Anti-dumping investigation No 217 - Prepared or preserved tomatoes from Italy

Response to the Statement of Essential Facts

Our client ANICAV

23 February 2014

The present submission is filed on behalf of the Associazione Nazionale Industriali Conserve Alimentari Vegetali (hereinafter, "ANICAV"), in response to the conclusions contained in the Statement of Essential Facts (hereinafter "SEF") adopted by the Australian Anti-Dumping Commission (hereinafter, the "ADC") on 4 February 2014.

ANICAV is an industry association representing about one hundred Italian tomatoes processors, accounting for about 14% of the entire world production and 54% of the European Union production.

1. THE INJURY ASSESSMENT IS ENTIRELY AND IRREMEDIABLY FLAWED

According to Article 3.1 WTO 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"* (emphasis added).

In addition, pursuant to Article 3.5 WTO ADA, the investigation authority must demonstrate that *"the dumped imports are, through the effects of dumping […] causing injury […]. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. 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. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry"* (emphasis added).

The present Section will demonstrate that in carrying out the injury assessment the ADC has violated Articles 3.1 and 3.5 WTO ADA. In particular, it is submitted that the ADC's injury analysis is irremediably and entirely flawed since:

(a) the ADC erred in assessing the volume of dumped imports in the injury determination;

(b) the ADC took into consideration the effects of undumped imports on prices in the injury determination;

(c) the ADC attributed the injury caused by factors other than dumped imports to the dumped imports;

(d) the findings reached by the ADC are in stark contradiction with the logic and the conclusions of the Australian Productivity Commission ("APC") in the safeguard investigation on the same product;

(e) 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.

In light of the foregoing, it is submitted that the whole investigation should be terminated forthwith.

1.1. The ADC erred in assessing the volume of dumped imports to be taken into account in the injury determination

The WTO ADA and the applicable case-law indisputably provide that unduped 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"* (emphasis added).

The case law of the WTO has clarified 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 investigation".*[1]

At Section 8.8.1, the SEF reports that the volumes of goods exported by the Italian producers found to be *de minimis* (i.e. La Doria and Feger) accounted for about 44% of the total volumes Italian exports to Australia during the investigation period. At Section 8.6.1, the SEF further reports that *"[i]n order to assess the impact of dumped imports, the Commission estimated the volume of Italian dumped goods to be approximately 56% of the total Italian goods exported to Australia during the investigation period"*.

While the decision not to take into account the 44% of undumped imports by La Doria and Feger is in full compliance with the WTO, the same conclusion cannot be reached with regard to the ADC's decision to consider 56% of Italian imports as

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

dumped for the purpose of the injury determination. In this respect, the following should be noted.

At Section 7.3, the SEF indicates that the sampled exporters (i.e., Conserve Italia, Corex, De Clemente, Feger, IMCA, La Doria and Lodato Gennaro & C.) accounted for approximately 70% of the volumes exported to Australia during the investigation period. This means that the "residual exporters" (i.e. the exporters not included in the sample) accounted for approximately 30% of total exports from Italy.

As regards the exporters included in the sample (representing 70% of total exports), the following should be further noted. Since - as explained above - the goods exported by La Doria and Feger accounted for about 44% of total Italian exports, it follows that the remaining five exporters included in the sample (i.e., Conserve Italia, Corex, De Clemente, IMCA and Lodato Gennaro & C.) accounted for approximately 26% of the total exports from Italy during the investigation period.

The overall picture is summarized in the table below.

Exporters	Share of imports (in volume)	Share of examined imports (in volume)
La Doria + Feger	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 from the above table, only 26% of total Italian exports were actually found to be dumped following the analysis of the questionnaires replies by the ADC. On the contrary, 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 *EC — Bed Linen*, the Appellate Body found that the right of the investigating authorities to resort to sampling pursuant to Article 6.10 WTO ADA and the right to

impose a "residual duty" to unexamined exporters pursuant to Article 9.4 WTO ADA *"cannot be read as permitting a derogation from the express and unambiguous requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports — including dumped import volumes attributable to non-examined producers — on the basis of "positive evidence" and an "objective examination"*. The Appellate Body concluded that *"Article 9.4 does not provide justification for considering all imports from non-examined producers as dumped for purposes of Article 3".*[2]

