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REVIEW INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON ANTI-DUMPING MEASURES OF PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY EXCEPT FEGER AND LA DORIA

Written submission of the European Commission on the Statement of Essential Facts

On 20 February 2017, the Australian Anti-Dumping Commission ('ADC') disclosed its statement of essential facts ('SEF') with regard to the interim review investigation of anti-dumping measures on imports of prepared or preserved tomato products ('PPT') from all Italian exporters other than Feger and La Doria. The SEF also concerned the review investigation of anti-dumping measures on imports of PPT by AR Industrie Alimentari S.p.A..

The Commission welcomes the fact that the ADC considered that the EU agricultural aid schemes had no distortionary impact on the price of raw tomatoes and therefore did not adjust the cost of EU exporters for the establishment of the margins of dumping. The Commission however has substantive comments with regard to other elements of the SEF which are developed below.

1. Claims made by the Australian industry

In its review application, the Australian domestic PPT industry claimed that circumstances had changed. This claim was related to the alleged impact of direct income support payments made to tomato growers and the introduction of a new coupled subsidy for processed tomatoes. On this basis, the applicant requested the Australian authorities to adjust the CTMS for the purpose of determining normal value.

The arguments made by the complainant more than likely followed the decision of the ADC to adjust costs in a parallel investigation concerning PPT exported by two other Italian exporters.

In the framework of an appeal proceeding, the ADC however concluded that such methodology was no longer warranted as the exporter's records reasonably reflected competitive market costs for the purchase of raw tomatoes purchased at arm's length.

On the basis of the above, the Commission considers that the claims made by the Australian domestic industry in the present review investigation should be dismissed and, in absence of other claims made in the application, the investigation should be terminated without changing the level of the measures established in the original investigation.

2. Proposed measures

a. Cooperative non selected exporters

In the original investigation, the level of the measures for the cooperative producers ranged from 3,25% to 4,54%. Further to several accelerated reviews, the level of the measures was however reduced to 0% for several producers.

In this respect, the Commission submits that, based on existing jurisprudence (AB in Mexico Anti-dumping Measures on Rice¹), when an investigation determines that there is no dumping margin (or a *de minimis* dumping margin) for an exporter, the investigation for that exporter should be terminated. As a result, it should also be excluded from the scope of any subsequent review.

On this basis, it is argued that the Australian authorities have unlawfully re-assessed the dumping margin for the Italian producers whose dumping had been found to be zero in their respective accelerated reviews and that they should not have been concerned by this investigation.

b. Uncooperative and other exporters

In the original investigation, the level of the measures for the cooperative producers ranged from 3,2% to 4,5% and was established at a level of 26,35% for the uncooperative exporters.

In the current review, while the level of the measures for cooperative exporters ranged from 0,8% to 5,4%, i.e. on average a comparable level than in the original investigation, it is proposed to set the level of the measures for uncooperative exporters at 118,7%. The Commission considers this rate **completely disproportionate**.

Furthermore, it seems that the AUS authorities have changed their methodology to establish the level of the duty for uncooperative exporters.

In view of the above, the Commission invites the AUS authorities to review their calculation of the duty applicable to uncooperative exporters.

¹ https://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm#fntext549, see 405.

3. Form of the measures

As far as the form of the measures is concerned, the Commission understands that the ADC intends to impose a “floor price”, in the form of a variable duty, and that this floor price would apply also to the companies whose dumping margin was found to be negative or *de-minimis*.

In this regard, reference is made to Article 5.8 of the WTO ADA whereby “...*an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis [...]. The margin of dumping shall be considered to be de minimis if this margin is less than 2 per cent, expressed as a percentage of the export price.*”.

In this context, the Commission considers that the investigation should be terminated against exporters with negative or *de minimis* dumping margins. Any measure, irrespective of the form it may take, e.g. duty ad valorem or floor price, would be purely unlawful and inconsistent with the requirements of the Anti-Dumping Agreement since there is no need for the importing Member to offset any dumping for the exporters concerned.

4. Claims by individual exporters

Finally, it appears that the claims made by certain exporters with regard to product comparability were not addressed properly when assessing the level of their dumping margins. It is expected that the Australian authorities will take a close look at such claims and handle them in an appropriate way.

5. Conclusion

The Commission trusts that the Australian authorities will duly examine the points raised above and revise its conclusions accordingly in order to ensure full compliance with the WTO obligations.