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

Written submission of the European Commission to the

Anti-Dumping Review Panel

On 16 April, after completing an anti-dumping investigation initiated on 10 July 2013, the Australian government announced the imposition of definitive duties on preserved tomatoes exported to Australia from Italy. This decision was based on the recommendations made by the Anti-Dumping Commission (ADC) in the Final Report 217.

The European Commission has been considered as an interested party within the framework of the above-mentioned investigation and has, in this context, made various claims to the ADC on a number of occasions. The European Commission had acted in full co-ordination and support to the Italian government and its exporters.

While the ADC has taken the arguments raised by the European Commission into consideration, these claims were neither adequately nor sufficiently addressed. As will be explained below, the injury and causality assessment are flawed and, as result, it is considered that the anti-dumping measures are unwarranted.

The European Commission considers that the reviewable decision is not the correct for the following reasons.

1. INJURY

According to Article 3.1 of the WTO Anti-dumping Agreement (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".*

1.1 Volume of dumped imports

As far as the volume of dumped imports is concerned, the WTO jurisprudence confirmed 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 investigation¹".

The ADC has examined the volume of dumped imports in section 8.6 of the Final Report. However, this section is quite general and does not seem to have excluded the imports that were found not to be dumped - it is recalled that this concerns not less than 44% of the Italian imports.

For example, the section on lost sales mentions that "The Commission considers that suppliers of imported proprietary products to the retail sector were able to discount the price of their product during the investigation period to levels lower than they would have otherwise in absence of dumping". This is merely a general statement not based on any evidence, and refers to imported products, without mentioning or explaining whether and how the non-dumped Italian imports were excluded from this analysis.

Similarly, the next section on market shares refers to "market share in the Australian market for prepared or preserved tomatoes from June 2010 to June 2013", and the whole section further refers to "Italian goods". Despite the laconic statement at the end of the section, it looks as if the ADC has not only considered the dumped imports in its analysis, but rather the overall Italian imports.

In any case, in its analysis, the ADC still takes into account exports from residual exporters, i.e. those that have not been examined because they were not part of the sample.

As already raised by the European Commission and other interested parties within the framework of the investigation, a determination of the volume of dumped imports that automatically considers the residual/**non-examined exporters** as being dumped is inconsistent with the WTO Appellate Body's jurisprudence². Indeed, the Appellate Body has concluded³ that considering all imports from non-examined exporters or producers as dumped because a number of exporters included in the sample were found to have been dumping is inconsistent with the obligations to conduct an "objective examination".

In reply to this claim, the ADC indicated that "*it would not appear necessary under Australia's legislation to separately establish that the volume of imports from residual exporters were dumped for the purposes of assessing material injury*"⁴. This statement is surprising since it would simply imply that a measure taken by Australia according to its domestic legislation does not necessarily need to comply with the WTO rules.

The ADC further argues that "*Australia's legislation⁵ specifically provides for the Minister to have regard to the size of the dumping margin as a relevant factor in assessing whether dumping caused material injury*" and that "*In this case, the Commission considers that the dumping margin determined for residual exporters is relevant to the material injury assessment being undertaken.*"⁶ In this regard, Australia's legislation is in fact in compliance

¹ Panel Report. EC - Salmon (Norway) para. 7.625.

² Appellate Body. EC - Bed Linen. Para. 126

³ Appellate Body. EC - Bed Linen. Paras. 132—133

⁴ Final Report 217. Section 8.4.1. Page 52.

⁵ s.269TAE(1)(aa)

⁶ Final Report 217. Section 8.4.1. Page 52.

with the WTO ADA since the magnitude of the dumping margin is one of the 15 injury factors that should be examined for the purpose of the injury determination. However, in this case, the magnitude of the dumping margins is questionable (44% of imports are not dumped and a dumping margin just above the *de-minimis* threshold was established for another 30% of the exports), but even more importantly, before making such an exercise, the volume of dumped imports needs to be examined on the basis of "positive evidence" and an "objective examination" should be carried out in accordance with the conclusions of the Appellate Body. In this respect, the ADC has made an attempt to demonstrate that the residual/non-examined exports were also dumped, based on a comparison between statistical import values for goods exported by each individual residual exporter during the investigation period and the verified weighted average normal for all cooperating exporters.

The European Commission however considers this methodology extremely simplistic and very likely leading to erroneous conclusions. Indeed, nothing in this exercise has been done to ensure a fair price comparison. For example, by comparing average prices, the existence of various product types with completely different prices has been completely disregarded. The European Commission considers that the ADC could have, at the very least, confirmed the reliability of its methodology by applying it to the individually examined exporters and compare the results with their actual margin of dumping (positive or negative). No such check appears to have been made.

As a consequence of the above, additional evidence does not seem to qualify as "positive evidence" subject of an "objective examination", hence it do not appear to prove reliable enough to conclude that exports from non-examined exporters can be considered as dumped.

As a final note on this issue, the WTO Appellate Body acknowledged that *"there may be other ways of making these calculations that satisfy the requirements of paragraphs 1 and 2 of Article 3"* and suggested, as an objective alternative method⁷ using the proportion of examined exports found to be dumped/not dumped to determine the share of non-examined dumped/not dumped exports. Applying this proportion to non-examined exporters would lead to the conclusion that 63% of the aggregate exports would be not dumped and just 37% would be dumped.⁸

1.2 Effect of dumped imports on prices

According to the Article 3.2 WTO ADA, *"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."*

In the opinion of the European Commission, the information provided by the ADC does not support an adequate assessment of the different price effects (described above) caused by dumped imports on domestic prices during the investigation period.

