Australian Government

Anti-Dumping Review Panel

Anti-Dumping Review Panel
C/O Legal, Audit & Assurance

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By EMAIL

Mr Dale Seymour
The Commissioner of the Anti-Dumping Commission
Anti-Dumping Commission
55 Collins Street
Melbourne VIC 3000

Dear Commissioner,

Review of a Decision of the Parliamentary Secretary to alter a Dumping Duty Notice in relation to Prepared or Preserved Tomatoes ("PPT's") Exported from Italy by AR Industrie Alimentari S.p.A. (ADN 2017/46) and by all exporters other than by Feger Di Gerardo Ferraioli S.p.A. and La Doria S.p.A. (ADN 2017/47)

The Anti-Dumping Review Panel ("ADRP") has received applications for a review of decisions by the Parliamentary Secretary to the Minister for Industry, Innovation and Science under section 269ZDB(1) of the *Customs Act 1901* ("the Act") to vary dumping duty notices in respect of Certain Prepared or Preserved Tomatoes Exported to Australia from the Republic of Italy by all exporters except Feger di Gerardo Ferraioli S.p.A ("Feger), La Doria S.p.A ("La Doria") and AR industrie Alimentari S.p.A. and in respect of Certain Prepared or Preserved Tomatoes Exported to Australia from the Republic of Italy by AR Industrie Alimentari S.p.A ("ARIA") ("the Reviewable Decisions").

Notice of the Reviewable Decisions were published on the Anti-Dumping Commission ("ADC") website on 5 May 2017 (ADN 2017/46 and ADN 2017/47). The Reviewable Decision was made in relation to your report, No. 349/354 ("REP 349/354").

The ADRP accepted application for review from: SPCA Ardmona Operations Ltd, Conserve Italia Soc.Coop.Agricola, Mutti S.p.A. and Le Specialita Italiane, together referred to as the Applicants.

As you are aware, I am currently conducting the review.

Pursuant to s.269ZZL of the Act, I require that the following findings in REP 349/354, relating to the Applicants' grounds of review, be reinvestigated:

SPC Armona Operations Ltd ("SPCA")

1. **Finding: The Application of findings in REP 360 to Reviews 349/354**

   In its reinvestigation of this finding the ADC should take into consideration SPCA's submissions in the course of Reviews 349/354 relating to its critical comments on the regression analysis used by the ADC in REP 360, including the unsuitability of the data for a regression analysis and the absence of certain fundamental conditions relating to regression analysis.

   In this regard I note the ADC's statement in REP 349/354:

   > *"The Commission notes that the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not consider it appropriate to revisit the interpretation of data from REP 360 in these reviews"*.[1]

   While I also note the ADC's statement in its submission to the ADRP pursuant to s.269ZZJ(aa), that the findings in REP 360 fall into the category *of "any other matters that the Commissioner considers relevant*" for the purpose of s.269ZD(2), the ADC should also take cognisance of the requirement of s.269ZD(2)(a)(ii) that the Commissioner "*must*" have regard to *"any submissions relating generally to the review"* that are received by the Commissioner within the statutory time period. The fact that the analysis of the data in REP 360 was accepted in ADRP Report No. 35 and subsequently accepted by the Parliamentary Secretary, does not, however, detract from the right of SPCA, as an interested party to make submissions to the ADC on the applicability of REP 360 to the Reviews in question, and for such submissions to be considered by the ADC.

   During its reinvestigation of this finding, the ADC should at the same time have regard to and take into consideration the relevance to its finding of SPCA's submissions relating to the following:
   - 2014 becoming the base year for the new BPS introduced in 2015;
   - The value of the identified 'tomato payment' in the application for assistance document that was submitted, and the contention that this evidence was more reliable than the selected data supplied by Feger and La Doria;
   - The contention that the use by the ADC of an average value resulted in a lower tomato subsidy amount;

[1] REP 349/354, page 14.

- The contention that the ADC did not correctly consider the impact of fallow land or SPS payments received in respect of other crops;
- The contention that the ADC did not examine the magnitude of the subsidy that it found (even though SPCA considered the data was flawed);
- The contention that the negotiated price of tomatoes does not reflect a competitive cost; and
- the new "coupled' payment to Italian tomato growers of 160 €/ha (the existence of which both the EC and ANICAV did not dispute).

In its reinvestigation, the ADC should take into consideration SPCA's relevant submissions to the ADC during the Reviews, other relevant information and documents and as well as other interested parties' relevant submissions to both the ADC and the ADRP.

Conserve Italia Soc. Coop. Agricola ("Conserve Italia")

2. **Finding: Normal Value of Certain Product Codes with the CIRIO trademark**

In its reinvestigation, the ADC should take into consideration the claim raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia, as set out in the third ground of review in its application for review.

The ADC should note that there is evidence that this claim was raised by Conserve Italia in an email to the ADC dated 14 February 2017. [2] In its s.269ZZJ submission to the ADRP the ADC recognises that such a claim was made by Conserve Italia, but states that no evidentiary basis was provided to the ADC to justify how the adjustment was arrived at, nor how it ought to be quantified, and as a result the ADC did not make the adjustment. However, there would appear to be no indication in REP 349/354 (or in any other document on the record) that this claim was considered or the reasons for its rejection provided.

