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Ms Joan Fitzhenry
Panel Member
Anti-Dumping Review Panel
Australian Customs and Borders Protection
Service
5 Constitution Avenue
Canberra City Act 2601

16 August 2014

BY EMAIL

Dear Ms Fitzhenry,

Re: Review of tomatoes prepared or preserved exported from Italy

Thank you for your letter of 12 August 2014 inviting interested parties to present observations on whether further submissions should be allowed in response to the Anti-Dumping Commission's (the "ADC") reinvestigation report.

On behalf of our client Lodato Gennaro & C. S.p.A (hereinafter "Lodato"), we would like to submit the following.

First, we would like to draw your attention to the fact that, as explained in Lodato's application for review, the ADC's final report failed to provide adequate disclosure of the essential facts and considerations upon which the ADC based its conclusions. For example, the ADC failed to provide adequate "objective evidence" that exports from the residual exporters were to be treated as dumped.

More importantly, the ADC failed to provide adequate information regarding the methodology used to calculate the dumping margin of 26,35% applied to Lodato, despite several requests for clarification in this respect had been filed with the ADC within the relevant deadline.

The above-mentioned significant procedural deficiencies did not allow Lodato to fully exercise its rights of defence in relation to the essential facts and considerations on the basis of which the ADC proposed to impose anti-dumping measures. However it must be recalled that according to Article 6.9 of WTO Anti-Dumping Agreement (and, thus, of the applicable Australian legislation), the Australian authorities were under the obligation to *"inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interest"*.

We trust that the re-investigation report of the ADC will address the deficiencies pointed out by Lodato and will contain all the essential elements on the basis of which the new findings of the ADC will be adopted. In view of the above, Lodato considers that it should be given the opportunity to comment upon the essential facts upon which the re-investigation report will be based. This will finally allow Lodato to fully exercise its rights of defence, although at a late stage of the procedure.

Second, in your letter you ask that interested parties address the relevant provisions of the Customs Act dealing with the ADRP's ability to have regard to further submissions. In this respect, the following should be noted.

Section 269ZZK(4) of the Act provides explicit parameters on the nature of information that the ADRP can have regard to in making its recommendations. In particular the ADRP:

- must not have regard to any information other than the relevant information; and
- must only have regard to the relevant information and any conclusions based on the relevant information that contained in the application for the review or in any submissions received under section 269ZZJ within the period of 30 days referred to in that section.

However, that provision is subject to ss.269ZZK (4A) and (5) of the Act. The relevant provision in this circumstance is subsection (4A) which deals with information that the ADRP must have regard to in making its recommendations, following its decision to require the Commissioner to reinvestigate certain findings in accordance with ss.269ZZL. Subsection 269ZZK(4A) provides that the ADRP *'must have regard to the report the Commission gives the Panel under subsection 269ZZL(2).'*

While ss.269ZZK(4) clearly outlines restrictions on the type of information that the ADRP can have regard to in a review where no reinvestigation was required, ss.269ZZK(4A) does not set a clear restriction on the type of information that the ADRP can have regard to where a reinvestigation was required.

Therefore, in our view it is appropriate to read ss.269ZZK(4A) as providing the ADRP with the discretion to have regard to additional submissions following the Commissioner's reinvestigation report, subject to ss.269ZZK(5). The above interpretation is also in line with the objective of allowing interested parties to fully exercise their rights of defence, in compliance with the principles set out by the WTO Anti-Dumping Agreement.

Yours sincerely,

A handwritten signature in blue ink, consisting of a vertical line followed by a wavy horizontal stroke.

Fabrizio Di Gianni / Gabriele Coppo