⁷ Appellate Body. EC – Bed Linen. Para. 138.

⁸ From the results of the sample (examined exporters) it appeared that 44% of the total exports were not dumped and 26% of total exports were dumped, i.e. 63% of the sampled was not dumped and 37% was dumped.

First and most important because the evaluation of price effects made by the ADC is taking into account **prices of all Italian imports** and not solely prices of dumped imports, both at FIS and retail level.

Secondly, the Australian government makes an 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. In this respect, it should be noted that the 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 could not be verified because the SEF did not provide sufficient explanation.

In reply to the above claims, the ADC has made an attempt to address this argument by providing additional figures demonstrating the existence of a correlation. Unfortunately, the series only covers a part of the investigation period and these figures show that strict correlation did not even occur in 2009. On this basis, it is more than questionable whether data from retailers can be used to estimate price effects in a proper way. In any case, if the assumption would have proven correct, the prices that it is trying to support would still be including dumped and not dumped prices and therefore would have not been objective for the purpose of making a price effect analysis.

Finally, in reply to claims made by some interested parties during the investigation that the price effects analysis should have been carried out on the basis of verified prices from examined dumping exporters rather than vague assumptions, the ADC just provided some information explaining that prices of these exporters and of residual exporters were lower than the lowest not dumped export price. This analysis is certainly not satisfactory and clearly no adequate justification for not having used the prices provided by the individual co-operating exporters.

1.3 Impact of dumped imports on domestic producers

Article 3.4 of the WTO ADA requires 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”*⁹. 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 ADC's Final Report, which manifestly contradicts the WTO requirements.

In addition, the analysis of the relevant economic factors is insufficient since, contrary to the WTO requirements, it rarely reveals the *“actual intervening trends in each of the injury factors and indices”* and basically limits the analysis to the *“comparison of endpoints”*¹⁰.

⁹ Panel Report, EC - Bed Linen. Paras. 6.156

¹⁰ Panel Report. EC - Tube of Pipe Fittings. Para. 7.316

In sum, the European Commission considers that the Australian authorities failed to conduct an objective injury analysis based on positive evidence.

2. CAUSALITY

Notwithstanding the fact that, according to the European Commission, the Australian authorities failed to carry out an injury analysis which is compliant with WTO provisions, 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*".

A number of factors other than dumped imports have been identified by the ADC, but the European Commission considers that the magnitude of their impact has not been adequately assessed. These other causes were the following:

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 ADC is however diluting the issue with the statement that "in an environment where dumping occurs, prices of non-dumped imports would be lower". There is however no evidence supporting this statement. It should be recalled that no dumping margin was established concerning imports representing around 45% of the total Italian imports. On this basis, it can be concluded that the non-dumped imports would have caused at least as much injury as the dumped imports. In addition, as explained above, there are reasons to assume that the volume of non-dumped imports is even higher than the volume of dumped imports (63% versus 37%), and in this case, the dumped imports would be causing even less injury (if any) than non-dumped imports.

ii) **Exchange rates:** According to the ADC's Final Report, the appreciation of the Australian dollar was a significant contributing factor to the injury suffered by the domestic industry. The AUD appreciated 37% against the EUR between 2009 and 2013 and 42% at its peak in 2012. The ADC 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 tomato imports in from 2009 to 2013 and given that Italian imports represented 87%¹¹ 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 Final Report, private label strategies of major supermarkets contributed to the competitive environment in the Australian market. This issue is also evaluated by the Productivity

¹¹ Safeguards Inquiry into the Import of Processed Tomato Products - pg 53

Commission, who affirms that "private label strategies can cause injury irrespective of imports"¹² and that this strategy "has affected the ability of local manufacturers to charge premium prices for their own label products"¹³.

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 contradicted this observation by affirming that no evidence was found on the difficulties to source raw tomatoes experienced by SPCA. This is quite surprising and in fact difficult to believe that the Productivity Commission made this statement without having any evidence available. The ADC however never clarified the situation.

In summary, the assessment made by the Australian authorities clearly establishes that factors other than dumped imports contributed significantly to the injury suffered by the domestic industry. Amongst these factors, the non-dumped imports alone might have caused as much injury as the dumped imports. However, there are enough reasons to assume that a portion of residual exporters were not dumping and therefore, injury caused by dumped imports would be significantly less than injury caused by non-dumped imports. On this basis, and taking into account that dumping margins of examined exporters are very close to the *de-minimis* level, the European Commission considers that the cumulative effect of other causes individually contributing to injury is so significant that the injury attributed to dumping cannot be material.

3. CONCLUSIONS

In conclusion, the European Commission submits that:

- The assessment of the volume and the effect of dumped imports on prices has not been based on positive evidence and did not involve an objective examination;
- The analysis of the impact of the imports on the domestic producers has been incomplete;
- The causality analysis has been inconclusive, in particular any injury suffered by the domestic producers appears to have been caused by factors other than the dumped imports which should break any causal link established between injury and dumping.

In view of the above, the European Commission urges the Anti-Dumping Review Panel to recommend to the Minister that the reviewable decision be directed to reinvestigate the findings that formed the basis of the reviewable decision which can only lead to the non-imposition of measures on processed tomatoes from Italy.

¹² Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products - pg 57

¹³ Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products - pg 12