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cc: Commissioner of the Anti-Dumping Commission
National Manager Operations
National Manager Policy

Accelerated review of prepared or preserved tomatoes export from Italy - Calispa S.p.A.

Dear Geoff,

This submission is made on behalf of Calispa S.p.A (Calsipa) in response to the correspondence from the Commission in relation to the preliminary normal value calculations in respect of the accelerated review of canned tomatoes from Italy.

Firstly, Calispa wishes to express its strongest opposition to this unprecedented decision to establish normal values on nothing more than 'the Commission has selected the highest normal value of the models/types' of canned tomatoes sold on the domestic market by Calispa during the review period. The reasons appear to be driven by a recent Federal Court ruling which found a long-standing practice of imposing model specific duties to be unlawful. This proposed approach by the Commission totally ignores the fundamental principles of the Anti-Dumping Agreement and Australia's domestic legislation and is inconsistent with international and domestic legal jurisprudence.

It would appear that the only basis for determining normal values on domestic sales of cherry tomatoes, which represent only 16% of the total domestic volume, is that they are the highest priced variety of canned tomatoes sold by Calispa. This is clearly inconsistent with the Commission's long standing practice and policy of determining normal values under s.269TAC(1) of the *Customs Act 1901* using all domestic sales of like goods at arms-length transactions that are made in the ordinary course of trade.

As far as I can remember, there has never been a circumstance where the Commission has simply ignored domestic sales of like goods in establishing normal values, purely on the basis of price. As the Commission's Dumping and Subsidy Manual, the Federal Court and WTO Dispute Bodies have correctly interpreted, the only basis for rejecting domestic like sales under s.269TAC(1) (or the equivalent Article 2.1 of the Anti-Dumping Agreement) are non-arms length transactions, ordinary course of trade, low volume or particular market situation.

In fact, the proposed approach by the Commission in this case is akin to the US administration's past practice of 'zeroing', which effectively excluded transactions on the basis of no dumping. Such practices have repeatedly been found by the WTO to be inconsistent with the Anti-Dumping Agreement and as outlined in this submission, this proposed approach by the Commission is also clearly inconsistent with the WTO jurisprudence.

Determination of normal values in accelerated reviews

Section 269ZG(3)(b)(ii) of the Act outlines that the Minister must declare that the Act and the Dumping Duty Act have effect as if:

> *the original dumping duty notice or countervailing duty notice had applied to the applicant but the Minister had fixed specified different variable factor relevant to the determination of duty payable by the applicant; [emphasis added]*

Section 269T(4D)(a) of the Act defines 'variable factors relevant to the determination of duty payable under the Dumping Duty Act' subject of a dumping duty notice as:

> *(i) to the normal value of the goods; and*
> *(ii) to the export price of the goods; and*
> *(iii) to the non-injurious price of the goods*

The provisions for determining the normal value of goods are set out at section 269TAC of the Act. In the email received on 7 August 2014, the Commission advised that the proposed approach for determining Calispa's normal values 'was assessed in terms of subsection 269TAC(1) of the *Customs Act 1901*'.

In that same email, the Commission advised that the following domestic sales were deemed unsuitable for determining normal values under s.269TAC(1):

1. sales of [redacted] [product type] of preserved or processed tomatoes as the Commission was unable to be satisfied [redacted] [product specification]
2. sales of [redacted] [product type] of preserved or process tomatoes as the Commission was [redacted] [product specification];
3. sales of [redacted] [product type] which were deemed to not be made in the ordinary course of trade.

Calispa does not contest these findings. In fact, Calispa provided its domestic sales information with sufficient detail for the Commission to be able to make these proper determinations.

Following the exclusion of the above sales deemed unsuitable for establishing normal values, it stands to reason that all remaining domestic sales of like goods fulfil the requirements of s.269TAC(1) of the Act. Therefore, it is without doubt that the remaining arms-length domestic sales of like goods made in the ordinary course of trade should form the basis of the normal value.

This has been the Commission's long-standing practice and policy for determining normal values in original investigations, subsequent reviews, accelerated reviews and duty assessments. It would also seem that this approach was used in the most recent accelerated review which recommended that different variable factors be fixed[1].

Federal Court decision

In its email of 7 August 2014, the Commission advised it:

> *has selected the highest normal value of the models/types because of the recent Federal Court finding that favoured single "consolidated" levels for anti-dumping measures (rather than by model).*

This statement by the Commission reflects a complete lack of understanding of the nature and basis for the finding by the Federal Court[2] in that matter. It also highlights the inconsistency of the Commission's proposed normal value determination with the Federal Court ruling, which is to base the normal value on a single model rather than a consolidated normal value based on all like goods models that meet the conditions of s.269TAC(1).

