your staff  
25 report on page II-2, Table II-1, you see the imports from

1 Mexico and you see an increase in the Mexican imports into  
2 food service, which is what we're talking about. So their  
3 complaint that they aren't present, in fact they're  
4 increasing their presence in that portion of the market, and  
5 I would point out that there's been at least talk, not  
6 testimony, that a major food service provider, Subway,  
7 switched to Romas, which allows them to use Roma tomatoes in  
8 which there's not so much differentiation between vine ripe  
9 versus mature green.

10 COMMISSIONER STAYIN: And then there's the  
11 final canner, the tomato, can of tomatoes that you can buy  
12 at the grocery store. Do you sell -- I guess, again you  
13 probably go to your repacker and the repacker sells to the  
14 Heinz tomatoes and whoever else cans tomatoes?

15 MR. DiMARE: Commissioner, Tony DiMare. That  
16 is a completely separate business independent from our fresh  
17 market tomato. That is a processing industry. Varieties of  
18 production methods are completely different. The processing  
19 tomato that you're referring to is a completely different  
20 industry, doesn't have any impact whatsoever on the fresh  
21 tomato market industry, of what Mexico and the U.S. is  
22 producing. Totally independent.

23 COMMISSIONER STAYIN: So there are growers  
24 that just grow a type of tomato for that --

25 MR. DiMARE: Correct, and the Hunts Company

1 specifically develops their own variety for process, and  
2 they need a product that contains mostly solid content for  
3 processing. They're trying to yield as much of that given  
4 tomato as possible, and therefore they've developed their  
5 own variety specifically for processing, for canning,  
6 separate from the fresh market tomato. We don't, that is  
7 not a sector of the industry that we sell to.

8 COMMISSIONER STAYIN: That's my time is up.  
9 Thank you all.

10 MR. SCHADLER: Commissioner, can I one more  
11 thing?

12 COMMISSIONER STAYIN: Yes, go ahead.

13 MR. SCHADLER: I'm Michael Schadler for the  
14 Tomato Exchange. Just for the point of record and for maybe  
15 even just some basic education, so when we talk about  
16 ethylene, so if you are in the business of harvesting mature  
17 green tomatoes, first of all we call them "mature green  
18 tomatoes" because they're mature on the inside, and they're  
19 at the point where they can now start ripening.

20 Whether or not they're subjected with ethylene  
21 or not, that tomato will start ripening. The ethylene  
22 process, so ethylene is a natural substance, natural gas  
23 that is emitted by a lot of fruits and vegetables. So it's  
24 the same concept that, you know, a lot of people use if they  
25 want to ripen up some tomatoes that aren't quite ready to

1 eat, and they'll put them in a brown paper bag with a  
2 banana. It's because both the banana and those tomatoes are  
3 naturally emitting ethylene.

4                   So same phenomenon with trees in the fall.  
5 You see the leaves start falling, they fall because those  
6 leaves start creating ethylene naturally, which creates the  
7 leaf to essentially ripen and all off the tree. So this is  
8 a natural process. And then another distinction when, you  
9 know, I know the Respondents will spend a lot of time  
10 talking about the difference between vine-ripened tomatoes  
11 and, you know, even on the slide here we see U.S. gas green  
12 tomatoes, as a little bit more of a pejorative term.

13                   But please remember there's a lot of  
14 complexity in the market, right? So even as the witnesses  
15 here, we have two witnesses that grow 100 percent  
16 vine-ripened tomatoes at their individual farms, and then  
17 two of these other witnesses, yes they have a big portion of  
18 their production that is mature green product. But so take  
19 Florida for instance, and so I represent the Florida Tomato  
20 Exchange.

21                   There's about 700 million pounds of round  
22 tomatoes produced in Florida each season, 700 million  
23 pounds. Of those 700 million pounds, about 85 percent of  
24 just round tomatoes are mature green. So 15 percent of 700  
25 million pounds, that's a lot of vine-ripened tomatoes, is it

1 not? Now we're just talking about round tomatoes there. On  
2 Romas, the percentage of vine ripens are going to be even  
3 bigger, and then well, that's just rounds and Romas.

4                   What about grape tomatoes? What about cherry  
5 tomatoes? 100 percent of the grape and cherry tomatoes  
6 grown in Florida are vine-ripened. So then we look at this  
7 list of companies that have gone out of business in the last  
8 year. I could take you through that list and you know what?  
9 A whole lot of those companies were 100 percent dedicated to  
10 growing vine-ripened tomatoes.

11                   For instance, I just got word that one of our  
12 growers in south Florida, a company called S&L Beans, while  
13 they grow a lot of green beans, but they also grow grape  
14 tomatoes. The only tomato category that they have grown is  
15 grape tomatoes. They just said we are shutting down our  
16 tomato operation because we can't -- there's just too much  
17 downward price pressure. You got that price crunch and it's  
18 not worth it for us to grow vine-ripened grape tomatoes  
19 anymore.

20                   So every time you hear about, when the  
21 Respondents talk about well, these guys are going out of  
22 business it's because they're not growing with the market.  
23 Well first of all, we are providing the market with product.  
24 We're selling our product, and secondly a lot of the product  
25 we're growing are vine-ripened tomatoes. Why isn't there an

1 expansion of vine-ripened tomato production in the United  
2 States if there's such a big demand for it?

3                   The point is because there's so much  
4 low-priced Mexican vine ripe tomatoes coming in that affect  
5 those vine ripe growers in the U.S. and the mature green  
6 growers in the U.S. So that's just a point of clarification  
7 that I wanted to make.

8                   COMMISSIONER STAYIN: Thank you very much.  
9 That's all for my --

10                   COMMISSIONER SCHMIDTLEIN: Commissioner  
11 Karpel.

12                   COMMISSIONER KARPEL: Yeah, thank you. I  
13 wanted to ask why are greenhouse tomatoes more expensive  
14 than field tomatoes, assuming we're comparing the same type  
15 of tomato, round to round, Roma to Roma, etcetera?

16                   (Pause.)

17                   MR. DiMARE: Tony DiMare, California-Florida.  
18 Typically, it's the cost of production is why and price  
19 points at retail, and it's somewhat relative. I mean take  
20 any given tomato. The markup typically at retail from the  
21 farm gate price is anywhere from 2-1/2 to 3 times in a lot  
22 of cases.

23                   But greenhouse product is more expensive to  
24 produce and therefore the price point, the price that that  
25 buyer has to pay for that product is at obviously a higher

1 price point and therefore the retail prices are typically  
2 higher than conventional product.

3 MR. CANNON: So in -- Jim Cannon -- in March  
4 when Chad was here, as I recall, he actually observed that  
5 the -- there was convergence. As time goes on, prices are  
6 coming down. I'll find that for you in the post-hearing.

7 MR. SCHADLER: And I would say another point.  
8 I mean if you look at -- you know, I obviously don't,  
9 haven't seen all the questionnaire data and the pricing.  
10 But if you go to a grocery store, you will often see -- so  
11 one of the main items in any grocery store are going to be  
12 tomatoes on the vine. I'm sure you have all purchased them  
13 yourselves, and you often see that they are the  
14 lowest-priced tomato in the market on a per pound basis.

15 Oftentimes you will see -- and this is the  
16 case where I live in Florida, so I shop in Florida. You'll  
17 go into a grocery store and you'll see a Florida vine ripe  
18 tomato that will be maybe \$2.29 per pound, and then you'll  
19 see the tomato grown, TOV grown far away, whether in  
20 different parts of the United States or in Canada or in  
21 Mexico, and they will be really the low cost leader in the  
22 tomato category.

23 I mean so but, you know, to the point on price  
24 as well, I mean if in some of the more sophisticated  
25 greenhouses you're looking at a million dollars per acre to

1 construct that greenhouse, so there's significant cost that  
2 goes into it. But with the amount of volume coming in from  
3 greenhouses around North America, you've got a significant  
4 amount of volume and efficiency in those greenhouses that do  
5 enable a low, a relatively low priced production the overall  
6 market. Again, sometimes the low cost leader at the  
7 supermarket level.

8                   COMMISSIONER KARPEL: Okay. Just a quick,  
9 just a quick follow-up to that. So the TOVs are greenhouse  
10 tomatoes in your --

11                   MR. SCHADLER: Yeah typically. I mean you  
12 could ask the Respondents how tomatoes on the vine are grown  
13 in Mexico. But typically you're going to grow a tomato on  
14 the vine in a greenhouse. It helps with basically  
15 establishing conformity in the ripeness, so that when you  
16 pick a cluster they're all going to be right about at the  
17 same stage color coming out of the greenhouse.

18                   COMMISSIONER KARPEL: Wait. So following up,  
19 if greenhouse tomatoes are generally priced higher because  
20 it costs more to produce them, does that mean that producers  
21 of greenhouse tomatoes are better able to pass on costs to  
22 purchasers? And if that's so, why is that?

23                   MR. DiMARE: Tony DiMare, California-Florida.  
24 I argue against that. Greenhouse tomatoes aren't always  
25 typically higher. Again, it goes back to the supply. There

1 are a lot of times during the year you have an over-supply  
2 of a given item, whether it's TOVs or beef-type tomatoes  
3 from greenhouse. A lot of times because of the supply  
4 they're at cheaper price points.

5 I think there was a slide earlier that showed  
6 Mexican tomatoes at retail were 80 cents a pound, and the  
7 U.S. tomatoes were \$1.29 or whatever it was. That is  
8 probably predicated again on too much supply, over-supply,  
9 you know.

10 MR. SULLIVAN: Mike Sullivan,  
11 California-Florida. I'll add to that. In the previous  
12 suspension agreements and the difference with the one we had  
13 now, the reason we took out the methods of growing was that  
14 there wasn't clarity in what was coming out of a greenhouse  
15 or what was open field or lower tax structures in Mexico.

16 So if greenhouse was over-produced, they just  
17 wouldn't label it as greenhouse. You could just bring it in  
18 as open field and maybe get a different amount of money for  
19 it. So greenhouse is not always the highest price.

20 MR. SCHADLER: And within the greenhouse  
21 category as well, Michael Schadler, Florida Tomato Exchange,  
22 you know, that we've talked about how there's various types  
23 of greenhouses. High tech greenhouse, medium tech  
24 greenhouses and then lower teched, covered production,  
25 whether that's a shade house, net house or just a simple

1 shade cloth.

2                   Those, I think a lot of people wouldn't  
3 necessarily consider those greenhouse. But in some of the  
4 statistics, some of that production is showing up as  
5 greenhouse in the statistics. Then even within the higher  
6 tech category, not all greenhouses are created equal.  
7 Nature Sweet, who is here today, they're known in the  
8 industry to be really a top quality greenhouse producer.  
9 They're certainly a market leader in pricing. They sell  
10 premium product. They do a great job with marketing.

11                   I think if you talked to Nature Sweet, they  
12 would simply -- they would probably say they have a  
13 competitive advantage over some of their counterparts in  
14 Mexico and the United States because of the quality that  
15 they're particularly putting up in their own greenhouses.

16                   MR. CANNON: Lastly, I would observe from your  
17 data that if you look at your pricing data, so your odd  
18 numbers of your open field and your even numbers of your  
19 greenhouse, if you look at Product 1 versus Product 2 or  
20 Product 3 versus Product 4, that's the big volume. If you  
21 look at the Mexican prices, the disparity is confidential,  
22 but not great, all right. So the prices are roughly  
23 comparable.

24                   If you look at the U.S. producer prices,  
25 that's where you see the higher price in the greenhouse, and

1 the U.S. greenhouse industry, which is represented by Chad,  
2 which is obviously a smaller portion, has struggled, has  
3 difficulty with these imports and that kind of tells you  
4 what's going to happen if there's no suspension agreement on  
5 all tomatoes and on open field tomatoes.

6                   What's going to happen is the prices on the  
7 open field tomatoes are going to fall, and the U.S. growers  
8 in the open fields are going to suffer the same fate in  
9 terms of the volumes that you see coming out of the U.S.  
10 growers in greenhouse.

11                   COMMISSIONER KARPEL: If you can point me to  
12 where on the record or put on the record sort of information  
13 about what you just share with me about the relative price  
14 of greenhouse tomatoes versus field tomatoes. There is some  
15 information on page I-25 of the staff report that does  
16 suggest that greenhouse prices are more. It does refer to  
17 high technology greenhouses particularly, so maybe there's  
18 something you want to say there.

19                   But just if you can either point me to the  
20 record or put something on the record that sort of  
21 elucidates that a little bit more as you discussed today.

22                   And I guess my related question to all this,  
23 if there is some higher price being gotten for greenhouse  
24 tomatoes, is that saying anything about consumers willing to  
25 pay more for greenhouse tomatoes because they find that they

1 have some type of attributes that they prize more than a  
2 field grown tomato?

3 MR. CANNON: Surprising no one jumped at this.  
4 Are you going to jump Fred?

5 MR. LEITZ: Not really.

6 MR. CANNON: Go ahead.

7 MR. LEITZ: Probably just make a fool of  
8 myself. But anyway Fred Leitz from Michigan. I think, I  
9 think what you're seeing there is a preference by the  
10 retailer. It's an easier product to handle and probably a  
11 more consistent product, not a more flavorful product and  
12 not a more regional product. Just a more easier product to  
13 get supplies of. They do not want to merchandise anymore.  
14 All they want to do is sell a certain volume at a certain  
15 price year-round and make their money off of that.

16 MR. DiMARE: Tony DiMare, California-Florida.  
17 I think a lot of it is perception, and yes I think there is  
18 a percentage of the consuming public that are willing to pay  
19 a higher price point. But a lot of it is perception. The  
20 perception is in, you know, appearance, in some cases  
21 perceived better nutrition because it's deemed greenhouse.  
22 Well you know, we said earlier what is greenhouse? There is  
23 no true definition of what constitutes greenhouse product,  
24 and a layperson consumer seeing greenhouse at a retail store  
25 a lot of times equates that greenhouse as maybe better for

1       them nutritionally or otherwise.

2                       But that's not the case. There's no evidence  
3       that a product because it's grown in a certain method is  
4       more nutritional or healthier for you. So I think a lot of  
5       the buying practices is perception in a lot of ways. TOVs  
6       hasn't attracted because of the volume. Both in appearance  
7       it looks like it's fresh. You smell the aroma of that vine  
8       there and therefore you have a certain percentage of  
9       consuming public that is attracted to that particular type  
10      tomato. So you know, it all depends.

11                      MR. CANNON: So Jim Cannon. In our slides on  
12      the pink sheet number 7, I just want to put a little  
13      perspective on this. In our shipment data, you see in the  
14      middle the importer questionnaires through the sunset and  
15      for the final. You see there's percentage numbers, around  
16      about a third. So your importers are telling you about that  
17      much from Mexico was greenhouse.

18                      But then you look at your pricing data. They  
19      give you half of that. So they're making a lot about they  
20      are the sellers of greenhouse tomatoes and we're the vine  
21      ripe and mature green. In fact, the market is 85 percent  
22      the market. They're pointing you to almost a fringe area of  
23      the market based on your data that are before you.

24                      So don't be misled by the absence of the  
25      producers in the room who are making the product that we are

1 competing with.

2 COMMISSIONER SCHMIDTLEIN: All right, thank  
3 you. I just have a couple of questions. I know we're late  
4 into the lunch hour here. There was some testimony about  
5 the second and third sale, and so I just want to make sure I  
6 understand where this fits into the legal argument.

7 The way I understood it, and correct me if I'm  
8 wrong, is that this really relates to the volume argument,  
9 that the impact of the volume being significant, I suppose  
10 you're going to argue on an absolute basis and the increase  
11 in that volume is that it's driving these second and third  
12 sale prices lower.

13 Is that -- is that correct, or are you arguing  
14 that the Commission ought to be looking at, you know, we  
15 didn't collect the right pricing data? We should have  
16 collected further into the stream, right? What's why I want  
17 to make sure I'm clear on like where this fits into our  
18 legal analysis?

19 MR. CANNON: I think in your legal analysis,  
20 given a finding of the conditions of competition, that we  
21 all offer all of the varieties of tomatoes produced in the  
22 same manner, and that we produce to a perishable product  
23 which is going to die, which retailers buy for shelf space  
24 or food processors buy. Given those conditions, we are  
25 looking at a product in which from time to time there are

1 huge volumes, there are peaks in volume. It causes overall  
2 market prices to be depressed.

3                   That is a significant volume effect. You can  
4 see it in the record in the past. If that's difficult, you  
5 can certainly see it in the future. They are planting more.  
6 It would drive more U.S. growers out of business. So that  
7 is the volume effects. Separate from that on the price  
8 side, your record gives you evidence of price effects  
9 primarily in the greenhouse product, but there are price  
10 effects.

11                   I understand that you do not see the normal  
12 level of underselling that one would expect, given  
13 everything else in the record, purchaser questionnaires,  
14 conditions of competition and so forth. I don't think the  
15 Commission wants to be sending out more questionnaires to go  
16 downstream in future cases.

17                   COMMISSIONER SCHMIDTLEIN: No, I doubt we  
18 would do that.

19                   MR. CANNON: We've done what we can do. I  
20 think it is a feature of the suspension agreement that we  
21 see more layers of distribution downstream than what we  
22 normally see. I think it is a feature of having a  
23 perishable product that's going to rot. So for Walmart,  
24 I've got to repack and get my best quality or good quality,  
25 different than USDA, out of the box and sell the other

1 tomatoes somewhere else before they rot, and that causes  
2 price pressure in the market.

3 COMMISSIONER SCHMIDTLEIN: So where would we  
4 look in this record that, as to that effect of the volume,  
5 that this is causing the prices down the stream to be -- in  
6 the supply chain to be reduced?

7 MR. CANNON: So there --

8 COMMISSIONER SCHMIDTLEIN: Is that in the  
9 record, or should you put something on the record?

10 MR. CANNON: We have, and you can see the  
11 price depression in the record in -- maybe it's in the  
12 public slides. In the public slides. But that's a  
13 shorthand for the whole record. In the public slides, we  
14 have Slide No. 28, which shows when we do cost at 2009  
15 dollars, prices are going down and we can make this much  
16 more robust, but you can see it also in your pricing data.  
17 The trend in prices is downward.

18 You also see the shift toward now the market  
19 is 50 percent a Mexican market, and we are experiencing  
20 lower prices in the U.S.

21 COMMISSIONER SCHMIDTLEIN: Okay, all right.

22 MR. CANNON: Can anyone add to that?

23 COMMISSIONER SCHMIDTLEIN: No? Okay. I don't  
24 think I have any other questions. This is one factual  
25 question. When you were talking about the "vine-ripened

1 tomatoes" being picked at Stage 2, and I assume that those  
2 tomatoes are never, that ethylene gas is not added to those  
3 to further ripen them then, since they're picked when  
4 they're fairly green, if I understood the testimony.

5 MR. SINGH: Priya, California grower. No, we  
6 do not use ethylene.

7 COMMISSIONER SCHMIDTLEIN: And nobody who's  
8 selling a vine-ripened tomato would be using ethylene to  
9 ripen them, right? Is that right?

10 MR. SINGH: Not that I would know of.

11 COMMISSIONER SCHMIDTLEIN: Yeah, okay.

12 MR. SINGH: Although I can't confirm it.

13 COMMISSIONER SCHMIDTLEIN: So they just ripen  
14 naturally during transportation, how it's being transported?

15 MR. SINGH: Yeah. Again for us, I'm  
16 harvesting more at a 3-4 color stage just because I am  
17 predominantly on the west coast. However, if I am shipping  
18 farther east or anything like that, I would be shipping at  
19 Color 2 so that it would arrive there at a Color 5-6 stage,  
20 and it is ready, ready to eat. So but that's how our model  
21 runs.

22 COMMISSIONER SCHMIDTLEIN: Okay, okay. I  
23 think that's all the questions I have that I can think of at  
24 the moment. So let me pass it to Commissioner Kearns.

25 COMMISSIONER KEARNS: All right, thank you.

1 My first question I think is a legal question. I don't want  
2 to spend a whole lot of time on it, but Respondents state in  
3 their brief "Over time, the agreements have led to a shift  
4 in subject import product mix, production processes and  
5 product quality." They argue they compete in that way, not  
6 on price. I know you all disagree, that Mexican tomatoes  
7 are higher quality.

8                   But for the sake of argument, if we assume  
9 that they are, and that the suspension agreement has led  
10 them to shift their product mix, if that's right where does  
11 it lead us? I mean we know, you know, there have been cases  
12 where we know subject imports don't necessarily take market  
13 share on the basis of price. They take it on adding bells  
14 and whistles to a product, in some way competing on bases  
15 other than price.

16                   I guess my question is is -- do you think that  
17 any of that is going on here, or do we really have the right  
18 kind of, you know, to mix my metaphors, apples to apples  
19 comparison? Does that question make sense?

20                   MR. CANNON: We'll certainly read -- Jim  
21 Cannon -- we'll certainly read it again and answer it in our  
22 post-hearing. But just recall, we make every type of tomato  
23 that the Mexicans make. We make every type of specialty,  
24 every type of vine ripe, every type. So the innovation  
25 argument we don't think is supported by the record here.

1 COMMISSIONER KEARNS: Okay.

2 MR. SINGH: Priya Singh, California grower. I  
3 tend to peak volumes late August, September and October.  
4 This year, I experienced some of the largest retailers that  
5 I deal with. They let me know very clearly that though my  
6 quality was better, they would not be purchasing from me  
7 this year. The price difference was three to four dollars,  
8 and I just -- I couldn't compete with that. I couldn't go  
9 there.

10 So as I put in my testimony, my coolers got  
11 full and I literally had to offload product at a substantial  
12 loss to our operation.

13 COMMISSIONER KEARNS: Okay, thank you. Ms.  
14 Alves.

15 MR. DiMARE: Commissioner on that note, Tony  
16 DiMare again, California-Florida. You know, typically all  
17 of us as grower/shippers are offered contracts by the  
18 customer base, Mexico-U.S., prior to our season starting. I  
19 can tell you recently we as a company were offered the  
20 opportunity to participate in different contract bids, to  
21 which we declined because they were at levels that we didn't  
22 feel were profitable for our organization.

23 Those kind of -- and these are large buyers,  
24 by the way. They went out and got contracts somewhere, I  
25 don't know whether it's U.S. or Mexico. The point is at the

1 end of the day, it does come down to price, and again I  
2 think I clearly demonstrated by the display here of the fact  
3 that you can't discern what product is from Mexico or U.S.,  
4 whether it's the Roma or the round type or the grape tomato.

5 I mean they look the same, and the only way to  
6 truly identify the origin is by the country of origin  
7 labeling on the given product. So again, at the end of the  
8 day, you know, it does come down to price with everything  
9 being equal.

10 COMMISSIONER KEARNS: Thank you. Ms. Alves.

11 MR. LEITZ: Fred Leitz, Michigan. I'll concur  
12 with what Tony said. It's mostly price. The next thing  
13 might be availability on a spot market or a chain store not  
14 getting the product they need. They'll bump the price a  
15 little bit so you sell them something. But the reference  
16 price, if we have to hang onto the reference price, I'm out  
17 of business. It takes me 48 cents a pound to raise  
18 tomatoes, to start to be profitable. I mean that's where  
19 it's at, 46 to 48, depending on which package I'm putting it  
20 in.

21 COMMISSIONER KEARNS: Okay. Ms. Alves.

22 MS. ALVES: Commissioner Kearns, Mary Jane  
23 Alves from Cassidy Levy Kent. Two quick points. First, as  
24 your question understood, the record doesn't actually show  
25 that the Mexican tomatoes are higher quality. Your

1 purchasers resoundingly said they're comparable, and in fact  
2 they're both similar quality.

3                   However, if you were to indulge Respondents in  
4 their argument and say well, maybe you're bringing in a  
5 higher quality product, well taking their arguments to the  
6 extreme, what is their highest alleged quality type product?  
7 Greenhouse tomatoes. Why is there so much underselling for  
8 greenhouse tomatoes?

9                   COMMISSIONER KEARNS: Okay, thank you. Yeah,  
10 I think this is just for post-hearing. But at page 26, the  
11 Mexican growers state that the "lack of price injury is the  
12 direct result of price restraints of suspension agreements."  
13 I'd like to hear you all respond to that, how we should  
14 consider that statement.

15                   MR. CANNON: I think there is a story we've  
16 been talking about all day, and it's from a multi-variable  
17 calculation. So I think on this one I'd prefer to write  
18 that down for you.

19                   COMMISSIONER KEARNS: Yep. That would be  
20 fine, thank you.

21                   MR. CANNON: Handle that in post-hearing.

22                   COMMISSIONER KEARNS: Okay, thank you. A  
23 couple of quick questions on threat. I'll just ask both of  
24 them together. Why do you believe that subject imports will  
25 increase in the future? What is the basis for that? And

1 also Respondents say there is no potential for product  
2 shifting in Mexico. I'd like to respond to that argument as  
3 well.

4 MR. CANNON: Okay. So if we pull up the  
5 slides at the very end, the public slides, I'll just -- I  
6 think sometimes the data say more than I can say by words.  
7 At 38, all right. So here are their own projections of  
8 their capacity, and they project they're going up, as well  
9 as their production.

10 And we know that. They have been selling to  
11 the United States, which is their closest nearby market for  
12 a perishable product. So it is fair to say that imports  
13 will increase without a suspension agreement or an  
14 anti-dumping duty order or any other restraint.

15 Then on the next slide, we can see the  
16 production, the total shipments and the share that is the  
17 U.S. As to product shifting, they admit they -- once you've  
18 planted a tomato, you can't shift it to any other product.  
19 So it's a question of planting.

20 (Simultaneous speaking.)

21 COMMISSIONER KEARNS: Thank you. That I knew.

22 MR. CANNON: So as to product shifting, it's  
23 not that they have a factory and they can shift to a  
24 different product. They have acreage that they planted in  
25 tomatoes that they plan to increase. We obviously -- we are

1 an attractive market, and so they're going to ship tomatoes  
2 here. They have done it in the past and in fact, as our  
3 long term slide shows, for 20 years what history teaches,  
4 what the USDA data show you, there has been a long term  
5 inexorable climb in the volume from Mexico.

6                   You can look at the past, you can look at the  
7 present and you can extrapolate from that easily. Even  
8 their own data concede that. Thank you.

9                   COMMISSIONER KEARNS: Okay, thank you.

10                   MS. ALVES: Commissioner --

11                   MR. LEITZ: Fred Leitz. Go ahead, Mary Jane.

12                   MS. ALVES: Mary Jane Alves from Cassidy Levy  
13 Kent. Commissioner Schmidtlein earlier in the morning had a  
14 question, and part of her question was talking about the  
15 relevance of the sunset review analysis to the analysis  
16 here. So looking at the restraining effects that the  
17 agreement may have had, and then projecting forward.

18                   So in a sense the Commission can look at a  
19 sunset review context and then project forward. You've had  
20 that situation before where you looked at the restraining  
21 effects of a dumping order or of a suspension agreement, and  
22 then you then look at what the existing data are, look at  
23 the attractiveness of the market and then project forward  
24 well what would be the effect of removing that order.

25                   Similarly, in the context of a sunset review,

1 Congress just like it did in this context said yes, there  
2 are certainly times where there may be a dumping order or  
3 there may be a suspension agreement that's not effective.  
4 How do we know that? Well in the sunset review the standard  
5 is, is the injury likely to continue or recur?

6 Well continue means that even with the  
7 agreement in place or with the order in place, there was  
8 injury. Similarly here, Congress recognized sure, you need  
9 to discount during the Period of Investigation the fact that  
10 there may have been a restraining effect from the suspension  
11 agreement that has been a factor in this period of time, and  
12 then project forward what's going to be the effect of  
13 removing that.

14 COMMISSIONER KEARNS: And so you -- so we can  
15 look at when we're thinking about threat, we can ask what if  
16 there is no suspension agreement, because there is sort of  
17 the circularity to that, right? But you're telling me that  
18 your view is we can say well if the suspension agreement is  
19 removed, what do we think is going to happen?

20 MS. ALVES: Yes exactly.

21 COMMISSIONER KEARNS: Okay, thank you, and I'm  
22 hoping that the Respondents in the afternoon can also  
23 respond to that as well.

24 MR. LEITZ: Commissioner, Fred Leitz,  
25 Michigan. I look at my season and ten years ago you

1 couldn't have drug me here. I'd have said that's a  
2 Florida-Southeast-U.S. problem, not my problem. But in the  
3 last ten years, since the port of entry was in Texas there,  
4 the east side of Texas the road was built and the Mexicans  
5 built up the infrastructure to supply the eastern side of  
6 the U.S. and take over my markets.

7 In 2005 they had 8,000 10,000 pound units  
8 coming into the U.S. Last year it was 23,000 10,000 pound  
9 units, a threefold increase and the production during my  
10 season for U.S. producers was cut in half. That's from USDA  
11 numbers.

12 COMMISSIONER KEARNS: Thank you. My time is  
13 up.

14 COMMISSIONER SCHMIDTLEIN: Commission Stayin?

15 COMMISSIONER STAYIN: No further questions.  
16 Thank you and thank you all for being here.

17 COMMISSIONER SCHMIDTLEIN: Commissioner Karpel?

18 COMMISSIONER KARPEL: Alright, I do have a few  
19 more questions. I'm going to try to go through them quickly  
20 and if you want to save some of these for post-hearing,  
21 fine.

