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Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Branch
5 Constitution Avenue
Canberra City, ACT 2601

Dear Ms Fitzhenry

Review – Prepared or preserved tomatoes exported from Italy

This submission is made on behalf of Leo's Imports & Distributors Pty Ltd (Leo's Imports) pursuant to s.269ZZJ of the Customs Act 1901 (the Act). The submission is relevant to the review initiated by the Anti-Dumping Review Panel (ADRP) concerning prepared or preserved tomatoes (canned tomatoes) exported from Italy.

1. Background

In its submission of 3 June 2014, Leo's Imports raised a number of issues in support of the application for review submitted by the exporter, Lodato Gennaro & C. S.p.A (Lodato Gennaro). In summary, Leo's Imports argued that the dumping margin determined for Lodato Gennaro was not correct and preferable on the basis that:

- a) the Anti-Dumping Commission (the Commission) failed to apply its own policy by undertaking an evaluative, comparative assessment of all relevant information in determining the export price for Lodato Gennaro's exports;
- b) the Commission failed to apply its own methodology in determining a normal value for a like product that could be properly compared to the export price, and
- c) the Commission failed to correctly apply the law and its own policy guidelines by making necessary adjustments to the normal value to ensure proper comparison with the export price.

The purpose of this submission is to provide comments in response to the submission made by the Commission on 23 June 2014¹.

¹ [Letter to ADRP re ADC Invitation to Comment Letter](#)

2. Failure of the Commission to provide a meaningful summary of the methodology used to determine the dumping margin for Lodato Gennaro.

In its submission, the Commission highlights numerous sections of its Statement of Essential Facts Report No. 217 and Final Report No. 217, where it claims that it adequately outlined its approach to determining the dumping margin for uncooperative exporters which included Lodato Gennaro.

Leo's Imports notes that these sections simply reference the relevant provisions of the Act and explain that the lowest export price and highest normal value from cooperating exporters were used to determine dumping margins. The reports provide no information on the types of products used and whether adjustments were made to ensure proper comparison.

In examining the question of what constitutes essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement, a WTO Panel² found that:

in the context of the determination of dumping, the essential facts which must be disclosed include the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data. Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made, would also have to be disclosed. [Emphasis added]

Whilst accepting that the underlying data referred to by the Dispute Panel could only be provided to parties that originally submitted the data, Leo's Imports considers that the Commission has not complied with its WTO obligation to provide affected parties with a meaningful understanding of the essential facts so as to properly contest and dispute the findings. The essential facts in this particular circumstance are:

- a) whether like models were used to determine the dumping margin for Lodato Gennaro;

² China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States. (WT/DS427/R), para 7.91

- b) if like models were not used to determine the dumping margin for uncooperative exporters, whether adjustments made to ensure proper comparison in accordance with s.269TAC(8) and s.269TAC(9);
- c) if adjustments were made, the type of adjustments that were required to be made; and
- d) whether the Commission follow its own policy of weighting the unit normal values by the corresponding volumes of the exported goods.

Leo's Imports seeks no underlying data or information that would be clearly confidential to the parties that provided the relevant information to the Commission. Apart from item (c) above, Leo's Imports only seeks a simple yes or no response from the Commission so as to be satisfied that the Commission complied with its own prescribed policy. In respect of item (c), affected parties are entitled to understand the nature of adjustments that have been made to the normal value without needing to know the figures or level of adjustments.

In its submission, the Commission notes that:

due to confidentiality limitations, the Commission cannot release certain information where the interested parties that provided that information do not expressly consent to its disclosure. In this case, the values for determining dumping margins were derived from information provided by certain other exporters subject to the investigation.

Leo's Imports makes the following observations on the Commission's use of confidentiality for refusing to provide a meaningful summary of its methodology for determining the contested dumping margin.

Firstly, Lodato Gennaro has not requested information that can be considered to be confidential to the cooperating exporters on which the export prices and normal values were based. All that has been requested of the Commission are the essential facts and methodology used to establish export prices and normal values in determining a dumping margin for exports by Lodato Gennaro.

An explanation of the Commission's methodology for determining dumping margins for cooperating exporters is set out at section 7.5 of REP 217. In that section of the final report, titled 'Approach to calculation of product dumping margins', the Commission outlines in great detail its policy and practice in establishing weighted average export prices and weighted average normal values.