Applying the above principle to the circumstances of that case, the Appellate Body concluded that the fact that producers accounting for 47% of total imports attributable to examined producers were found to be dumping was not a sufficient basis to justify treating imports from unexamined exporters as dumped for the purpose of the injury analysis. The Appellate Body determined that an objective examination of that evidence alone could not lead to the conclusion that imports from unexamined producers were dumped, and concluded that there must be other evidence to justify treating imports from unexamined producers as dumped for purposes of the injury investigation.[3]

It is submitted that the above conclusion applies *a fortiori* in the present case in which the share of dumped exports by examined producers is even lower than that found in the *Bed Linen* case. In fact in our case only 37% (compared to 47% in the *Bed Linen* case) of the total exports attributable to examined producers (i.e. 26% out of 70%) were found to be dumped by the ADC, while 63% of the total exports attributable to examined producers (i.e. 44% out of 70%) were found to be undumped.

Since the SEF does not provide – nor does it even attempt to provide - any additional "objective evidence" supporting the conclusion that the exports attributable to unexamined producers were dumped, it must be concluded that such exports are to be considered as undumped for the purpose of the injury analysis. The above conclusion is further supported by the following elements:

- as illustrated above, during the investigation period only 37% of the examined Italian exports were found to be dumped. Such a percentage is likely to further decrease should exports of Corex be deducted from the total exports figure on the ground that Corex, although initially sampled, was eventually found to be a trader and not an exporting producer (SEF, Section 7.3.6). It follows that the share of dumped exports by (four and not five) examined producers is likely to be even lower than 37% of the total figure;

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2 Appellate Body Report, EC — Bed Linen (Article 21.5 — India), paras. 124-127.
3 Appellate Body Report, EC — Bed Linen (Article 21.5 — India), para. 133.

- the dumping margin established with respect to the (small) part of Italian exports which were found to be dumped is extremely low (between 3.25% and 4.54%);

- recalling that two producers with the largest sales volumes were found not be dumping, 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. This further confirms the illegality of the decision to treat the exports of the unexamined exporters as dumped exports for the purpose of the injury determination.

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 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 the 30% of imports made by the unexamined producers was dumped.

Keeping the above in mind, the finding at Section 5.3 of the SEF (*"[w]hen examined in totality the volume of the goods exported from Italy increased 16.4% since June 2010, whilst SPCA and other countries' volumes decreased by 39.7% and 84.9% respectively")* is misleading for the purpose of the injury determination. No such an increase can be observed <u>if only dumped imports attributable to the examined exporters</u> (26% or less) would be taken into consideration.

The same holds true with regard to the ADC's considerations regarding the market share of Italian products (*"[t]he volume for the Italian goods has increased during the injury analysis period by 16% to June 2013 whilst SPCA's volume has fallen by 39% in the same corresponding period*") at Section 8.6.1 of the SEF.

Moreover, also the ADC's conclusion at Section 8.8.1 of the SEF, i.e. *"it is reasonable to expect that dumped prices offered to importers/retailers during contract negotiations would have influenced and impacted on prices being tendered by exporters of un-dumped product. In a market unaffected by dumped prices of prepared or preserved tomatoes from Italy, the Commission would consider that prices of un-dumped goods would be higher",* is flawed. Indeed, it is totally unreasonable to claim that in a fragmented market several players representing an overall share of 26% (if not less) of Italian imports only (and, therefore, a very small share of the overall Australian market) would be able to act as price leaders so as to influence the price level in the market.

For all the above reasons, it is submitted that the injury analysis carried out by the ADC is irremediably vitiated and that the investigation should be immediately terminated.

1.2. The ADC erred in assessing the effect of dumped imports on prices

At Section 8.3, the SEF explains that *"[i]n assessing whether dumped goods have caused material injury, the Commission has relied on purchasing and retail shelf pricing information submitted by Coles and Woolworths which represent approximately 60% of the total imported volume and 73% of goods sourced from selected exporters".*

It follows that 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.

According 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 *"[w]ith 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"* (emphasis added).

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.

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 the SEF provides 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 and it is vitiated by a wrong methodological approach which, in addition, has not been justified.