22 Okay, so the first is -- and maybe this is fine  
23 for post-hearing. The staff report on page V-24 states that  
24 only three purchasers indicated that they bought Mexican  
25 tomatoes instead of U.S. tomatoes because they were cheaper.

1 That seems a bit inconsistent with some of the testimony  
2 we've heard this morning, if you could try to explain why  
3 that might be. And also related to that I want to make sure  
4 that we actually have on the record those instances where  
5 U.S. producers have been pressured by their purchasers to  
6 lower price because of Mexican imports. I assume that that  
7 some of that's already been put into the record. If you  
8 have more that can be put in the record -- and I think  
9 that's particularly important in this case, given some of  
10 the challenges you've noted with respect to the pricing  
11 data.

12 Interested in how easily and quickly U.S.  
13 producers could increase production to respond increase in  
14 demand, so if we did had a situation where there were less  
15 Mexican imports in the market what can we look to, to know  
16 that U.S. producers could fulfill that. And also, do you  
17 have information on the volume and pricing of subject  
18 imports after the suspension agreement was terminated in May  
19 2019? That's not part of our POI, but I'm curious what  
20 happened in that period between May 2019 and the new  
21 suspension agreement.

22 And we may have covered this, but I'm sorry if I  
23 missed it, but there's been some assertions by Respondents  
24 that demand is shifting away from green tomatoes to  
25 vine-ripened and I'm curious if you agree that that's

1 happening. I have heard some testimony. Mr. Singh  
2 mentioned that there's an increased willingness of food  
3 processors to -- food service to take vine-ripe, so maybe  
4 that's some indication of that, but if you could speak to  
5 that, if you agree that that's happening, and if that has  
6 any effect on the competitiveness of Florida tomatoes;  
7 particularly, the mature green segment.

8           Also, in your slides -- I believe Slide -- on  
9 page 5 of the confidential slides, you show sales to  
10 supermarkets, food service by domestic producers and  
11 imports. Can you explain how you broke that data out? It's  
12 broken out different than we have seen in the staff report,  
13 so I'm curious about -- just walk me through that. You  
14 might've explained that, but I'm not sure I caught it.

15           MS. ALVES: There's one additional U.S. producer  
16 that's now included in the data that's in Exhibit 5.

17           COMMISSIONER KARPEL: I thought our staff report  
18 was broken out, not just to -- it was broken out between  
19 supermarket, food service, re-packers, distributors, and you  
20 seem to have just two categories now. How did you collapse  
21 that data or is there some other place in the record I  
22 should be looking at?

23           MS. ALVES: If you're looking at Slide 5, Slide  
24 5 does have packers or re-packers. It also has  
25 distributors, brokers, and handlers, supermarkets and

1 grocery chains and food service providers as well -- the  
2 confidential Slide 5?

3 COMMISSIONER KARPEL: I think more about the  
4 question, but I'm not sure I'm squaring that with what's in  
5 the staff report, but I can always give you a written  
6 question.

7 MR. CANNON: So, one thing we did differently in  
8 Slide 5 is we're showing the share within each channel. So,  
9 in other words, instead of the whole table adding up to 100,  
10 it's channel-by-channel, so packers, or re-packers it adds  
11 up to 100. Distributors add up to 100. So, it's the share  
12 within each one in order to show that there was actually a  
13 growth in the share of imports in all channels and in some  
14 channels where they talked, for example, about food service  
15 they not only are growing, they're a major portion of that  
16 channel. They've achieved -- you know in distributors,  
17 brokers, and handlers they're the most important share in  
18 that market. But in each segment you can see the growth in  
19 market share, which is why this is different than Table 2.1;  
20 is that your question?

21 MS. ALVES: Commissioner Karpel, what we did is  
22 we took the same data that was underlying Table 2.1. Table  
23 2.1 just shows within the domestic industry what their  
24 relative shares are in sums up to 100. What we did is we  
25 took the same underlying data and then we took by channel of

1 distribution what the domestic industry's shipments were for  
2 each period. Let's say for food service we said here's what  
3 the domestic industry shipments were for each one of those  
4 years in the interim periods. We then added that with the  
5 imports to the food service sector for each of those  
6 periods. That gives us 100 percent. And then we said,  
7 well, what share of food service was U.S., what share of  
8 food service was imported, and so that's the relative share  
9 within that segment.

10           So, in that sense there is no replica of this  
11 table in the report because what the report is showing is  
12 within the domestic industry shipments what is their  
13 relative share within that channel. It's not trying to  
14 compare it between the U.S. and the Mexican. So, what this  
15 tried to show you is, even if you're looking at your "C"  
16 tables, you see what the relative change in market share is  
17 over the entire market. But even if you're looking within  
18 the individual channels of distribution, you're also seeing  
19 competition in every single channel between the U.S. and the  
20 Mexican imports. And then you're also seeing growth of the  
21 Mexican imports in every one of those channels.

22           So, contrary to the way that they are  
23 summarizing what's going on in the market, they're trying to  
24 say, well, food service is U.S. and we're really coming in  
25 to serve grocery stores and other segments not served by the

1 U.S. industry. That's not the case and that's what your  
2 data show. Your data showed that there was competition in  
3 each one of these channels and that they are gaining sales  
4 in each one of those channels.

5 COMMISSIONER SCHMIDTLEIN: Sorry. Alright,  
6 let's see. I have no further question. Commissioner  
7 Kearns.

8 COMMISSIONER KEARNS: So, I think these are all  
9 questions that can be answered post-hearing, but let me  
10 rattle them off real quick. Respondents present data from  
11 the USDA Agricultural Marketing Service in Exhibit 7 of  
12 their briefing, showing that after the suspension agreement  
13 was terminated earlier this year prices of Mexican tomato  
14 imports did not fall. Can you explain that in your  
15 post-hearing please?

16 MR. CANNON: Yes, we'll do that. We would  
17 observe, however, upon termination duties went into effect  
18 on those imported prices.

19 COMMISSIONER KEARNS: Okay.

20 MR. CANNON: And they were subject to the  
21 anti-dumping duty law, so as Commerce found they were  
22 dumping by over 20 percent, we would certainly expect the  
23 prospect of a dumping duty Order would have some effect.

24 COMMISSIONER KEARNS: Okay. Okay, thank you.  
25 And our staff report shows in Figure V-2 and V-7 that

1 pricing products generally move in tandem, except for  
2 pricing products 2 and 6. To what do you attribute the  
3 different behavior of those products? And again,  
4 post-hearing is fine. Thank you.

5           Another question, Respondents argue that they  
6 produce a competitive product because they invest in  
7 greenhouses and other equipment that U.S. producers do not  
8 and that they produce a better product for the consumer.  
9 Besides greenhouse investments, are there other advantages  
10 that Mexican producers have that you do not? For example, I  
11 know that labor costs are high in this industry. Do  
12 Mexican producers have higher or lower labor costs, if you  
13 know? And do you know whether labor practices in Mexico  
14 meet international standards; is that something we should  
15 consider? And again, I wouldn't expect you to necessarily  
16 be able to answer that question right now, but maybe  
17 post-hearing.

18           MR. CANNON: We'll answer it post-hearing. I  
19 will say, again, put aside the labor cost issue, they were  
20 found to be dumping. And so just like -- I mean you can  
21 imagine -- in fact, that's the answer to your other question  
22 about do we have to assume because there's a suspension  
23 agreement how do we look forward in the injury. Well, if  
24 you make a negative determination, there won't be a  
25 suspension agreement. There won't be a dumping Order.

1 There will be free trade and that's what you have to assume  
2 for injury. But looking at that, our panel would say that  
3 we are impacted by those prices in the market and the  
4 addition of some new agreement, some amount of dumping duty  
5 would counteract that, despite those advantages of low-labor  
6 costs, they're still dumping.

7 COMMISSIONER KEARNS: Okay, thank you. I have  
8 no further questions.

9 COMMISSIONER SCHMIDTLEIN: Commissioner Stayin  
10 -- oh, okay. Commissioners have no further questions. Do  
11 staff have any questions for this panel?

12 MS. HAINES: Staff has no questions.

13 COMMISSIONER SCHMIDTLEIN: Okay. Do Respondents  
14 have any questions for this panel? No questions? Okay,  
15 thank you very much.

16 Alright, at this point, we will take a break for  
17 lunch. This panel is dismissed. Thank you all again very  
18 much. Let me remind you that the hearing room is not  
19 secure, so please take your documents and confidential  
20 information with you. And we will reconvene at 2:30 for the  
21 afternoon session. We stand in recess.

22 (Whereupon, a lunch recess was taken at 12:25  
23 p.m.)

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AFTERNOON SESSION

(2:33 p.m.)

MR. BISHOP: Will the room please come to order.

COMMISSIONER SCHMIDTLEIN: Mr. Secretary, are there any preliminary matters?

MR. BISHOP: Madam Chairman, I would note that the panel in opposition to the imposition of the antidumping duty order have been seated. This panel has 60 minutes for their direct testimony.

COMMISSIONER SCHMIDTLEIN: Very well. You may begin.

MR. WILNER: Thank you. Rather than making any opening, we will go right to the witnesses, starting with Mr. Esquer.

STATEMENT OF SERGIO ESQUER

MR. ESQUER: Good afternoon, Commissioners. My name is Sergio Esquer. I am the CEO of two farms in Mexico--Agricola Chaparral in the state of Sinaloa and Agroindustrias Villa Santiago in Nayarit. I am also Vice President of Fruit and Vegetable Section of the Consejo Nacional Agropecuario of Mexico. My family has been in the business of growing and distributing fresh tomatoes and vegetables for over 65 years. I took over as CEO in 1992.

I am testifying on behalf of the Mexican industry, but based on my own experience as a grower in the

1 business for almost 30 years.

2           The U.S. producers have told you that all  
3 tomatoes are basically the same--that a tomato is a tomato.  
4 That is not true. In reality, there are great differences  
5 in types of tomatoes and in the ways they are grown. The  
6 U.S. and Mexican industries grow different types of tomatoes  
7 in very different ways.

8           The U.S. industry has always produced and still  
9 produces predominantly what the industry calls a gas green  
10 tomato. That is a tomato specifically developed to be  
11 picked green before it begins to ripen. These tomatoes are  
12 picked green and then taken to warehouses where they are  
13 treated with ethylene gas to turn red. The overwhelming  
14 majority, about 90 percent, of U.S. tomatoes are grown in  
15 open fields.

16           The Mexican industry, in contrast, has always  
17 produced primarily a vine-ripened tomato, one that begins to  
18 ripen naturally on the vine. The overwhelming majority,  
19 about 90 percent, of Mexican tomatoes are not grown in open  
20 fields but in protected agriculture environments such as  
21 greenhouses, hot houses, shade houses.

22           The story of the Mexican tomato industry over the  
23 years has been one of constant innovation and investment to  
24 bring the best possible vine-ripened product to the market.

25           We are blessed with fertile soil and an excellent

1 growing climate. Originally, however, our vine-ripened  
2 tomatoes had a fairly short shelf life and could not be  
3 distributed long distances.

4 Mexican growers set about working with seed  
5 companies to develop a vine-ripe tomato with a longer shelf  
6 life. We originally approached U.S. seed companies, but  
7 they turned us down because they feared a backlash from  
8 Florida growers if they helped us.

9 We then turned to scientists in Israel for  
10 innovations in seed development, and developed with them a  
11 so-called ESL seed that enabled us to produce a vine-ripe  
12 tomato with a longer shelf life that could be distributed  
13 longer distances.

14 We also visited and studied the most innovative  
15 growing methods used around the world in countries like the  
16 Netherlands, and were early in adopting methods such as drip  
17 irrigation, which enabled us to increase our productivity  
18 and the quality of our produce.

19 This is basically the situation we were in 23  
20 years ago in 1996 when the suspension agreement was  
21 originally signed. We were growing vine-ripened tomatoes in  
22 the open field using the most innovative methods available  
23 at that time.

24 Since then, we have revolutionized our production  
25 methods. Mexican tomato growers have invested more than \$5

1 billion converting production from open field growing to  
2 protected agriculture. Again, we visited other countries  
3 like the Netherlands, Israel, and Spain to find the best  
4 greenhouse-protected agriculture methods to adopt to our own  
5 local conditions.

6           There are various types of protected agriculture  
7 structures depending on your particular location. They  
8 range from full permanent greenhouses in some locations to  
9 what we call shade houses, or simple tunnels in others. On  
10 one of my farms, we grow in greenhouses, and on the other in  
11 shade houses.

12           I want to make clear that my shade houses and  
13 greenhouses that I have right now, they are not a joke as  
14 was implied. Mine are sophisticated and represent a million  
15 dollars of investment.

16           The conversion to protected agriculture required  
17 a large investment. I personally invested more than \$20  
18 million converting to protected agriculture. As I said, the  
19 Mexican producers overall invested over \$5 billion to do so,  
20 but the benefits have been remarkable.

21           Tomatoes in the open fields are grown naked.  
22 They are exposed to the elements, vulnerable to damage from  
23 weather and pests, as well as to animal contamination which  
24 can spread sickness and disease.

25           On the other hand, protected agriculture

1 environments shield the plants from the elements, from  
2 insects, and animal contaminations. As such, they avoid all  
3 the problems of growing in the open field. They also  
4 provide temperature control and proper ventilations.

5           Protected agriculture tomatoes can be grown with  
6 few, if any, pesticides, are free from animal contamination,  
7 and therefore much safer from a food safety standpoint.  
8 They are more uniform in quality and appearance. They can  
9 be brought to the market fresher, and production is more  
10 predictable and stable.

11           Protected agriculture plus new seed varieties  
12 have enabled us to offer customers a wide variety of  
13 different shapes, sizes, colors, and even flavors of fresh  
14 tomatoes.

15           Our customers wanted a higher quality, healthier,  
16 naturally grown tomato, and our investments have enabled us  
17 to provide them with a better tomato that consistently  
18 commands the higher price. Today, about 90 percent of  
19 Mexican tomatoes are grown in protected agriculture.

20           In contrast, the U.S. industry has chosen not to  
21 make those investments. They still produce primarily the  
22 same tomato the same way they did 23 years ago. Protected  
23 agriculture covers only 10 percent of tomatoes grown across  
24 the entire United States.

25           And the U.S. consumer has spoken: A tomato is not

1 just a tomato. They are not all the same. Ours are better.  
2 That is why the U.S. tomato producers buy them to sell, in  
3 many cases, instead of their own. It is as simple as that.

4 Finally, I must tell you that last year 22  
5 percent of my U.S. sales were to Florida Tomato Exchange  
6 members--the Petitioners in this case.

7 Thank you for your attention, and I look forward  
8 to any questions you may have.

9 MR. WILNER: Thank you. Mr. Agostini?

10 STATEMENT OF MICHAEL J. AGOSTINI

11 MR. AGOSTINI: Good afternoon, Commissioners. My  
12 name is Mike Agostini. I am what they call in the business  
13 an old "cabbage head," still. I have been in the retail  
14 produce business for more than 40 years.

15 In the 1990s, I was a vegetable buyer for Food  
16 Lion, which operated about 1,400 grocery stores. Eventually  
17 I served there as Director of Product and Floral.  
18 Subsequently, I joined Walmart in 2002 as one of four senior  
19 buyers. In 2009, I became senior director of vegetable  
20 purchasing and merchandising for Walmart. During my time at  
21 Walmart, grocery operations expanded from approximately 400  
22 stores to almost 5,000 stores offering food.

23 My eight years in charge of vegetable purchasing  
24 at Walmart saw a real shift in the retail market away from  
25 mature green tomatoes, the predominant product of U.S.

1 tomato growers, over to vine-ripe and protected agriculture  
2 tomatoes. Those products have now largely replaced the  
3 mature greens in retail markets.

4           Let me give you a little background. In some  
5 respects, it might be said that we the retailers pushed  
6 mature greens on our consumers for our own benefit. Mature  
7 greens stayed firm, were easy to ship, lasted forever, and  
8 they looked good on the shelf. But they were basically  
9 tasteless. Consumers didn't like them and complained, and  
10 they were often a joke on late-night television shows.

11           The introduction of vine-ripe and protected  
12 agriculture tomatoes was a real revelation to us as  
13 retailers. They made us realize that customers were willing  
14 to pay more for a tomato with better quality and better  
15 taste. And these better quality products actually increased  
16 overall demand for fresh tomatoes at the retail level.  
17 Although they were more expensive, consumers bought more of  
18 them.

19           The market has shown that consumers are willing  
20 to pay more for vine-ripe, protected agriculture tomatoes  
21 because they perceived them to be better.

22           At Walmart, we paid more for them as well, even  
23 though there was a little more risk for spoilage than there  
24 was in the mature greens. In fact, in my eight years, I  
25 cannot recall an instance where the contracted price offered

1 for the Mexican product was below that offered for domestic,  
2 mature-green tomatoes.

3 In many respects, I think what's happened in the  
4 tomato market is an indication of a growing and continuing  
5 trend in the overall produce market in general. Consumers  
6 are willing to pay more for what they perceive to be better  
7 and more flavorful produce. And this has been the case in  
8 particular for the younger generations, Generation X and the  
9 Millennials.

10 These generations continue to make up a growing  
11 share of the retail consumers who will likely continue to  
12 increase the demand for higher quality produce. Millennials  
13 much more so than earlier generations value eating higher  
14 quality protected agriculture tomatoes. Generation X has  
15 also started to spend more on higher quality protected ag  
16 tomatoes in recent years.

17 Based on my experience as a retail produce buyer,  
18 the customers will continue to be willing to pay a premium  
19 for what they perceive to be a higher quality product.

20 You must understand that I was a huge  
21 supplier--supporter of Florida and U.S. tomatoes up to the  
22 day I left Walmart. We continued to buy Florida tomatoes,  
23 millions of pounds.

24 But I also must tell you, in the face of a clear  
25 trend away from lower quality and less flavor, Florida

1 growers still produce primarily the same product they did  
2 before in the field-grown and mature-green tomatoes.

3           This is not the product retail consumers prefer.  
4 They want higher quality, more flavorful tomatoes. And  
5 consumers believe vine-ripe and protected agriculture  
6 tomatoes provide that.

7           And scientific studies show that this is not just  
8 a matter of perception or belief. They are confirming that  
9 "ripened on the vine tomatoes have significantly more  
10 lycopene and B-carotene" and that those ripened off the vine  
11 result in an "inferior quality of tomato" with less flavor.

12           I am not permitted to give you Walmart  
13 proprietary figures, but the USDA figures that I've seen and  
14 that have been mentioned, seem accurate to me. In retail  
15 sales, field green--field-grown gas green tomatoes has  
16 dropped from about 80 percent or so of the retail market to  
17 around 10 percent today. And that is not because of price,  
18 but because the customer prefers more flavorful protected  
19 agriculture vine-ripe tomatoes.

20           I should also note that most of the Mexican  
21 tomatoes I purchased at Walmart were bought from U.S.  
22 companies such as DiMare, Lipman, Procacci, Del Monte, and  
23 Flavor First. A large part of their business today is  
24 distributing Mexican tomatoes.

25           In closing, I would like to say that in reality

1 it has emerged as a choice between two different products,  
2 rather than a choice between two different prices.  
3 Open-field gas greens and the protected agriculture  
4 vine-ripes are seen in the market as two different products.

5 Thank you for your time, and I look forward to  
6 your questions.

7 STATEMENT OF LANCE JUNGMEYER

8 MR. JUNGMEYER: Good afternoon, Commissioners.  
9 My name is Lance Jungmeyer. I'm the president of the Fresh  
10 Produce Association of the Americas. We're an association  
11 of distributors of produce, the majority of which distribute  
12 fresh tomatoes from Mexico. We're headquartered in Nogales,  
13 Arizona, the largest historical port of entry for Mexican  
14 produce. This year, we're celebrating 75 years as an  
15 organization.

16 I also co-chair the North American Produce  
17 Food Safety Working Group. This group convenes meetings  
18 with the U.S. Food and Drug Administration and its  
19 counterpart agencies SENESICA in Mexico and CFIA in Canada.  
20 In these capacities, I've gained significant firsthand  
21 knowledge of the tomato industry in Mexico and in the United  
22 States.

23 I appreciate the opportunity to appear before  
24 you today. FPA has been an active participant in this case.  
25 Our members have responded to your importer questionnaire,

1 both in this investigation and in the sunset earlier this  
2 year, and we have worked hard to provide you with relevant  
3 information.

4                   You're here today to decide whether imports of  
5 fresh tomatoes from Mexico injure or threaten to injure the  
6 petitioning U.S. industry. The following facts demonstrate  
7 that the answer to these questions should be a resounding  
8 no.

9                   The data shows that since this saga began in  
10 1996, the Petitioners have done little to innovate or move  
11 their horticultural interests forward. With the continuing  
12 market share decline of their primarily field grown gas  
13 green tomato product, the FTE companies have largely hitched  
14 their wagons to their competitors in Mexico, investing in  
15 fields, packing houses and strategic partnerships there in  
16 order to remain relevant in the marketplace.

17                   Indeed, far from causing injury, the  
18 importation and distribution of Mexican tomatoes is one of  
19 the only things keeping the FTE marketing companies in the  
20 game. I'd like to use my time to put what you heard this  
21 morning into context, and I'll cite government data and not  
22 anecdotes. You've heard from the Florida Tomato Exchange  
23 that Mexican tomatoes are in demand because they're cheap or  
24 unfairly traded. You've heard from the Florida Tomato  
25 Exchange that its members are being injured by imports of

1 Mexican tomatoes.

2                   However, nothing could be further from the  
3 truth. First, imported Mexican tomatoes are sold above the  
4 price for U.S. gas green tomatoes, which comprise the  
5 backbone of the U.S. industry. Second, FTE has actually  
6 gained market share in the United States by distributing  
7 Mexican tomatoes. Allow me to explain.

8                   American consumers decide for themselves what  
9 tomatoes they want to buy, and they clearly choose to buy  
10 vine-ripened tomatoes. They demand quality, flavor and  
11 variety. In order to survive, FTE marketing companies have  
12 had to come to terms with the fact that their customers want  
13 to buy Mexican vine-ripened tomatoes. If you add the public  
14 data from the Commission's staff report for round tomatoes,  
15 FTE's main product, to the data released in the USTA's March  
16 report on tomato supplies in the U.S., you'll see that U.S.  
17 open field gas green tomatoes sells at a lower price point.  
18 There's a chart in the record with a black dotted line where  
19 you may see this.

20                   There are a number of reasons Mexican tomatoes  
21 sell at a premium. The primary reason is taste. A  
22 vine-ripened tomato grown in protected environments just  
23 taste better than an open field mature green gas tomato that  
24 has been gassed to turn red. You may be familiar with the  
25 umami flavor sensation. This is what gives soy sauce its

1 distinctive appeal.

2                   Umami is one of the cornerstones of taste and  
3 flavor, and in fact the full rounded meaty flavor that is  
4 associated with a good tomato is from umami. You have on  
5 the record a scientific study vetted by the National  
6 Institutes of Health that explains why. But here's the  
7 thing: As the study shows, a tomato does not begin to take  
8 on this flavor profile, this umami profile, unless and until  
9 it is vine-ripened.

10                   A tomato that's picked green will never get  
11 this true tomato taste and texture. If I may repeat: A  
12 tomato that has begun to ripen on the vine does not taste  
13 like a tomato. Gas green tomatoes from Florida will never  
14 taste that way. There's another component to the consumer  
15 appeal of Mexican vine-ripened tomatoes. The bulk of these  
16 are grown in protected environments that minimize the food  
17 safety hazards compared to open field tomato production.

18                   Growing in a protected environment protects  
19 against animal intrusion, significantly reduces the need for  
20 chemical pesticide exposure, and improves the percentage of  
21 number one quality fruit.

22                   Many of the FTE tomato growers also grow gas  
23 green tomatoes in California during the summer months, and  
24 according to the book "Tomatoland," they have to apply eight  
25 times the amount of pesticides in Florida compared to what

1 these in California because of the intense pest pressures in  
2 the subtropical Florida environment.

3 Plus the Mexican tomato supply is more stable.  
4 Since 2007, the University of Florida has been documenting  
5 the severe challenges FTE faces in tomato production,  
6 including sandy soil, the wax nutrients and cannot retain  
7 water, as well as severe pest pressure requiring extensive  
8 chemical applications.

9 The most important factor contributing to the  
10 unreliability of the U.S. product, however, is the annual  
11 reality of extreme weather events, including droughts,  
12 freezes, flooding after heavy rains and hurricanes. As Tony  
13 DiMare said, we all have weather; Florida has a little bit  
14 more of it. In contrast, Mexico offers much better growing  
15 conditions with fertile soil and a more temperate climate.

16 As you can see from this chart from the NOAA,  
17 which tracks hurricanes over the past 50 years, you'll  
18 notice that Florida is completely criss-crossed, while  
19 Mexico's coastal and highland farming areas go largely  
20 unscathed. This is one of the primary reasons about the  
21 stability of Mexican tomatoes.

22 U.S. buyers pay more from Mexican tomatoes  
23 because they know consumers demand better flavor, and  
24 because Mexican suppliers can guarantee a stable supply all  
25 year round. While FTE would have you believe the U.S. and

1 Mexican products are directly competitive, this is simply  
2 not the case. As the Commission staff report points out,  
3 the U.S. and Mexican produce different types of tomatoes.  
4 The gas green tomato is still the dominant U.S. product and  
5 marketed heavily to the large food service section of the  
6 market, where it's been preferred because it's easily  
7 processed in a mechanical slicer.

8                   As the Commission staff report confirms, the  
9 Mexican protected agricultural product is sold to the retail  
10 segment of the U.S. market at higher prices, as Mr. DiMare  
11 himself has described. What's happened in the tomato  
12 business is you've had a shift in diversification, with  
13 production moving more and more to protected culture,  
14 greenhouse, shade and high tunnel, which has created a  
15 shift in buying practices primarily at the retail level, to  
16 source more greenhouse product. This in turn has caused  
17 market share loss for the growers who produce open field  
18 product. That was a quote from Mr. DiMare.

19                   While FTE would also have you believe it has  
20 lost market share in the United States, this is actually not  
21 the case. The companies that represent the largest volume  
22 of U.S. production, some of which testified here this  
23 morning, Lipman Family Farms, Pacific Tomato Growers,  
24 Proccacci Brothers, DiMare Fresh, they have all started  
25 growing in Mexico or purchasing Mexican tomatoes that they

1 then distribute in the U.S.

2                   Instead in investing in protected agriculture  
3 technology in the U.S., they have made the business decision  
4 to grow, import and distribute Mexican tomatoes. Over the  
5 last few years, they have systematically bought up  
6 distribution operations all across the U.S. and transitioned  
7 from tomato farming to tomato marketing.

8                   We did a survey of our members. We found that  
9 almost a quarter of the Mexican tomatoes imported by our  
10 members were sold to these four Florida companies. It's  
11 generally estimated in the industry that U.S. producers  
12 purchase 25 to 35 percent or more of all the Mexican  
13 tomatoes imported into the U.S., which they then market to  
14 their customers here. If you then add that to what they  
15 produce and sell, they supply about 65 percent or more of  
16 the U.S. market. That's a pretty good market share.

17                   They have simply chosen to supply the  
18 greenhouse portion as marketers rather than producers.  
19 Thank you for your time Commissioners. I look forward to  
20 your questions.

21                   MR. WILNER: Now I'm going to turn it over to  
22 Mr. Porter.

23                   STATEMENT OF STEVE MACCHIO

24                   MR. MACCHIO: Good afternoon. My name is  
25 Steve Macchio. I'm the CFO for Red Sun Farms. With me here

1 today are Carlos Visconti, CEO of Red Sun Farms and Jim  
2 DeMenna, president of Red Sun Farms. Red Sun Farms is one  
3 of the largest high tech greenhouse tomato operations in  
4 North America, with greenhouse tomato operations in the  
5 United States, Mexico and Canada.

6 Red Sun Farms itself constitutes all three  
7 categories of participants in this trade case. Red Sun  
8 Farms is a U.S. producer of fresh tomatoes to through  
9 greenhouse facility in Dublin, Virginia. Red Sun Farms is a  
10 U.S. importer with sales and distribution operations  
11 headquartered in Texas, and Red Sun Farms has three  
12 affiliated tomato producer-exporter farms in Mexico.

13 I therefore believe that Red Sun Farms can  
14 offer important perspectives for the Commission's analysis  
15 of the competitive dynamics in the U.S. market for fresh  
16 tomatoes. I'd like to begin by noting how honored we were  
17 to receive your staff at our Dublin, Virginia greenhouse  
18 tomato production facility last month. We much enjoyed  
19 showing off our state-of-the-art U.S. tomato production  
20 facility and discussing our expansion plans.

21 Before I delve into fresh tomato market  
22 dynamics, I simply want to note the legal arguments that we  
23 identified in our prehearing brief. The time constraints  
24 for this respondent panel did not allow separate testimony  
25 by our counsel, and so I urge you to address these with our

1 legal counsel during questions and answers.

2                   The one legal point I do want to address now  
3 concerns the Commission's analysis for this case. Given the  
4 unique legal and factual circumstances of years of import  
5 restrictions, the only legal issue before the Commission is  
6 whether tomato imports from Mexico constitute a threat of  
7 future material injury to the domestic tomato industry.

