



## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate H - Trade defence

**Investigations IV Relations with third countries for Trade defence matters**

Brussels, 20 February 2014

### **ANTI-DUMPING INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON IMPORTS OF PROCESSED TOMATO PRODUCTS**

#### **Written submission of the European Commission on the**

#### **Statement of Essential Facts**

On 4 February, the Australian Anti-Dumping Commission published the Statement of Essential Facts NO. 217 (SEF) by which it is proposing to recommend the imposition of definitive anti-dumping duties on preserved tomatoes exported to Australia from Italy. At the same time, it considers that it is appropriate to amend the provisional securities imposed on 1 November 2013 to reflect the new dumping margins.

The European Commission has analysed the SEF in detail and is extremely concerned about this decision since it considers that the Anti-Dumping Commission could not provide sufficient arguments that would justify the imposition of definitive measures.

#### **1. DUMPING**

The Anti-Dumping Commission is proposing to recommend the imposition of a 5.06% duty to the so-called residual exporters, i.e. those exporters that were willing to cooperate with the investigation but were not selected in the sample. The European Commission would like to better understand how this duty has been calculated since it seems that the methodology applied by the Anti-Dumping Commission is not compatible with the WTO standards.

According to Article 9.4 of the WTO Anti-dumping Agreement (ADA), in cases where the authorities resort to sampling of exporters, *"the anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed: (i) the weighted average margin of dumping established with respect to the selected exporters or producers (...) provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6"*. Article 6.8 WTO ADA refers to cases where the best facts available have been used in case of no or not sufficient cooperation, which apparently has been the case for the two Italian companies which were attributed a 26.35% dumping margin.

In view of the above, the only two companies fulfilling the conditions established in Article 9.4 are *De Clemente* and *Conserve Italia*, whose recommended anti-dumping duties are 3.25% and 4.54% respectively. The European Commission does not have access to the detailed individual dumping margin calculations and therefore is not in a position to comment on this issue. However, the European Commission would have expected that the anti-dumping

duty for residual exporters would have been a weighted average calculation of the two figures, rather than 5.06%.

Consequently, there seems to be an inconsistency with the WTO provisions in the methodology used to calculate the duty for residual exporters. The European Commission urges the Australian authorities to explain the reasons for having departed from the WTO law and to ultimately amend the calculation.

## 2. INJURY

According to Article 3.1 of the WTO ADA, a determination of injury "*shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products*".

The European Commission is of the opinion that the injury analysis made by the investigating authorities presents some weaknesses which would make its conclusions incompatible with the WTO rules. In particular:

### 2.1 Volume of dumped imports

Article 3.1 clearly indicates that positive evidence on the volume of dumped imports should be based on an objective examination. The WTO jurisprudence confirmed with regards the examination of the volume of the dumped imports, that in cases where some imports are found to be dumped below the *de minimis* threshold, "*it would be illogical to treat such imports as 'dumped' imports for purposes of the injury determination, when they cannot be considered as 'dumped' for purposes of imposition of anti-dumping duties as a result of the investigation*"<sup>1</sup>.

Unfortunately, the European Commission noted that the Australian authorities did not properly and objectively separate the dumped imports from the non-dumped imports in their analysis. The SEF contains a mere reference to the percentage of dumped imports in relation to the total imports from Italy (56%) but does not reveal any analysis made on the volume of dumped imports alone. Instead, it refers to variation percentages of the overall imports of Italian goods as a whole (+16% during the investigation period). The same applies to the volume of imports relative to consumption (or market share).

Additionally, a determination of the volume of dumped imports which takes into account the non-examined companies is inconsistent with the WTO Appellate Body's approach<sup>2</sup> by which Article 9.4 does not provide justification for considering all imports from non-examined producers as dumped for purposes of Article 3. Furthermore, the Appellate Body concludes<sup>3</sup> that considering all imports from non-examined exporters or producers as dumped because a

<sup>1</sup> Panel Report. EC - Salmon (Norway) para. 7.625.

<sup>2</sup> Appellate Body. EC – Bed Linen. Para. 126

<sup>3</sup> Appellate Body. EC – Bed Linen. Paras. 132—133

number of exporters included in the sample were found to have been dumping is inconsistent with the obligations to conduct an “objective examination”.

The European Commission considers that the Anti-Dumping Commission should have used the information obtained from examined manufacturers/exporters to estimate the volume and the trends followed exclusively by the dumped goods. By not having done so, it deviates from the WTO provisions and fails to provide positive evidence on the volume of dumped imports.

## 2.2 Effect of dumped imports on prices

Similarly to the above, the evaluation of price effects has taken into account prices of all Italian imports and not solely prices of dumped imports. The European Commission fails to understand why the Anti-Dumping Commission did not use the information contained in the questionnaire replies of exporters which were found to be dumping and used general information instead.

Indeed, the Australian government makes its assessment of a hypothetical magnitude of undercutting on the basis of shelf/retail prices under the assumption that there is a correlation between wholesale prices and retail prices. WTO jurisprudence specifies, when referring to determinations made upon assumptions that *“these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified”*. In this case, even if the assumption was made upon the examination of available information gathered during the investigation, its objectivity cannot be verified because the SEF provides no sufficient explanation.

In the European Commission's view, the price effects analysis lacks the observance of the WTO rules as well as a strong methodological approach, which so far, has not been justified.