1.3. Injury, if any, has been caused by factors other than dumped imports

According to the SEF, the dumped tomatoes exported from Italy would have caused material injury to the Australian industry producing like goods despite the fact that important factors other than dumping were found to have contributed to the injurious effects experienced by SPCA (SEF, Section 8.10). Such factors include, *inter alia*:

- ? the appreciation of the Australian dollar (AUD) towards the Euro (EUR);
- ? supermarkets' private label strategies;
- ? the extreme weather events, and
- ? the decrease of SPCA'S export sales.

We wish to emphasise that the SEF does not provide 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 (see infra). In doing so, the SEF violates Article 3.5 WTO ADA, according to which the investigating authorities must "*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*".

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 analysed below.

1.3.1 The appreciation of the AUD towards the EUR

As it is very clear from paragraph 8.8.3 of the SEF, as from 2007 the AUD/EUR exchange rate has started appreciating significantly. In particular, in the period 2009-

2013, the AUD appreciated by 37% and reached its peak in 2012, when it appreciated by a stunning 42% against the EUR.

In this respect, it should be noted that since the vast majority of prepared or preserved tomatoes exported from Italy were sold in EUR, the appreciation of the AUD had a clear impact on the economic situation of the Australian industry. In fact, the appreciation reduced the price of imported processed tomatoes relative to domestic products, making the domestic products less competitive on the Australian market.

The SEF itself considers that the appreciation of the AUD was a "*significant contributing factor to the injury suffered by the Australian industry by reducing the FOB value in Australian dollar terms thereby improving the competitiveness of the imported goods*".

This having been clarified, it is evident that the injury caused by the above-described exchange rate fluctuations must be separated and distinguished in the present case and cannot be attributed to imports from Italy.

1.3.2 Private label strategies

The SEF recognizes that one of the causes for decreasing prices in the domestic market is the private label strategy of the major supermarkets. In particular, the ADC agreed with the view that the private label strategy of the supermarkets has "*contributed to the competitive environment in the Australian market*" and thus to "*suppliers of Italian imports seeking to secure the fixed volume contracts at prices less than the normal value*".

As it is well-known, supermarket chains have developed their own label products to compete with branded products. Thus, major supermarkets were forced to seek the lower possible prices in order to advance their private label product strategies. This reduction of prices has led to an increase of supply of non-Australian sourced goods.

This issue was also taken into account the APC in the framework of the recent Safeguards Inquiry into the Import of Processed Tomato Products, who concluded that *"private label strategies can cause injury irrespective of imports*" and that this strategy "*has affected the ability of local manufacturers to charge premium prices for their own label products*".

1.3.3 Extreme weather events

The preserved tomato production in Australia, in recent years, has seen considerable fluctuations and, in 2011, did not reach 90,000 tons (0.23% of the world production of

tomato for processing). The drop in production can be traced to the bad weather conditions that the country has suffered. Indeed, in the last 10 years, there has been a period of severe drought, followed by severe flooding. It is evident that this reduction in the domestic production has been substituted by imports to meet the demand of the domestic market, which has remained constant.

In this respect, it should be noted that, as it has been clarified by the APC, sales of domestic private label products have not recovered to their pre-flood levels. It is therefore clear that the floods caused significant injury to the domestic industry, and that the injury has persisted since Australian products have failed to regain market share even after production levels recovered in the following years.

1.3.4 The decrease of SPCA's export sales.

Another cause of the injury suffered by SPCA is the decrease in exports of its products. In fact, Australian exports of processed tomato products dramatically decreased by 45% between 2008-09 and 2010-11, coinciding with the appreciation of the AUD.

In this respect, it is important to note that the APC noted that the decrease of SPCA's export sales "*has likely caused injury to SPC Ardmona through decreased production volumes, sales, revenues and profits*".

1.4. The conclusions reached by the ADC are inconsistent with the findings of no injury of the APC

In addition to the above considerations, it is submitted that the conclusions reached in the SEF as regards the impact of the other factors on injury are unwarranted and clearly contradict the findings on no injury of the APC in the safeguard investigation conducted in parallel with regard to the same product.

At the outset, it is to be noted that the "other factors" have been properly analysed by the APC in the framework of the above-mentioned Safeguards Inquiry into the Import of Processed Tomato Products. Considering that 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, the SEF should have justified and substantiated with adequate evidence the reason why it departed from the conclusion reached by the Australian government in December 2013.