8                   Very simply, the Commission cannot ignore the  
9 fact that for 20 plus years, up until May 2019, the Commerce  
10 Department continued to find that fresh tomato imports from  
11 Mexico had complied with the terms of the various suspension  
12 agreements, which explicitly by law were designed to  
13 eliminate injury to the domestic industry. So we submit it  
14 is simply not legally possible for the Commission to find  
15 that fresh tomato imports caused injury during 2016, 2017 or  
16 2018. The only injury analysis that the Commission should  
17 undertake is a forward-looking threat oriented examination.

18                   I now want to move to what we know best, U.S.  
19 market competitive dynamics for greenhouse tomatoes. I want  
20 to emphasize a few critical points. Number one, the  
21 Commission staff report is incomplete with respect to  
22 information and data about U.S. greenhouse production of  
23 fresh tomatoes. The report suggests that there are only  
24 four U.S. producers of greenhouse tomatoes in the United  
25 States.

1                   This does not reflect the U.S. greenhouse  
2 tomato industry. In fact, Red Sun Farms itself is aware of  
3 at least 17 separate large-scale U.S. greenhouse operations  
4 focusing primarily on tomatoes. I hasten to add that this  
5 absence of information is not at all the fault of the  
6 Commission staff. We know that the staff sought responses  
7 from all U.S. producers, but many did not reply.

8                   Because the overwhelming majority of U.S.  
9 greenhouse tomato operations did not respond to the  
10 Commission's questionnaire, the Commission's information and  
11 data about U.S. producers of greenhouse tomatoes are  
12 incomplete.

13                   Number two, removal of anti-dumping  
14 restrictions will have little effect on prices of Mexican  
15 greenhouse tomatoes. The Petitioners claim that a  
16 Commission negative injury determination will automatically  
17 result in a precipitous drop in the selling prices of  
18 Mexican greenhouse tomatoes. This is simply not true, and  
19 unlike the Petitioners we have real world data and  
20 experience to prove our point.

21                   The selling prices of Mexican greenhouse  
22 tomatoes have consistently been higher than the reference  
23 prices established by the Commerce Department. If the  
24 Petitioners' claims and theory of competition were true,  
25 this undisputed fact would not exist. Rather, the data and

1 history would show that selling prices of Mexican greenhouse  
2 tomatoes would have been identical to the minimum prices  
3 established by the Commerce Department.

4                   However, this is not actually -- has not  
5 actually taken place in the market. Rather, Red Sun Farms,  
6 like most other importers, is able to charge prices that are  
7 higher than minimum prices established by the Commerce  
8 Department. Given that we are already selling above the  
9 established reference price, it defies all logic and  
10 business sense to assume that we would unilaterally lower  
11 our prices below the reference price if the reference price  
12 is eliminated.

13                   Number three, U.S. producers of greenhouse  
14 tomatoes are not being harmed by imports of greenhouse  
15 tomatoes from Mexico. You heard this morning the repeated  
16 allegation that tomato imports from Mexico are devastating  
17 the U.S. tomato producers because they are selling at lower  
18 prices and therefore stealing sales from U.S. tomato  
19 producers. I can tell you from personal firsthand  
20 experience that this is absolutely not true for U.S.  
21 greenhouse tomato producers.

22                   Our own U.S. greenhouse tomato production  
23 facility in Dublin, Virginia always sells all of its  
24 production and always commands premium prices. The reason  
25 is straightforward. There is increasing demand for locally

1 grown fresh tomatoes, and therefore our customers who  
2 purchase our Dublin, Virginia tomatoes are willing to pay  
3 the highest prices for our local produce.

4                   Indeed, for those customers we are actually  
5 able to demand a premium price for our Mexican grown  
6 tomatoes. Now given these sales and pricing dynamics, one  
7 would ask why doesn't the data demonstrate better  
8 profitability for U.S. greenhouse tomato producers? I  
9 noticed that the public version of the Commission staff  
10 report for the sunset case explicitly noted that U.S.  
11 greenhouse tomato producers had worst profitability than  
12 U.S. open field tomato producers.

13                   The impression that U.S. greenhouse tomato  
14 producers cannot make money is misleading. U.S. greenhouse  
15 tomato producers absolutely are profitable once start-up and  
16 expansion costs are taken into account, and appropriate  
17 scale is achieved. This turning point is very important.  
18 The Commission has only collected data for a three year time  
19 period. However, greenhouse tomato production assets can  
20 last 25 years and beyond, but depreciation occurs over a  
21 faster time period.

22                   What this means is that if the U.S. greenhouse  
23 tomato production operations are in a period of growth and  
24 expansion, as most have been over the past few years, the  
25 depreciation and other expenses will make it appear that the

1 operation is losing money for a couple of years, even though  
2 the longer term financial prospect is much better.

3                   Further evidence of this is private equity  
4 investment in the industry. There is significant private  
5 equity money behind the expansion of U.S. greenhouse tomato  
6 production assets. Indeed, we are aware of a number of U.S.  
7 greenhouse tomato production companies that have significant  
8 supporting private equity investment. We ourselves have  
9 been contacted on several occasions by private equity funds  
10 wanting to participate in our operations.

11                   I want to conclude with what I believe is our  
12 most important point. U.S. greenhouse tomato production  
13 operations are healthy and prospects are very positive for  
14 the considerable future. This morning Mr. Singh, who was  
15 part of the Petitioners' panel, stated that there was a very  
16 real possibility that the United States would lose all of  
17 its U.S. tomato production, and indeed Mr. Singh explicitly  
18 identified tomato production operations in Virginia as being  
19 particularly at risk for closure.

20                   I completely disagree with these statements.  
21 Red Sun Farms is a thriving, profitable U.S. production  
22 operation in Virginia. Moreover, Red Sun Farms itself is  
23 already committed to significant expansion of its Dublin,  
24 Virginia operations, and we are just one of many across the  
25 country. There continues to be strong U.S. demand for

1 locally grown vine-ripened tomatoes, and so we remain quite  
2 bullish for U.S. production of greenhouse tomatoes for the  
3 future.

4 We believe that in the current business  
5 environment, the U.S. greenhouse tomato industry, including  
6 Red Sun Farms, will continue growing. That completes my  
7 statement. My colleagues and I look forward to answering  
8 your questions.

9 STATEMENT OF THOMAS L. ROGERS

10 MR. ROGERS: Good afternoon. I'm Tom Rogers  
11 with Capital Trade. I'm following up on the testimony you  
12 just heard from the industry witnesses. I'm going to review  
13 key conditions of competition, and then run through some  
14 basic data points on volume, price, impact and threat.

15 Now the witnesses have described the basic  
16 framework of the case. That is, differences in production  
17 process and products translates into attenuated competition.  
18 Some of these conditions are summarized in Slide 1.

19 In terms of production process, most imports  
20 are vine ripe tomatoes grown under a controlled environment  
21 or protected agriculture. In contrast, the vast majority of  
22 domestic production is open field. Witnesses also testified  
23 that these significant differences in production process  
24 result in very different products, both physically and as  
25 viewed in the marketplace.

1                   Purchasers agree. Two-thirds of responding  
2 purchasers reported that there are differences in the  
3 products. As you also heard, product differences lead to  
4 different end uses and channels or market segments.  
5 Specifically, the food service industry generally prefers to  
6 gas greens, while retailers prefer vine ripe tomatoes. As a  
7 result, most U.S.-produced fresh tomatoes go to food  
8 service, while only a small share of imports go to this  
9 channel.

10                   Turning to the next slide, more conditions.  
11 Consumer preference, as you've heard from Mr. Agostini, is  
12 another important condition of competition, and there's been  
13 a shift in the tomatoes that we buy, for salads, condiments  
14 and snacking. This shift has not been driven by price.  
15 Simply put, consumers have switched to vine ripe tomatoes  
16 because they taste better. This shift occurred despite  
17 higher prices for those products.

18                   Remarkably, in what would seem to be a mature  
19 product, these innovations in process and product have  
20 fueled a dramatic increase in fresh tomato consumption, from  
21 12 pounds per capita annually in the 1980's to almost 21  
22 pounds per capita in this decade. Now due to these many  
23 product differences, we have to disagree with the staff that  
24 there is a high degree of substitutability between domestic  
25 and Mexican tomatoes.

1                   But you don't have to take my word for it.  
2     First, as shown in your prehearing report, more than half of  
3     U.S. producers, not purchasers, producers, reported that  
4     vine ripe tomatoes are only sometimes or never  
5     interchangeable with domestic gas greens. You also heard  
6     from Mr. Agostini that based on his extensive experience  
7     buying tomatoes, the differences between Mexican tomatoes  
8     and U.S. gas greens are very important in the retail  
9     channel.

10                   Commission staff in fact noted that "vine ripe  
11     tomatoes are preferred in retail channels, but have limited  
12     demand in food service establishments." Indeed, it makes  
13     you wonder if the products were so substitutable, than the  
14     lower-priced gas green tomatoes would not be losing share to  
15     higher-priced vine ripe tomatoes.

16                   Put another way, if the products were  
17     substitutable and price were paramount, then the  
18     lower-priced gas green tomatoes would still dominate the  
19     U.S. market. For all these reasons, we submit that a much  
20     lower elasticity of substitution range is appropriate.

21                   We also heard some discussion this morning  
22     about the suspension agreement, and that's another important  
23     factor in the market. I draw your attention to a couple of  
24     key points. First, by definition the Department of Commerce  
25     has found consistently that the reference eliminates

1 injuriously priced sales. Second, the reference prices act  
2 as a price floor. This can be significant for a perishable  
3 agricultural product where prices can vary sharply due to  
4 supply-demand imbalances.

5                   It is shown in Slide 4 due to strong demand,  
6 Mexican tomatoes are frequently sold well above the  
7 reference price. Thus, terminating the agreement does not  
8 mean that import prices would fall below the negotiated  
9 floor prices, or for that matter below U.S. producer prices.  
10 Demand for the specific tomatoes grown in Mexico is expected  
11 to remain high.

12                   I'll next summarize the data demonstrating no  
13 injury by reason of imports. Turning first to volume, you  
14 can see in the staff report that U.S. consumption increased  
15 by 2.7 percent from 2016 to 2018. Next, U.S. producer  
16 shipments increased over the same period by 0.8 percent. In  
17 other words, Mexican imports did not prevent U.S. producers  
18 from increasing their total shipments.

19                   Overall, Mexican market share was essentially  
20 flat, increasing by only one percent over the period, and  
21 some of that was at the expense of non-subject imports.  
22 Also as noted by Mr. Jungmeyer, U.S. producers grow and buy  
23 lots of Mexican tomatoes. To supplement their production,  
24 these producers account for a significant share of import  
25 demand.

1                   There are also no adverse price effects. As  
2 mentioned, import prices were consistently above the  
3 negotiated reference price. In terms of direct comparisons,  
4 there are more individual instances of underselling than  
5 overselling in the data in the report, but you need to look  
6 at the quantity to get a more accurate picture of price  
7 competition.

8                   Using the data submitted in Exhibit 4 of FTE's  
9 brief, which we understand includes additional production,  
10 we see that Mexico oversold domestic producers in sales  
11 accounting for a very large majority of U.S. sales volume.  
12 More importantly, there was significant overselling of field  
13 tomatoes, by far the main U.S. products. This shows no  
14 material price competition, and the size of the margins are  
15 another indication of significant differences between the  
16 domestic and Mexican tomatoes.

17                   Either way, the pricing data show that imports  
18 of vine ripe tomatoes did not have an adverse price effect  
19 on the domestic industry's main products. Non-price factors  
20 are also important. In addition to the product differences  
21 we discussed, as shown in this slide purchasers identified  
22 several factors as more important than price in their  
23 purchasing decisions. This is corroborated by Mr.  
24 Agostini's testimony, that the shift in the retail market to  
25 vine ripe tomatoes occurred because of consumer preference,

1 not price.

2                   Now given the lack of volume or price effects,  
3 it's no surprise that subject imports did not cause material  
4 injury. At the outset, we note that the Commission issued  
5 questionnaires to 816 firms. Only 19 responded. Such a  
6 poor response rate sends a strong message that a substantial  
7 share of the domestic industry does not believe that it is  
8 injured, enough to bother completing a questionnaire. As  
9 noted, this is particularly the case for the greenhouse  
10 segment of the domestic industry.

11                   Now turning to the next slide in terms of  
12 impact. Specific financial information is BPI, so the  
13 results must be characterized in general trends. Following  
14 are some of the key points listed in the prehearing report.  
15 First, U.S. producer shipments increased. We also see that  
16 net sales revenue increased, and gross profit increased,  
17 which was due to an increase in net sales, average unit  
18 value, while the per unit cost of goods sold decreased.  
19 Finally operating income, another key indicator, followed  
20 the same general positive trend as gross profits. That is  
21 not an injured industry.

22                   So to summarize, the domestic industry's  
23 profitability improved over the period, and the trend in  
24 aggregate COGS to net sales ratio reaffirms no price  
25 suppression or adverse price effects. This lack of a causal

1 link is even clearer when the results are reviewed by type,  
2 open field and greenhouse. The predominance of your report  
3 contains data separately for those two segments of the  
4 industry.

5                   For the predominant segment, gas green  
6 tomatoes grown in open fields, the industry results improved  
7 over the period. For the greenhouse segment, which accounts  
8 for roughly ten percent of U.S. production, Red Sun  
9 thoroughly described why this segment is thriving. Indeed,  
10 simply from a volume perspective, the growth has been  
11 remarkable, and as you heard from the witnesses, U.S.  
12 greenhouse producers continue to expand, with substantial  
13 investment in physical assets as well as marketing and  
14 branding.

15                   I'm now going to turn to threat, and I'll  
16 review the key statutory factors and trends demonstrating  
17 that subject imports do not threaten the domestic industry.  
18 In terms of excess capacity, I first note that the staff  
19 report figure of approximately 70 percent unused capacity is  
20 misleading. A review of the questionnaire shows that  
21 producers did not report capacity on a common basis, and  
22 many based it on their packing plants, not the actual  
23 capacity to grow tomatoes.

24                   More importantly however, the tariff act  
25 specifies that the Commission should not simply consider

1 excess capacity, but whether there is a substantial increase  
2 indicating the likelihood of substantially increased exports  
3 to the United States. Given recent trends in Mexican  
4 shipments, the data do not support such a conclusion.

5           Further, we note that while Mexican production  
6 increased marginally from 2016 to 2018, their home market  
7 shipments as a percentage of total shipments increased by  
8 1.6 percent, while the percentage of shipments to the United  
9 States declined by a similar amount. Thus, Mexican  
10 producers did not target any increase in production to boost  
11 shipments to the U.S. market.

12           The record also confirms there was not a  
13 significant rate of increase in imports. Import market  
14 share increased by at most one percent, and this increase  
15 was due entirely to imports of greenhouse tomatoes. Given  
16 the statements today and the lack of participation by the  
17 growing U.S. greenhouse industry, there is no indication  
18 that this segment is threatened with injury.

19           Finally, we see that there's no significant  
20 price depression nor suppression during the period. As  
21 shown in Slide 11, we also see that the prices of Mexican  
22 tomatoes has increased since the termination of the  
23 suspension agreement. Again, there is no imminent threat.  
24 I apologize. We lost that slide, but it was in our brief  
25 and we'll put it again in the post-hearing.

1                   In sum, the subject imports did not cause  
2 material injury and do not threaten the domestic industry.

3                   MR. NOLAN: As Mr. Amberlang gets the clicker  
4 so he can go up to the podium, I'm going to distribute  
5 something to the staff and to the Commission.

6                   STATEMENT OF BRYANT AMBERLANG

7                   MR. AMBERLANG: Hi, good afternoon. I'm Bryant  
8 Amberlang. I've been the CEO and president of Nature Sweet  
9 Tomatoes for over 10 years. I've been growing tomatoes for  
10 over 20 years and thank you for taking the time to listen to  
11 what I want to present to you today.

12                   You all have had the opportunity to listen to a  
13 lot of different numbers and you're going to see some more  
14 market research numbers I'm going to share with you today  
15 about specific varieties, but I would ask you to consider  
16 this one question. Just in your intuitive, everyday  
17 experience, do you make choices about how you eat and what  
18 kind of tomatoes you will eat? And I think if you're like  
19 the rest of consumers in the United States, you're going to  
20 have five reasons why you chose tomatoes.

21                   One is just where the -- how the category has  
22 developed over time. I'm going to tell you how it's  
23 materially changed over time. Secondly, is over flavor.  
24 Each one of you have likely had the experience that tomatoes  
25 do taste different, depending on what kind of varieties you

1 buy. Third is appearance. You'll actually choose what kind  
2 of occasion you'll use tomatoes for based on the size and  
3 shape and colors that those tomatoes represent. Fourth,  
4 you get direct marketing from every person in this room.  
5 People present you with concepts and ideas and present you  
6 with different packaging to consider which products you  
7 should use at a specific occasions.

8           And then, finally, you will look at the price,  
9 but you'll actually establish prices of value relationship  
10 between what you're buying and whether or not it's actually  
11 worth it. And I'm going to show you how that's affected the  
12 majority of U.S. consumer behavior over the past 10 years.

13           So, first of all, let's just look at consumer  
14 demand. The chart that's up here right now is actual retail  
15 sales in the United States, by a third party group called  
16 IRI or Neilson, both of them measure this. So, this is the  
17 majority of U.S. grocery stores. And what you'll see up  
18 there on this chart is that small tomatoes are moving  
19 dramatically upward. That says that consumers do not say a  
20 tomato is a tomato is a tomato. That they're making  
21 specific decisions based on new varieties and new products  
22 that are hitting the marketplace.

23           And what you can see, which is incredible, is  
24 that over time the large tomato segment and the small tomato  
25 segment have virtually met each other. This is on a dollar

1 basis. That's why this won't match the volume metric  
2 numbers that you have in your report. So, from a value  
3 standpoint, from the number of dollars that consumers are  
4 willing to pay, it's significantly more on smaller tomatoes.

5           The most recent data, meaning the last 13 weeks,  
6 actually has smaller tomatoes surpassing larger tomatoes and  
7 that trend will continue. Next, this is actual consumer  
8 data, so a consumer research test that went out and said in  
9 a controlled environment where we went out and asked  
10 numerous consumers, look, I'm going to give you these  
11 products. I'm going to ask you to taste them and I'm going  
12 to ask you to tell me which ones taste better.

13           And as you can see -- and this is cherubs, a  
14 product we have on the market, versus tomatoes on the vine  
15 versus Romas versus beef steak. And the point of this chart  
16 is to demonstrate that there is real material difference  
17 between products and consumers can perceive it and they can  
18 perceive it at a significant difference and make buying  
19 decisions based upon it. It's not theoretical. This,  
20 again, is a third-party market research group that is  
21 measuring this data.

22           Next is appearance. So, if you think about the  
23 four major different usage occasions that we have in  
24 tomatoes, the first one is salads. Sixty-five percent of  
25 tomatoes are consumed on salads and consumers consistently

1 would choose a smaller tomato for that. The second occasion  
2 to consider is recipes or appetites. For that, again, small  
3 tomatoes are chosen. The third category would be snacking.  
4 Again, not very many people eat a large tomato like an  
5 apple. So, again, they choose snacking tomatoes. They  
6 choose specialty tomatoes like the ones that you have on  
7 your podium right now.

8                   The only occasion where larger tomatoes are  
9 actually chosen is for sandwiches and obviously for its  
10 slicing ability. But even in that case, a tomato is not a  
11 tomato. They're making choices based on firmness. They're  
12 making choices based on color.

13                   Finally, direct marketing, so we saw earlier a  
14 table of product and even those different boxes had specific  
15 messages attached to them. But I have to tell you, all  
16 these different brands have different consumers. I know  
17 that because these are our brands. They have different  
18 packages. They have different colors. The products  
19 themselves have different taste profiles. This is a means  
20 of segmenting the market that demonstrates once again that a  
21 tomato is not a tomato is not a tomato.

22                   Finally, and I want to be really clear about  
23 this next chart because no CEO in their right mind would  
24 show their financials up on a piece of paper, but that's  
25 what this is because that's how important this issue is for

1 our company. This is our actual net price to the retail  
2 customer. That top line that you see, and it's by month. I  
3 know it's difficult, but you have the paper copy of this.  
4 This is not our retail price. This is our net price to the  
5 client that we're selling to, normally, retail grocery  
6 stores.

7           And I would like you to notice two things. One,  
8 it's almost two dollars higher than the referenced price per  
9 pound. The second thing is the line doesn't move. It  
10 doesn't move by seasonality. It doesn't -- the only time  
11 that that line moved is when we actually had some sort of  
12 substandard quality issue we segmented that product and we  
13 sold it into the open market, so it was a production issue.  
14 It wasn't a market issue. This, by itself, stands alone as  
15 representative of what consumers are willing to pay when you  
16 actually get the marketing right and you get the product  
17 profile right.

18           And if one more piece of evidence -- by the way,  
19 I forgot to mention we grow in the United States like our  
20 colleagues from Red Sun. We grow in the United States. We  
21 distribute in the United States and we also grow in Mexico  
22 and there's where our facilities are located. But finally  
23 -- and I want to put this up for all my competitors to see  
24 as well -- if there's no future market in the United States  
25 to grow tomatoes of that kind of caliber, our company just

1 invested \$100 million over the course of the last five  
2 years. And no one in their right mind would make that kind  
3 of an investment unless they were bullish about the future  
4 of those kinds of tomatoes.

5 Thank you for your time and I look forward to  
6 your questions.

7 MR. WILNER: That concludes our direct  
8 testimony. We'll reserve the remainder for our closing.  
9 Thank you.

10 COMMISSIONER SCHMIDTLEIN: Okay. Alright, thank  
11 you very much. I'd like to thank this panel for being here  
12 as well. This afternoon we will begin -- I will begin the  
13 questioning. So, I want to make sure I understand. I know  
14 I've heard a couple witnesses say that 90 percent of  
15 tomatoes in Mexico are grown in a protected agricultural  
16 environment, right? And I know we've had some slides  
17 differentiating between shade houses and simple tunnels to  
18 more sophisticated you know greenhouses and controlled  
19 environments. So, my question is how much of the production  
20 in Mexico is vine-ripened? So, is 90 percent of the  
21 tomatoes grown in Mexico vine-ripened because they're grown  
22 in a "protected" environment?

23 MR. WILNER: Let me ask the industry witness to  
24 answer, but there are two different issues. Vine-ripe is  
25 ripened on the vine. That could be grown either in the open

1 field, as it used to be in Mexico, or in a protected  
2 environment. And again, you're right, "protected"  
3 environment is anything that really protects you from the  
4 outside environment. The type of structure you build  
5 depends on the particular location. Some locations you need  
6 a full greenhouse. Others you need less, shade house, but  
7 still -- okay.

8 COMMISSIONER SCHMIDTLEIN: Ninety percent is  
9 what quote has. I think, in fact, in your opening you said  
10 90 percent is grown in a protected environment. And my  
11 question is how much -- how much of the production is  
12 vine-ripened.

13 MR. WILNER: Okay. And let me ask -- I think  
14 almost all is, but somebody want to answer?

15 MR. VALDEZ: There are 90 percent are vine-ripe  
16 on the different type of tomatoes, either cherry tomato,  
17 grape tomatoes, or ripe tomatoes they're all vine-ripes.

18 COMMISSIONER SCHMIDTLEIN: Okay, so you believe  
19 90 percent of production in Mexico is vine-ripened --  
20 vine-ripened.

21 MR. VALDEZ: Yeah, they are.

22 COMMISSIONER SCHMIDTLEIN: Regardless of the  
23 type?

24 MR. WILNER: May we put in the post-hearing  
25 brief an exact number because we'll get the exact figure for

1 you.

2 COMMISSIONER SCHMIDTLEIN: Yeah, that would be  
3 great.

4 MR. de la VEGA: Hi Eduardo de la Vega, those  
5 tomatoes are grown in Mexico. I know I go into different  
6 areas and I think there's only like three or four mature  
7 green growers -- mature green growers in Mexico, so there's  
8 very, very little mature green tomatoes grown in Mexico.

9 COMMISSIONER SCHMIDTLEIN: Okay.

10 MR. de la VEGA: I would say 98, 99 percent,  
11 according to my figures.

12 COMMISSIONER SCHMIDTLEIN: Okay, okay, that's  
13 helpful. And are most of these -- or the vast majority or  
14 all of them picked at stage two in terms of the chart we saw  
15 this morning, which it showed you know a very green tomato  
16 and then one that's a little less green. Are most of them  
17 picked at stage two and then shipped.

18 MR. De la VEGA: It's at least two, three, but  
19 mostly we are on the Baja area, so our main market is  
20 California. And so it's close to us and we normally like to  
21 harvest in three and four color because our main market is  
22 Los Angeles, so it's -- yeah, two and three color, mainly.

23 COMMISSIONER SCHMIDTLEIN: Okay.

24 MR. ESQUEE: In my case, it's three or four  
25 number of color.

1                   COMMISSIONER SCHMIDTLEIN: And that's because  
2 you're closer --

3                   MR. ESQUEE: Three or four.

4                   COMMISSIONER SCHMIDTLEIN: And you're closer to  
5 where you're shipping, I suppose?

6                   MR. ESQUEE: Yes, I am closer.

7                   COMMISSIONER SCHMIDTLEIN: Okay. And I guess  
8 this is -- the reason you can pick or some can pick at stage  
9 two is because of the seeds -- the nature of the seeds that  
10 were developed; is that right that allows you to pick so  
11 early and then it ripens while it's being transported and  
12 doesn't change the better quality of the taste, according to  
13 you all? Because most people -- just from a layperson, from  
14 somebody who's not in this industry, right, when you think  
15 of vine-ripened, you think of you know the tomatoes are  
16 turning red or close to red on the vine. So, I think it for  
17 -- I don't know. For most of us interesting to see like,  
18 well, no, these tomatoes are actually pretty green when  
19 they're picked and they turn red in route.

20                   MR. LEY: I would like to elaborate a little  
21 bit. I'm sorry here in the back.

22                   COMMISSIONER SCHMIDTLEIN: Okay, thank you.

23                   MR. LEY: The tomatoes -- we grow tomatoes  
24 vine-ripeness. Some of the witnesses here explained  
25 already. We focusing to varieties that are longer shelf

1 life because we focus on producing tomatoes with flavor.  
2 Flavor it has been what we are seeking in different methods,  
3 but we're looking a niche and we're looking for repeat sales  
4 and that has put us in a preference position in the  
5 marketplace. So, the longer we can wait, depending on the  
6 variety, for example, grape tomatoes some of the tomatoes  
7 that are grown in Mexico the later that you can wait -- and  
8 you can be harvesting them at color five because they are  
9 going to have much more flavor, more sugar, et cetera and  
10 the weight per pound, is going to be more balanced. So, we  
11 are always are looking to harvest at the latest stage  
12 possible.

13 COMMISSIONER SCHMIDTLEIN: Sure, but --

14 MR. LEY: Depending on the variety and the  
15 growing location and the consumer.

16 COMMISSIONER SCHMIDTLEIN: I understand.

17 MR. LEY: And also, the specs of the customers.

18 COMMISSIONER SCHMIDTLEIN: But there's a lot of  
19 points in the United States that are pretty far from Mexico.

20 MS. ELLIS: For Red Sun Farm -- I just want to  
21 interrupt -- for the high-tech, hydroponic growing  
22 environment, I think you get a bit of a different answer.  
23 And I think it would apply both for the Mexican product and  
24 for the domestic product, so I'll let Carlos speak.

25 MR. VISCONTI: To complete --

1           MR. BISHOP: Could you please remember to  
2 announce your name when you speak?

3           MR. VISCONTI: Okay, Carlos Visconti, with Red  
4 Sun Farms. To complement Mr. Ley's comment, in our case,  
5 Red Sun, we pick up our tomatoes around stage three or four.  
6 Okay. But when we look for varieties, we tried no less, to  
7 look for flavor, of course, is one of the biggest drivers,  
8 but I go back to your point when you say we also look for  
9 shelf life. Okay, we try to find the right balance between  
10 shelf life so we can extend the color as much as we can to  
11 overbear flavor.

12           COMMISSIONER SCHMIDTLEIN: And most of these  
13 tomatoes are coming across the border in trucks, right?

14           MR. VISCONTI: That is correct. Yes.

15           COMMISSIONER SCHMIDTLEIN: Yes, they're coming  
16 across the border and they're traveling up to New York or  
17 wherever they're going in trucks, right?

18           MR. VISCONTI: All the places in the U.S. and  
19 Canada even.

20           COMMISSIONER SCHMIDTLEIN: Okay, right, so  
21 they're not -- or even in Canada.

22           MR. VISCONTI: Yes.

23           COMMISSIONER SCHMIDTLEIN: Okay, so you go  
24 through the United States to get to Canada.

25           MR. VISCONTI: That is correct. Yes.

1           MR. NOLAN: This is how they come off the vine.  
2 What you're seeing when they pick them this is what they  
3 look like and they are packed in Mexico and shipped direct,  
4 right?

5           COMMISSIONER SCHMIDTLEIN: Okay.

6           MR. NOLAN: So, this is what you get coming off  
7 the vine.

8           COMMISSIONER SCHMIDTLEIN: Okay, alright.  
9 That's helpful. How do -- you know we've got this word  
10 "greenhouse" that's been used. I'm just wondering how do  
11 you all define "greenhouse," and not including what we  
12 understand to be a controlled environment, right? Like I  
13 know that -- because in our pricing products it's  
14 greenhouse/controlled environment. So, what I'm trying to  
15 get at is what else is included in those shipments that's  
16 not you know a permanent -- a controlled environment  
17 structure.