As outlined in its earlier submission, Leo's Imports agrees with and supports the Commission's methodology for determining dumping margins. Leo's Imports is simply seeking to understand whether the Commission applied that same methodology as outlined in section 7.5 of REP 217, in calculating the weighted average export price and weighted average normal value for Lodato Gennaro's exports of canned tomatoes.

Secondly, it would appear to Leo's Imports that the Commission considers that the requirements of natural justice do not apply equally to cooperating parties and non-cooperating parties. We note the very clear obligations that fall upon the Commissioner as interpreted by the Federal Court in *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs*, where Buchanan J³ stated that:

Counsel for the Minister argued that the requirements of natural justice had been substantially curtailed by the confidentiality requirements of the Act. It was submitted that those requirements amounted to an exhaustive statement of any requirement to afford procedural fairness. There are two principal difficulties with this contention. The first is that the Act contains no express statement to support a conclusion that the provisions relied upon have extinguished such an important right. The second is that the provisions in question seem to me to be directed at quite different objectives. Indeed their focus is less on the imposition of confidentiality restriction, although the need for confidentiality is a premise of the whole scheme, than on the need to maintain a very high degree of transparency consistently within that premise.

His Honour went on to add⁴:

Far from emphasising any overruling requirement of confidentiality, s.269ZJ imposes an obligation on the CEO to ensure that a claim for confidentiality does not result in inadequate information to interested parties except in very limited circumstances.

It is clear that the Commissioner has failed to meet these obligations to enable affected parties to properly defend their interests in this matter.

Thirdly, it appears from the Commission's statement that it considers that affected parties such as Lodato Gennaro and Leo's Imports are seeking the 'values for determining dumping margins'. That is not correct. Leo's Imports is seeking to better understand the approach and methodology used to determine the dumping margin relevant to its imports. As outlined in its earlier submission to the ADRP, Leo's Import is seeking to understand whether the Commission determined export prices, normal values and dumping margins in line with its stated methodology and policy set out at section 7.5 of REP 217.

Leo's Imports also repeats its earlier request for an understanding of the essential facts used in determining the dumping margin for Lodato Gennaro:

- a) whether like models were used to determine the dumping margin for Lodato Gennaro;

³ *Thai Pineapple Canning Industry Corp Ltd v Minister for Justice & Customs* [2008] FCA 443, para 91.

⁴ *ibid*

- b) if like models were used to determine the dumping margin for Lodato Gennaro, did the Commission follow its own policy of weighting the unit normal values by the corresponding volumes of the exported goods;
- c) if like models were not used to determine the dumping margin for uncooperative exporters, were adjustments made to ensure proper comparison in accordance with s.269TAC(8) and s.269TAC(9);
- d) if adjustments were made, what type of adjustments were required to be made, and
- e) if adjustments were made, did the Commission follow its own policy of weighting the adjusted unit normal values by the corresponding volumes of the exported goods.

Lastly, in its submission, the Commission points out that:

All interested parties, including the applicant, were informed in both SEF 217 and REP 217 that the visit reports to the exporters should be read together with SEF 217 and REP 217. In the Commission's view, the information in those public file versions of the exporter visit reports is the limit to which the Commission can release information on the factors included to calculate the uncooperative dumping margins.

An examination of the publicly available visit reports for the two cooperating exporters highlights the need for a further explanation by the Commission on its approach to determining the dumping margin for Lodato Gennaro.

The Conserve Italia visit report states that:

When sorted by product types we identified the following broad categories;

- *Cherry prepared or preserved tomatoes 1/1 Kg can*
- *Cherry prepared or preserved tomatoes 1/2 Kg can*
- *Crushed prepared or preserved tomatoes 1/2 Kg can*
- *Crushed prepared or preserved tomatoes 1/4 Kg can*
- *Diced prepared or preserved tomatoes 1/2 Kg can*
- *Diced prepared or preserved tomatoes 330g glass bottle*
- *Like cherry prepared or preserved tomatoes 1/2 Kg can*
- *Peeled prepared or preserved tomatoes 1/1 Kg can*
- *Peeled prepared or preserved tomatoes 1/2 Kg can*
- *Peeled prepared or preserved tomatoes 1/4 Kg can*
- *Sliced prepared or preserved tomatoes 1/1 Kg can*
- *Sliced prepared or preserved tomatoes 1/2 Kg can*
- *Spicy diced prepared or preserved tomatoes 690g glass bottle.*

Further, the Conserve Italia visit report identifies the following characteristics which would be relevant to adjustment claims.