The ADC's only explanation in this respect the is a generic assertion contained in the SEF as regards the difference between anti-dumping investigations and safeguards investigations and the different tests applied for the two types of trade remedies. In essence, the ADC – by referring to the December 2013 report of the APC – stated

that, even though what serious injury is has not been clearly defined, the word *serious* indicates at least that the injury threshold is higher for safeguards cases than for anti-dumping cases (material injury). Moreover, according to the ADC, since the two systems are intended to deal with different circumstances, there should be no expectation that the findings reached with regard to one system would lead to a similar findings under the other system.

Although the above assertions cannot be disputed, we would like to highlight that the existing differences between safeguards and anti-dumping proceedings do not affect in any way the "causality test" to be carried out by the investigating authority. Indeed, in both safeguards and anti-dumping proceedings, the investigating authority is under an obligation to consider whether the injury on which it intends to base its findings actually derives from imports of the product concerned and must disregard any injury deriving from other factors.

In particular, irrespective of the "degree of injury" (serious or material) required by the relevant legislation, the authorities are always required to assess the effects of other known factors, not only when analysing the causal link between those factors and the injury suffered by the domestic industry, but also when determining the injury suffered by the latter.

The above is confirmed by the WTO Appellate Body, which in *US — Hot-Rolled Steel* stated that:

> "*Although the text of the Agreement on Safeguards on causation is by no means identical to that of the Anti-Dumping Agreement, there are considerable similarities between the two Agreements as regards the non-attribution language. Under both Article 3.5 of the Anti-Dumping Agreement and Article 4.2(b) of the Agreement on Safeguards, any injury caused to the domestic industry, at the same time, by factors other than imports, must not be attributed to imports. Moreover, under both Agreements, the domestic authorities seek to ensure that a determination made concerning the injurious effects of imports relates, in fact, to those imports and not to other factors*" (emphasis added).

This having been clarified, it is important recalling that in the safeguard case the APC concluded that injury suffered by the domestic industry was been caused by imports of processed tomatoes but, rather, it *"has resulted from a combination of factors, including:*

- *sustained competitive pressure from imports*

- *supermarket private label strategies, facilitated by the appreciation of the Australian dollar*

- *extreme weather events"*

In particular, according to the APC, *"the injury to the domestic tomato processing industry coincides with, and has been caused by, a combination of long-term industry and market trends as well as recent acute events (including floods and appreciation of the Australian dollar)*" (emphasis added).

In view of the above, it is not clear on what grounds the ADC could disregard the findings of the APC. The conclusion adopted by the ADC is even more inexplicable if one considers that the "other factors" on which the APC based its findings are exactly the same as those taken into account by the ADC in the SEF.

In addition to the above, it should be noted that the ADC itself recognized that the above-mentioned factors, other than dumped imports, contributed to the injury suffered by the domestic industry.

Lastly, as regards floods of 2011, it is worth to note that the ADC merely contradicted the findings of the APC, according to which floods caused significant injury to the domestic industry, without providing any explanation in this respect.

1.5. The Italian tomatoes are not like products to the Australian tomatoes

Another aspect demonstrates that the injury assessment has been carried out not in compliance with the WTO principles and, as a result, it is ill-founded.

Article 3 WTO ADA dictates that 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.

In this respect, it is submitted that the Italian peeled tomatoes under investigation are not like products to the Australian tomatoes. In fact, 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 in fact of the type "long tomatoes", which have different physical characteristics from those of tomatoes produced in Australia.

Moreover, it must be noted that some Australian products contain a tomato paste, where this paste is not added at all to Italian tomatoes. The addition of paste to the raw material impacts the physical characteristics of the goods under consideration to such an extent that goods containing paste must be excluded from the product scope.

Finally, it should be recalled that Italian exporters also produce San Marzano tomatoes. As it is well-known, San Marzano tomatoes are PDO ("Protected Denomination of Origin") certified and they are different from regular tomatoes because they have a different shape, a thicker flesh and fewer seeds. As a result, San Marzano PDO tomatoes cannot be considered like product to Australian tomatoes.

In view of the foregoing ANICAV strongly claims that the Italian tomatoes under investigation are not like products to Australian tomatoes.