18           COMMISSIONER SCHMIDTLEIN: So how do you all  
19 define the word "greenhouse"? Is there other things that  
20 are included in that, that's --

21           MR. DiMENNA: Can I respond --

22           COMMISSIONER SCHMIDTLEIN: -- differentiated from  
23 an adaptive environment?

24           MR. DiMENNA: Can I respond to that? Jim  
25 DiMENNA, Red Sun Farms.

1 COMMISSIONER SCHMIDTLEIN: Sure.

2 MR. DiMENNA: So a high-tech greenhouse, in our  
3 opinion, both United States, Canada and Mexico is  
4 hydroponic, it's heated --

5 COMMISSIONER SCHMIDTLEIN: Well, that would be  
6 controlled environment, right?

7 MR. DiMENNA: Yes.

8 COMMISSIONER SCHMIDTLEIN: So if you've got two  
9 -- if we're putting things in a category that's described by  
10 two things -- greenhouse and controlled environment, what  
11 you're describing would be a controlled environment.

12 MR. DiMENNA: That's our greenhouse.

13 COMMISSIONER SCHMIDTLEIN: Okay.

14 MR. DiMENNA: We control our nutrients that we  
15 give the plant --

16 COMMISSIONER SCHMIDTLEIN: Yeah.

17 MR. DiMENNA: We recycle anything that the plant  
18 doesn't take. We send it back to the feeding station,  
19 recharge, send it back out. We heat it, and it's grown  
20 hydroponically. And the heat's an important factor in our  
21 space to call it a high-tech greenhouse.

22 COMMISSIONER SCHMIDTLEIN: Okay.

23 MR. DiMENNA: So we can take a high-tech  
24 greenhouse from Mexico, if we could, and you'd lift it up  
25 and put it in Ontario in February and you'd still grown

1 tomatoes out of it. So we're heated, we're good.

2 COMMISSIONER SCHMIDTLEIN: Yes.

3 MR. DiMENNA: That's our opinion of high-tech  
4 greenhouse.

5 COMMISSIONER SCHMIDTLEIN: Okay. Well, the  
6 description is just greenhouse, so that's what I'm trying to  
7 get at. What else might be included in that?

8 MR. JUNGMEYER: This is Lance Jungmeyer from the  
9 Fresh Produce Association. The Federal Tomato Marketing  
10 Order defines greenhouse simply as grown indoors. So that  
11 means it has walls, a roof, and a door.

12 COMMISSIONER SCHMIDTLEIN: Okay. So is that how  
13 everyone on this panel defines a greenhouse? If it has  
14 walls, a roof and a door?

15 MR. WILNER: Yes, but honestly, and that is the  
16 definition, but honestly, because there's been development  
17 of so many protected agricultural methods, it sometimes--and  
18 I find this part of the confusion--the people say, well,  
19 it's a greenhouse-grown, and what they really mean is  
20 protected environment all the way from, you know, just  
21 making sure you covered it from the environment and  
22 protected it from outside in sort of plastic things, all the  
23 way to a high-tech greenhouse in Ontario in the middle of  
24 winter.

25 COMMISSIONER SCHMIDTLEIN: So what's an adaptive

1 environment then?

2 MR. WILNER: Adaptive environment is basically  
3 what they're talking about is another term used for a  
4 low-tech greenhouse. That's what we found. So that's some  
5 of the confusion in the data, honestly.

6 COMMISSIONER SCHMIDTLEIN: Yeah.

7 MR. WILNER: The way the USDA collects it, or  
8 customs collects it is different ways. And we will try in  
9 the post-hearing brief to give more precise definitions and  
10 data on it. The one thing I'll say, while there might be  
11 some disagreements on the precise statistics and what they  
12 are, there's no doubt that the vast majority of the Mexican  
13 product exported to the United States today is grown in this  
14 protected environment --

15 COMMISSIONER SCHMIDTLEIN: Right.

16 MR. WILNER: -- and that the vast majority of the  
17 U.S. product is not. There's no dispute about that. And  
18 what the specifics --

19 COMMISSIONER SCHMIDTLEIN: Okay. My time is up.  
20 In terms of that, do you have any idea how much has grown in  
21 a high-tech greenhouse versus a low-tech greenhouse?

22 MR. WILNER: We'll need to look that up unless  
23 somebody has it right --

24 MR. NOLAN: That could be a bit of a misnomer as  
25 well. Everything that NatureSweet makes is grown in a

1 greenhouse. The greenhouse in that picture is obviously  
2 high-tech controlled environment, because it's hot and cold  
3 in Arizona. Technically, the greenhouses are the same in  
4 Mexico, except they don't have heating, which then makes  
5 them adaptive environment under the Commerce Department  
6 rules, but we still treat them as greenhouses, because they  
7 are high-tech hydroponic greenhouses. They just don't need  
8 to be heated. Because of that, they're not controlled  
9 environment, but they're still high-tech greenhouses. I  
10 mean what these guys make is nothing but high-technology  
11 product technique.

12 MR. WILNER: And if I may -- because we've asked  
13 the same question. And what people have explained is, you  
14 build the structure necessary in that particular location to  
15 protect the growing from the outside elements. And it  
16 depends on, you know, on the location you are. Canada, you  
17 need heating, in Mexico, you don't. In some things, you  
18 need more protection from rain and in other things it could  
19 be less permanent because you don't have very --

20 COMMISSIONER SCHMIDTLEIN: Right. But in your  
21 all's view -- the key is that it's vine-ripened. But this  
22 all allows these tomatoes to be vine-ripened --

23 MR. WILNER: And protected --

24 COMMISSIONER SCHMIDTLEIN: -- and that's changed  
25 the taste?

1           MR. WILNER: -- from inclement weather, from  
2           pests, from insects and animal intrusion. And so you can  
3           control it, right?

4           COMMISSIONER SCHMIDTLEIN: All right, thank you.  
5           And Commissioner Kearns, I apologize.

6           COMMISSIONER KEARNS: Thank you all for being  
7           here. I appreciate your testimony. Kind of, I guess,  
8           starting up where Commissioner Schmidtlein left off, I mean,  
9           for one thing, as you mentioned, Mr. Wilner, I mean this is  
10          sounding a bit nebulous to me about what -- how you are  
11          segmented -- or how the competition is attenuated between  
12          you and U.S. imports.

13          And one thing is, as you pointed out, well, it  
14          kind of depends on your weather conditions whether or not  
15          you need heating. But that doesn't necessarily change the  
16          tomato I buy, right? In other words, you don't need heating  
17          in Mexico, somebody else may need heating in Canada. Is the  
18          tomato gonna be any different?

19          MR. AMBELANG: Can I reply to that? This is  
20          Bryant Ambelang from NatureSweet. So the seed  
21          characteristics that you choose will determine what kind of  
22          conditions you need to create for that particular variety.  
23          So if--and we'll use some of the varieties that you have  
24          sitting inside of that package that you're by right now.

25          Those orange and yellow tomatoes that have

1 different flavor profiles and different shelf lives are very  
2 susceptible to heat and cold, and so we've got to control  
3 the temperatures in order to grow those different types of  
4 varieties. That darker tomato that's inside that actually  
5 doesn't have to have those sorts of controlled environments.  
6 It has a much thicker skin, it's a very different eating  
7 experience. And the red, it actually can endure in both  
8 different environments.

9                   So it depends, for us to be able to really  
10 generate segmentation in the market and give consumers  
11 varying degrees of experiences, we need to have different  
12 technologies, just like you would in other food processing  
13 environment.

14                   COMMISSIONER KEARNS: Okay, thank you. And I  
15 guess, I'm sorry, Mr. Porter?

16                   MR. PORTER: Sometimes it's good to go back to  
17 sort of 50,000 feet, and I understand there's a little bit  
18 maybe, some difference of opinion or confusion about the  
19 definition of this greenhouse or that greenhouse on the  
20 Mexico side.

21                   But the overarching point is 90% of the U.S. are  
22 not greenhouse at all, under any definition, okay? They're  
23 open-field and they're what's called gas-green tomatoes,  
24 okay? And the fact that in Mexico, they're not, I think  
25 that's the more important sort of overarching point that we

1 believe you should take.

2           The fact that maybe we have a little bit of a  
3 difference of opinion of a greenhouse is less important than  
4 what's coming in from Mexico is very different than the  
5 overwhelming majority of what is produced in the United --

6           COMMISSIONER KEARNS: Let me just make sure I  
7 understand the numbers. Because you said 90% of U.S. are  
8 not greenhouse. But what I'm looking at, which is Table 3-9  
9 on Page 319, it's proprietary, so I won't say it, but --

10           MR. PORTER: I apologize. 90% coming from Mexico  
11 is not open-field gas-green. That's what I --

12           COMMISSIONER KEARNS: Okay. But, so now, let's  
13 go to Mexican though. Mexico, what I'm looking at, and this  
14 is not proprietary, if I'm looking at this right, this is  
15 Table 4-3 on Page 4-10, shows that 72.4% of imports from  
16 Mexico in 2018 were field.

17           MR. PORTER: That's what I'm saying. I'm saying  
18 majority from Mexico are not gas-green open-field. That's  
19 the point I'm trying to make.

20           COMMISSIONER KEARNS: But these are field. I  
21 mean they may not be gas-green, but they're field tomatoes,  
22 right? Am I missing that?

23           MR. DiMENNA: Jim DiMENNA, Red Sun. They're  
24 still vine-ripes, but they're open-field vine-ripes.  
25 They're grown in a different way.

1                   COMMISSIONER KEARNS: Right. So they may not be  
2 -- so it's not about greenhouse versus open, it's about  
3 vine-ripened or not? Because if you look at open versus  
4 greenhouse, the numbers are almost identical for the  
5 U.S.--again, it's proprietary, so I won't quite say it--I  
6 won't say it's identical, it's actual not, an  
7 overstatement. They're very similar to me. So I see no  
8 distinction whatsoever, basically no significant distinction  
9 between Mexico and U.S. in terms of field versus greenhouse.  
10 Now, if we wanna talk about -- right? Am I wrong?

11                   MR. NOLAN: No, I would make a distinction, not  
12 necessarily between Mexico and U.S., but growing. As Mr.  
13 Ambelang just said, specific types of tomatoes require  
14 specific growing environments, heat, cooling, that sort of  
15 thing. In a field environment, you are given what you got,  
16 right? You're gonna be growing in Georgia. You're gonna be  
17 growing in Florida. The temperature's gonna be that way all  
18 the time. You can't control it.

19                   In a greenhouse, you can. You can control lots  
20 of factors. You can grow things in a greenhouse in a  
21 high-technology environment that just simply cannot grow in  
22 the field, unless you're lucky enough to have the perfect  
23 conditions to grow that particular variety in that  
24 particular field. So what you're seeing is an explosion of  
25 different types of tomatoes because you can control that in

1 a greenhouse.

2 COMMISSIONER KEARNS: But the U.S. has not such a  
3 different amount of greenhouse, if I'm looking at this right  
4 --

5 MR. LARUSSA: Excuse me. This is Rob LaRussa.

6 COMMISSIONER KEARNS: Yeah.

7 MR. LARUSSA: Can I take a crack at this?

8 COMMISSIONER KEARNS: Please.

9 MR. LARUSSA: I think this is all the fault of  
10 the Commerce Department, where I used to work for eight  
11 years, by the way. So, let me get through this -- in the  
12 real world, there's tomatoes growing in the open-field, and  
13 then there's protected environment tomatoes. That's the  
14 real world, right?

15 COMMISSIONER KEARNS: Yeah.

16 MR. LARUSSA: You have open-field and then you  
17 have protected environment, which could be a shade house,  
18 could be a high-tech greenhouse. That's the real world.  
19 That's what you have to put in when you talk about the  
20 market. The Commerce Department in 2013 agreement  
21 introduced the terms that really don't have much of a  
22 meaning elsewhere and those terms are "adapted" and  
23 "controlled". And I just think you have to understand that.  
24 And when we talk about protected, we're talking about  
25 everything from a simple shade house to a complex shade

1 house --

2 COMMISSIONER KEARNS: Right.

3 MR. LARUSSA: -- the high-tech.

4 COMMISSIONER KEARNS: Understood. But we don't  
5 have data on U.S. outside of greenhouse, right? We don't  
6 know how much of it's put up in a tunnel or so forth, right?

7 MR. WILNER: Can I say that there is some data,  
8 and if that chart gives that impression, it's incorrect.  
9 For instance, on Page--I never know if it's proprietary,  
10 it's not bracketed, but I'm always worried--but it said,  
11 most reported tomato crop is grown in the field. There's no  
12 doubt about it.

13 COMMISSIONER KEARNS: But again, "in the field."  
14 That does not mean --

15 MR. WILNER: Yes, it does.

16 COMMISSIONER KEARNS: That does not mean it's in  
17 a protected environment, does it?

18 MR. WILNER: No-no, excuse me.

19 COMMISSIONER KEARNS: It mean that it's not in a  
20 protected environment?

21 MR. WILNER: It's in the open field. I think  
22 that's what the staff meant when they wrote that. I think  
23 that if -- check with the staff, and we'll give more data on  
24 it -- I think it's generally accepted and Mr. Agostini can  
25 mention it to what he sees is presented to him, but

1 generally accepted that the vast majority of Mexican import,  
2 at least that exported to the United States, is grown in  
3 protected environment.

4 COMMISSIONER KEARNS: Right. You have that in  
5 your brief --

6 MR. WILNER: And we can --

7 COMMISSIONER KEARNS: -- but we don't know what  
8 -- do we have percentages of what percentage of U.S. product  
9 is in a protected environment?

10 MR. WILNER: Well, excuse me, but this morning,  
11 Mr. DiMare said that, and someone else said that 85% of  
12 their product, I think, is grown in the open field.

13 COMMISSIONER KEARNS: Again, open field is not  
14 the same thing -- we're comparing apples and oranges here,  
15 right?

16 MR. WILNER: Well, we're talking about  
17 definitions. I understood that to mean we could clarify --

18 COMMISSIONER KEARNS: Okay, but here's my point.  
19 If you're right that field means not protected, then what  
20 I'm seeing is that Mexico, you've got 72.4% is field. It's  
21 by your definition, it's not protected.

22 MR. JUNGMEYER: If I can clarify that. This is  
23 Lance Jungmeyer with Fresh Produce Association. Open field  
24 tomatoes must be inspected, import tomatoes must be  
25 inspected as per the Federal Marketing Order. 7.8% of

1 Mexican tomatoes that come in are open-field round tomatoes  
2 and are inspected in a tomato marketing order, so the  
3 reverse, can imply that 92% are not open-field, round  
4 tomatoes.

5 COMMISSIONER KEARNS: Okay, so our data's wrong?

6 MR. WILNER: Yes.

7 COMMISSIONER KEARNS: Okay, like --

8 MR. WILNER: And we can clarify that.

9 MR. ROGERS: Excuse me, Commissioner Kearns, this  
10 is Tom Rogers. I have just one observation which make,  
11 which may be contributing to some of the confusion. And  
12 that in the pricing products, you've defined open-field and  
13 adaptive environment, included those together. And then you  
14 have a separate category for greenhouse. So I think, what  
15 you're looking at that's open-field, also includes adapted  
16 environment in Mexico.

17 COMMISSIONER KEARNS: Right.

18 MR. ROGERS: So I think that's --

19 COMMISSIONER KEARNS: Right.

20 MR. ROGERS: -- where the difference is.

21 COMMISSIONER KEARNS: Let me take a slightly  
22 different tact here. So putting aside greenhouse -- I'm  
23 looking at a chart that you all put together on Page 8 of  
24 the Mexican Growers' brief. And it seems to me that, in two  
25 ways, I think I would have thought that the petitioners

1 would have put this out here.

2 I mean what this shows to me is, there's a lot of  
3 overlap between U.S. and Mexico, I think. I mean, you're  
4 still seeing almost 30% of U.S. is specialty tomatoes versus  
5 rounds. And versus, looks like about 60%, I think, is, what  
6 -- well, I don't have the percentages right, I don't have  
7 the percentages right, because I can't read the graph well  
8 enough, but anyway, the percentages are what they are.  
9 There seems to be quite a bit of overlap.

10 And so what I'm asking is, I mean, how does that  
11 not show that there is competition, that there isn't  
12 attenuation? There seems like there's an overlap there.  
13 The other thing the graph seems to show is, you put rounds  
14 in one category and specialty in the other, and then in  
15 parentheses, you put "Greenhouse and open-field adaptive,"  
16 as if you don't wanna distinguish between those things. But  
17 you think there's a huge distinction. So what do I make of  
18 that, I'm sorry, there's someone in the back here. I'm  
19 sorry, I don't know who that is? Mr. Robles, is that you?

20 MR. LEY: No, Martin Ley. Commissioner, let me  
21 take a shot at this. Your question right now is connected  
22 to the one before, and I want to take a step back. The  
23 petitioners say that the term "greenhouse" is confusing in  
24 the marketplace. As Mr. Jungmeyer said, it's a very clear  
25 definition, "is grown indoors." That's what is greenhouse.

1                   What Mr. DiMare said is that the term  
2 "greenhouse" in the business is more of a marketing term,  
3 and as Mr. LaRussa explained, the two concepts of adaptive  
4 and controlled that I believe is what's adding to a lot of  
5 the confusion is only two terms that were created in the  
6 event for the 2013 suspension agreement.

7                   Mr. Wilner explained that, and Mr. Ambelang  
8 explained that it depends on the location that you're gonna  
9 build a greenhouse, and it depends on what type of tomato  
10 you're gonna grow in that greenhouse. It determines what  
11 type of level of technology you have to put into that  
12 facility. High-tech greenhouses is, what is normally  
13 includes heating, it's in areas that are very cold,  
14 etcetera, so the more technology you put in there, the more  
15 the wind industry call it high-tech.

16                   But the issue is because you need to control more  
17 variables to grow the right tomato in the proper environment  
18 for that variety of tomato. So, for us as growers, we have  
19 to make those decisions based on the location that we're  
20 gonna put the facility, or the type of tomato we're gonna  
21 grow. Those two things are within the concept of adapted  
22 environment and controlled environment.

23                   The Commission selected the prior definition by  
24 putting adapted environment and open-field in one category  
25 on Products 1, 3 and 5. That mixes open-field with

1 protected agriculture tomatoes. Also, in prior definitions  
2 2, 4 and 6, it makes the concept greenhouse that is more of  
3 a concept that is a marketing term, but is also defined by  
4 using it as a fully enclosed, grown indoors, with controlled  
5 environment, which is what we know in the industry as  
6 high-tech greenhouses.

7           So from the get-go, you are mixing, to your  
8 questions, you are mixing open-field with protected  
9 agriculture. Within protected agriculture, you have what  
10 we're calling shade houses and what you're calling high-tech  
11 greenhouses.

12           Give you rough numbers, the United States, in  
13 terms of acres, have 1,000 acres of greenhouses.  
14 Colloquially, we call them greenhouses because the  
15 conditions in the United States, because the latitudes in  
16 the United States requires almost 100% of the greenhouses  
17 here in the U.S. to put heating on them in order high --  
18 other technologies that are more in the realms of high-tech.

19           The United States have 1,000 acres out of over  
20 300,000 acres in total of tomato growing. Probably that  
21 number can give you the context and the proportion of how  
22 much they can grow. So you only have 1,000 acres. It  
23 doesn't matter how productive they are, but you're never  
24 gonna be on the 75% or on the 70% numbers that are in there,  
25 the numbers that came from your report, and we cannot see

1 that. We're not lawyers and we're not on the APO list.  
2 But the definition of Products 1, 3, 5 and 2, 4, 6 creates a  
3 lot of the confusion that we're talking about. We hope that  
4 that explanation clarifies to your questions.

5 MR LEY: That helps a lot, if you can put any  
6 more information on our record that helps us see the numbers  
7 differently, that would be helpful, thank you.

8 We shall do that to try to clarify. Okay, thank  
9 you.

10 COMMISSIONER KEARNS: Thank you.

11 MR. de la VEGA: Eduardo de la Vega. Okay,  
12 sorry, the maturity are usually produced to the mainly some  
13 of the growers produce them themselves. I just -- they're  
14 bred for concentration of the crop and they are bred for the  
15 resistance mainly. In addition to what Bryant Amberlang  
16 said earlier, the varieties that are used for taste, are  
17 bred in Europe, so they are different.

18 They are bred for -- they -- we need more flavor.  
19 We want more shelf life, so they are completely different  
20 varieties. You cannot use them interchangeably.

21 COMMISSIONER KEARNS: Thank you.

22 COMMISSIONER SCHMIDTLEIN: Okay, thank you very  
23 much. Commissioner Stayin?

24 COMMISSIONER STAYIN: Thank you. In the staff  
25 report it identifies in terms of channels of distribution

1 that the Mexico products come into the United States  
2 primarily through distributors, brokers and handlers. What  
3 does that mean? Are these basically people that you sell to  
4 and then it's resold? Or, are these people part of your own  
5 operation?

6 MR. JUNGMEYER: I can answer that. So, Lance  
7 Jungmeyer, President, Fresh Product Association. We  
8 represent importers and distributors of all kinds of produce  
9 from Mexico. And at the border areas you have warehousing  
10 companies that receive the produce from Mexico for  
11 distribution and sale to the United States.

12 These are the importers of record and all kinds  
13 of companies do this. You have -- many of these companies  
14 in this room have their own companies that do this. Some  
15 growers sell to other companies that do this. The  
16 Petitioners that we've mentioned earlier, DiMare, Lipman,  
17 Procacci, all these companies also are importers of record.

18 So, essentially these companies receive the  
19 produce at the border, they break it down into pallet  
20 shipments for customers who don't want a whole truckload of  
21 tomatoes, they want four pallets -- that's kind of how that  
22 part works. I hope that answers.

23 COMMISSIONER STAYIN: And they're shipped by  
24 truck to direct to retailers?

25 MR. JUNGMEYER: They're by truck directly to

1     retailers, directly to food service distribution centers,  
2     directly to terminal markets, all kinds of places.

3                   COMMISSIONER STAYIN: Okay. We talked earlier  
4     about the conditions in production in the United States, and  
5     weather conditions could be a real issue. There are  
6     droughts, freezes, we have floods, what do the weather  
7     conditions in Mexico have to do with your production? Are  
8     there any weather conditions that have a problem created  
9     which is extremely difficult for you to produce?

10                   MR. AMBELANG: This is Bryant Ambelang from  
11     Nature Sweet. So, that's the key purpose of a greenhouse.  
12     So, the greenhouse itself protects us from the weather  
13     conditions like for instance, even wind. It also protects  
14     -- the plants themselves act as a heating unit even in  
15     non-heated greenhouses.

16                   They generate heat for themselves. So, most --  
17     well, and then it protects from rain, so we get the right  
18     amount of irrigation. Those specialty tomatoes and the  
19     specialty tomatoes that our competitors are all here, they  
20     need a specific recipe of fertilizer and water.

21                   When they don't get that they burst, they crack,  
22     and they don't taste very good. So, that's how we deal with  
23     the weather conditions that are in Mexico that are -- that  
24     would be many, much of the weather condition you would deal  
25     with in the United States except that we don't have the

1 severe cold in Mexico that we have in our operations in the  
2 United States.

3 COMMISSIONER STAYIN: So, you haven't had any  
4 problems with having to shut-down production for any kind of  
5 a weather problem in Mexico?

6 MR. AMBELANG: Well, we've never had the -- we  
7 have had wind events that have damaged the structure and  
8 have had to pull the crop out for things like that. So, for  
9 instance, in a greenhouse if you have a plastic or a glass  
10 greenhouse and that plastic gets torn or that glass is  
11 broken, the majority of greenhouse growers will throw away  
12 the whole crop because it's a food safety event for a  
13 greenhouse grower. If that environment gets obviously,  
14 again, if the glass is broken or the plastic's torn, then  
15 for us there is the potential of animal, or there's the  
16 potential for something that rolled off the top of that roof  
17 into the crop, so we would throw that crop away.

18 COMMISSIONER STAYIN: As I understand, your  
19 position is that Mexico sells vine ripe tomatoes which  
20 compete with mature green tomatoes in the United States.  
21 What's the difference?

22 MR. AGOSTINI: Mike Agostini, retail consultant.  
23 If I can answer that from the customer perspective, it's  
24 really more a question of field grown versus grown in  
25 protected agriculture in a greenhouse. As you've heard here

1 today, the protected environments create a much more  
2 consistent crop that's been given all the right inputs as  
3 far as amount of sunlight, fertilizer, irrigation and the  
4 like.

5           So, the quality is not only better, it's much  
6 more consistent than what comes out of the field and it's  
7 also vine ripened so that it's left on the vine longer to  
8 ripen more naturally. So, what I've seen on the retail end  
9 is that improvement and consistency of quality and flavor,  
10 that it can stay at a high level all the time is what the  
11 customers have really responded to and have shown that  
12 they'll pay more for versus field grown product that's  
13 sometimes okay, sometimes not very good, but the consistency  
14 is all over, so it's hard to market it as a premium higher  
15 priced product because of those inconsistencies.

16           COMMISSIONER STAYIN: So, is it your position  
17 that the Mexican product is being sold consistently at a  
18 higher price than the U.S. produced tomatoes?

19           MR. AGOSTINI: Yeah, that's my opinion and that's  
20 my experience that the product that's coming out of  
21 protected agriculture is a premium, that it's better than  
22 field grown, and you can pay more for it and you can charge  
23 more for it, and the customer will pay it.

24           COMMISSIONER STAYIN: And by customer you mean  
25 the retailer who then is supplying it to customers who

1 prefer it?

2 MR. AGOSTINI: Yeah, actually both. I'm  
3 advocating for the customer and the retail store because  
4 that was my business for 45 years and I happen to be  
5 fortunate enough to sit on top of an organization that had  
6 80 million, about 80 million, customer transactions a week.

7 And as a retailer, you get very tuned in to how  
8 those customers are voting by what they buy or what they  
9 don't buy. And with that kind of a sampling across the U.S.  
10 we began to see very clearly that there were levels of  
11 product and what inputs went in to create those levels of  
12 product that customers would be more satisfied with and  
13 would pay more for.

14 And then in turn, we, as retailers, would pay  
15 more for those as well.

16 COMMISSIONER STAYIN: And some of these retailers  
17 might be who? Can you tell me some of these retailers that  
18 you're shipping to directly?

19 MR. AMBELANG: This is Bryant Ambelang from  
20 Nature Sweet. So, this week I think most of us would agree  
21 that specialty tomatoes are at the floor price. This week  
22 at Kroger, Walmart, Giant, Costco, Sam's, who am I missing  
23 -- Safeway, Albertsons, all of those stores, Aldi, that  
24 product again, the suspension price being at about \$8.00 for  
25 the equivalent product that's selling for \$23.00 a case,

1 that product right there, at an equivalized basis.

2 COMMISSIONER STAYIN: What about the beefsteak  
3 tomato? Are you shipping those as well?

4 MR. AGOSTINI: Yeah, if I can add just a little  
5 more. In my opinion, and through my experience, not just  
6 now, but watching this whole thing evolve over the last 20  
7 to 25 years, if I can encapsulate this and one thing it  
8 would be that I don't believe it's a U.S.A./Mexico thing, I  
9 believe it's an open field/hot house thing.

10 That it's a hot house business that's taking over  
11 the overall tomato consumption and sales and the field  
12 business is declining. And Mexico is consequentially very  
13 high on hot house production. The U.S. is very low on hot  
14 house production. There's other areas like Canada that  
15 produce a lot of hot house product that are getting a lot of  
16 growth in their items, so as the consumers evolved from a  
17 price buyer to a quality flavor buyer, which has been a very  
18 distinct occurrence over the last 10 years, the tomato sales  
19 have gone from primarily field grown at retail, to primarily  
20 hot house grown.

21 Speaking on behalf of the produce industry  
22 because I can't share Walmart specifically, 20 years ago a  
23 typical U.S. retailer, when you looked at their total fresh  
24 tomato sales would have been about 10% hot house items, 90%  
25 field items. Right now, up to this year, a typical

1 supermarket in produce their tomatoes total sales would be  
2 in excess of 70% hot house items, and 30% or less in field  
3 items.

4 So, it's that teeter-totter of overall sales and  
5 where those could come from that I think is the real  
6 determining factor in all that's going on here. The field  
7 is getting to be of less and less value because the demand  
8 at retail for field is dropping down and down while the  
9 demand at retail for hot house and protected ag is going up.

10 COMMISSIONER STAYIN: Are you selling the same  
11 product, I mean the same kind of tomato as the U.S.  
12 producers, or are there different -- are you selling in  
13 addition, a greater variety of tomato, or pretty much the  
14 same?

15 MR. AGOSTINI: In today's world the typical  
16 supermarket will have 20 to 22 different items in the tomato  
17 section. Ten years ago, it might have been 8 or 9, so there  
18 are a lot of different items as Bryant from Nature Sweet  
19 said. The small tomato segments have just exploded, and  
20 they field a lot of growth due to very high flavor and  
21 attractiveness and all of that.

22 And this segment is primarily hot house grown.  
23 The field grown red grapes and cherries, which were there  
24 10-15-20 years ago, still exist but the sales have dropped  
25 way off in lieu of these higher flavor, more premium items.