It's also worth highlighting that the issue before the court was whether the Minister was required by law to impose duties on a consolidated or differentiated basis, and not whether the Minister was entitled to calculate differentiated model normal values for the purposes of establishing a weighted average normal value for the product under consideration.

In fact his Honour went to great lengths to highlight the correct reasoning for determining a 'product' dumping margin by referencing the WTO Appellate Body[3] and emphasising appropriate paragraphs:

> 108. First, we recall that dumping is defined in Article VI:1 of the GATT 1994 as occurring when a "product" of one country is introduced into the commerce of another country at less than the normal value of the "product". Consistent with this definition, Article VI:2 provides for the levying of anti-dumping duties in respect of a "dumped product" in order to offset or prevent the injurious effect of dumping.

[1] REP 214 – Accelerated review by Guangdong Jinxiecheng Al Manufacturing Co Ltd. The report notes that normal values were determined using domestic sales of aluminium extrusions made by Guangdong Jinxiecheng in China that were made in the ordinary course of trade (and in sufficient volumes)

[2] Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth [2013] FCA 870

[3] United States – Measures relating to zeroing; WT/DS322/AB

109. This definition of dumping is carried over into the *Anti-Dumping Agreement* by Article 2.1. Furthermore, by virtue of the opening phrase of Article 2.1—"[f]or the purposes of this Agreement"—this definition applies throughout the Agreement. Thus, the terms "dumping", as well as "dumped imports", have the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews. In each case, they relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country.

110. Article VI:2 defines "margin of dumping" as the difference between the normal value and the export price and establishes the link between "dumping" and "margin of dumping". The margin of dumping reflects the magnitude of dumping. It is also one of the factors to be taken into account to determine whether dumping causes or threatens material injury. Article VI:2 lays down that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Thus, the margin of dumping also is defined in relation to a "product".

111. Secondly, the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.

112. Other provisions of the *Anti-Dumping Agreement* also make it clear that "dumping" and "margins of dumping" relate to the exporter or foreign producer. Article 6.10 requires, "as a rule", that investigating authorities determine "an individual margin of dumping for each known exporter or producer". Similarly, Article 9.4 of the *Anti-Dumping Agreement* refers to situations where anti-dumping duties are applied to exporters or foreign producers not examined individually in an investigation, and provides that such duties shall not exceed "the weighted average margin of dumping established with respect to the selected exporters". In addition, Article 9.5 indicates that the purpose of new shipper reviews is to determine "individual margins of dumping for any exporters or producers in the exporting country in

question who have not exported the product" and refers to a "determination of dumping in respect of such producers or exporters".

113. Thirdly, the *Anti-Dumping Agreement* and the GATT 1994 are not concerned with dumping per se, but with dumping that causes or threatens to cause material injury to the domestic industry. Article 3.1 stipulates that a determination of injury shall be based on an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products. Furthermore, Article 3.5 of the *Anti-Dumping Agreement* lays down that "[t]he 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 dumped imports." Among the non-attribution factors listed in this Article are "the volume and prices of imports not sold at dumping prices".

114. Thus, it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the Anti-Dumping Agreement.

115. **A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."**

It is important to note that the Appellate Body concluded that dumping had 'the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews. In each case, they relate to a product because it is the product that is introduced into the commerce of another country at less than its normal value in that country.' [emphasis added]

Nicholas J ultimately concluded:

> *In my opinion the Minister was not entitled to include in public notices published pursuant to s 269TG a statement of variable factors for the purposes of subs (3) different to those utilised for the purpose of determining whether to make the declarations referred to in subss (1) and (2). It follows that the Minister was not entitled to vary the dumping duty notices so that they would have effect as if different variable factors had been fixed with respect to different finishes.*

It is evident then that the Federal Court also considers that the relevant determinations of normal value and export price for the purposes of imposing a dumping duty 'cannot be found to exist for only a type, model, or category of that product'. Whilst this appears to be acknowledged in the Commission's email, this is exactly the basis on which the Commission is proposing to determine the normal value for Calispa.

Calispa's domestic sales

It is also worth pointing out that the Commission's own normal value calculations clearly categorise and identify each relevant domestic transaction as either being included or excluded from normal value following the ordinary course of trade test. All suitable domestic sales of like goods made in the ordinary course of trade are indicated as being included in the normal value[4]. This includes all domestic sales of [redacted], [redacted] and [redacted], and approximately [redacted] of all [redacted] [product types].

