

# PUBLIC VERSION



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24 June 2015

Mr Geoff Gleeson  
Director, Operations 1  
Anti-Dumping Commission  
Level 35, 55 Collins Street  
Melbourne Victoria 3000

## **Revocation review of preserved mushrooms exported from the People's Republic of China**

Dear Geoff,

This submission is made on behalf of Global Procurement Pty Ltd (Global) in response to information presented to the Anti-Dumping Commission (the Commission) in respect of the revocation review into preserved mushrooms exported from the People's Republic of China (China).

### **Threshold test for revocation of measures**

In its submission to the review, Simplot Australia Pty Ltd (Simplot) states:

*GlobalCo's application relates solely to the revocation of the anti-dumping measure on the grounds that the local manufacture of the goods does not exist. As Simplot is a manufacturer of like goods the subject of the notice, GlobalCo's application for the revocation of the measures must fail. GlobalCo has not provided any additional information concerning any change in any of the applicable variable factors.*

It would appear from this statement that Simplot holds the view that there are no grounds for revocation where the Commission can be satisfied that an industry producing like goods exists. Global respectfully disagrees and wishes to highlight its understanding of the threshold test for revocation and where the evidentiary burden lies to demonstrate that measures are warranted.

Section 269ZDA(1A)(b) of the *Customs Act 1901* (the Act) explicitly requires that the Commissioner:

*...must make a revocation recommendation in relation to the measures, unless the Commissioner is satisfied as a result of the review that revoking the measures would lead,*

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*or be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisations and the material injury that the measures are intended to prevent. [emphasis added]*

The primary and really the only question for the Commissioner is whether the revocation of measures would lead, or likely lead, to a recurrence of material injury. It is undeniable that if an industry producing like goods does not exist in Australia, then there can be no grounds for being satisfied that revocation of measure would result in a recurrence of material injury. Likewise, if the Commission finds that an industry producing like goods exists, then it must be established that the revocation of measures would lead or likely lead to the recurrence of material injury.

In Global's view then, the necessary assessment of actual or likely recurrence of material injury is not extinguished simply because an industry producing like goods is found to exist in Australia. To repeat, the Act is clear that the Commissioner must recommend revocation unless satisfied that the revocation of the measure would lead, or likely lead, to a recurrence of material injury.

The Anti-Dumping Commission's (the Commission) Dumping and Subsidy Manual<sup>1</sup> provides further guidance on the threshold test for establishing whether recurrence is 'likely'. It explains that:

*In examining the likelihood of injury as a result of any future dumping or subsidy, the Commission takes guidance from WTO jurisprudence where 'likely' has been taken to mean 'probable'...*

In *US Drums*<sup>2</sup>, the WTO Dispute Panel also found that the continued imposition of measures must be based on 'positive evidence'. The Panel stated:

*Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, i.e. whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.*

Further, the WTO Appellate Body said of Article 11 in *Corrosion Resistant Carbon Steel*<sup>3</sup>:

*In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.*

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<sup>1</sup> Dumping & Subsidy Manual; December 2013, page 153

<sup>2</sup> Panel Report, US - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea, WT/DS99/R; para 6.42, page 139.

<sup>3</sup> Appellate Body Report, US – Sunset Review of Anti-dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R; para 111, pages 39-40.

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It is clear then that the Commissioner is not empowered to make a recommendation under s.269ZDA of the Act on the mere possibility of the recurrence of material injury or on no more than speculation.

The threshold prescribed by s.269ZDA(1A)(b) requires that the Commissioner recommend revocation, unless there is positive evidence to demonstrate that the recurrence of material injury in the future is likely or probable.

Based on the interpretations of the likelihood test outlined above, it is the view of Global that the evidentiary burden does not rest with it to demonstrate that prospective material injury is unlikely. The purpose of a revocation review is to provide the Commissioner with an opportunity to conduct an investigation and gather evidence which may satisfy him that prospective material injury is likely in the absence of the dumping measures.

This is particularly critical in these circumstances given that:

1. the original Australian producer of like goods, Windsor Farm Foods Pty Ltd (Windsor Farm), ceased operations in 2011 after more than 5 years of protection in the form of interim dumping duties against some imports of preserved mushrooms from China,
2. the potential emergence of Simplot as a new producer of like goods in 2011 following the cessation of Windsor Farm's production, and subsequent relocation of its production operations, and
3. the potential commencement of future production of like goods by White Prince Pty Ltd (White Prince).

### **Relevant factors to be considered**

#### Like goods

In assessing whether Simplot is a producer of like goods, Global submits that the Commission must apply its like goods framework in examining whether the goods manufactured by Simplot can reasonably be found to possess characteristics closely resembling those of the exported goods. Whilst the provision of contemporary cost and sales information may be relevant for assessing injury, Global contends that the data is not particularly useful in addressing the substantive issues surrounding like goods.