1                   And so, as you segmented as a retailer, you'll  
2 have a typically a round field tomato which would be a  
3 slicer of some sort, that would be what we call an opening  
4 price point -- an item that's a little bit cheaper because  
5 the production is a little cheaper. You can buy it a little  
6 cheaper, and if somebody wants a slice on their hamburger  
7 and they're very economically minded, you have that  
8 offering.

9                   And then you'll carry a hot house round of  
10 beefsteak or maybe a tomato on the vine that's higher  
11 quality, higher flavor. You'll see that at a higher price  
12 and that will be your premium offering for those that are  
13 looking more for that, so you could carry the same items.

14                   I don't see a whole lot of, in fact very little,  
15 of somebody interchanging field with hot house and saying  
16 here's my round tomato and sometimes I'll put a field item  
17 in there, sometimes I'll put a hot house item in there. I  
18 don't see that very much.

19                   MR. ANDERSON: Commissioner, this is Chuck  
20 Anderson, Cap Trade. If I could just elaborate on this  
21 point because I think there's a little bit of a  
22 misimpression from this morning when they showed you that  
23 grading or point at which you pick chart, and sort of  
24 suggested if you started out with a green -- a field tomato,  
25 and you started out with a green protected tomato, as it

1 ripens you get the same thing, and that's just not true.

2           And the reason for that is you're not starting  
3 with the same variety of tomato. If you are planning to  
4 produce vine ripened, if you're planning to produce in  
5 protected environment, you're using a different variety of  
6 tomato.

7           Now, it might turn red and it might look exactly  
8 like that mature green, but it will have a different flavor  
9 profile, and it will taste different and this is the reason  
10 why Mexican vine ripened, protected environment tomatoes  
11 command a price premium in the market, and a price premium  
12 that's been confirmed by your pricing data.

13           So, there are actual physical differences between  
14 the product that leads to differences in consumer  
15 preferences.

16           MR. JUNGMEYER: This is Lance Jungmeyer. If I  
17 can follow-up just very briefly on that. The tomato when it  
18 starts to ripen on the vine as that study showed, it --  
19 there's a metabolic change. There's some enzymes in there  
20 that are activated and that's when that "mommy" flavor that  
21 I mentioned starts to take hold.

22           So, until it starts to ripen on the vine that  
23 will never happen. Once that starts, you get that tomato  
24 flavor.

25           MR. WILNER: Mr. Commissioner, I just want to say

1 the staff report also confirms that on page -- and I think  
2 this is publish on 118, the mature green cannot be  
3 transformed into vine ripe production because of varieties  
4 or bred specifically to be picked green.

5 And I think Mr. Agostini, who ran all purchasing  
6 for Walmart's 5,000 stores could also confirm where we could  
7 get each type of tomato, you know, where they were produced.

8 MR. AGOSTINI: Yeah, I just reiterate that if  
9 you're after the high flavor of protected ag vine ripe  
10 tomatoes, you have to go where they're available, and that's  
11 largely Mexico. And as you heard from Red Sun a little bit  
12 in the U.S., but there's just not a lot of it in the U.S.

13 COMMISSIONER STAYIN: Alright, thank you. My  
14 time has run out, so.

15 My time has expired. May other Commissioners  
16 talk.

17 COMMISSIONER SCHMIDTLEIN: Okay, Commissioner  
18 Karpel?

19 COMMISSIONER KARPEL: Yeah, I want to unpack,  
20 very specifically. Why, according to you, Mexican tomatoes  
21 would have better quality or taste? You've cited a number  
22 of qualifiers before the word tomato when you make those  
23 statements, but I want to break down what qualifiers are  
24 leading to the better quality and the better taste?

25 So, one that I've heard is vine ripe tomato

1 versus mature green tomato, and I think Mr. Agostini, am I  
2 pronouncing that right?

3 MR. AGOSTINI: That's correct, Agostini.

4 COMMISSIONER KARPEL: You were most recently  
5 talking about green, mature green, versus vine ripe. And I  
6 agree with you there's some information in the staff report  
7 that the mature green start with a different seed type than  
8 a vine ripe.

9 I've also heard you talk, Mr. -- oh, help me with  
10 your name.

11 MR. JUNGMEYER: Jungmeyer.

12 COMMISSIONER KARPEL: Jungmeyer, you've also  
13 talked about this chemical process that starts once a tomato  
14 starts to ripen on the vine, and that those lead to  
15 different physical characteristics than you would say leads  
16 to a better tasting, or a better quality tomato.

17 So, I don't think we need to repeat that unless  
18 you think I've misunderstood anything there. So, I now want  
19 to move to the next sort of distinguishing feature you  
20 talked about between Mexican and U.S. tomatoes. You keep  
21 talking about protected environment tomatoes, or what's  
22 grown in Mexico.

23 What is it about growing a tomato in a protective  
24 environment that leads to different quality or flavor  
25 characteristics? And I want to be very specific about that

1 because we've discussed earlier, protected environment is a  
2 big term, right? And Mr. Agostini, you were talking about  
3 hot houses, which to me is a controlled environment  
4 greenhouse, a more high-tech greenhouse.

5           And I could get that yes, in that kind of  
6 environment you really could control how much water is going  
7 in, how much heat, how much you know, light is getting in,  
8 but when you're talking about a protective environment that  
9 is a net over a field where the sunlight gets in and the  
10 rain gets in, it's hard for me to understand, you know, what  
11 you were saying.

12           So, if we could sort of break down what is it  
13 about growing it in a greenhouse with walls, a roof, total  
14 controlled environment -- that kind of greenhouse. What is  
15 it about that, that leads to a better quality or better  
16 flavor profile?

17           MR. DiMENNA: Jim DiMENNA from Red Sun Farms.

18           COMMISSIONER KARPEL: Yes.

19           MR. DiMENNA: What we do in our company is we  
20 travel to Europe at least once a year or twice, to find a  
21 specific variety that has a higher -- and if you go back in  
22 the Nature Sweet charts, you'll see a number that they  
23 referred to as brix.

24           So, the brix is important and that's what we're  
25 tasting. So, the tomatoes you've got in front of you, and

1 I'm not telling for them, but I'm telling you what they are.  
2 The brix levels are probably some of the highest in the  
3 industry. It might be 7 or 8, maybe even 9 brix. You see  
4 them on the bottom there. That's a very important piece of  
5 why you enjoy your tomatoes.

6           If you take a gas green tomato, and I'm not --  
7 I've never tested a gas green tomato, but the brix might be  
8 a 1 or a 2. Vine ripe might be a 3 or a 4, so the brix are  
9 a factor. And again, I'm far from a scientist, but those  
10 are what we sell.

11           What we do specifically, as our company, is we're  
12 traveling to Europe getting better flavors, higher brix. We  
13 have a tomato that we produce that we have it in Virginia,  
14 it's grown in Mexico called a sweet pop. It's 12 brix.  
15 It's an amazing tomato. And that's what sells tomatoes,  
16 it's the --

17           COMMISSIONER KARPEL: Is it your production  
18 method? Is it because you grow it in a greenhouse?

19           MR. PORTER: Commissioner, this is Dan Porter,  
20 just following-up what Chuck Anderson said. You're exactly  
21 right. At least with respect to a high-tech greenhouse.  
22 You are completely controlling the environment, so they can  
23 go to Europe and take something that maybe is better natural  
24 for Europe, and take it to Canada and grow and get the brix  
25 that they want and get the flavor that they want because

1 it's a completely controlled environment and so, you're  
2 absolutely right.

3 It's the environment that allows you to choose  
4 what to start with that then yields the tomatoes that you  
5 want.

6 MR. WILNER: Madame Commissioner, can I just say  
7 one thing because I think it is confusing. And I had to  
8 inquire into it too, and Mr. LaRussa is right, there are a  
9 lot of terms. But what you're after is the structure  
10 necessary to shield the plant from the elements and also  
11 from pests and animal intrusion.

12 And that structure differs on your particular  
13 location. If you're growing in Ontario, Canada, you need a  
14 fully structure with heat and everything. If you're growing  
15 in Virginia, you might use less. If you're growing in  
16 Mexico, you might need less, certain places in Mexico you'll  
17 need more.

18 So, you really -- and that's what, for instance,  
19 southern Spain has different protected environment from the  
20 Netherlands, but the point is you make the investment  
21 necessary for the structure that protects it from the  
22 elements, from insects, from animal intrusion.

23 And the benefits of that, as Mr. Esquer put down  
24 is once you get that structure, the benefits you get are  
25 better. You're protected from the elements, more uniform

1 quality, the ability to fertilize and use the correct water  
2 and you have no insect, you really hardly need any insect,  
3 you know, things, and also you know, people don't say it but  
4 animal intrusion in open field is a huge food safety issue.

5           So, and you get rid of all that, but the  
6 structure difference depending on the location.

7           COMMISSIONER KARPEL: But -- and that makes  
8 sense, but I want to understand how that impacts the outcome  
9 of the tomato and it's taste and quality, and so I  
10 understand about a greenhouse, you could control everything  
11 that goes into that tomato, so in theory, you could control  
12 exactly how that tomato comes out, right?

13           But let's say you're in an open field with  
14 netting over it, right. You can't control how much sunlight  
15 there is, you can't control how much rain there is. You  
16 can't control how much other things might be in the air that  
17 could get through the netting.

18           MR. WILNER: But in the protected environment,  
19 you do control it, so you control, you don't depend on the  
20 rain from outside. You're protected from the wind.

21           COMMISSIONER KARPEL: But you're not fully  
22 protected if you just have a net, right?

23           MR. WILNER: And you're protected the necessary  
24 amount for that particular location. If it's not enough  
25 protection, you need to go up in your structure. So, it's

1 the structure necessary to give you those controls. And  
2 then the benefits of those are the ones that Mr. Esquer put  
3 out in this -- Mike you can.

4 MR. AGOSTINI: I was just going to add in an  
5 environment where you can use a net or a shade house, it's  
6 that level of control because typically that's a very dry  
7 environment, almost desert like, so it's usually too much  
8 sun and no water, so you need the fabric to kind of shade  
9 the product and cut the sunlight down which is why it's  
10 called a shade house and you don't have rainfall.

11 You're irrigating, so then that level of  
12 protection controls your sun, controls some wind, and you're  
13 irrigating because there is no rain, so that's just an  
14 example of how the levels step up to what they need to be  
15 depending on the environment.

16 MR. LARUSSA: Commissioner Karpel, just one  
17 point. A shade house is not netting. It's a very solid  
18 structure, as you could see from the photographs that we had  
19 earlier. I've been in them many times, rain does not get  
20 through, insects don't get in, it's very protected.

21 MR. ANDERSON: And Commissioner, Chuck Anderson,  
22 I think we're missing an important point here which is it's  
23 not just the flavor profile, but the real -- one of the real  
24 big advantages of any kind of protected environment tomato  
25 is the consistency of the product.

1           If you are cutting out a lot of the mother nature  
2 variables, you're going to be able to produce a much more  
3 consistent product. Now, if you're a retailer, or a  
4 wholesaler, that's important to you because that's going to  
5 basically reduce your spoiling trait and also increase your  
6 shelf life. So, you will pay more for that.

7           In addition, that protective environment also  
8 enhances the biosecurity of the product because it does  
9 reduce the amount of pesticides that are needed, it does  
10 protect from bugs, it does protect from animals. So, there  
11 are a couple of things that aren't related to flavor that  
12 really enhance the value of the product to the retailer to  
13 the food service user of a protected tomato over a simple  
14 field grown, open field grown tomato, which is the vast  
15 majority of the tomatoes produced in the United States.

16           That is it's open field that is not protected  
17 against these types of inconsistencies that either create,  
18 you know, a less consistent product or one that is of a  
19 higher bio risk.

20           MR. LEY: Commissioner, Martin Lay here in the  
21 back. I would like to add to your question what are the  
22 other attributes that are in the tomato itself? If we can  
23 go back to Slide Number 9, because I think we don't want to  
24 leave the confusion that a shade house is a low-tech or it's  
25 just a cover on top.

1           There is a lot of technology behind this  
2 structure here. For example, the fabric itself, it has  
3 different calibers of elements that is assigned to protect  
4 either bring light inside, or to shade and protect some of  
5 the light radiation to go inside the greenhouse so it  
6 doesn't -- you can granulate that.

7           The other part of the structure that is in there,  
8 is not only to protect or to hold the shade cloth, but it's  
9 also to support the plant. The plant is hanging -- it's  
10 hard to see in the pictures, probably the picture in the  
11 lower left you can see better, but the plant grows on a  
12 twine and it stays away from the ground. So, there's other  
13 key elements when you're growing protected agriculture.

14           It allows you to have drape irrigation which by  
15 doing that, you can bring liquid fertilizers and you can be  
16 more specific on the irrigation programs that you have. So,  
17 you always have the plant happy and very well balanced, fed.  
18 That just leads into very consistent -- those are the  
19 attributes the consumer and our customers, the retailer, are  
20 looking for -- consistency on the flavor.

21           Mr. Ambelang was saying 7.5. The success of  
22 those tomatoes that you're having there is that every tomato  
23 that you taste is going to be good. You can grow a lot of  
24 those tomatoes in that clam shell, can be grown in open  
25 field, but you're going to have a very erratic experience

1 when you open that clam shell and you taste that tomato.  
2 Some of them are going to be very sweet, some of them are  
3 going to be nothing, and some of those are going to be sour.

4 That is the result of having not enough  
5 technology and not enough control of your variables that are  
6 going to maintain the plant happy and give you a good  
7 tasting tomato all the time. We have to work at bringing  
8 that technology to provide that consistency and also, as Mr.  
9 Wilner's saying, we have a weather impact element.

10 So, we want to be able to guarantee the retailer  
11 that every way we're going to be able to buy those tomatoes.  
12 It doesn't matter if it rains, it doesn't matter if the sun  
13 didn't come out. So, you have drape irrigation, you have  
14 the control of the plant being hanged so the fruit doesn't  
15 have any contact to the ground.

16 You have control of light. You have control of  
17 ventilation. So, there's a lot of variables. We just want  
18 to underscore in this technology of this type of shade  
19 houses, it's not low-tech. I will challenge that because  
20 this is technology that was developing places where hardly  
21 it rains ever, like Israel, like Jordan, like Spain, the  
22 southern part of Spain.

23 So, it hardly ever rains, so you cannot -- you  
24 don't have to spend money on controlling a variable that is  
25 not there in the location that you selected. Mexico,

1 country also the message that is trying to be projected that  
2 we are low-tech or right on the edge where we just throw a  
3 tarp on it, and we call them greenhouses, that is farthest  
4 from the truth because we have all kinds of weather in  
5 Mexico.

6 We have high-tech. We have locations where it  
7 freezes every night. You need to have heating. It's high  
8 elevation, it's not only latitude, but we have elevation,  
9 and then we are also growing right next to the ocean. We  
10 have the situation from Spain, or from Israel, and that's  
11 why we went to Israel.

12 We also went to the Netherlands for irrigation  
13 technology. We went to Holland because they are very good  
14 and to Israel because they're good at fertilization. There  
15 is a lot of -- instead of using agrichemicals, pesticides,  
16 there's a lot of probiotics that are used for reasons of  
17 predatory insects, so they eat the bad insects to the plant.

18 So, we almost produce a product that is almost  
19 organic, and that's what the consumer is looking for. Mr.  
20 Ambelang didn't get into that part, but we do a lot of  
21 research as to what the consumer wants and what's behind  
22 this technology is how are we going to bring to the  
23 consumer, a good, health and safety product. That's the  
24 last point I want to make.

25 By having these in a controlled environment, we

1 keep pests out. We have control of people coming in and  
2 out, we have control of everything that goes inside those  
3 greenhouses, they follow protocol.

4           So, we can provide a much higher standard of food  
5 safety controls and measures which the retailers and the  
6 food service companies that they buy from us love, because  
7 they are always number one concern for them is to not have  
8 an empty shelf, or a menu item, or an ingredient that they  
9 cannot use.

10           Second part is that their name is not involved on  
11 an outbreak. And this is another attribute that we offer.  
12 We've -- the transition and the evolution that we in Mexico  
13 have made away from open field into protected agriculture.

14           Again, we want to convey to you that shade house,  
15 greenhouse, there's no difference other than the right  
16 technology for the right location and for the right variety.  
17 Variety in the type of tomatoes are key. The growth -- we  
18 talked earlier about the expansion and the per capita  
19 consumption of tomatoes, that has been a transformation.

20           Back in 1996, we were all fighting for a very  
21 small segment or a share of the stomach of the U.S.  
22 consumer. Right now, that has grown. And it has grown  
23 because we have brought a better, more consistent, more  
24 flavorful, better experience when they eat a tomato.

25           And it has been done through the use of

1 technology. That's what we in Mexico have focus on. We do  
2 not focus on what's happening in Florida, what's happening  
3 in California, or what's happening anywhere. We are looking  
4 all over the world, as Mr. DiMENNA said, every year we go  
5 searching and we were very close to with his companies, to  
6 bring the best tomato we can find.

7 MR. JUNGMEYER: This is Lance Jungmeyer with the  
8 Fresh Produce Association. Sorry, to take this one a step  
9 further but I'd like to answer the question in a completely  
10 different way. But Mr. Ley hit on it very early when he  
11 said that the plant is happy.

12 And when you think about what is going to make  
13 the best yields, the best tasting produce is when your plant  
14 is happy. Now, Mexico has a lot of sunshine, as you get  
15 closer to the equator you have more sunshine. Tomatoes love  
16 sunshine.

17 In fact, there are some places where there is too  
18 much sunshine which is why they have netting that minimizes  
19 some of that. So, when you think about what makes a good  
20 apple? The best apples are typically grown in Washington  
21 State, Michigan, upstate New York where you have cool  
22 nights. You need that cold weather, but you also need  
23 certain other attributes to make a good apple.

24 So, I would just say that Mexico grows a darn  
25 good tomato, and that's why the customers keep going there.

1 COMMISSIONER KARPEL: Okay, thank you.

2 COMMISSIONER SCHMIDTLEIN: Okay, thank you. I  
3 want to ask a couple questions about pricing, I guess, and  
4 this morning the Petitioners had a set of public exhibits.  
5 I don't know if you all have a copy of those -- if you were  
6 given a copy of those, but in particular, I'm looking at the  
7 exhibit where they had put up the USDA terminal market data  
8 for round tomatoes, do you all have a copy of that?

9 It's this chart. And I asked the Petitioners to  
10 put on the record in the post-hearing, you know, what  
11 exactly the parameters were. I mean we pulled up the USDA  
12 terminal information in the back here to look at that and I  
13 can see where you can create these charts.

14 So, it looks like this is round tomatoes from the  
15 entire country, right? They went back to 2010, but it goes  
16 and includes up to first quarter 2019. So, I guess one  
17 question I have about this is this shows Mexican prices  
18 being below U.S. prices, on the terminal price basis.

19 This is the red line is below the blue line. And  
20 so, I have a couple questions about this. One is, do you  
21 have any thoughts about this? What are you, you know, what  
22 is -- do you believe we should be looking at terminal  
23 pricing, and if Mexican tomatoes are consistently better, as  
24 Mr. Agostini, you just testified, they're consistently  
25 better and consistently demand a higher price, because of

1 the taste, why would the terminal price for round tomatoes  
2 be consistently below U.S. prices? Mr. Anderson, did you  
3 want to go first?

4 MR. ANDERSON: Let me at least get started on  
5 this, okay. First of all, we have to see what we're looking  
6 at -- terminal market prices. There was a time when  
7 terminal markets were a major distribution channel in the  
8 market. I was able to dig up a study from 1996, from U.C.  
9 Davis, so this is over 20 years old that said that the  
10 terminal markets, even back then were only 25 to 30% of the  
11 total distribution -- the total volume distributed was only  
12 about 25%.

13 So, you're looking only at one segment of the  
14 market. What you're missing here is direct sales to  
15 retailers, to the food service segments, and sales to  
16 wholesalers. The other point is this -- according to the  
17 USDA deficient can be two or three steps removed from the  
18 initial sale by the grower to the first unrelated buyer.

19 So, this is a downstream product. And at that  
20 downstream product there can be some changes in price. The  
21 important thing though, is --

22 COMMISSIONER SCHMIDTLEIN: Well, let me stop you  
23 right there because that was part of the case this morning,  
24 right?

25 MR. ANDERSON: Yes, and --

1           COMMISSIONER SCHMIDTLEIN: That there are changes  
2 in price in the supply chain.

3           MR. ANDERSON: In the downstream.

4           COMMISSIONER SCHMIDTLEIN: Right.

5           MR. ANDERSON: But if you look at these terminal  
6 prices versus the ITC's pricing product data, which is the  
7 first price, the price to the first unrelated, these  
8 terminal market prices are significantly higher.

9           So, this notion that there is somehow losses  
10 being made downstream just doesn't square with the  
11 information on the record before you. There's a 20 to 30  
12 cents a pound markup between the pricing product prices and  
13 the terminal market prices that were put on the record, and  
14 you could actually see how much higher they are above the  
15 referenced prices because there's a couple of markups.

16           Now, I still haven't answered your question which  
17 is why at the terminal market do the U.S. prices seem to be  
18 higher?

19           COMMISSIONER SCHMIDTLEIN: Right.

20           MR. ANDERSON: Again, the terminal markets are  
21 not a major part of the overall industry.

22           COMMISSIONER SCHMIDTLEIN: Yeah, but they're  
23 eventually competing, right?

24           MR. ANDERSON: Yes.

25           COMMISSIONER SCHMIDTLEIN: So?

1           MR. ANDERSON: And here's the situation were the  
2 timing and perishability may become a factor. Because, as  
3 we heard this morning, U.S. producers are closer to their  
4 markets and for a perishable product, you know, a price will  
5 decline as its shelf life decreases.

6           And they have a built-in inherited advantage at  
7 the terminal market level because they're closer to the  
8 market. The slight differences here may reflect that type  
9 of thing. It may reflect differences in freight costs and a  
10 few other items.

11           COMMISSIONER SCHMIDTLEIN: Well, freight costs  
12 ought to be -- that ought to push the Mexican price higher,  
13 right?

14           MR. ANDERSON: Yes.

15           COMMISSIONER SCHMIDTLEIN: Right, so but you're  
16 saying because it's traveled so long, the Mexican tomato may  
17 be not quite as nice as the U.S. tomato.

18           MR. ANDERSON: The U.S. tomatoes can be very  
19 close to these terminals and that is one of the reasons why  
20 there may be a price differential, but again these prices  
21 are so far removed from the point of first competition, and  
22 their so much higher overall that I don't think you can  
23 really use this as a basis for pricing comparisons, and it's  
24 only a very minor segment of the total U.S. industry.

25           So, what you're missing, if you're using terminal

1 market are the very large sales -- direct sales to  
2 retailers, which are a big proportion of total sales for  
3 both U.S. producers and Mexican producers. And you're  
4 missing sales to wholesalers.

5 COMMISSIONER SCHMIDTLEIN: And when you say  
6 wholesalers, do you mean packagers or distributors?

7 MR. ANDERSON: They can be either or both. The  
8 one final point I'll make about the terminal market price  
9 for prices, they're collected as potential bid prices based  
10 on phone calls. They're not actual prices.

11 The data that you collected is actual price --  
12 they are actual prices, and they're actual prices after  
13 adjustments. This morning we heard a lot of -- a lot of  
14 discussion about how "X" shipment adjustments may somehow be  
15 affecting the market price in the United States and maybe in  
16 fact, masking underselling by Mexican producers.

17 I'd like to address that too. First, I have been  
18 working on tomato cases since 1995 and 1996. I have looked  
19 at a lot of data over these years of transaction by  
20 transaction prices, and transaction by transaction  
21 adjustments. And I will tell you that they are extremely  
22 rare.

23 When I first started looking at this in 1995-96,  
24 adjustments were about 5%. I've been told that currently  
25 nowadays they're in the 1 to 2% range. There aren't that

1 many price adjustments on the basis of quality because  
2 growers, including Mexican growers, have really -- have  
3 worked on quality.

4           The other point about adjustments is damaged  
5 tomatoes cannot spoil the market. It's a natural occurrence  
6 in any highly perishable agricultural product that you will  
7 have some coals, you will have some spoilage, and there is a  
8 secondary market for that type of product.

9           There's U.S. product that also has coals and  
10 spoils. If anything, that tiny segment competes with each  
11 other, but it doesn't really affect the market price of good  
12 quality products, which is what people quote, what people  
13 cite and what people basically rely on when they buy.

14                           COMMISSIONER SCHMIDTLEIN: Okay,  
15 so do you have anything -- does anyone want to, anything?

16           MR. LARUSSA: Mr. LaRussa, Robert LaRussa. Just  
17 one more point about this. Under the suspension agreement  
18 that was written, the new one, there's no secondary market  
19 for rejected tomatoes because they have to be destroyed, so  
20 that was in the suspension agreement.

21                           COMMISSIONER SCHMIDTLEIN: Okay. Do you have any  
22 thoughts then, because we've heard a lot of testimony about  
23 how much better vine ripened tomatoes are, that it's clear  
24 in the taste that that's what the market is moving to,  
25 right? Like that's been the theme.

1                   So, given that, why do we see -- I mean, it is --  
2 the underselling, overselling data in the pricing products,  
3 which I sense that you all like the pricing product. You're  
4 happy, everyone keeps pointing to the pricing product, but  
5 of course the question is if your taste is so superior, why  
6 do we see?

7                   I mean it's roughly 50/50 right? It's a little  
8 bit more overselling than underselling, but there's still a  
9 substantial quantity of underselling and volume. So, why do  
10 we see that much underselling if the better tasting vine  
11 ripened tomato is in such high demand?

12                   MR. ANDERSON: We see in round tomatoes that the  
13 data, consistent overselling in large magnitudes, both of  
14 which are consistent with our theory that it's really a  
15 different product. People are paying a premium for it.

16                   Where the data gets a little mushy, where the  
17 tomatoes get a little mushy if you will, is in the  
18 greenhouse product. That's where there appears to be more  
19 underselling by Mexican product than there is U.S. And here  
20 is where this definition of greenhouse, I think, is  
21 confusing to some people, protected environment and all the  
22 rest.

23                   We traced some of the lowest priced products in  
24 our brief for the greenhouse imported product back to the  
25 source by going through the importer questionnaires and then

1 matching them up with the foreign producer questionnaires.

2           And what we found is that a number of the low  
3 priced products were related to foreign producers who  
4 weren't greenhouse, they were in fact, protected  
5 environment. So, we think that there's some problems in the  
6 greenhouse data. There are problems with the greenhouse  
7 data in general in this case, because we have hardly any  
8 information from the U.S. side -- the U.S. greenhouse  
9 industry because an incredibly small number of the total  
10 greenhouse growers even bothered to --

11           COMMISSIONER SCHMIDTLEIN: But, so you agree  
12 though that tomatoes coming from Mexico, whether they're in  
13 a high-tech greenhouse or a low-tech greenhouse, or some  
14 kind of a protected environment in the field, the Mexican  
15 tomatoes are all competing with each other.

16           Right? Is there a distinction in the Mexican  
17 tomatoes between that? They're all vine ripened, or 95-8  
18 whatever the percentage is, right? So, all the Mexican  
19 tomatoes are competing with each other? In rounds? Would  
20 you agree with that?

21           MR. LEY: It depends on the tomato type. If your  
22 question, sorry, it's Martin Ley here. It depends on the  
23 tomato type. If it's a vine ripe tomato, a Roma tomato  
24 coming from Mexico to another vine ripe Roma tomato from  
25 Mexico, yes, they're competing.

1           COMMISSIONER SCHMIDTLEIN: Yeah, whether it was  
2 grown in a high-tech greenhouse or a shade house.

3           MR. LEY: Yes, that can be the case. Now, they  
4 usually, the growers identified as a better quality grower  
5 and that grower can be demanding a premium in the  
6 marketplace as you have some examples in here.

7           COMMISSIONER SCHMIDTLEIN: Right.

8           MR. LEY: Even the same tomato type, in the same  
9 tomato as they're competing.

10          COMMISSIONER SCHMIDTLEIN: So, do you think we  
11 should -- I'd be curious to see what the data looked like if  
12 we combine the pricing products for what we tried to  
13 separate in greenhouse "controlled environment" and field.  
14 Have you done that? Have you combined? I mean I'm going to  
15 ask that that be done after the hearing, that we combine the  
16 pricing products and see what the underselling/overselling  
17 is.

18          MR. NOLAN: This is Matt Nolan, for Red Sun. I  
19 mean for Nature Sweet. I think Red Sun did that in their  
20 pre-hearing brief.

21          COMMISSIONER SCHMIDTLEIN: Did they? Okay.

22          MR. NOLAN: I saw that when I was reading it.  
23 And just one other comment, you know, Nature Sweet, we're a  
24 specialty, so we're focused. I would comment just on the  
25 pricing data for the specialties on greenhouse, that we are

1 a major greenhouse producer of specialties in the U.S. and a  
2 major greenhouse producer of specialties in Mexico.

3 So, we actually had to dissect the data in our  
4 pre-hearing brief to show you just how relative important we  
5 are to this, but I can guarantee you one thing -- we are not  
6 injuring ourselves.