Le Specialita Italiane Sri ("LSI")

3. **Finding: Methodology used to calculate LSI's ascertained normal value ("ANV") using the weighted average of the ANV from the five verified exporters whose normal value was determined under s.269TAC(1)**

In reinvestigating this finding the ADC should reconsider its reasoning for finding that LSI sales in the domestic market of bright cans (unlabelled) were unsuitable for use in "*calculating a domestic sale price as it is uncertain whether these will be entered into home consumption*" because "*the unlabelled goods can be either*

[2] See Confidential Annex IV to Conserve Italia's submission to the ADRP.

exported or sold domestically, and the manufacturer does not have control over (or potentially awareness of) the end destination for the goods."

Section 269TAC(1) provides:

> *"Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods."(*emphasis added*)*

The reasoning of the ADC in REP 349/354 appears to presume that complete certainty is required by s.269TAC(1) of the *Customs Act 1901* that the goods sold domestically are entered for home consumption and not exported, if such sales are to be used to determine normal value. The ADC appears to consider that a mere uncertainty concerning the final destination of the goods is sufficient to exclude these goods from the normal value calculation. I do not think that this can be read into s.269TAC(1). Rather, it would appear, as LSI suggests, that the emphasis should be on whether there is some knowledge or presumed knowledge that the goods may actually be exported, that is, "*if like goods are not so sold by the exporter*"(emphasis added). Only if there is such an indication, should the ADC look to like goods so sold, "*by other sellers of like goods",* to determine normal value.

This would appear to align with the WTO case law and the practice of other WTO members referred to by LSI in its s.269ZZJ submission to the ADRP,[3] as well as the ADC's own past practice.

There is no indication in REP 349/354 that it was evident or that there was any knowledge (or reason to believe) by LSI that the products sold were to be exported. In REP 351 the ADC did not appear to question whether similar sales by LSI entered into home consumption, and stated:

> "*As a result of the above analysis, the Commissioner is satisfied that he has sufficient information to rely on Le Specialità's domestic sales for the purposes of calculating a normal value under subsection 269TAC(1)."*[4]

The ADC also indicates in both SEF and REP 349/354 that the approach taken in REP 351 was based on *"the best information available at the time",* implying that better information became available in Reviews 349/354 (in the form of verified

[3] See Footnotes 3, 4 and 5 of LSI's submission, page 6.
[4] See REP 351, page 10.

normal values of other exporters), which the ADC then **chose** to use.[5] However, s.269TAC(1) does not allow for such a choice of better information. It only provides for the normal value to be determined by other sellers of like goods, "*if there are no sales of like goods sold in the ordinary course of trade for home consumption in the country of export*" (emphasis added) by the exporter.

Please note that in its reinvestigation of this finding the ADC should only consider information that was before it during the course of the investigation. [6]

4. **Finding: Methodology used to calculate LSI's ascertained export price ("AEP") using the weighted average of the AEP from the five verified exporters whose export prices were determined under s.269TAB(1)**

Since LSI did not export PPT to Australia during the review period, the ADC calculated the AEP under subsection 269TAB(3) by having regard to "*all relevant information*" because sufficient information was not available to enable the export price to be determined under the preceding subsections. In REP 349/354 the ADC therefore calculated the weighted average of the AEP from the five verified exporters of the goods whose export prices were determined under subsection 269TAB(1).

In its s.269ZZJ submission the ADC stated that in REP 351, the only relevant information available for the determination of the AEP was the ANV, while in REP 349/354*, "there was significantly more reliable information, namely verified export prices comprising 93 per cent by volume of the exports under review."*

The ADC is requested to reinvestigate this finding, also taking into consideration other relevant information, including:

- That LSI's has a negative dumping margin and therefore its AEP is greater than its ANV;
- The form of the duties is the combination method, with a fixed and variable component. Circumstances may arise where the actual export price is below the AEP but still higher that the ANV (since the AEP is set higher than the ANV), effectively triggering the variable duty and resulting in a dumping duty being imposed on exports that are not in fact dumped, as they are higher than the normal value; and
- Previous practice of the ADC in reviews where there were no exports during the review period, for example:

[5] In SEF 349/354 the ADC used the words "*chosen instead* to determine the ascertained normal value ……" (emphasis added), page 19.

[6] In its s.269ZZJ submission, LSI makes reference to a document that does not appear to have been before the ADC when it made its findings as set out in REP 349/354, and would therefore not be considered to be "relevant information" for the purpose of the definition in s. 269ZZK.

- In REP 351 the AEP was set at the same level as the weighted average normal value for LSI, so that a dumping duty would only be incurred where the actual export price is below this, that is, when dumping occurs;
- In REP 250, in circumstances where the exporter concerned did not export during the review period, the ADC considered it appropriate to determine the export price to be the same amount as the normal value, so that dumping duty would only be incurred where the actual export price is below this, that is, when dumping occurs.

In reinvestigating this finding, the ADC should also take into consideration:

- Article VI:2 of the GATT and Article 9.3 of the Anti-Dumping Agreement;
- Section 8(2) of the *Customs Tariff (Anti-Dumping) Act 1975* ("The Dumping Duty Act") which provides for a dumping duty to be imposed in relation to which the amount of the export price is less than the amount of the normal value, calculated in accordance with s.8(6) of the Dumping Duty Act (in this case being the difference between the amounts the Minister ascertains to be the export price and the normal value of those particular goods).

Date for providing reinvestigation report

Please report the result of the reinvestigation within 45 days from the date of this letter, that is, by **26 October 2017**.

Thank you for your assistance and co-operation.

Yours sincerely

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
11 September 2017