## 2.3 Impact of dumped imports on domestic producers

Article 3.4 of the WTO ADA determines that the impact analysis *“shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry”* and it gives a list of fifteen indicators. The WTO Panel, when referring to such indicators, confirms that *“the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4”*<sup>4</sup>. In this regard, factors such as ability to raise capital or investments and assets are not analysed because SPCA did not provide adequate data. Others, such as output, productivity, effects on cash flow, wages or growth are not even mentioned in the SEF, which manifestly contradicts the WTO requirements.

Furthermore, the level of data provided on the economic factors which have been analysed is extremely poor since it rarely details the *“actual intervening trends in each of the injury factors and indices”* and basically limits the analysis to the *“comparison of endpoints”*<sup>5</sup>.

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<sup>4</sup> Panel Report, EC - Bed Linen. Paras. 6.156

<sup>5</sup> Panel Report. EC - Tube of Pipe Fittings. Para. 7.316

In sum, the European Commission considers that the Australian authorities failed to conduct the impact analysis of dumped imports on the domestic industry. From one side because not all the relevant factors were observed and from the other side, because no “evaluation” of the relevant economic factors has been made according to the understanding of the WTO Panel, which in this regard concludes that “*the ‘evaluation’ to which Article 3.4 refers is the process of analysis and interpretation of the facts established in relation to each listed factor*”<sup>6</sup>.

### 3. CAUSALITY

In anti-dumping investigations the burden of proof regarding the existence of dumping, injury to the domestic industry and the relationship between both falls on the investigating authorities.

Notwithstanding the fact that, according to the European Commission, the Australian authorities failed to demonstrate positive evidence of material injury, the causality also remains a significant issue.

Pursuant to Article 3.5 WTO ADA, “*The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*”.

In the light of the above, the European Commission believes that the following causes of injury other than dumping are significant enough to justify by themselves the current condition to the domestic industry:

i) **Non-dumped imports:** As acknowledged by the Australian authorities, non-dumped imports were also a significant cause of injury to the domestic industry. The Anti-Dumping Commission is however diluting the issue with the statement that in an environment where dumping occurs prices of non-dumped imports would be lower, which has not been proven with evidence. It should however be recalled that non-dumped imports represent at least 44% of the Italian imports and given the fact that there was no individual assessment as to the individual impact of the dumped and non-dumped imports, the only possible conclusion would be that non-dumped imports would cause at least as much injury as dumped imports, if any.

ii) **Exchange rates:** According to the SEF, the appreciation of the Australian dollar was a significant contributing factor to the injury suffered by the domestic industry. It also refers to the fact that export prices in EUR had fallen 11.9% between June 2010 and June 2013. However, the European Commission notes that these findings contradict those of the Australian Productivity Commission in its causality assessment for the purpose of the safeguard investigation on processed tomatoes which, when referring to imports from 2009 to 2013, found the following: “*FOB values expressed in Euros — the currency of the major source country for imports (Italy) — did not change significantly over the period. This suggests that the appreciation of the Australian dollar (...) was the main factor behind the decrease in FOB and supermarket unit values.*” The Productivity Commission considers all

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<sup>6</sup> Panel Report. Egypt - Steel Rebar. Para. 745

tomato imports in from 2009 to 2013 and given that Italian imports represented 87%<sup>7</sup> of total imports in the same period, these conclusions are mainly driven by the price behaviour of Italian products.

iii) **Private label strategies and supply diversification by supermarkets:** As reflected in the SEF, private label strategies of major supermarkets contributed to the competitive environment in the Australian market. This issue is also considered by the Productivity Commission, who affirms that *"private label strategies can cause injury irrespective of imports"*<sup>8</sup> and that this strategy *"has affected the ability of local manufacturers to charge premium prices for their own label products"*<sup>9</sup>. The European Commission agrees with the view of the Productivity Commission that *"the ready availability of imported products - assisted by the concurrent appreciation of the Australian dollar- made it possible for supermarkets to increase their use of imports for private label brands"*<sup>10</sup>

iv) **Floods 2011:** The Productivity Commission found that flooding in the tomato growing areas of Victoria in 2010-11 caused significant injury to the domestic industry by reducing the tomatoes harvested by approximately two-thirds and provides data on production (which declined substantially in 2011) to support this view. However, the anti-dumping investigating authorities contradict this observation by affirming that no evidence was found on the difficulties to source raw tomatoes experienced by SPCA. The European Commission is persuaded by the first finding and is of the view that suitable explanations would need to be given on the above contradiction.

In summary, the European Commission submits that the assessment made by the Australian authorities clearly establishes that factors other than the dumped imports contributed significantly to the injury suffered by the domestic industry. Amongst these factors, the non-dumped imports alone might have caused (if any) as much injury as the dumped imports. On this basis, a strict and objective application of the Article 3.5 WTO ADA would inevitably come to the conclusion that the vast majority of the injury is caused by factors other than the dumped imports which should break any causal link established between injury and dumping.

#### 4. CONCLUSIONS

The SEF presents manifest inconsistencies with the WTO requirements as regards the anti-dumping duties calculation, the injury determination and the causal link analysis.

In view of the above, the European Commission urges the Anti-Dumping Commission to review its recommendations which can only lead to the non-imposition of measures on processed tomatoes from Italy.

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<sup>7</sup> Safeguards Inquiry into the Import of Processed Tomato Products - pg 53

<sup>8</sup> Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products - pg 57

<sup>9</sup> Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products - pg 12

<sup>10</sup> Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products - pg 62