7 COMMISSIONER SCHMIDTLEIN: That comes up --

8 MR. NOLAN: We are not underpricing ourselves.

9 COMMISSIONER SCHMIDTLEIN: Yeah, yeah, okay.

10 MR. PORTER: Commissioner Schmidtlein, first of  
11 all I want to thank Mr. Nolan for reading our brief, that's  
12 very nice.

13 COMMISSIONER SCHMIDTLEIN: I've read it too, I  
14 just had too much information.

15 MR. PORTER: I appreciate that, but yeah, so we  
16 were faced with sort of the exact same sort of issues that  
17 you were doing, like how do we do this? We need to use the  
18 data, because the data's the data, and how do we do it. And  
19 we hit upon just what you said. So, if you look at Exhibit  
20 6 to our brief.

21 COMMISSIONER SCHMIDTLEIN: Okay.

22 MR. PORTER: We did that.

23 COMMISSIONER SCHMIDTLEIN: Okay. We sort of said  
24 let's combine categories, let's make them a little broader,  
25 and we think there's more inferences that can be drawn from

1 that, and we asked you to look at the bottom of the -- of  
2 each page.

3 We say here is a percent of Mexican underselling.  
4 Here is a percent of U.S., you know, and so forth, and we  
5 have quite a bit of different data after doing just what you  
6 suggested.

7 COMMISSIONER SCHMIDTLEIN: Okay. Well, I'll  
8 definitely take a look at that exhibit. And my time has  
9 expired so let me pass it on to Commissioner Kearns.

10 COMMISSIONER KEARNS: Thank you. A lot of the  
11 questions I had have already been asked, so let we won't be  
12 too long on this. But just one quick follow-up on the  
13 pricing questions here. Petitioners this morning also gave  
14 us some reasons why they don't think our pricing product  
15 data is necessarily reliable.

16 And I don't have their answers real handy. But  
17 if you do, any response to those arguments as to why the  
18 data may not be reliable? You know, they were -- this is in  
19 a context to why they said the USDA data may be better than  
20 the data we have in our pricing products. You've now, Mr.  
21 Anderson, explained why there's some problems with the USDA  
22 data, any response to some of their concerns about the  
23 pricing data that we have?

24 MR. ROGERS: Commissioner Kearns, this is Tom  
25 Rogers. They listed several factors in their pre-hearing

1 brief, and we'll go through. I don't have them memorized,  
2 it had to some with comparisons of volumes and the products  
3 versus the census data, and others having to do with how  
4 certain companies might have reported their information.

5           So, we'll address that in detail in the  
6 post-hearing brief. I will say that there was a remark this  
7 morning that the coverage on the importer's side was  
8 inadequate, and I think your report, your staff report noted  
9 that the coverage actually on the importer's side was  
10 greater than the U.S. producer's side, so I think that point  
11 is misplaced.

12           MR. ANDERSON: But if I could just --  
13 Commissioner, Chuck Anderson, if I could just summarize.  
14 You kind of have a choice in front of you. You can either  
15 use data from your own staff report which covers, actually  
16 as the Petitioners said this morning, a pretty high  
17 proportion of the total U.S. production. And it covers all  
18 segments of the market -- food service, retail, wholesale,  
19 terminal.

20           Or, and actual prices, after adjustments, or you  
21 can use a price that is one, two levels downstream, only to  
22 one relatively narrow segment and based on price bids and  
23 not verified and not, and so that's the kind of choice that  
24 you have.

25           And I think on balance, that the pricing data is

1 not only -- it's not only going to give you better coverage,  
2 but it's more accurate.

3 COMMISSIONER KEARNS: Okay, thank you. I want to  
4 turn to some questions about threat. And I guess starting  
5 with the discussion we had this morning, the question I  
6 asked there was, you know, as we consider threat, what are  
7 we supposed to do with respect to the suspension agreement?

8 Is it -- are we supposed to think about this in  
9 terms of what happens if the suspension agreement is  
10 terminated? Are we supposed to assume that the suspension  
11 agreement remains in place? Help us think through that.

12 I know Mr. Porter you addressed this, I think, to  
13 some extent in your brief. So, I don't know if you want to  
14 take a first crack at this?

15 MR. PORTER: I will start, but then I'm going to  
16 quickly hand over my colleague, Valerie Ellis who has spent  
17 quite a bit of time parcing through all the statutory  
18 languages that apply to suspension agreements.

19 Our principal point about the threat was simply  
20 we believe and we're a little bit strong here, but almost as  
21 a matter of law you cannot find current injury given the  
22 existence of the suspension agreements that were  
23 specifically designed to eliminate injurious dumping.

24 I mean, I'm sorry, we just have a real hard time  
25 seeing how you could say for example, in 2016, there was you

1 know, injury from imports and that's the basis of our injury  
2 finding. We believe that is very, very difficult under our  
3 reading of the law. We recognize, as been actually admitted  
4 this morning, or just about in a sui generis case here. I  
5 don't think any one of us can know of another case where 20  
6 years later we continued.

7                   But we do think it's very, very relevant. The  
8 fact that the suspension agreements were designed to  
9 eliminate injury, and to pick up Commissioner Schmidtlein's  
10 point this morning, no one ever asked the Commission to say  
11 is this not true.

12                   COMMISSIONER KEARNS: I hear you, but can we get  
13 on track?

14                   MR. PORTER: Right, okay, and I'm sorry. Let me  
15 turn it over to my colleague -- do you want to talk about  
16 threat, or do you want. You mean you're talking about the  
17 threat factors or?

18                   MR. WILNER: Oh no, I think maybe Commissioner  
19 Kearns, I -- and I agree with Mr. Porter. Let me address  
20 your question first. I'd like to address this in the  
21 post-hearing brief because what I'm saying now would be off  
22 the cuff. I'm not sure.

23                   And your precise question is do we look at this  
24 at injury as if there's going to be the suspension agreement  
25 in place, or as if there's not going to be.

1 COMMISSIONER KEARNS: Right.

2 MR. WILNER: And we've got to address that in the  
3 post-hearing brief, and I don't want to do some more  
4 research. I agree totally with Mr. Porter, as I said this  
5 morning, that really this is not a current injury case  
6 because the suspension agreement specifically was supposed  
7 to eliminate injury.

8 It said it did, and they passed on the  
9 opportunity to challenge that. They had a statutory  
10 opportunity to challenge whether it did or not, specifically  
11 under the statute, by getting a 75-day review. So, I think  
12 that's it.

13 And let me say one other thing about injury. And  
14 I might not have made it -- or, threat of injury. Miss  
15 Alves, very articulately said that in their view the injury  
16 continued despite the suspension agreement. As I said, it  
17 really can't have continued despite the suspension  
18 agreement.

19 The suspension agreement eliminated injury, said  
20 it did and they never challenged it. But I also think that  
21 that's what shows is that the injury they're complaining  
22 about that continues, isn't the result of these low-priced  
23 imports in the United States. Commerce found that it  
24 eliminated any injury from all the parties' imports.

25 And we could address that, even the dumping

1 margins have no relevance to the U.S. price. So, my only  
2 point is -- and that's why we get into this protected  
3 agriculture versus open field, you know, mature green,  
4 really what's happening I think, is the problems they're  
5 facing aren't price-related import problems, they're product  
6 difference problems.

7 COMMISSIONER KEARNS: Right.

8 MR. WILNER: And until they -- so, that's.

9 COMMISSIONER KEARNS: Okay, I just want to focus  
10 on the threat if I can.

11 MR. WILNER: Okay.

12 COMMISSIONER KEARNS: If we can just get back to  
13 that, thank you. I didn't hear you -- I've heard you.

14 MR. WILNER: It also goes to threat if I may say.  
15 If those are the problems, they face, and it will be. I  
16 think whatever problems they face, and will face in the  
17 future are the result of the product they have chosen to  
18 produce and bring to the market in the way they've done in.  
19 That was the way to put it.

20 COMMISSIONER KEARNS: Okay, okay, fair enough  
21 thank you. So, continuing on with some threat questions,  
22 and I look forward to the post-hearing brief on suspension  
23 agreement, but putting aside the suspension agreement for a  
24 second. Data from the staff report show that Mexican excess  
25 capacity is larger than total U.S. production. The report

1 also shows that about 2/3's of all tomatoes produced in  
2 Mexico go to the U.S. market while the remainder almost  
3 entirely remain in the Mexican market, there's almost no  
4 third country export.

5           Why doesn't that suggest a threat of material  
6 injury? And I hear part of your answer Mr. Wilner, it's  
7 just it's going to be product differences, so I hear you on  
8 that, but right. Mr. Anderson?

9           MR. ANDERSON: Commissioner Kearns, I think we're  
10 going to have a fair amount to say about those capacity  
11 utilization figures in our post-conference, our post-hearing  
12 brief. First, there are something like 224 separate foreign  
13 producer questionnaire responses, which is pretty amazing  
14 given the fact there are only 19 U.S. producer questionnaire  
15 responses.

16           Given the sheer magnitude of the questionnaire  
17 responses, different growers in Mexico responded to the  
18 capacity utilization question in different ways. So, when  
19 we saw those very low capacity utilization figures, we  
20 started looking into it.

21           We haven't completed our analysis because there  
22 are 224, but we've done enough of them to know what is  
23 really driving those figures. And here's what it is.  
24 There's a vast difference between the growers who reported  
25 their capacity on the basis of acreage or production versus

1 those who reported it on the basis of pack house capacity.

2 Now, I grew up in a farming community in Michigan  
3 where the packing houses would sit idle for most of the  
4 year, and then would get cranked up for six to eight weeks  
5 out of the year, and then they would sit idle. You cannot  
6 use packing capacity to measure capacity.

7 What you need to know is what the acreage is, or  
8 what the production is. In an agricultural product like  
9 this from year to year, your capacity -- your capacity, your  
10 production in many respects is your capacity.

11 If you are using protected agriculture, you are  
12 not basically building capacity and not using it, it's being  
13 used because it's just too expensive to essentially invest  
14 in it and not use it. So, the reality is that when we  
15 filter out all of this excess packing capacity, I think you  
16 will see that we are at capacity, and that capacity is not  
17 really expected to increase materially.

18 MR. PORTER: Commissioner Kearns, if I could  
19 again, it's Dan Porter with Curtis. I just want to echo and  
20 to be quite blunt and honest and a little bit sheepishly,  
21 our own client kind of had some confusion on filling out the  
22 capacity. And it was just had to do with how do you take  
23 into account other products, like other peppers or something  
24 like that and the calculation from acres to yield and all  
25 that.

1                   But their point is really simple -- you don't, at  
2                   least in a controlled environment, in a greenhouse, you  
3                   never leave something half empty. You grow -- you  
4                   essentially plant everything you grow, and you sell  
5                   everything that you can harvest. So, the concept of this  
6                   excess capacity and capacity utilization, which is being  
7                   adapted from a, you know, steel machine rate type idea is  
8                   very different in agriculture and I think you got some  
9                   confusion in the questionnaires, and so I think in this  
10                  particular case, the so-called excess capacity numbers have  
11                  got to be taken a little bit with a grain of salt.

12                  COMMISSIONER KEARNS: And just to add to that,  
13                  I'm not sure if you were saying this but I kind of thought I  
14                  heard it. Could it also -- could greenhouse be different  
15                  from open? Is open year round? I mean I don't think open  
16                  is year round, whereas greenhouse is year round, so what  
17                  will that mean about capacity utilization?

18                  MR. ANDERSON: I think I can take a stab at that.  
19                  If a greenhouse grower was reporting capacity based on  
20                  packing, they would probably have a lot higher capacity  
21                  utilization simply because they used the packing shed.

22                  The packing sheds are right next to the  
23                  greenhouses typically, and so they would be using them for  
24                  longer during the period. But they still would have times  
25                  of down capacity. But if you're a field grower, and you

1 have a limited season, and you've basically reported to the  
2 Commission that your theoretical capacity of running your  
3 packing for year round, then those numbers are wildly  
4 inflated.

5 And when you start drilling down into it, you  
6 find that the excess capacity is always like it's hardly  
7 ever small. It's just like huge.

8 COMMISSIONER KEARNS: Yeah, but putting aside the  
9 packing issue -- I'm sorry, I'm going over my time, but with  
10 an open field if you don't have full year production,  
11 there's also going to be an issue there, right?

12 MR. ANDERSON: Yes.

13 COMMISSIONER KEARNS: Okay.

14 MR. ANDERSON: It's going to be a bigger issue  
15 for open field than it is for greenhouse.

16 COMMISSIONER KEARNS: Yeah, okay, thank you.

17 MR. ANDERSON: But even greenhouse doesn't  
18 necessarily grow year round.

19 COMMISSIONER KEARNS: Okay, thank you very much.

20 COMMISSIONER SCHMIDTLEIN: Commissioner Stayin?

21 COMMISSIONER STAYIN: Thank you. It sounds like  
22 you turned producing tomatoes into an art. You've brought  
23 the concepts and design and technology from Israel and from  
24 the Netherlands and it's quite exotic and you know, I admire  
25 you.

1                   And I have to get back down to earth and when I  
2 look at this staff report on page Roman IV-VI, it reads, "A  
3 majority of total shipment of imports of fresh tomatoes from  
4 Mexico were sourced from open fields. 72.4% while the  
5 remainder were sourced from greenhouses 27.6%. The average  
6 unit values on shipment of tomatoes from the fields were  
7 around, you know, they were underselling, and your  
8 greenhouse shipments were over.

9                   That's kind of where we are and, you know, I've  
10 got we're back down to when I go into the grocery store and  
11 I see there there's the rounds, and there might be a Roma  
12 and some cherries, I wouldn't know anywhere where they were  
13 from, but those don't seem to be particularly exotic,  
14 they're -- aren't they just a bread and butter kind.

15                   MR. JUNGMEYER: Categorically state 7.8% of  
16 Mexican tomato imports are open field tomatoes, are open  
17 field rounds. 7.8%. That is the amount that is inspected  
18 by USDA by order of inspecting open field round tomatoes.  
19 Grape tomatoes, cherry tomatoes, are practically never grown  
20 in an open field.

21                   You can find a few Romas, that's the state of the  
22 industry.

23                   MR. LARUSSA: Commissioner?

24                   COMMISSIONER STAYIN: Excuse me.

25                   MR. LARUSSA: Sorry.

1           COMMISSIONER STAYIN: So, you're saying that the  
2 fresh tomato imports at the number 72.4% is incorrect?

3           MR. LARUSSA: That being open field tomatoes.

4           COMMISSIONER STAYIN: Open field.

5           MR. LARUSSA: That is incorrect, yes.

6           COMMISSIONER STAYIN: Incorrect.

7           MR. LARUSSA: It's based on, excuse me, Robert  
8 LaRussa, it's based on the dates in the questionnaire. Your  
9 questionnaire is open field, and most of protected  
10 agriculture together. Okay, and that's the problem here.

11           COMMISSIONER STAYIN: Well they did have  
12 greenhouse.

13           MR. LARUSSA: No --

14           COMMISSIONER STAYING: And they said that was  
15 27.6%.

16           MR. LARUSSA: I'm sorry, the way they put it  
17 together again, we've been talking all day about the  
18 different types of protected agriculture, right? There are  
19 high-tech greenhouses and then there are shade houses and  
20 other forms. All protected houses in the forms which is the  
21 majority, most of what's in Mexico are in the open field  
22 category in your questionnaires, in the ITC questionnaires,  
23 that's the difference.

24           All of those are the greenhouse, or the high-tech  
25 controlled greenhouses from a mistake made in 2013 in the

1 definition by the Commerce Department. So, basically your  
2 numbers are way wrong, and with all due respect, Lanta's are  
3 right.

4 MR. PORTER: Commissioner, can I just make one  
5 quick, just to highlight this point.

6 COMMISSIONER STAYIN: Sure, go ahead.

7 MR. PORTER: So, the number that you see in the  
8 staff report, your 72% okay, this is from the importer  
9 questionnaire, essentially a compilation of the  
10 questionnaire responses and specifically page 11 of the  
11 importer questionnaire response.

12 If you look at page 10, it says here are the  
13 definitions we want you to fill out when you complete page  
14 11. And as Mr. LaRussa says, it says open field and adapted  
15 environment tomatoes. So, Mr. LaRussa's correct, the very  
16 questionnaire is telling the importer to include what is  
17 called adapted environment, which is to them not open field,  
18 into the open field thing and then when staff compiled it,  
19 they just compiled it under that basis. So, it's a pure  
20 definitional issue.

21 COMMISSIONER STAYIN: It conflated the open field  
22 with the other, and therefore your answers. But they had  
23 this other thing about greenhouse, and wasn't that another--

24

25 MR. WILNER: The greenhouse is that high-tech

1 greenhouse, so 27 percent is basically the high greenhouse,  
2 and everything but the other 7 percent is protected  
3 environment.

4 MR. NOLAN: This is Matt Nolan. We had the same  
5 issue during the review cycle, only it was actually probably  
6 even more confusing then because they didn't try to put the  
7 greenhouse insertion in. And the greenhouse insertion  
8 didn't help. It just caused more confusion, I think, on  
9 some people's. But I can guarantee you on the specialties,  
10 on the small tomatoes, these are all greenhouse.

11 COMMISSIONER STAYIN: I would appreciate it if  
12 you would address this in your posthearing brief. I think  
13 it's an important question.

14 MR. WILNER: We shall, in detail.

15 MR. VALDEZ: Commissioner, this is Salvador  
16 Garcia. If I may explain here?

17 COMMISSIONER STAYIN: Yes.

18 MR. VALDEZ: I'm going back, when we drove through  
19 California, that's as specific a definition in the  
20 California to say that greenhouse tomato has to be grown  
21 hydroponically. It had to have heat, and like air condition  
22 in the greenhouse. So all the tomatoes that we grow either  
23 open field, shade house, low-tech greenhouse, growing on the  
24 ground have to grow our open field tomato. Because if it's  
25 not growing hydroponically, you cannot call it greenhouse.

1 You have to call it open field. So maybe that's the  
2 confusion. I listened to that part of the growth in  
3 California. You cannot call it greenhouses or market it as  
4 greenhouse tomato even if it's growing in the greenhouse.

5 COMMISSIONER STAYIN: Alright, well we need to  
6 figure out a way to bridge that gap. And any suggestions  
7 you might have would be appreciated.

8 MR. PORTER: I'm sorry, Commissioner, I wouldn't  
9 want to pick up--I'm sorry, I'll mispronounce the last name,  
10 but Lance's statement is very important.

11 The U.S. Government requires this classification  
12 between "open field" and "not" and they require inspections  
13 for open field, if I understand what he's saying. So I  
14 think his data is very good data on getting at the very  
15 question that you're asking.

16 COMMISSIONER STAYIN: Okay, that's the end of my  
17 questions. I thank you very much.

18 COMMISSIONER SCHMIDTLEIN: Commissioner Karpel?

19 COMMISSIONER KARPEL: Okay, I want to start off  
20 picking up where Lee left off. It seems like so long ago we  
21 were talking about the different features of Mexican  
22 tomatoes, and the attributes they have.

23 I just wanted to do a few cleanup questions  
24 there. So am I correct to understand that you're saying  
25 that all, or almost all Mexican greenhouse tomatoes, or

1 Mexican tomatoes grown in protective environments, are  
2 harvested vine-ripe? I see you nodding, so that's correct.

3 Okay, and so what's the converse of that? Are  
4 all Mexican vine-ripe tomatoes grown in adapted environments  
5 of some sort?

6 MR. JUNGMEYER: Not necessarily. This is Lance  
7 Jungmeyer.

8 COMMISSIONER KARPEL: Okay. And is it something  
9 about growing in a greenhouse that results in it being  
10 harvested vine ripe? Or is it just that Mexican tomatoes  
11 are harvested when they're vine ripe because of where  
12 they're growing, or the growing conditions? Is it something  
13 about a greenhouse, or a protected environment that you're  
14 harvesting at that stage?

15 MR. NOLAN: So I'm going to let Mr. Ambelang  
16 speak from our side. This is Matt Nolan. But I mean if you  
17 look at this, greenhouses allow you to control a lot of  
18 things, right? If you get the right seed. But if you get  
19 the seed that Mr. Ambelang was describing earlier, certain  
20 seeds require certain growing techniques, certain mediums,  
21 certain environments, right? If you have a series of  
22 greenhouses, you can have one that's programmed at 65  
23 degrees. You can have one that's programmed at 70 degrees.  
24 You can have one that opens doors and let's more air in, or  
25 more light in, or one that's less light in. You can do all

1 sorts of things that you cannot do in an open field.  
2 Because whenever God wants the sun to shine, it's going to  
3 shine, right?

4                   So these tomatoes are highly engineered from the  
5 standpoint of the seed right through to the watering, the  
6 fertilizing, the temperature that it's been controlled in,  
7 and it's not a distinction in my mind between Mexico versus  
8 U.S. tomato. It's a distinction between where is this thing  
9 being grown? Right? How is it being grown? And is it  
10 being grown in such an environment such that you're going to  
11 get more innovative product, a better tasting product, a  
12 better looking product, a more consistent product, all the  
13 attributes that the consumer that Mr. Agostini told us wants  
14 to pay more for.

15                   COMMISSIONER KARPEL: Right, right. And I get--  
16 and U.S. cherry tomatoes and these special varieties are  
17 also picked when they're vine ripe. So I'm not as  
18 interested in that. But I appreciate your input, I'm not  
19 suggesting that, but I'm trying to understand for those  
20 tomatoes, Romas and rounds, is there something about growing  
21 them in a greenhouse that makes you pick them at the  
22 vine-ripe stage versus earlier? Or is just tomatoes are  
23 grown in Mexico?

24                   MR. ANDERSON: Commissioner Karpel, I think I can  
25 maybe help out a little bit. I'm going to show my age

1 again. When I first started working on this case in 1996,  
2 there was virtually no greenhouse production in Mexico at  
3 that time. But almost all of the tomatoes coming across  
4 were vine-ripened.

5 Vine-ripened is a higher quality tomato. It just  
6 tastes better because of the physical properties and the  
7 chemical changes that occur.

8 Mexico, which does have lower labor costs, were  
9 able to invest and create a vine-ripened product even before  
10 they got into protected agriculture. So that's kind of  
11 independent.

12 Then on top of that, they began to move into  
13 protected agriculture which essentially enhanced the  
14 consistency and allowed them to grow new varieties, new  
15 seeds, and the like.

16 The sort of ironic thing here is that in some  
17 sense the suspension agreement pushed the Mexican industry  
18 into a higher quality product. They were not allowed to  
19 sell below the reference price for 23 years. In order to  
20 basically comply with the suspension agreement, they had no  
21 question but they had to sell on quality.

22 So they invested billions and billions of dollars  
23 into developing protected environment. And at this stage,  
24 they have reached a point where even the suspension  
25 agreement prices, as we've seen since the suspension

1 agreement was dropped, in that short window don't really  
2 even bite. Because the quality is so much higher that  
3 people are willing to pay more prices.

4           So there is--there is a fundamental difference  
5 between a vine-ripe and a mature green. In addition, there  
6 are valuable benefits to protected, and Mexico has the  
7 blessings of being able to take advantage of both.

8           MR. AGOSTINI: This is Mike Agostini. If I can  
9 add one more piece to that, the protection of greenhouses  
10 and the like also allows for the use of different seed  
11 varieties. And through that there has emerged a breeding  
12 program called ESL, Extended Shelf Life. And what that does  
13 is create breeds and varieties of tomatoes that stay in the  
14 red range much longer before they start to decline. And you  
15 can use those in protected ag and they don't respond well to  
16 field growing.

17           So you can let the tomato get much redder because  
18 you know you've got extra days in the red range to deal with  
19 as you ship it downstream. So that's enhanced this whole  
20 riper on the vine and flavor before you pick it and ship it.

21           MR. LaRUSSA: Commissioner Karpel, would you mind  
22 if I added something to that? So this is a comparison that  
23 you're talking about. There is another side to this  
24 comparison.

25           There's a 2011 highly decorated book called

1 "Tomato Land" that was written by Barry Esterbrook who is a  
2 New York Times food writer. And the entire book is about  
3 the gas green tomato. And I would just like to give you one  
4 quote from the book, which is: "As far back as the 1920s,  
5 food scientists had determined that no tomato artificially  
6 ripened with ethylene would ever have taste or texture equal  
7 to one allowed to ripen naturally."

8           And if you look at the book, which I believe is  
9 on the record and if it's not we'll put it on the record,  
10 the entire book is about that. And it's about basically the  
11 difficulties of the nutritional difficulties and the taste  
12 difficulties of this type of tomato.

13           And as everybody else just said, you need certain  
14 conditions to make a really good tomato, which I don't have  
15 in my front yard. And you can duplicate those conditions in  
16 an artificial environment and make a perfect tomato. That's  
17 basically what everybody is saying.

18           MR. WILNER: And I just want to add on to Mr.  
19 LaRussa's very relevant and terrific quote that he's  
20 memorized. That also exhibit--you know, exhibit 9 to our  
21 brief is a recent scientific study which really goes into  
22 the difference and the taste differences between the tomato  
23 allowed to ripen, taken off the vine, and ripened  
24 artificially with ethylene gas, and one that is allowed to  
25 ripen on the vine. And they're significant.

1                   MR. JUNGMEYER: And, Commissioner Karpel, this is  
2 Lance Jungmeyer. One other thing to note about how the  
3 industry has changed over the course of the years, and since  
4 this is such an old case a lot has changed.

5                   The old industry model was to control shrink--  
6 i.e., to minimize waste. If you're a retailer, you want to  
7 throw away less. You wanted to mess with your display less  
8 often. But the new model is just-in-time delivery. It's to  
9 turn sales. It's to sell things faster and to sell more of  
10 it. And that I believe is a huge difference in these two  
11 industries.

12                   You have an industry that is eager to put out a  
13 produce that is going to fly off the shelves, and another  
14 industry that was geared to keeping the produce on the shelf  
15 and having it look pretty. Thank you.

16                   COMMISSIONER KARPEL: I don't want to get into it  
17 here because I have limited time, but if you could in your  
18 posthearing brief also sort of connect the dots. We've  
19 talked a lot today and tried to get some record evidence  
20 about the taste being different between these kinds of  
21 tomatoes, but how do we translate that into what purchasers  
22 or consumers are buying, or looking to buy?

23                   I think we're looking at some of the data in  
24 Section 2 on comparability between domestic tomatoes and  
25 Mexican tomatoes, and we're seeing comparability all the way

1 down on flavor, and texture, and so forth.

2           So I have other questions I want to ask, and I  
3 don't know how long we're going to be here today, so I don't  
4 know if I want to spend much time. I know you all are eager  
5 to respond to that, but--

6           MR. PORTER: I think--I promise, 15 seconds,  
7 okay? I look at--I pulled open the questionnaire and looked  
8 at the question. With all due respect, if you read the  
9 question, a natural interpretation is: Mexican hydroponic,  
10 U.S. hydroponic. Okay? Are those different? And the  
11 answer is, like, no, they're very comparable.

12           The question does not say "gas green" versus  
13 "hydroponic." It does not do that. And that's what we're  
14 sort of talking about here. And so to say that the  
15 purchaser said, oh, they're the same, is because in the  
16 purchaser's mind they're comparing Mexican and U.S. with the  
17 exact same type of tomato.

18           MR. AGOSTINI: Mike Agostini here, quickly. I  
19 can tell you unequivocally from a big view of retail that  
20 the house-grown products are way more received by the  
21 customer as quality and flavor versus field-grown products.  
22 It's been migrating over forever, and it's not going to  
23 stop, and the house is going to continue to grow in that  
24 segment.

25           COMMISSIONER KARPEL: So in the posthearing

1 please, you know, we're going to have to think about if  
2 we're going to accept your argument how we overcome the  
3 information in Section 2. So it's your opportunity to tell  
4 us in posthearing, in addition to what you've said today.  
5 So I just encourage you to do that, if that's fair.

6 I've expired my time, so I will come back to my  
7 other questions after other Commissioners have had a chance.

8 COMMISSIONER SCHMIDTLEIN: Okay, I just have a  
9 few more questions. One of my questions was the purchaser  
10 survey data, so I will look forward to that response in the  
11 post-hearing.

12 Another question having to do with the testimony  
13 on U.S. producers being focused on food service and the  
14 Mexican producers being focused on retail and retail really  
15 has moved to desiring, demanding the vine-ripened tomato.  
16 So, this morning the Petitioners -- and this is  
17 confidential, so only the attorneys -- I don't know whether  
18 you get a copy. Do you all hand out copies before -- do you  
19 have a copy of the pink?

20 MR. PORTER: I think we got one copy, overall,  
21 so we don't --

22 COMMISSIONER SCHMIDTLEIN: So, you got one copy.  
23 So, maybe you'll have to really address this in the  
24 post-hearing, but what they did at Slide 5 is based on the  
25 questionnaire responses, right, they looked at the market

1 share in each of the channels of distribution. And when you  
2 break that down, according to this, and I know you'll have  
3 to respond to this in post-hearing, but you see domestic  
4 producers losing market share in the food service segment  
5 and imports from Mexico gaining substantial market share in  
6 the food service segment, okay. So, U.S. loses in food  
7 service and Mexico gains.

8                   And I understand we have distributors and then  
9 packers, re-packers and I have another question about that  
10 based on something in your brief, Mr. Porter. But putting  
11 those aside for a second, when you look at the  
12 supermarket/grocery store chain, which I know we just had  
13 some testimony that that's a very important segment, U.S.  
14 actually gained market share.