Global requests the Commission to provide Simplot with a like goods questionnaire which addresses as a minimum the questions posed in the Commission's Dumping and Subsidy Manual<sup>4</sup>. These include:

1. Physical likeness
  - a) Assess which physical characteristics are similar, and identify the extent of differences. Characteristics to consider:

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<sup>4</sup> [http://adcommission.gov.au/accessadsystem/Documents/DumpingandSubsidyManual-December2013\\_001.pdf](http://adcommission.gov.au/accessadsystem/Documents/DumpingandSubsidyManual-December2013_001.pdf) pages 8-10.

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- Size,
  - Shape,
  - Content,
  - Weight,
  - Appearance,
  - Taste,
  - Grade,
  - Standards,
  - Age,
  - Strength,
  - Purity.
- b) Are the goods classified to a matching tariff classification?
2. Commercial likeness - refers to attributes identifiable from market behaviour.
- a) Are the goods directly competitive in the market? e.g. do the goods compete in the same market sector?
  - b) Within a market sector, are the goods similarly positioned?
  - c) To what extent are participants in the supply chain willing to switch between sources of the goods and like goods? e.g. willingness of participants to switch between sources may suggest commercial interchangeability.
  - d) How does price competition influence consumption? e.g. close price competition may indicate product differentiation is not recognised by the market.
  - e) Are the distribution channels the same?
  - f) How similar is the packaging used?
  - g) Does different packaging reveal significant differences in the goods, or highlight different market sectors?
3. Functional likeness - Functional likeness refers to end-use. End-use will not of itself establish like goods, but may provide support to the assessment of physical and commercial likeness.
- a) Do the goods have the same end use?
  - b) To what extent are the two products functionally substitutable? e.g. both a shovel and an earthmoving machine can move earth.
  - c) To what extent are the goods capable of performing the same, or similar functions? e.g. an earthmoving machine is capable of moving earth more rapidly than a shovel.
  - d) Do the goods have differential quality? Quality claims can be subjective. Objective evidence has higher probative value e.g. by standards, or the extent consumers are willing to use the goods to perform the required functions.
  - e) Is consumer preference likely to change in the future?
  - f) Consider consumer behaviour in other markets/ countries?
4. Production likeness - different production processes may produce identical goods. However, different production processes may be used to create different product characteristics. A comparison of production process will not of itself establish like

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goods, but may highlight differences or provide support to the assessment of other considerations.

- a) To what extent are the goods constructed of the same or similar materials?
- b) Have the goods undergone a similar manufacturing process?
- c) If different, what is the impact of those differences?
- d) Are there any patented processes or inputs involved?

Non-confidential responses to these questions from parties claiming to produce like goods should then be disclosed on the public record so that other interested parties have sufficient opportunity for provide further evidence and counter-views.

### Exports subject to interim dumping duties

Global notes that the interim dumping duties were last revised on 4 March 2011. On the basis that no producer of like goods has requested a review of the anti-dumping measures since then, it is reasonable to conclude that selling prices into the Australian market of imported preserved mushrooms from China that are subject to anti-dumping measures, have not been injurious. Therefore, any actual injury currently being experienced by Simplot or hindrance of establishment in the case of White Prince, cannot be attributed to imports currently subject to interim dumping duties.

In that context, Global wishes to highlight the findings of the Panel in US – DRAMS<sup>5</sup> which considered the issue of causation in conducting an injury review under Article 11.2 of the WTO Anti-Dumping Agreement.

*If, ... the only injury under examination is injury that may recur following revocation (i.e., future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping.*

### Exports exempt from interim dumping duties

Global notes that exports of preserved mushrooms from China are exempt from the anti-dumping measures and have been so since their original imposition in 2006 where they involve the following parties and trading arrangements:

1. Manufactured by and supplied through Jiangsu Cereals, Oils & Foodstuffs Import/Export Group Corp (Jiangsu COF);
2. Manufactured by and supplied through Xiamen Gulong Import & Export Co. Ltd (Xiamen Gulong);
3. Manufactured by Xiamen Gulong Food Canned Food Co Ltd (Xiamen Gulong CFC) and supplied through either Jiangsu COF or Xiamen Gulong;
4. Manufactured by Fujian Zishan Group Co., Ltd and supplied through Jiangsu COF; and

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<sup>5</sup> Panel Report, US - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R; para 6.28, page 137.

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5. Manufactured by Zhangzhou Lixing Tin Food Limited Co., Ltd or Nanjing Dongbaowang Food Co Ltd and supplied through Xiamen Gulong.

It is Global's understanding that the vast majority of exports from China of preserved mushrooms are currently being traded by one of the five ways outlined above and therefore exempt from interim dumping duties. It is also Global's understanding that the Chinese exporters exempt from measures are the some of the largest manufacturers in China and would represent a significant share of the industry producing the goods and like goods in China.

In that circumstance, the Commission must in assessing whether the revocation of measures would lead, or likely lead, to a recurrence of material injury, distinguish and isolate the effects of injury that can be attributed to these exempt exports from that component of injury that can be attributed to exports subject to measures. The Commission must not attribute injury or likely injury caused by the exempt exports to exports subject to measures. And finally, as outlined earlier, the Commission must reach a level of satisfaction based on positive evidence and not mere speculation.

Yours sincerely

John Bracic