1.6. Conclusion on injury

In the light of the foregoing, it can be concluded that the injury assessment carried out by the ADC is entirely flawed for the following reasons:

- the ADC wrongly treated the volume of imports made by unexamined producers as dumped imports for the purpose of the injury determination. The correction of this flagrant error would lead to the obvious conclusion that a share of only 26% (or less) of Italian imports (a large part of which found to be sold at a very modest dumping margin ranging between 3.25% and 4.54%) was not suitable to cause any material injury to the Australian industry;

- the ADC wrongly attributed to exports by unexamined producers effects on prices in the Australian market for peeled tomatoes. In particular, the ADC's assessment regarding the magnitude of price undercutting was carried out on the basis of shelf/retail prices of goods marketed by Coles and Woolworths, which sourced their peeled tomatoes from exporters which sold undumped imports. This approach fundamentally flaws the injury assessment contained in the SEF;

- the SEF clearly identified factors other than dumped imports which caused injury to the domestic industry and established that such factors significantly contributed to the injury allegedly suffered by the domestic industry. On such basis, a proper application of Article 3.5 WTO ADA leads to the conclusion that no causal link has been established between dumped imports of processed tomatoes from Italy and any injury allegedly suffered by the Australian industry. In this respect, it should be borne in mind that in the parallel safeguard investigation the APC has held that the injury suffered by the domestic industry was caused by a number of factors unrelated to allegedly dumped imports of tomatoes from Italy;

? finally, the injury assessment is flawed since the ADC did not take into account the existing differences in the type and physical characteristics between the products imported from Italy and those domestically produced.

2. THE CALCULATION OF THE DUMPING MARGIN ESTABLISHED WITH RESPECT TO RESIDUAL EXPORTERS IS VITIATED

As a subordinate claim, ANICAV wishes to draw the ADC's attention to the errors affecting the level of the dumping margin calculated with respect to cooperative residual exporters. In fact, it will be demonstrated that the dumping margin applied to residual exporters is too high and does not comply with the requirements set out in the WTO ADA and the relevant WTO jurisprudence.

At point 1.3.5, the SEF determines the following dumping margins for the exporters which were included in the sample:

Manufacturer/Exporter	Visited	Effective rate of security
Selected exporters		
La Doria	Yes	negligible
Feger	Yes	negligible
De Clemente	Yes	3.25%
Conserve Italia Soc. Coop Agr	Yes	4.54%
I.M.C.A.	No	26.35%
Lodato	No	26.35%

At point 7.4, the SEF identifies the known cooperative exporters not included in the sample which were considered as "residual exporters" for the purpose of the anti-dumping investigation. The ADC clarified that the dumping margin for such exporters was established by taking into account:

- the *"weighted average export prices of cooperative selected exporters whose dumping margin was greater than 2%"*, and

- the *"weighted average normal values from cooperating sampled exporters found to have a dumping margin greater than 2%"*.

By applying the above methodology, the ADC calculated a dumping margin of **5.06%** for all residual cooperating exporters.

However, the level of the residual dumping margin appears to be inconsistent with Article 9.4 WTO ADA, which set out the applicable rules for calculating the dumping margins for cooperating exporters when the investigating authority has limited its examination by resorting to the so-called "sampling". In such cases, while an

individual anti-dumping duty is calculated for each of the cooperating sampled exporters, the cooperating non-sampled exporters are subject to a residual anti-dumping duty which *"shall not exceed […] the weighted average margin of dumping established with respect to the selected exporters or producers, […] provided that the authorities shall disregard […] any zero and de minimis margins and margins established on the basis of [facts available]".*

In other words, as clarified by the Appellate Body in *US — Hot-Rolled Steel*, Article 9.4 WTO ADA *"identifies a maximum limit, or ceiling,* [i.e. the weighted average margin of dumping of the expoters included in the sample] *which investigating authorities 'shall not exceed' in establishing an 'all others' rate"* and establishes two prohibitions on the use of certain margins in the calculation of the "all others" rate, i.e. not to use (i) zero or *de minimis* margins and (ii) margins established on the basis of facts available.[4]