The Commission's own summary calculation then shows that based on all domestic sales found to be included in the normal value, the weighted average normal value based on gross selling prices to be €[redacted]/kg. This compares to the Commission's proposed selection of the highest average price for [redacted] of €[redacted]/kg.

It is also worth noting that the weighted average normal value based on all sales (€[redacted]/kg) is approximately [redacted]% higher than the current ascertained normal value determined for non-cooperating exporters. The proposed approach by the Commission would impose a floor price measure which was [redacted]% above the current ascertained normal value determined for non-cooperating exporters. This highlights the unreasonableness of the approach being proposed by the Commission.

It is also important to note that the Commission has not at this stage provided Calispa with a draft report outlining its reasons or the legislative basis upon which it has made the decision

[4] Column AM ('Include in NV') of the Commission's calculations indicates 'Y' for those sales found to be made in the ordinary course of trade, and 'N' for sales not in the ordinary course of trade.

to reject and exclude domestic sales that it has determined meet the necessary requirements of s.269TAC(1) of the Act. The only information to date has been the attached email received yesterday, confirming that normal values have been assessed under s.269TAC(1).

Therefore, in line with the Commission's common practice, Calispa requests a draft report or minute setting out and explaining the preliminary normal value findings, including the ordinary course of trade assessment, and the legislative basis on which it has relied to reject domestic sales of like goods in the ordinary course of trade from the normal value determination under s.269TAC(1).

[redacted]

In [redacted], it is pointed out that the retail shelf price for [redacted] [product type] sells at premium to SPC Ardmona's standard product range of approximately [redacted]%. A similar comparison between Calispa's domestic selling prices reveals that [redacted] [product type] sell approximately [redacted]% higher than the [redacted] [product types] products.

This again highlights the unreasonableness of the Commission's proposed normal value, which will require Calispa to export its [redacted] [product type] canned tomato products at a price equivalent to the [redacted] [product type], into the Australian market where the domestic industry [redacted]. There is no doubt that this is an implausible and illogical outcome.

Future exportations

If the reasoning for the Commission's decision to propose a normal value based on the highest domestic model is due to the lack of exports during the review period by Calispa, then we wish to make the following observations.

Firstly, the Commission's Dumping and Subsidy Manual states that:

> *The Commission does not require an applicant for an accelerated review to have already exported some minimum quantity of the goods to Australia. … In the circumstances where there have been no exportations, any accelerated review will assess the normal value for the goods.*

It goes on to state that 'Normal value and export price for the new exporter will be established under the relevant provisions of s.269TAC and s.269TAB.'

Secondly, Calispa's exporter questionnaire response states:

Please note that Calispa did not export prepared or preserve tomatoes to Australia during the period of review. Goods exported by Calispa to Australia during the review period relate only to [redacted].

[redacted]

[redacted]

[Details relating to future exportations to Australia]

Calispa has on numerous occasions sought to have the Commission visit its manufacturing facility in Italy to verify the information submitted in its questionnaire response. The visit was also an opportunity to demonstrate to the Commission the types of canned tomato products that Calispa was negotiating to export [redacted] [customers]. Unfortunately however, the Commission has decided that on-site verification was not required and that remote verification was more appropriate in the circumstances.

Non-injurious price

Further, we note that a review of measures includes the non-injurious price variable factor. Whilst Calispa is unaware of the non-injurious price established during the original investigation period, we expect that the Commission has had regard to the imposition of a lesser duty where the non-injurious price is found to be less than the normal value.

Where the non-injurious price has been revised or updated to reflect the applicable review period, Calispa expects that it will be provided with an opportunity to comment on the methodology adopted by the Commission in calculating the unsuppressed selling price.

Implications for future accelerated reviews

Finally, the approach being proposed in this accelerated review of simply selecting the highest priced domestic model by the Commission is not documented anywhere in its policy and practice manual. As stated earlier, this is the first time that such a practice has been adopted in an accelerated review and certainly the first time that relevant domestic sales of like goods under s.269TAC(1) have been rejected or excluded with no legislative basis and purely on the basis of price.

The implications of this approach will be to encourage new exporters to ensure that at least one exportation has taken place during the review period. In that scenario, it would be interesting to understand how the Commission would address concerns arising from the Federal Court ruling that eliminated the ability to impose model specific interim duties, and in particular what its approach would be to model matching in accordance with its current stated policy and practice as outlined in Section 7.5 of REP217.