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CONTINUATION ENQUIRY -EXPIRY REVIEW- BY THE AUSTRALIAN GOVERNMENT INTO ANTI-DUMPING MEASURES

PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY EXCEPT FEGER AND LA DORIA

Written submission of the European Commission on Initiation

On 16 April 2014, Australia imposed anti-dumping measures to Italian exporters of prepared or preserved tomatoes except Feger and La Doria. On 16 April 2019, the application period of these measures will come to an end.

Following an application of the domestic industry, Australia initiated on 16 July a continuation enquiry -or expiry review- into these measures.

The European Commission would like to thank the Anti-Dumping Commission for the opportunity to submit comments with regard this investigation.

At this initial stage, the European Commission would like to raise the following issues that need to be considered in the course of this investigation:

1. Weak grounds at initiation

This review was initiated on the grounds that *“the expiration of anti-dumping measures might lead, or might be likely to lead, to a continuation of, or a recurrence of, the material injury that the measures are intended to prevent.”*¹

The complainant’s claims are based on the mere assumption that the expiration of anti-dumping duties will lead to a price decrease that will affect its profitability and cause injury to the domestic industry. Furthermore, the complainant simply assumes that Italian prices will also be dumped since any injury claimed has to be caused by dumping.

However, no evidence to substantiate these assumptions has been provided despite the fact that in the previous review (INV 354²) it was found that most of the EU exporters were not dumping.

¹ Anti-dumping Notice No. 2018/106 – Anti-Dumping Commission.

2. Likelihood analysis of continuation or recurrence of dumping and injury

The European Commission expects that Australia conducts a proper likelihood analysis. According to WTO jurisprudence, a likelihood analysis has to be based on positive evidence.

The Panel in *US – Corrosion-Resistant Steel Sunset Review* underlined the importance of the need for sufficient positive evidence on which to base the likelihood determination:

*"The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."*³

In the current case, imports continue to take place in substantial quantities after the imposition of measures and therefore, the investigating authority has important available factual information to support its analysis.

However, as explained above, no positive evidence of likelihood of continuation or recurrence of dumping has been provided in the complaint.

As regards the investigation, the above jurisprudence also implies that questionnaire replies from Italian exporters should be the main factual basis to assess the likelihood of continuation or recurrence of dumping.

Furthermore, according to little the information provided in the complaint, the domestic industry has recovered during the period of application of measures. This recovery has taken place despite the continuation of imports at similar levels after the imposition of measures in 2014. Any recurrence of injury would have to be demonstrated on the basis of positive evidence regarding likely import volumes and prices and their likely impact on the situation of the domestic industry.

The mere assumption that Italian exporters currently not dumping will have an incentive to decrease prices is pure speculation and does not give any indication whether such prices would also be dumped.

² Investigation period 1 April 2015 – 31 March 2016.

³ Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271. The Appellate Body agreed with this view. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114.

3. Measures should expire for exporters that are not dumping

Article 11.1 of the Anti-dumping Agreement determines that “*An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.*”

Therefore, following the review Nr 354, measures for Italian exporters whose dumping margin was found to be *de minimis* or 0% should have ended. No dumping and dumping below the *de minimis* level should have resulted in the termination of the case for these companies.

These exporters are however being examined again, when they should have never been part of this review.

The European Commission expects that in the current review Italian exporters not found to be dumping will have the duties removed.

4. Conclusion

The information provided in the complaint is insufficient. It does not give any evidence of either continuation or recurrence of dumping and injury and should thus not have been accepted.

The investigating authority should follow the WTO rules and jurisprudence when analysing the likelihood of continuation or recurrence of dumping and injury.

Furthermore, in the previous review, most of the Italian exporters were found not to be dumping, and therefore the continuation of measures for these companies was not warranted.

In any event, the domestic industry has recovered during the period of application of measures, while Italian imports continued as significant levels. This proves that Italian imports, mostly not dumped, are not causing any injury to the domestic industry.

The European Commission will continue to monitor this case and expects that the Australian authorities will comply with their WTO obligations during the course of this investigation.