In *US – Hot-Rolled Steel,* the Appellate Body also clarified the meaning of the word "margin" in Article 9.4 WTO ADA. The Appellate Body ruled that the interpretation of the word "margins" under Article 2.4.2 WTO ADA should also apply to the word "margins" under Article 9.4 WTO ADA. Therefore, the word "margin" in Article 9.4 WTO ADA must be understood as referring to *"the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product".*[5]

In light of the foregoing, it would appear that the level of the residual duty applied to all cooperating non-sampled exporters is inconsistent with Article 9.4 WTO ADA. Indeed, irrespective of the methodology used to calculate it, the "all other" rate should not exceed the weighted average dumping margin established for cooperating producers which were found not to be *de minimis* and for which facts available were used. In this respect, suffice it to note that the residual duty applied to non-sampled cooperating exporters (i.e. 5.06%) is higher than all the individual margins of dumping determined for the cooperating sampled exporters (i.e. 3.25% and 4.54%).

In light of the foregoing, it can be reasonably concluded that had the ADC acted in compliance with the Article 9.4 WTO ADA, the anti-dumping duty applied to all residual (cooperating) exporters would have been set at a level between 3.25% and 4.54%, i.e. the margins imposed on cooperating sampled exporters.

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4 Appellate Body Report, US — Hot-Rolled Steel, para. 116.

5 Appellate Body Report, US — Hot-Rolled Steel, para. 118

3. THE DECISION TO TREAT IMCA AND LODATO AS NON COOPERATIVE EXPORTERS IS RESPECTIVELY UNWARRANTED AND DISPROPORTIONATE

In addition to the above, ANICAV expresses its strong dissatisfaction with the ADC decision to treat its affiliates I.M.C.A. SpA ("IMCA") and Lodato Gennaro & Co. ("Lodato") as uncooperative exporters, subject to a residual duty of 26.35%.

As regards IMCA, ANICAV considers that, for the reasons put forward by the company in its submissions, the decision to treat IMCA as non cooperative exporter is unwarranted. In fact, this company has cooperated to the best of its ability and has provided a response complete in many respects, which did not justify treating it as non cooperative. In light of the WTO law and case-law the decision to make it subject to the residual duty appears to be vitiated.

With regard to Lodato, it should be noted that this company was in the material impossibility to provide a response within the deadline set by the ADC. In any case, the decision to apply to this company an anti-dumping duty of 26.35% appears to be disproportionate having regard to the small amount of its exports compared to the total exports from Italy.

As a subordinate point, ANICAV considers that the method to set the residual duty for non cooperating exporters (i.e. the lowest export price and the highest normal value established for cooperative selected exporters found to have a dumping margin greater than 2%) is unreasonable and excessively severe and bears no realistic relationship with objective facts available to the ADC.

4. CONCLUSIONS

In conclusion, we wish to bring to the ADC's attention the crucial substantive issues raised in this submission.

The present submission demonstrates that the injury assessment carried in the SEF is irremediably vitiated. In this respect, it must be stressed that the ADC unlawfully treated as "dumped imports" the volume of goods exported by the unexamined residual exporters (representing about 30% of total exports of tomato products from Italy). This approach is unwarranted and inconsistent with the WTO case law. The elimination of such sales from the volume of "dumped imports" would lead to the conclusion that the small share of Italian dumped imports is unsuitable to cause any material injury to the Australian industry. For similar reasons, i.e. treatment of undumped imports as dumped imports, also the assessment of "dumped imports" on the price in Australia is ill-founded.

Moreover, even though the SEF identifies factors other than dumped imports which have caused injury to the domestic industry, it fails to draw the appropriate conclusions from this finding in the framework of the injury determination. This flaw is even more flagrant in so far as the findings contained in the SEF are in stark contradiction with the conclusions on causality reached by the APC in the recently terminated safeguards investigation on the same product.

In light of all the above considerations, the present anti-dumping proceeding should be terminated forthwith.

As a subordinate ground, it is claimed that :

- the level of the residual duty applied to all cooperating unexamined exporters is inconsistent with Article 9.4 WTO ADA. Indeed, irrespective of the methodology used to calculate it, the “all other” rate should not exceed the weighted average dumping margin established for cooperating producers. It follows that the anti-dumping duty applied to all residual (cooperating) exporters should be set in a range between 3.25% and 4.54%;

- the decision to apply a residual duty of 26.35% to IMCA and Lodato is unwarranted and disproportionate.