- Container – the visit team identified tin cans and bottles used as containers sold by Conserve Italia;
- Filling – different fillings appeared to have different brix levels which are a key driver of costs and price; and
- Product coding – the visit team identified both private and proprietary labels which were a clear factor that affected price as confirmed by Conserve Italia.

It is clear then that depending on which particular products were used to determine export price and normal value and the characteristics of those products, adjustments may be required to ensure proper comparison.

3. The calculation of the dumping margin applied to uncooperative exporters is flawed.

In its submission, the Commission stated:

Due to the lack of response from uncooperative exporters and noting the significant variations in the circumstances of trade and model mixes identified at exporter verification visits, the Commission considered that it was not appropriate to infer that uncooperative exporters had the same or similar circumstances of trade or model mix as those of verified exporters.
[emphasis added]

It would appear that the Commission acknowledges the great variations between the numerous products exported to Australia and sold on the domestic market in Italy during the investigation period. These variations were outlined and identified in REP 217 and the respective exporter visit reports.

In the absence of a meaningful understanding of the types of products used to establish export price and normal value, it is these ‘significant variations’ that leads Leo’s Imports to consider that the Commission’s approach to determining dumping margins for uncooperative exporters may be flawed. For example, without appropriate adjustments it would be clearly unreasonable to compare the export price of a 500gm can of crushed tomatoes in a generic label to a domestic price for a 720ml bottle of organic whole tomatoes in a proprietary label.

Leo’s Imports does not consider that the Commission has adequately addressed this issue in its submission. As a result the Commission has not

properly responded to applicants' claims that its calculation of the dumping margin for uncooperative exporters was flawed and not the correct and preferable decision.

The Commission points out in its submission that it considers its approach to be consistent 'with the provisions of section 269TACAB of the Act, which requires that section 269TAB and section 269TAC be used to determine export price and normal value respectively for uncooperative exporters.' Once again, Leo's Imports considers that the Commission has not properly responded to the issue raised in Lodato Gennaro's application for review.

The Commission correctly points out that the relevant provisions within the Act for determining export price and normal value are s.269TAB and s.269TAC respectively. However the Commission appears to have overlooked the fact that the provisions of s.269TAC do not end at subsection (6).

Subsections 269TAC(8) and 269TAC(9) require that where normal value is based on the price paid or payable for like goods on the domestic market, or a constructed domestic price in accordance with s.269TAC(2)(c), and the export price of the goods exported 'are not in respect of identical goods', the domestic price should be adjusted 'so that those differences would not affect its comparison with that export price.'

It is only after such adjustments have been made to ensure that 'like' product is being properly compared with 'like' product, that the comparison of export price and normal value can be considered to be consistent with the requirements of s.269TACB(1). As explained in its submission to the ADRP, Leo's Imports considers that 'due allowance' and 'proper comparison' are fundamental principles of the WTO Anti-Dumping Agreement and Australia's anti-dumping legislation.

Accordingly, Leo's Imports considers that the Commission has not adequately addressed or outlined whether its comparison of export price and normal value pursuant to s.269TACB, was of like models exported to Australia and sold domestically in Italy, and as a result adjustments were not necessary. If the comparison did not involve like models exported to Australia and sold domestically in Italy, the Commission has not explained whether adjustments were made to the domestic sales to ensure proper comparison, as required by s.269TAC(8) and s.269TAC(9).

Conclusion

In conclusion, Leo's Imports considers that the Commission continues to not meet its obligations to provide affected parties with a meaningful understanding of the essential facts used in determining the dumping margin for Lodato Gennaro. Instead the Commission appears to be relying on the confidentiality provisions of the Act to justify suppressing these essential facts.

It is noted that the Commission has offered to meet with the ADRP to provide further clarification or relevant materials. Leo's Imports respectfully requests that the ADRP request relevant information from the Commission which would enable it to properly address the issues raised in this submission and its earlier submission of 3 June 2014.

Yours sincerely

John Bracic

27 June 2014