APPLICATION FOR REVIEW OF

DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : **X** a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

☒ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

ANICAV (Associazione Nazionale Industriali Conserve Alimentari Vegetali)

Viale Della Costituzione Centro Direzionale Is. F/3

80143 Napoli

☒ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

Antonio Ferraioli

President/Legal Representative

Tel. 0039.081.7347020

Fax 0039.081.7347126

Email: info@anicav.it

☐ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

NOT APPLICABLE

☒ Full description of the imported goods to which the application relates.

Tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

☒ The tariff classification/statistical code of the imported goods.

The goods are classified to subheading 2002.10.00 to Schedule 3 of the Customs Tariff Act 1995 with statistical code 60.

☒ A copy of the reviewable decision.

Please see the Annex I

☐ Date of notification of the reviewable decision and the method of the notification.

NOT APPLICABLE

☒ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

Please see the Annex II

☐ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

NOT APPLICABLE

Signature:.....

Name: ...Antonio Ferraioli.....

Position:...President/ Legal Representative.....

Applicant Company/Entity:

ANICAV (Associazione Nazionale Industriali Conserve Alimentari Vegetali)

Date: 13/MAY/2014

ANICAV
Associazione Nazionale Industriali
Conserve Alimentari Vegetali

Napoli, May 13th, 2014

SUBMISSION ON BEHALF OF ANICAV TO THE ANTI-DUMPING REVIEW PANEL CONCERNING A REVIEW OF A MINISTERIAL DECISION IN RELATION TO THE PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY

ANICAV - representing, as an industry associations, about one hundred Italian tomatoes processors, accounting for about 14% of the entire world production and 54% of the European Union production - is an interested party concerned with production in Italy and exportation to Australia of prepared/preserved tomatoes.

Reference is made to the investigation following the application lodged by SPC Ardmona Operations Limited and the consequent proceeding started with Anti-Dumping Notice NO. 2013/59.

The purpose of this submission is to bring to the attention of the Review Panel the recent findings of the Parliamentary Secretary to the Minister for Industry, dated April 16, 2014.

We refer, in particular, to the following issues:

1. erroneous assessing of the volume of dumped imports by the "residual exporters";
2. erroneous consideration of the effects of undumped imports on prices in the injury determination;
3. lack of consideration of the factors other than dumped imports that caused injury;
4. the injury determination carried out by the ADC is ill-founded in so far as it is based on an a flawed like products definition.

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1. Erroneous assessing of the volume of dumped imports by the "residual exporters"

It is important to consider the following chart:

Exporters	Share of imports (in volume)	Share of examined imports (in volume)
La Doria + Feger (neglegible margins)	44%	63%
Conserve Italia + Corex + De Clemente + IMCA + Lodato Gennaro & C.	26%	37%
Residual (unexamined) cooperating exporters	30%	0%
TOTAL	100%	100%

As it can be easily observed, only 26% of total Italian exports were actually found to be dumped following the analysis of the questionnaires replies by the ADC. Such a percentage is likely to further decrease by considering that 3 companies on 5 should not been considered. In fact:
- COREX is a trader and not an exporting producer, therefore its exports must be deducted;
- Lodato and IMCA have not been examined by the ADC.

In addition, the decision to treat the goods exported by the (unexamined) residual exporters – representing 30% of the total exports of tomato products from Italy – as dumped imports is contrary to the relevant case-law of the WTO and, as such, ill-founded.

In this regard, it must be considered that the WTO ADA and the applicable case-law *(ex plurimis Appellate Body Report, EC – Bed Linen - article 21.5 –*

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India) indisputably provide that undumped imports do not have to be taken into account for the purpose of the injury determination. Article 3.1 WTO ADA in fact prescribes that 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".

In light of the foregoing, the ADC's decision to consider 56%, rather than 26% (or even a lower figure further to the adjustment to be made as a result of the exclusion of Corex other than Lodato and IMCA from the group of unexamined exporters), as dumped imports for the purpose of the injury assessment is unwarranted. No evidence whatsoever supports the conclusion that 30% of imports made by the unexamined producers was dumped.

According to the ADC, the average dumping margin for the residual exporters was approximately 14% when compared to the verified weighted average normal value for all cooperating exporters. This conclusion is apodictic and vitiated.

Pursuant to the official data (i.e. IRI Information Resources s.r.l, The Nielsen Company S.r.l.) more than 70% of the Italian market is composed by Private Label and Other Producers. By considering the Leader's average price (Mutti, Cirio, Divella), the average price of said 70% market share is less than half.

In addition, common sense would suggest that the export prices of producers exporting smaller volumes (i.e. the residual unexamined cooperating exporters) were not lower than those of the market leaders. So if two producers with the largest sales volumes were found not be dumping, the same could be asserted for the rest of the Italian producers.

Indeed, it is totally unreasonable to claim that in a fragmented market several players representing an overall share of - by far less than - 26% of Italian imports only (and, therefore, a very small share of the overall Australian

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market) would be able to act as price leaders so as to influence the price level in the market. In any case the dumping margin average is merely 4.24%.