15                   MR. ANDERSON: Vice Chairman, if I can --

16                   COMMISSIONER SCHMIDTLEIN: Well, thank you, but,  
17 no, I'm just a Commissioner. You promoted me.

18                   MR. ANDERSON: Oh, I'm sorry. We saw that  
19 table.

20                   COMMISSIONER SCHMIDTLEIN: Okay.

21                   MR. ANDERSON: And it's true that the Mexican  
22 product has gained market share in the food service sector.  
23 That also reflects some changing consumer demand in that  
24 sector. The mature greens are basically sliceable. It's  
25 basically the burger part of the sector and that is a part

1 of the food service sector that has relatively flat growth.  
2 Where you see growth is in sort of alternative fast food,  
3 Chipotle's and Chops and things like that -- more salads --  
4 and those types of food service businesses, in fact, prefer  
5 vine-ripened and even the smaller tomatoes. And so, there  
6 is growth in the sort of non-gas green demand within the  
7 food service. And it's growth, not based on price, but it's  
8 based on changes in consumer preference.

9 COMMISSIONER SCHMIDTLEIN: So, why -- then why  
10 is the U.S. gaining share in the supermarket/grocery chain  
11 if it's so clear that -- especially in that segment, right,  
12 where you're talking about -- you know those stores are  
13 buying to sell direct to consumer and they demand  
14 vine-ripened. Why did the U.S. gain market share over the  
15 past few years.

16 MR. BURCH: I'm sorry; are you looking at?

17 COMMISSIONER SCHMIDTLEIN: Slide 5, 2016 to  
18 2018.

19 MR. PORTER: Commissioner, just two points. One  
20 is --

21 COMMISSIONER SCHMIDTLEIN: I mean the lost in  
22 the interim period compared to the prior interim, but over  
23 the POI, overall, they gained.

24 MR. PORTER: Right. But, Commissioner, one, I  
25 think the -- again, we can't talk as to the actual numbers,

1 but the magnitude of the gain is not that great, number one,  
2 and number two --

3 COMMISSIONER SCHMIDTLEIN: But why would they  
4 gain at all? I mean they're producing these you know  
5 gas-green tomatoes.

6 MR. PORTER: Why would gas-green tomatoes?

7 COMMISSIONER SCHMIDTLEIN: Gain at all.

8 MR. PORTER: I don't have an answer for that.  
9 We will try to do that post-hearing, but I would actually  
10 make what you just said is the most important. Because, we  
11 submit, this is a threat case, the interim period is  
12 actually more relevant.

13 COMMISSIONER SCHMIDTLEIN: Okay.

14 MR. PORTER: So, I would end with that.

15 COMMISSIONER SCHMIDTLEIN: Okay. Well, I know  
16 you only have one copy. You just saw it today, so I invite  
17 you to address it in the post-hearing, but you know the  
18 question is, is this inconsistent with an argument that all  
19 decisions in the market are being driven by a demand for  
20 vine-ripened tomatoes.

21 MR. JUNGMEYER: If I could just briefly address  
22 your first question about why the vine-ripened tomatoes are  
23 gaining in food service. And there's a very well publicized  
24 fact that from 2017 and 2018 Wendy's made a corporate  
25 decision that they were no longer going to purchase open

1 field tomatoes. That they were switching exclusively to  
2 vine-ripened protected agriculture tomatoes. This is well  
3 documented. You can find it in the Wall Street Journal,  
4 many numerous websites, but that's a major chain that made  
5 that commitment and they did it because they said no more  
6 mushy tomatoes. They made a marketing push out of it.

7 COMMISSIONER SCHMIDTLEIN: Okay.

8 MR. WILNER: And I must say there's another  
9 reason too. There's another major food chain which has  
10 shifted away. And while they won't testify public, it's  
11 because of food safety issues because they felt open field  
12 tomatoes had biological -- because of animal intrusion and  
13 feces in the field -- and you can ask them. A lot of their  
14 field-grown tomatoes are right next to the Everglades. They  
15 thought unless they could be protected, they were having  
16 food safety risks by buying them. So, there are those  
17 things happening.

18 MR. NOLAN: One other comment from Nature Sweet.  
19 I can't speak for the rest of the audience, but we are now  
20 selling out of the Wilcock facility and we're selling a lot  
21 of tomatoes out of Wilcock's.

22 MR. PORTER: I'm sorry. I want to echo that  
23 because my colleague made a very valid point. I believe the  
24 chart we're looking at it was just domestic versus imports.

25 COMMISSIONER SCHMIDTLEIN: Yep.

1 MR. PORTER: Which means our client, Red Sun  
2 Farms --

3 COMMISSIONER SCHMIDTLEIN: Subject imports.

4 MR. PORTER: I understand.

5 COMMISSIONER SCHMIDTLEIN: Yes.

6 MR. PORTER: Our client, Red Sun Farms, has an  
7 outfit in Dublin, Virginia that would be included in that  
8 number. And since they were literally growing during that  
9 time period, it literally could be because Red Sun Farms  
10 hydroponic tomatoes going into that sector.

11 MS. ELLIS: Right. In other words --

12 MR. PORTER: From the United States.

13 MS. ELLIS: Yeah, green is not gaining back  
14 market share. It's that the U.S. --

15 MR. PORTER: Is growing in the greenhouse.

16 MS. ELLIS: -- in the desired market segment.

17 COMMISSIONER SCHMIDTLEIN: Okay, well, I'd  
18 invite you to address this in the post-hearing, both sides.

19 MR. WILNER: We'll answer it, overall, but I  
20 need to be -- it behooves us to say that they have the food  
21 service market locked up and clearly there are parts of it  
22 they're still preferred. But the fact is, quality-wise, the  
23 vine-ripened, greenhouse tomatoes Mexico is growing and is  
24 even growing in the U.S. -- I mean you know are the U.S.  
25 grown vine-ripened greenhouse tomatoes are better products and

1 they've taken the retail market and they are moving into the  
2 food service product. Some won't take it, but over time --  
3 these guys' problems results from the tomato they're  
4 producing and the way they're producing it. That's it.

5 COMMISSIONER SCHMIDTLEIN: Okay. Okay, so last  
6 question I think I have right now is more of a legal nature.  
7 And Mr. Porter, I know you've made this point that we really  
8 should only be looking at threat. So, my question is in the  
9 sugar investigation, which I'm guessing you're familiar  
10 with. It was back in 2015. That was a case where there was  
11 a suspension agreement. There were Petitioners. We  
12 actually had two different types of proceedings there. We  
13 had a review of the suspension agreement and whether it  
14 completely eliminated the injury, and those same Petitioners  
15 then also requested that the investigation continue. And  
16 the Commission ended up going affirmative present in that  
17 case, so is this different than that? Like how is it  
18 different?

19 MR. PORTER: Okay, again, I'm handing it over to  
20 my colleague, Valerie Ellis. It's very different because if  
21 you sort of think about it from the law standpoint you first  
22 determined that the suspension agreement eliminated injury.  
23 And by definition, you're looking sort of backwards in time  
24 in doing that. You made that determination first.

25 COMMISSIONER SCHMIDTLEIN: Yeah, but you're

1 saying it's linked under the statute, so for us --

2 MR. PORTER: No, I'm not saying it's linked, I'm  
3 just saying as a factual matter you first determined in that  
4 case that the suspension agreement eliminated injury. Okay.  
5 Then later on you found injury, looking at almost the same  
6 data, and that makes sense, right?

7 COMMISSIONER SCHMIDTLEIN: Different standard, I  
8 can tell you. I recall.

9 MR. PORTER: It is a different standard, but if  
10 you just sort of think about data and looking at it, it sort  
11 of makes sense. You were basically saying there was injury  
12 by requiring the raising of prices you determined that's  
13 going to eliminate the injury.

14 COMMISSIONER SCHMIDTLEIN: Okay.

15 MR. PORTER: When then we were asked a different  
16 question, looking at that same period of time, but ignoring  
17 that, just looking at was there injury from imports? Well,  
18 of course, you found injury because you already determined  
19 it was eliminated by a suspension agreement.

20 COMMISSIONER SCHMIDTLEIN: So, you're saying  
21 unless they ask for a review of the suspension agreement, we  
22 can't consider a present material injury case.

23 MR. PORTER: Yes.

24 COMMISSIONER SCHMIDTLEIN: They should have also  
25

1 have --

2 MR. PORTER: Should have done that.

3 MS. ELLIS: It's not even that. It's not even  
4 just that. It's also that -- sorry, Valerie Ellis, counsel  
5 for Red Sun Farms. If this was 1996, and it was a 1996  
6 continuation, you'd have a current period of investigation  
7 that you'd be looking at and you'd have three years of data  
8 where there wasn't a suspension agreement in effect, and  
9 you'd be able to answer both those questions. Was there  
10 injury during my POI? Does this agreement eliminate injury?  
11 You'd apply the relevant standards.

12 What we have here are a series of suspension  
13 agreements. The first one eliminated injury. Throughout  
14 the duration for which it was in effect, injury was  
15 eliminated as a matter of law. That's a presumption. It  
16 remained in effect and the only party that can overturn that  
17 presumption is you. And the law gives you a few different  
18 ways to do that. If the Petitioners had --

19 COMMISSIONER SCHMIDTLEIN: Well, let's assume  
20 that we're just looking at the last three years.

21 MS. ELLIS: You can only look at -- let's assume  
22 -- okay, let's assume that.

23 COMMISSIONER SCHMIDTLEIN: Alright, we got a new  
24 investigation --

25 MS. ELLIS: The 2012 agreement --

1 COMMISSIONER SCHMIDTLEIN: -- and a new  
2 agreement.

3 MS. ELLIS: -- went into effect until May 7,  
4 2019. From 2012, whenever the agreement was signed, to May  
5 7, 2019, the presumption is that injury was eliminated.  
6 That presumption has not been overcome. It cannot be  
7 overcome. It's done. The agreement eliminated injury up  
8 until May 7, 2017, as a matter of law.

9 COMMISSIONER SCHMIDTLEIN: 2017?

10 MS. ELLIS: 2019.

11 MR. PORTER: 2019.

12 MS. ELLIS: May 7, 2019.

13 COMMISSIONER SCHMIDTLEIN: Okay, alright.

14 MS. ELLIS: Had there been -- you know there's  
15 this speculation, oh, I felt injured, right? I felt  
16 injured. Even though the agreement was in effect, I felt  
17 injured. That's too bad. The domestic industry doesn't get  
18 to make that determination. If they felt injured, they have  
19 a statutory right, under 1675, to seek a change of  
20 circumstance of you and say, hey, I don't think this is  
21 eliminating injury any more. Who gets to make that  
22 determination -- the Commission only.

23 COMMISSIONER SCHMIDTLEIN: Okay.

24 MS. ELLIS: Can Commerce make it? No. Not even  
25 in a violation scenario can Commerce make that decision.

1 That is left exclusively to the Commission and if you  
2 haven't been asked to make that finding, you can't go back  
3 and make it now. That agreement was in effect and it's  
4 over.

5 COMMISSIONER SCHMIDTLEIN: Okay, alright, I  
6 invite you to address that and I invite the other side to  
7 address that question as well. And I have one more  
8 question, so is it you all's position, did the prior 2013  
9 suspension agreement impose a discipline on the market? Did  
10 it impact the prices?

11 MR. PORTER: Absolutely. There was referenced  
12 price by law the Mexican suppliers could not go below. Of  
13 course, it had to have a negative effect.

14 MS. ELLIS: The prices were higher than the  
15 average price, but --

16 COMMISSIONER SCHMIDTLEIN: Okay.

17 MR. WILNER: I think that's highly questionable.  
18 I do because, as you'll see, there were some times when it  
19 might've stopped prices from going down.

20 COMMISSIONER SCHMIDTLEIN: Ah, that's the  
21 question, isn't it, right?

22 MR. WILNER: But overall -- and we don't know.  
23 But the fact is the Mexican product, at least from what  
24 we've seen, it was usually so well above the referenced  
25 price that they would be selling well above the referenced

1 price anyway because of their product.

2 COMMISSIONER SCHMIDTLEIN: Okay. Well, that's  
3 why I asked the question.

4 MR. WILNER: Yeah.

5 COMMISSIONER SCHMIDTLEIN: Do you think it had  
6 an effect?

7 MR. WILNER: I think that, right.

8 MR. LARUSSA: Can I add a footnote to that.

9 COMMISSIONER SCHMIDTLEIN: Sure.

10 MR. LARUSSA: Can I add a footnote to that.  
11 There are a lot of wild antidotes this morning about  
12 cheating on the suspension agreement. And I just have to  
13 say this, in the -- what is it now -- 23 years of the  
14 suspension agreement there has never, never, zero been a  
15 finding of a violation of the agreement on the record by the  
16 Commerce Department, never. And that is their -- FTE makes  
17 claims all the time. There's never been a finding of a  
18 violation. I think it's important to note.

19 COMMISSIONER SCHMIDTLEIN: Okay, alright. Thank  
20 you. Thank you, Commissioner Kearns, for indulging me.

21 COMMISSIONER KEARNS: Just to go back real  
22 quickly to Mr. Porter. You had said with sugar, I think in  
23 the sugar case, I think you said you determined the  
24 suspension agreement eliminated injury. You were referring  
25 to the Commission?

1 MR. PORTER: Yes.

2 COMMISSIONER KEARNS: So, did the Commission,  
3 because I'm sorry, I'm not familiar enough with this  
4 process, so the Commission made that determination?

5 MR. PORTER: Yes, in that case unlike this case,  
6 you had a domestic producer do two things. First, they said  
7 after signing the suspension agreement, Commission, under  
8 separate statutory provision, Commissioner Schmidlein is  
9 right, separate statutory provision.

10 Well, can you look at whether in fact, the  
11 suspension agreement does limit the injury?

12 COMMISSIONER KEARNS: Right, okay, so then  
13 turning to this case.

14 MR. PORTER: Yes.

15 COMMISSIONER KEARNS: Well we haven't done that.  
16 We never said, right, that the suspension agreement -- any  
17 of these versions of the suspense agreement addressed injury  
18 one way or the other, right? So, in terms of like our  
19 decision, you know, that sounds like more along the lines of  
20 what you were saying a minute ago, but you or Mr. Porter or  
21 whoever else.

22 MR. PORTER: Just to be very clear, the Commerce  
23 Department has made a sort of a factual legal conclusion  
24 that from 2013 until 2017 the suspension agreement  
25 eliminated injurious imports. That's a legal conclusion.

1                   COMMISSIONER KEARNS: Okay, but we -- because  
2 I've looked a little bit at some of the past cases and I  
3 thought there is language in there that suggests you know,  
4 we're not bound, we never determined that there's a limiting  
5 injury.

6                   MR. WILNER: May I explain it? And actually, we  
7 were involved in that case as well. The way the statute  
8 does it, and this was really the first suspension agreement  
9 under the C provision to eliminate the injurious effect.

10                   But the statute deals with it. The Commerce  
11 Department, which is not charged under the statute normally  
12 with deciding injury it's you. So, the way this statute did  
13 it is Commerce can enter into an agreement to eliminate the  
14 injurious effect, but interested parties, the domestic  
15 industry, if they question that, has the right under -- and  
16 it's 16 -- I never know the Tariff Act thing.

17                   28 -1673c(h) gave a specific provision allowing  
18 the domestic industry, and this if they have a question with  
19 Commerce's decision, within 20 days to go to the Commission  
20 and get a 75 day determination, does this eliminate injury?  
21 We don't think it does. So, get over it.

22                   And they have chosen, and that's their way to get  
23 a determination. If they don't do that, we say, look,  
24 they've given up that right then Commerce's determination is  
25 accepted. Now, I think that's the way it should be read.

1 And that's what Mr. Porter was saying.

2 COMMISSIONER KEARNS: Yeah, Mr. Wilner, just 10  
3 more seconds.

4 MR. PORTER: on your past case, quite honestly,  
5 there has not been a directly, at least as I know, directly  
6 analogous past case, I don't think there has been.

7 The one case that comes close is Softwood Lumber  
8 but guess what -- Softwood Lumber was not an ADCVD  
9 suspension agreement. It was called the SLA, it was outside  
10 of the ADCVD framework, so that's in our mind, different  
11 than what we have here.

12 MR. WILNER: But I think the first issue is  
13 clear, that they have the right to get a Commission  
14 determination of Commerce. They chose not to do it, so that  
15 determination is valid.

16 COMMISSIONER KEARNS: Okay.

17 MR. WILNER: The next question is now it's the  
18 one you asked, okay, what do you look at now, is it with the  
19 agreement or without the agreement? What is the effect?

20 COMMISSIONER KEARNS: Right, right, right, right,  
21 okay.

22 MR. WILNER: I should also just say in the sugar  
23 case, so they had two bites at the apple in a way. They,  
24 you know, they wanted to continue the investigation. Well,  
25 you know, this agreement has been going on for 23 years and

1 the market is totally changed. The products have totally  
2 changed everything. There is the agreement that was entered  
3 into at that time, there was the request under H for you to  
4 review it, you found no injury.

5 Then, the Mexican industry really didn't contest  
6 the final injury determination because they wanted the  
7 agreement to go in effect, so it was a funny proceeding,  
8 they didn't even contest it. This is different we're  
9 contesting.

10 COMMISSIONER KEARNS: Okay, thank you, so I want  
11 to turn back to the comparability survey that Commissioners  
12 Karpel and Schmidtlein referred to and I hear your answer  
13 Mr. Porter, that the answer is assume we're comparing, for  
14 example, hydroponic U.S. to hydroponic Mexico and so forth.

15 But isn't the point that U.S. -- that the United  
16 States is competing in each segment of the market, whether  
17 it's grape tomatoes, greenhouse tomatoes, tomatoes on the  
18 vine, vine ripened, don't we see plenty of competitive  
19 overlap in whatever segment you want to define?

20 Or, alternatively, the only areas where you may  
21 be able to -- you seem to be suggesting that there is no  
22 competitive overlap, are areas where we don't have data,  
23 like we don't have, you know, growing you know, vine  
24 ripened. We don't have data on that.

25 So, it seems to me like where we do have data, I

1 see a lot of competitive overlap, and where I don't have  
2 data, I don't have data.

3 MR. PORTER: Okay, Commissioner Kearns, with all  
4 due respect, we need to put numbers with respect to those  
5 different categories. As you well know, you know, we might  
6 have some competitive overlap here, but that's only 2% of  
7 U.S. production, it doesn't really get --

8 COMMISSIONER KEARNS: Right, but overall, I'm not  
9 seeing that. It's not just 2%, I don't think.

10 MR. PORTER: It's a hypothetical. The point that  
11 you are correctly noting is that we need to match numbers  
12 with one -- where is competitive overlap? But then, quite  
13 honestly, where we can, where we have the pricing product  
14 data.

15 So, we may have competitive, let's say we have  
16 conceptual competitive overlap, but if the Mexicans are  
17 overselling the U.S., then maybe how do we show that there's  
18 injury from imports, right?

19 COMMISSIONER KEARNS: Well we can get to the  
20 pricing data I think after we first establish those  
21 segments, because I'll tell you right now, I don't see  
22 segments where I see oh, the U.S. is basically not in that  
23 segment essentially. I'm just, I'm not seeing that.

24 In fact, a minute ago, in response to the same  
25 question, we're talking about hydroponic's I think.

1 MR. PORTER: Right.

2 COMMISSIONER KEARNS: And your own client  
3 produces in other countries.

4 MR. PORTER: Right, right.

5 COMMISSIONER KEARNS: So, to me that doesn't  
6 suggest that the U.S. isn't in hydroponics, your own client  
7 is in both.

8 MR. PORTER: Right, but with all due respect,  
9 when you talk about segments, there are two, there are  
10 different ways of talking about segments. One is sort of,  
11 channels of distribution, retailers versus food service.

12 COMMISSIONER KEARNS: Right.

13 MR. PORTER: Versus something else.

14 COMMISSIONER KEARNS: Right.

15 MR. PORTER: But quite honestly, most of the  
16 testimony you're hearing today is not segment competition,  
17 it's products.

18 COMMISSIONER KEARNS: No, I understand that.  
19 Show me, just show me post-hearing.

20 MR. PORTER: Yeah.

21 COMMISSIONER KEARNS: I want to see that the  
22 numbers you can align, because I'm just not seeing that.  
23 Whether we're talking about grape, that's a product, right?  
24 Grape tomato versus grape tomato, is there no real  
25 competitive overlap there? From what I've seen there is.

1           You know, if we're talking about greenhouse  
2 versus open, I see competition there. So, show me which  
3 categories -- there you go, there's no competitive overlap,  
4 and that's where the Mexicans are, and this other area is  
5 where the U.S. is, I'm just not seeing that.

6           MR. PORTER: Again, we're not arguing absolutely  
7 no competitive overlap. We're arguing that you know, that  
8 where there's overlap, you're not seeing low Mexican prices.

9           COMMISSIONER KEARNS: Okay.

10          MR. PORTER: Stealing share from the United  
11 States.

12          COMMISSIONER KEARNS: Right, understood,  
13 understood. So, anything you could do post-hearing.

14          MR. AGOSTINI: This is Mike Agostini, if I can  
15 add to that quickly. On the retail side it's very  
16 segmented. On the production side there may be some, you  
17 know, jumbling of the numbers, it's confusing, but in retail  
18 you'll very typically see a field grown red grape tomato and  
19 a hot house grown red grape tomato with the field grown  
20 being the opening price point good item and the premium  
21 higher priced item being at a hot house.

22                 So, and that runs through all the round tomatoes,  
23 the specialty tomatoes and the like, so out at retail it's  
24 very segmented. There's two on the shelf, it's the field  
25 and the hot house, and they're represented completely

1 differently, you're the customer.

2 COMMISSIONER KEARNS: Okay.

3 MR. JUNGMEYER: Commissioner Kearns, this is  
4 Lance Jungmeyer with the Fresh Produce Association. I want  
5 to address the future prospects of the greenhouse industry  
6 in North American, and you asked about prospect for future  
7 injury. And all you have to do is look at where the  
8 investment money is going these days. Look at Bright Farms  
9 in Kentucky, Soft Bank is going to do some major deals in  
10 Ohio, they're going to grow fresh produce, including  
11 tomatoes, in the high-tech greenhouses in the United States  
12 of America because they're bullish on the growth.  
13 They're not scared of anything. That's the future.

14 COMMISSIONER KEARNS: Okay, okay, thank you.  
15 Right, and turning back to threat. I had a couple more  
16 questions there. Table 7-6 shows exports of Mexican  
17 tomatoes grew from 2016 to 2017, and from 2017 to 2018, and  
18 they're projected to be even higher in 2019 and then higher  
19 still in 2020.

20 I think it said increase of about 7%. So,  
21 doesn't that -- let me ask that question and then get to a  
22 related one, doesn't that suggest threat in the future?  
23 That that sort of growth and projected growth is out there  
24 with respect to exports, and the same thing seems to be true  
25 with respect to production.

1                   In 2020, Mexican projections are that they will  
2 be, I think 8% higher than they were in 2016, so, can you  
3 respond? You know, does this not suggest the rat Mr. Porter  
4 has --

5                   MR. PORTER: Yes, again, we'll provide more  
6 details post-hearing, but all due respect, you have match  
7 prices with volume, okay? I disagree with the statement  
8 this morning that you could find threat of injury without  
9 finding any price effects in the dumping case.

10                   I don't think you can do that. You first have  
11 never, ever done that before, and I'm not so sure that you  
12 legally can do that. But we don't have to get into that  
13 fight, because I think when you look at the record, when you  
14 see the growth in imports to Mexico, you're going to see  
15 it's the growth in the higher priced product, and therefore  
16 there's no affect from dumping because there's overselling.

17                   So, I think you need to marry that when you're  
18 looking at increases in growth from Mexico.

19                   MR. NOLAN: Yeah, this is Matt Nolan for Nature  
20 Sweet. We can't, obviously we're in the specialty category,  
21 so we can't comment on some of the others, but I can tell  
22 you in our category, in specialties, the competition is at a  
23 very high level. The prices across the board, whether it's  
24 U.S. or Mexican, is very high.

25                   And that's because the tomatoes coming in from

1 these specialties are almost always greenhouse grown, almost  
2 always high-tech now, and fetch a very high price, and we  
3 will put in the post-hearing brief, the relative pricing  
4 patterns of the top 10 producers, whether U.S. or Mexico,  
5 that shows just how high these prices are.

6 It defies logic that you could find injury in  
7 that let alone threat.

8 COMMISSIONER KEARNS: Okay, thank you.

9 MR. ANDERSON: And Commissioner Kearns, I just  
10 want to add one thing. We had a long discussion sitting  
11 around a large table last night about the projection's  
12 figures, and we asked a number of the growers, okay, how do  
13 you do projections? And they said it's very simple,  
14 everybody has the same rule of thumb. We basically just  
15 have a particular level of production that we expect.

16 And then we assume an 85/15% split. 85% United  
17 States, 15% whole market. But the reality is always  
18 different. There are always more shipments to the home  
19 market than the 15%. If you look at the data -- historic  
20 data, it's much higher than that.

21 So, basically what we were told is we just do it  
22 the way we do it normally in the business. We do this 85/15  
23 split. Well, that inflates the actual likely exports to the  
24 United States over the next two years because the reality is  
25 those percentages are not realistic because of issues with

1 quality or with growth in the domestic market in Mexico,  
2 much higher percentage has been going to the domestic  
3 market.

4 COMMISSIONER KEARNS: Okay, sorry, I go over my  
5 time. But I think I understand that with respect to  
6 exports. In other words --

7 MR. ANDERSON: Right.

8 COMMISSIONER KEARNS: The exports last year were  
9 67% of their total sales and you would have thought they  
10 would have said well that's not the same distribution, you  
11 know, but then said they think for some reason --

12 MR. ANDERSON: Right, right.

13 COMMISSIONER KEARNS: So, that I think I get.  
14 What about production though? Why would the mix affect  
15 their production number increase?

16 MR. ANDERSON: Well, and then there is projected  
17 production increases because again, they're chasing consumer  
18 demand and changes in preferences. That is, there's an  
19 increasingly growing markets, the consumer market has gone  
20 from 12 pounds per capita, to 21 pounds in just under 20  
21 years.

22 There is a shift in the retail, sorry, the food  
23 service sector, and they do expect that that will continue  
24 to go.

25 COMMISSIONER KEARNS: Okay, alright thank you.

1                   COMMISSIONER STAYIN: Yes, it seems to me that  
2 what you really need is to have a separate like product.  
3 That you're talking about two different products.  
4 Unfortunately, that's not the way it came out from Commerce,  
5 but that's something we can look into and to the extent I  
6 would invite you to submit this in your post-hearing brief,  
7 is a solution to the difference in the original case.

8                   MR. WILNER: Commissioner, I agree with you  
9 totally. And in the original case, we really said that gas  
10 greens and the vine ripers, which was what we were growing at  
11 that time, we really had shifted the vine ripers into  
12 protected agriculture. We said they should be really two  
13 different like products. And the Commission said no.

14                   And so now what we're saying, okay, so one like  
15 product there's just most attenuated competition between  
16 them because they're perceived in the market as different  
17 products that compete primarily, they don't compete  
18 primarily on the basis of price.

19                   MR. NOLAN: This is Matt Nolan for Nature Sweet.  
20 We agree with Mr. Wilner's comments. We do, we've always  
21 thought there were two and beyond that, because we're a  
22 specialty producer, we've also requested specifically, a  
23 separate like product treatment for specialty tomatoes, and  
24 I would request that the staff report be amended because it  
25 says in the staff report that no one asks for that and in

1 fact, we did during the review cycle, but we never got to a  
2 decision because well, there was never a decision during the  
3 review cycle.

4 But we think a case can be made for a separate  
5 like product analysis. If not, within greenhouse versus  
6 non-greenhouse, at least with specialties because of the  
7 difference in the way the market operates.

8 COMMISSIONER STAYIN: Thank you, that's all that  
9 I have.

10 COMMISSIONER SCHMIDTLEIN: Okay, Commissioner  
11 Karpel.

12 COMMISSIONER KARPEL: Thank you. I was thinking  
13 about one of the things, or many of you said this, but one  
14 of the things you said in terms of talking about controlled  
15 environment is that there's a gradation of that because you  
16 control for what you need to in a particular area.

17 And so, now I'm thinking well why don't U.S.  
18 producers use more protected agriculture? And, right, but  
19 my question is maybe they're controlling for what they need  
20 to to produce a tomato that they think is high-quality and  
21 competitive in the market.

22 One thing Petitioners did say is that the pest  
23 situation in Mexico is different than in the United States,  
24 such that there might be more than need, and maybe there are  
25 other things. But I'm curious your reaction to that.

1           MR. WILNER: May I address that and I think and  
2 honestly, in my opening I was saying, and maybe I said it, I  
3 wish you would ask them, because that's always what's  
4 puzzling to us. I think there are two things. First of  
5 all, the biggest thing -- it is very expensive. It's very  
6 expensive. I mean Mexico has put in well over 5 billion  
7 dollars to convert its vine ripe production to protected  
8 agriculture.

9           And we'll send you the data on that in the  
10 post-hearing brief. Secondly, I think up until this point,  
11 they have -- they have had a good hold on the food service  
12 market, so you know, they have a preference in there and so  
13 they're able to sell their gas greens to the food service  
14 market and that's fine.

