



15 February 2019

Director Operations 1
Anti-Dumping Commission
GPO Box 2013
Canberra ACT
2601 AUSTRALIA

Expiry review of measures – Preserved or prepared tomatoes exported from Italy

Dear Director,

This submission is made by Calispa S.p.A. (Calispa) in response to the Anti-Dumping Commission's ("Commission") findings outlined in Statement of Essential Facts Report No 488 (SEF 488). In summary, Calispa agrees with and supports the Commission's finding that:

- Calispa's exports of canned tomatoes during the review period, were at non-dumped prices and above equivalent domestic selling prices of comparable like goods; and
- in the absence of measures, Calispa is not likely to commence exporting at dumped prices.

Whilst it is noted that the Commission has found that it is not satisfied that a recurrence of dumping and material injury is likely exporters generally from Italy, Calispa considers it important to more clearly distinguish its individual circumstances from that of other exporters.

Calispa was not an investigated exporter during the original investigation as it had not exported the subject goods to Australia during the original investigation period. As such, it did not contribute to the material injury caused by dumping during that original investigation period. Calispa formally sought an individual duty rate following its application for an accelerated review in 2014 (Review 250). That review imposed a floor price equal to its determined normal value.

In 2016, Calispa was a selected and cooperating exporter during Review 354. The Commission found that Calispa's exports during that review period were not dumped by a margin of -17.7%. In this most recent review, Calispa was again a selected and cooperating exporter. As noted in SEF 488, Calispa's exports were again found to not be dumped by a margin of -16.1%.

Therefore, the evidence confirms that Calispa has never exported the subject goods to Australia at dumped prices and has never caused material injury to the Australian industry producing like goods. In the absence of any information to the contrary, it is clear that positive evidence

exists to support the finding that Calispa would not cause its exports to be dumped in the absence of measures. This is relevant given the published interpretations of the evidentiary threshold for assessing whether continued imposition of the measures is warranted.

Section 269ZHF(2) of the Customs Act ("the Act") explicitly requires that the Commissioner:

must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent.

The Commission's Dumping and Subsidy Manual¹ provides further guidance on the threshold test for establishing whether recurrence of dumping 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*², the WTO Dispute Panel 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 Appellate Body said of Article 11 in *Corrosion Resistant Carbon Steel*³:

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.

The Act therefore requires that the Commissioner recommend expiry of the measures, unless there is positive evidence to demonstrate that the recurrence of dumping in the future is likely or probable (ie. implying a greater degree of certainty that the event will occur than a finding that the event is not "not likely").

As noted earlier, all of the evidence to date confirms that Calispa has never exported the subject goods at dumped prices, and has never caused or contributed to the material injury suffered by

¹ Dumping & Subsidy Manual; December 2013, page 153

² US Drums – WT/DS99/R; para 6.42, page 139.

³ 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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the Australian industry. This positive evidence confirms the Commission's findings in SEF 488 and supports a recommendation that the Minister allow for the existing measures to expire.

Yours sincerely

Gianluigi Di Leo