This further confirms the breach of Article 3.1 WTO ADA and the illegality of the decision to treat the exports of the unexamined exporters as dumped exports for the purpose of the injury determination.

2. erroneous consideration of the effects of undumped imports on prices in the injury determination;

In evaluating the effect of dumped imports on prices the ADC has taken into account the retail prices of all Italian imports marketed by Coles and Woolworths during the investigation period. However, such an approach violates again Articles 3.1 and 3.2 WTO ADA.

In fact, pursuant to Article 3.1 WTO ADA, a determination of injury involves an objective examination of "the effect of the dumped imports on prices in the domestic market for like products". Moreover, Article 3.2 WTO ADA provides that "with regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".

Therefore, the ADA clearly requires that the injury analysis should be based on prices of dumped imports only. On the contrary, the ADC's assessment regarding the hypothetical magnitude of undercutting was carried out on the basis of shelf/retail prices of the goods marketed by Coles and Woolworths, which were also supplied by companies found not have engaged in dumping. It follows that the ADC's assessment regarding price effects is flawed.

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In addition, the assessment was carried out on the basis of the unproved assumption that a correlation would exist between wholesale prices and retail prices. However, the WTO jurisprudence specifies that when determinations are made upon assumptions, "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 there are no sufficient explanation.

In light of the foregoing, it must be concluded that the analysis of price effects does not comply with the applicable WTO rules – with particular reference to Articles 3.1 e 3.2 - and it is vitiated by a wrong methodological approach which, in addition, has not been justified.

3. lack of consideration of the factors other than dumped imports that caused injury;

Important factors other than dumping were found to have contributed to the injurious effects experienced by SPCA, are:

- the appreciation of the Australian dollar (AUD) towards the Euro (EUR) that made the domestic products less competitive on the Australian market;
- supermarkets' private label strategies that forced the reduction of prices and consequently led to an increase of supply of non-Australian sourced goods;
- the extreme weather events, such as severe drought followed by severe flooding, causing reduction in the domestic production.
- the decrease of SPCA'S export sales equal to 45% between 2008-2009 and 2010-2011 and coinciding with the appreciation of AUD.

Therefore there are not sufficient evidence as to demonstrate that the injury suffered by the Australian industry was caused by the allegedly dumped imports from Italy rather than by other factors. Please note that pursuant to Article 3.5 WTO ADA, the investigating authorities must "examine any known factors other

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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 order to comply with the above-mentioned provision, the authorities must make an assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.

In the case at issue, it is clear that a correct and objective application of Article 3.5 WTO ADA would inevitably lead to the conclusion that the vast majority of the injury suffered by the Australian industry is caused by factors other than dumped imports. The other factors causing injury will be briefly analyzed below.

Please note that said "other factors" have been taken into consideration in the safeguard investigation (conducted in parallel with regard to the same product). In its final report the APC concluded that the combination of such factors was the sole cause of the "serious injury" experienced by the Australian industry – please refer to the Productivity Commission Inquiry Report No. 68, dated December 12, 2013.

4. the injury determination carried out by the ADC is ill-founded in so far as it is based on an a flawed like products definition.

The Italian peeled tomatoes under investigation are not like products to the Australian tomatoes.

This circumstance is in breach with Article 3 WTO ADA according to which the assessment of whether imports have caused any injury has to be carried out in respect of products which are like to the products under investigation.

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Please note that considerable differences regarding the physical characteristics exist between the imported goods and the domestically produced tomatoes.

The large majority of the Italian imported goods is of the type “long tomatoes”, which have different physical characteristics from those of tomatoes produced in Australia.

Said characteristics have also a relevant impact on quality as attested by worldwide consumers (see Public File, Folio no. 244).

In addition, Italian exporters also produce San Marzano tomatoes which are PDO ("Protected Designation of Origin") pursuant to CEE Regulations no. 1263/1996 and no. 2081/1992. Said denomination is reserved for the peeled tomatoes obtained from plants of the variety S. Marzano 2 and KIROS and must be both produced and transformed only in particular and defined area of the South of Italy.

As a result San Marzano PDO tomatoes cannot be considered like product to Australian tomatoes for the same reason why the organic range of tomato products have not be considered in the abovementioned proceeding. Therefore such a duty would not assist Australian producers of prepared or preserved organic and PDO tomatoes (as there are none) but would impose a real and direct financial penalty on Australian consumers of these products.

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Please note that we adhere also to all the conclusions proposed by our members (i.e. Lodato Gennaro & C. s.p.a., Attianese s.p.a. and other our companies members that will produce documentation about this question) in their Submissions to the Antidumping Review Panel.
We remain at your disposal for any further clarification you may have. We are persuaded of the validity of the above statements; otherwise there will be a distortion of Australian law, WTO jurisprudence and common sense.

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