15           Third, what they've done as I've said, is they've  
16 supplemented their supplies, everyone said, by buying the  
17 Mexican product. So, rather than investing, they make a  
18 guaranteed markup as marketers. You know, you don't take  
19 the risk of the investment.

20           Also, and this is something and Mr. DiMare said  
21 it, and I'll show this again in the closing. But he said  
22 basically, the market, at least the retail market has  
23 shifted to greenhouse protected agriculture product.

24           He says protected agriculture and he says so,  
25 field grown producers are losing share. But he said we in

1 Florida can't do greenhouses. Now, I'm not sure if that's  
2 so, but I suspect that the hurricanes in Florida make  
3 greenhouses very vulnerable.

4 COMMISSIONER KARPEL: Yes.

5 MR. WILNER: So, if that's so and is the largest  
6 producing state, it's a stunning admission because he says  
7 here's where the market's going. We can't produce what the  
8 market needs. So, that's a stunning admission, but I think  
9 it's those reasons.

10 MR. NOLAN: So, this is Matt Nolan for --

11 MR. DIMENNA: Can I add to that? And let me  
12 explain a little bit on why. So, when we look for  
13 greenhouse areas to grow, we're looking for elevation to get  
14 away from humidity. You know we're looking to get away from  
15 the heat.

16 So, in Florida it's a challenge for those folks  
17 to be in the hot and in high-tech greenhouses. That's why  
18 we're in Virginia. We're 2,100 feet in the air. Our  
19 temperatures at night are good. Why we grow so  
20 successfully.

21 In Mexico, we're 5,600 feet in the air, that's  
22 why they have success in Colorado. I think the guys in  
23 Arizona are high and Wilcox, they're in the air pretty good.  
24 That's one of the reasons why, my opinion anyway, is why  
25 they can't grow greenhouses in Florida.

1                   I did a research on a -- I wanted to get in the  
2 State of Florida with a greenhouse to take advantage of the  
3 buy local, and I looked at a project in Jacksonville, as far  
4 north as I could get, and we had our consultant go in that  
5 particular area, and you know, he said don't waste your  
6 money, you can't grow here. It's too hot, it's too humid,  
7 you won't get the return on your investment.

8                   Because we spent 1.2 million dollars an acre to  
9 build a greenhouse today, so it's not let me just throw a  
10 greenhouse up for fun, it's a very serious investment.

11                  MR. ANDERSON: And Commissioner, if I might add.  
12 There actually has been substantial investment and  
13 increasing production of greenhouse product in the United  
14 States. And there are two U.S. greenhouse producers on our  
15 panel who basically have invested a lot of money and are  
16 rapidly increasing production.

17                  But the reality is that very few greenhouse  
18 producers bother to respond to your questionnaires and  
19 consequently, we don't have the real true picture of these  
20 -- the performance of the U.S. greenhouse segment on the  
21 record.

22                  We have an incredibly small proportion. And in  
23 addition, if you look at our brief, the data on the  
24 greenhouse producers is being driven by some abhorrental  
25 results, all of which are proprietary that can't get into,

1 but don't really provide a picture of that.

2 COMMISSIONER KARPEL: I guess his question was  
3 more though about whether the field grown tomatoes in the  
4 U.S. are able to achieve some of the quality and taste  
5 profiles. Now, I've already asked that question for  
6 post-hearing and other Commissioners have too in light of  
7 the information in Table 2.

8 So, I don't want to get into that because I have  
9 other questions and it's late in the day, but that's really  
10 what I was getting at, okay.

11 So, let me move on to ask a few more clean-up  
12 questions. Alright, so I'm looking at page 17 of Red Sun's  
13 pre-hearing brief, and you lumped together packers and  
14 re-packers with food service providers, and then lumped  
15 together supermarket and grocery store chains with  
16 distributors and brokers.

17 If you, in your post-hearing, could explain your  
18 basis for lumping those together, I think to me that sounds  
19 like you're assuming that brokers sell to grocery stores,  
20 exclusively, and that re-packers sell to food service  
21 exclusively.

22 But if you could explain why you've made that  
23 choice.

24 MR. PORTER: Yes, we'll do that.

25 COMMISSIONER KARPEL: I appreciate that. I also

1 want to ask for an explanation of what you make of the  
2 information in Table 7-5 and 7-7, which are -- one is data  
3 from a non-questionnaire source talking about acreage in  
4 Mexico. And it shows a share of production being an open  
5 field of 43 to 40% or so, and under protection it shows  
6 57-59-60.

7                   So, I wondered what you made of that data. I  
8 know it's a different source, but it does seem to be  
9 breaking out open field from under protection, and then the  
10 data in Table 7-7 is again, that same break-out between open  
11 field and greenhouse showing the percentages of foreign  
12 producer's exports to the United States that fall in each of  
13 those categories.

14                   So, in light of what we've all heard today, I  
15 know we've talked about the data in Section 4, but I don't  
16 think we had much discussion about what we're seeing in  
17 Section 7 here.

18                   MR. JUNGMEYER: This is Lance Jungmeyer again,  
19 with the Fresh Produce Association. So, looking real  
20 narrowly at the open field production from Mexico, it's  
21 easily demonstrated that 7.8% is inspected under the Federal  
22 Marketing Order, and that represents almost all the open  
23 field production.

24                   COMMISSIONER KARPEL: Yeah, but then why do we  
25 see this data here breaking out open field and under

1 protection, I mean showing -- it sounds to me that none of  
2 this open field should be mixed up with protected  
3 agriculture, because there's a separate break-out for that.

4 MR. JUNGMEYER: My understanding as it relates to  
5 the way the questionnaire was asked, is that correct? Okay.

6 COMMISSIONER KARPEL: Sorry, this isn't  
7 questionnaire data, this is another source, so maybe you all  
8 can have a look at it post-hearing.

9 MR. JUNGMEYER: I'd be able to put that in the  
10 post-hearing brief, thank you.

11 COMMISSIONER KARPEL: This goes to Figure 1 in  
12 the Mexican Respondent's brief. I'm curious what your basis  
13 is for this figure. You appear to be lumping together  
14 Roma's and cherries in one category, in calling those  
15 specialty, and I wondered what the basis for that was. Do  
16 you want to think about it and answer it post-hearing that's  
17 fine too.

18 MR. ANDERSON: We prefer to respond to that in a  
19 post-hearing brief. Chuck Anderson, Cap Trade.

20 COMMISSIONER KARPEL: Okay, so on page 4 of the  
21 Mexican Respondent's brief there is an assertion that 80% of  
22 tomatoes today are grown in protected agriculture  
23 environments. I assume you mean Mexican tomatoes. But that  
24 doesn't -- we'll check that, I didn't see a citation there  
25 of where that yeah, there's no citation there of where that

1 data is coming from, so if you could provide that, that  
2 would be appreciated.

3 MR. WILNER: Absolutely, we'd like to do that in  
4 the post-hearing brief. It actually comes from something we  
5 did in the brief in the sunset, which had a whole list of  
6 calculations and we will do that again, there should have  
7 been a cite here, I apologize.

8 COMMISSIONER KARPEL: Yes, I had asked  
9 Petitioners this, that if you have any information on the  
10 volume and pricing of imports after the suspension agreement  
11 was terminated in May and when the new one went into place,  
12 if you could put that in in post-hearing. Was that a yes  
13 that you could look into that for post-hearing?

14 MR. ANDERSON: We'll address that in a  
15 post-hearing brief.

16 COMMISSIONER KARPEL: Okay, thank you. And then  
17 the last question it's about food safety. I've heard some  
18 assertions today that for food safety reasons, this  
19 protected agriculture environment is better.

20 But I want to sort of be clear about what that  
21 actually means. In my understanding, Mexican tomatoes and  
22 U.S. tomatoes are subject to the same FDA U.S. food safety  
23 standards, so in terms of meeting regulatory requirements,  
24 they should be equally safe.

25 But perhaps what you're saying is there's some

1 consumer perceptions about safety that maybe are above and  
2 beyond or different, in terms of pesticide use or exposure  
3 to you know, elements in the environment and so forth.

4 MR. JUNGMEYER: And Commissioner, this is Lance  
5 Jungmeyer. I'm Chairman, or Co-Chairman of the North  
6 American Produce Food Safety Working Group, so I'm exposed  
7 to a lot of different concepts. And animal intrusion is one  
8 of the key factors here.

9 And really, it's about eliminating risk from your  
10 growing chain. If you can eliminate the risk of the animal  
11 getting in there, you've gone a long way from preventing any  
12 kind of major food borne illnesses, and therefore lawsuits  
13 and other things that come with that.

14 So, that's a huge -- just eliminating that risk  
15 factor is huge. And one of the things that the consumers  
16 are doing, their grocery stores that they're caring about is  
17 pesticides and other chemicals and also water usage.

18 So, in a controlled environment you're able to  
19 minimize your chemical usage and your water usage. These  
20 are all things that factor into some growers have a  
21 sustainability scoresheet or they go through and say okay,  
22 as a supplier, which things can you check off? And these  
23 all factor into there.

24 COMMISSIONER KARPEL: Thank you, that's it for  
25 me.

1 COMMISSIONER SCHMIDTLEIN: Okay. Do  
2 Commissioners have any other questions? No? Alright, does  
3 staff have any questions for this panel?

4 MS. HAINES: Staff has no questions.

5 COMMISSIONER SCHMIDTLEIN: Okay. Do Petitioners  
6 have any questions for this panel? No questions? Okay,  
7 great.

8 This brings up to the end of the hearing, so I  
9 will dismiss this panel. Thank you very much.

10 MR. WILNER: May we have a very short break  
11 before we going into --

12 COMMISSIONER SCHMIDTLEIN: Certainly. Do we  
13 want to take a five-minute break? Okay, let's take a  
14 five-minute break. We'll stand in recess for five minutes.

15 Just so you know; Mr. Secretary, would you like  
16 to read the time allocations for the closings?

17 MR. BURCH: Yes, Petitioners have eight minutes  
18 for rebuttal and closing remarks and Respondents have 18  
19 minutes for closing and rebuttal remarks.

20 COMMISSIONER SCHMIDTLEIN: Okay, thank you.

21 (Whereupon, a recess was taken at 5:46 p.m.)

22 MR. BURCH: Please come to order. Closing and  
23 rebuttal remarks on behalf of Petitioner, we begin by Mary  
24 Jane Alves of Cassidy Levy Kent. Ms. Alves, you have eight  
25 minutes.

1 CLOSING REMARKS BY MARY JANE ALVES

2 MS. ALVES: Good evening. Mary Jane Alves again  
3 from Cassidy Levy Kent. Thank you. I know it's been a long  
4 day. I will do my best not to use the full eight minutes,  
5 but there are a couple of points that we did want to make in  
6 rebuttal.

7 First, there were some questions today about  
8 whether or not as a legal matter injury can occur under a  
9 suspension agreement and our position continues to be that,  
10 yes, of course, there can be; otherwise, there's no reason  
11 why the statute would have to tell the Commission to be  
12 careful to discount the data during the POI that might be  
13 affected by the suspension agreement.

14 It's also consistent with the Congress's  
15 approach in terms of a sunset review, whether or not  
16 material injury is likely to continue or recur. There would  
17 be no need to use the term "continue," if, by definition,  
18 every suspension agreement or every anti-dumping or  
19 countervailing duty Order eliminated injury. Sometimes it  
20 just doesn't happen. Here it didn't.

21 A good portion of the day was spent on whether  
22 or not there is attenuated competition. At the end of the  
23 day, a tomato is a tomato. You saw the samples. You had  
24 them in front of you for four hours. We passed them around.  
25 It is very difficult to tell, unless you were told, whether

1 a particular tomato was grown in Mexico or grown in the  
2 United States, whether it was picked at a stage one, stage  
3 two, or stage six, whether it was a vine-ripe tomato, or  
4 whether it was a greenhouse tomato. Your purchasers across  
5 the board reported U.S. and Mexican tomatoes are comparable.  
6 You pointed out Tables II-9, Tables II-10, II-11, II-12.  
7 They all show you both industries are making quality  
8 products that are comparable. The only difference was  
9 Mexico was priced lower.

10 Now, Respondents spent a lot of time this  
11 afternoon saying, well, here at Nature Sweet this is what we  
12 do or here at Jem-D here's what we do. There was a lot of  
13 discussion this afternoon about snacking tomatoes, but if  
14 you look at your data snacking tomatoes is not the gut of  
15 the market. Where is most of the market? There's a lot of  
16 round and Roma tomatoes. There wasn't much discussion of  
17 the round and Roma tomatoes this afternoon. There was a lot  
18 of discussion of greenhouse tomatoes. Again, what is the  
19 portion of the market that's represented by greenhouse  
20 tomatoes?

21 Both industries compete with the same types of  
22 tomatoes. You know that. Your data says that. Table  
23 III-9, Table IV-3, both industries are servicing the U.S.  
24 market with rounds and Romas and grapes and cherries.  
25 They're competing throughout the market. There were slides

1 in the Respondents' presentation that were focusing again on  
2 Florida. There is an entire U.S. market. The United States  
3 industry is not limited to Florida. We have Michigan  
4 growers. We have North Carolina growers. We have  
5 California growers.

6           There was also a lot of discussion today about  
7 whether or not mature green competes with vine-ripe  
8 tomatoes. At one point, Mr. Agostini said, well, you know  
9 really let's not talk so much about the mature green and  
10 vine-ripe tomatoes. Really this is all about environment,  
11 so let's not focus so much on the mature green and vine-ripe  
12 issue. Other Respondents were saying, well, it's all about  
13 taste. Vine-ripe makes better tasting tomatoes. Well,  
14 there are vine-ripes that are grown here in the United  
15 States. Not everything here is a mature green tomato. In  
16 fact, there are a lot of vine-ripe producers that have gone  
17 out of business. If vine-ripe is where the market is  
18 moving, why are U.S. vine-ripe producers going out of  
19 business?

20           Open field versus greenhouse, well, there was a  
21 lot of confusion again. There was a lot of confusion in the  
22 sunset review. There continues to be a lot of confusion  
23 about what exactly that means, whether or not there's  
24 competition.

25           Commissioner Kearns, you pointed to Table IV-3

1 and to Table III-9. Again, why is, if so much of what  
2 you're making is, in fact, greenhouse, which you say in  
3 certain, why Respondents, are you then reporting most of  
4 your tomatoes in the U.S. were actually reported as field?

5           There's also a lot of discussion about the  
6 special varieties that are made in Mexico, different  
7 varieties than are made in the United States. I don't know  
8 where the questionnaire data are on that. There was never a  
9 question. Respondents never asked for a question on the  
10 seed variety, so we don't have any information on that.  
11 There was also a lot of discussion about other types of  
12 consumer preferences. There was a lot of discussions about;  
13 well, this particular consumer might have a better taste  
14 profile for this. They might prefer that. That's not what  
15 the Commission is looking at. The Commission isn't looking  
16 at what consumer preferences are. Where the competition is  
17 between the U.S. and the Mexican imports is at the wholesale  
18 level before it gets to the consumer and that's what your  
19 data talks about.

20           I'll also point out in your report on page  
21 II-18, the Commission actually asked purchasers is vine-ripe  
22 interchangeable with mature green tomatoes. Well, Mr.  
23 Porter may not like the fact that you asked this question,  
24 but the reality is the majority of purchasers said, yeah,  
25 they're interchangeable. Vine-ripe is interchangeable with

1 mature green tomatoes.

2           Slide 5, not only are the -- both industries  
3 supplying the same types of tomatoes, but they're competing  
4 in the same channels of distribution. Imports from Mexico  
5 have increased their market share, either during the POI or  
6 by the interim period in each and every one of the segments.  
7 This is not the type of picture that Respondents are  
8 painting, but this is, in fact, what your data are showing.

9           Underselling, your pricing data, we've talked a  
10 lot about it this afternoon. We'll try and provide some  
11 additional detail about the USDA pricing data, the market  
12 terminal pricing data and where they came from. There was  
13 an argument this afternoon that your pricing data show a  
14 very different pricing point than the USDA market prices and  
15 that they are 20 cents apart. That's not what they show.  
16 In fact, what there may be there -- and we'll take a look at  
17 it -- is there's a difference in terms of weekly pricing  
18 where there's going to be more volatility and your pricing  
19 data, which were collected on a monthly basis.

20           Today, your witnesses actually agreed this  
21 afternoon that, once again, there was some confusion in  
22 reporting the pricing data. There was confusion in the  
23 sunset. There's confusion again.

24           Impact, you saw our final slide. There are a  
25 number of U.S. producers that have closed. They're no

1 longer here to speak for themselves. Let's not forget that  
2 there will be even fewer if the Commission doesn't grant an  
3 affirmative determination because the threat factors  
4 indicate that there is a lot of capacity. They're backing  
5 away from the capacity utilization numbers, but there's a  
6 lot of capacity still out there in the U.S. market.

7 As Mr. Anderson said, if you have it, you'll use  
8 it and it's coming here. Thank you.

9 COMMISSIONER SCHMIDTLEIN: Thank you, Ms. Alves.

10 MR. BURCH: Thank you, Ms. Alves. Closing and  
11 rebuttal remarks on behalf of Respondents will be given by  
12 Thomas B. Wilner, of Shearman & Sterling. Mr. Wilner, you  
13 have 18 minutes. Also, Matthew M. Nolan of Arent Fox will  
14 be joining.

15 CLOSING REMARKS BY MATTHEW M. NOLAN

16 MR. NOLAN: The Nats have not lost since I wore  
17 this hat before it got dark, so I am wearing this hat and  
18 praying to the gods that we have a World Series Champ on our  
19 hands.

20 Alright, thank you all very much. It's been a  
21 long day and I'll be brief and turn it over to Mr. Wilner.  
22 He's our Mr. Hudson closer, so he'll come up here in a few  
23 minutes.

24 First thing, I want to just take another quick  
25 plug about specialty tomatoes. We have put in a request for

1 a separate like product treatment. We will elaborate that  
2 in the post-conference brief -- post-hearing brief. We  
3 would like the Commission to give due consideration to that.  
4 We believe specialties are a special category. Even the  
5 Commerce Department has recognized that in the suspension  
6 agreement that they just completed by separating them out of  
7 the rest of the pack and treating them differently, why,  
8 because they are.

9           Moving back to the main case, Mr. Cassidy, my  
10 esteem colleague this morning started out with the concept  
11 of continuing injury; that the U.S. industry is suffering a  
12 continuing injury, despite the fact that we've had 23 years  
13 of controlled imports. We have lived in an environment for  
14 the better part of more than two decades in an environment  
15 where there is a price floor under which Mexico cannot sell  
16 and a situation where the U.S. industry has been sheltered  
17 for a great long period of time with guaranteed minimum  
18 prices, essentially, based on import levels.

19           And in that period of time, the U.S. industry  
20 has not changed. The percentage of agriculture that was in  
21 open filed 20 years ago is not that far off of where it is  
22 today. During that same period the degree or the quantity  
23 of greenhouse grown product from Mexico went from almost  
24 zero to a number which we will give specifics on in the  
25 post-hearing, but which is quite high, extremely high in its

1 detailed USDA reports that came out only this past March  
2 which would indicate a shift in the way Mexico produces  
3 products.

4           In Nature Sweet's case, this company in 1995 was  
5 a tiny startup. It is now a company that produces and sells  
6 somewhat north of \$400 million a year of product in the U.S.  
7 market. It sells at six or seven production locations in  
8 Mexico and it has built 200 -- or it has acquired and  
9 renovated 250 acres of hectors or acres in Arizona to build  
10 or make -- to grow and sell these tomatoes out of that  
11 process. That's \$100 million investment in the United  
12 States by this company. Why? Because they've made a  
13 product that people really like and that's the crux of this,  
14 right? Is that they're finding that the consumer has  
15 changed its taste. The consumer wants to pay more for a  
16 tomato. These packages go for four bucks a pound -- it's  
17 actually less than four bucks -- well, it's less than a  
18 pound. The 10.5 ounce containers go for four dollars in the  
19 retail market.

20           The reality is the injury here is not visited by  
21 Mexico. It's the U.S.'s failure to innovate and invest in  
22 new growing techniques in shifting with consumer demanding  
23 and developing the market that has evolved over time to  
24 allow this company to go from zero to \$400 million. That's  
25 not insignificant. That's not something you can ignore.

1 Nature Sweet didn't just do this in a vacuum. It figured  
2 out how consumers wanted to be treated and did so. The U.S.  
3 industry did not.

4           The idea that the Mexican industry is overbuilt  
5 is, in part, a function of the suspension agreement itself.  
6 Having told Mexican growers that they cannot sell below a  
7 certain price, what do they do? They figure out how to make  
8 a tomato that can sell above that minimum price. And then  
9 over the series of successive agreements, the price  
10 referenced price has gone up and up and up and each time  
11 Mexico has gone up and to the point where they've realized  
12 that there's no such thing as minimum referenced price.  
13 Let's just keep going up and see how high we can take the  
14 price and sell it in the U.S. market. And, in fact, that is  
15 what has happened. The Mexican industry has developed into  
16 an area in greenhouse technology and protected environment  
17 technology that has allowed them to produce different  
18 qualities, higher value, higher concentrations, higher  
19 quality, and more continuity in terms of quality for the  
20 products that are being sold, which is all critical stuff.

21           As far as injury as a legal matter, I'll think  
22 we'll all discuss that in the post-hearing briefs. I will  
23 say that you have a task because as a practical matter,  
24 again, we've lived in a protected environment, so you're  
25 going to find injury in an industry that has been protected

1 for 20 years with minimum prices, and yet, they still can't  
2 seem to make money at this, they say. Nature Sweet is  
3 making money. Make no doubt about that. They are making a  
4 great deal of money and they've just invested \$100 million  
5 in the United States. Thank you.

6 CLOSING REMARKS BY THOMAS B. WILNER

7 MR. WILNER: I am very impressed by Mr. Nolan's  
8 closing, and I am concerned that I will just make it worse.  
9 So this always happens when I do this.

10 But let me say, first of all, it seems to me that  
11 the U.S. industry's case depends on the argument, as Ms.  
12 Alves said, that this is a commodity product; that a tomato  
13 is a tomato, and they're all the same, and they compete on  
14 price.

15 One of my colleagues gave me something that said-  
16 -and she puts up a box of tomatoes and say, see, they look  
17 all the same, and one of my colleagues gave me a little note  
18 saying "Tell them that beauty is more than skin deep."

19 You've got to go beyond the look of the box to  
20 see what's inside. This is not the case of a commodity  
21 product competing just on the basis of price. And it's not  
22 a case where a commodity product and the foreign producer is  
23 coming and slashing prices to gain market share. I really  
24 think this is a totally different case.

25 It's a case where the foreign manufacturers have

1 invested a fortune first in developing a vine-ripe seed that  
2 can be taken to market so tomatoes can be picked as they're  
3 ripening, after they're beginning to ripen on the vine, and  
4 taken to market, which is a better tasting tomato. And  
5 they've put more than \$5 billion into being able to produce  
6 those in greenhouses, or protected agriculture, the range of  
7 protected agriculture that would give them the substantial  
8 benefits of that.

9           And there are many, as we talked about. I won't  
10 repeat them. From consistency, quality, food safety,  
11 irrigation, growing. I regret deeply, and I saw it even  
12 during the sunset, that there's confusion in the data. And  
13 Mr. LaRussa explained it. It's in part because of the way  
14 Commerce put it together and ag, USDA puts it together, so  
15 it doesn't come out clearly. And we will try our best to  
16 clarify it in our posthearing brief.

17           But I think, although there can be arguments  
18 around the edges, everyone agrees that the Mexican product  
19 is predominantly vine ripe. Very few, you know, mature  
20 greens are grown in Mexico or exported, a tiny amount.

21           We believe--and there'll be some arguments about  
22 the precise amount, but of the exports to the United States,  
23 those vine ripers are also produced in protected agriculture,  
24 and we'll need to define it again--as I think the staff  
25 report did--which give those benefits.

1                   I think it is also clear that the domestic  
2 product is primarily gas green. The staff report says that.  
3 And the USDA makes clear that the basic U.S. product is a  
4 mature green, and what we call gas green, tomato that is  
5 picked before it begins to ripen, picked green and treated  
6 with ethylene gas to turn red.

7                   We think--and as a matter of fact, I think Mr.  
8 DiMare or another gentleman said that, well, 15 percent of  
9 our tomatoes are vine ripe. Well, 15 is the most they are.  
10 We think we'll show that very few in the U.S. are grown in  
11 protected agriculture environments.

12                   We think that Mexico produces a better tomato  
13 because of these two factors. And we think that's really  
14 the story. Let me just show you some slides we really had  
15 at the sunset review, but it shows that there simply has  
16 been a shift in the retail market for tomatoes.

17                   This first slide--and it's taken from USDA's  
18 data--shows the drop in the mature green share of round  
19 tomatoes in the U.S. retail market. And this, it was taken  
20 really based on the USDA report put out in 2005, originally,  
21 entitled "Greenhouse Tomatoes Change The Dynamics of The  
22 North American Tomato Industry." And what it shows is that  
23 the U.S. share dropped from about 80 percent down to about  
24 10 percent.

25                   That's where they have suffered their injury.

1 You know, it's not from--I'll show it's not injury under  
2 cognizable under the antidumping laws. So that's the  
3 decline in volume that they've been talking about over that  
4 20-year period, 22-year period.

5 Then the next slide shows where that's going.  
6 And that's a USDA chart, too. And it shows the growth  
7 during that period of greenhouse tomatoes coming into the  
8 market. The blue thing is from Mexico, and then you see  
9 Canada and the rest of the world. So that's what's  
10 happening.

11 The Mexican product is this (indicating). As  
12 Mister, oh, gosh, Lance, as Lance said, 7.8 percent of the  
13 Mexican product being exported to the United States is open  
14 field. That's clear. We'll need to really define that.  
15 But that's what's happening.

16 And then I want to show the next slide, which I  
17 think really tells the whole story. And this is what Mr.  
18 DiMare explained. What's happening in the tomato business,  
19 you've had a shift in buying practices primarily at the  
20 retail level, to source more greenhouse product. This in  
21 turn has caused market share loss for growers who produce  
22 open field.

23 Well that's what the U.S. industry does. It  
24 doesn't say anything there about price competition. And  
25 that's not the issue here. It's not price that's doing it.

1           You know, I came in and closed at the sunset,  
2       which had no final resolution, and I said, you know, this  
3       reminds me of it. If we put our case, if this were  
4       automobiles, and somebody came in and said, as a petitioner  
5       and said I've got a 1996 Chevrolet here and I want  
6       protection from all these new-fangled automobiles which are  
7       coming into the market now. They've got all sorts of things  
8       on them. They've got, you know, electronics, and safety  
9       features and gas savings and all of that, and they're  
10      killing me in the market. And I need protection of them.

11           Yes, it's true I haven't changed my product at  
12      all in these 23 years, but I make a good product. Please  
13      protect me from these things. Even though they're selling  
14      at a higher price. We would look at that and say that's not  
15      what the trade laws are supposed to do.

16           That's what we're seeing here. And I really  
17      think that it's a totally inappropriate case for injury or  
18      for import protection. You know, I've got to say it. I  
19      really think after all these years the U.S. tomato industry  
20      should stop complaining and going to their Congressmen and  
21      the big daddy in Washington asking for protection from  
22      competition. What they should really do, if they want to  
23      produce a product of their own rather than just importing  
24      ours, if they want to produce a product of their own that  
25      they want to sell again in the retail market, that they

1 should cinch up their belt and get to work and make the  
2 investment to produce the product the consumers want: A vine  
3 ripe, protected agriculture product. As Mr. Agostini said,  
4 who ran 5,000 stores for Walmart, that's what the consumers  
5 want.

6 And we shouldn't be penalized. The Mexican  
7 producers have done just what somebody should do in fair  
8 competition. They've gone out and invested to make a better  
9 product. They shouldn't be penalized for it.

10 And these guys should not be rewarded for not  
11 doing it. Thank you, very much.

12 COMMISSIONER SCHMIDTLEIN: Thank you, Mr. Wilner.

13 This brings us to the closing statement.

14 Posthearing briefs, statements responsive to questions, and  
15 requests of the Commission and corrections to the transcript  
16 must be filed by October 31st, 2019.

17 Closing of the record and final release of data  
18 to parties will be November 18th, 2019. And final comments  
19 are due November 20th, 2019.

20 Thank you all for staying so late tonight. With  
21 that, this hearing is adjourned.

22 (Whereupon, at 6:17 p.m., Thursday, October 24,  
23 2019, the hearing in the above-entitled matter was  
24 adjourned.)

25

## CERTIFICATE OF REPORTER

TITLE: In The Matter Of: Fresh Tomatoes from Mexico

INVESTIGATION NO.: 731-TA-747

HEARING DATE: 10-24-19

LOCATION: Washington, D.C.

NATURE OF HEARING: Final

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceeding(s) of the U.S. International Trade Commission.

DATE: 10-24-19

SIGNED: Mark A. Jagan

Signature of the Contractor or the  
Authorized Contractor's Representative

I hereby certify that I am not the Court Reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission, against the aforementioned Court Reporter's notes and recordings, for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

SIGNED: Christopher Weiskircher  
Proofreader

I hereby certify that I reported the above-referenced proceedings of the U.S. International Trade Commission and caused to be prepared from my tapes and notes of the proceedings a true, correct and complete verbatim recording of the proceedings.

SIGNED: Larry Flowers  
Court Reporter