Australian Government

Anti-Dumping Review Panel

Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

Use this form[1] to apply for review of a reviewable decision of the Minister (or his or her Parliamentary Secretary) made on or after 2 November 2015.

Any interested party[2] may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Fees

Your application must be accompanied by the application fee. Please provide a copy of your proof of payment with the application. Information about fees and refunds is on the ADRP website.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given seven (7) business days' notice of the conference date and time. See the ADRP website for more information.

[1] Form approved by the Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

[2] As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

In certain circumstances some or all of your application fee may be refunded if you withdraw your application. See the ADRP website for more information.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name:	La Doria S.p.A.
Address:	Via Nazionale 320 84012 Angri (SA) Italy
Type of entity (trade union, corporation, government etc.):	Corporation

2. Contact person for applicant

Full name:	Fiammetta Monaco
Position:	Legal Affairs Manager
Email address:	fiammetta.monaco@gruppoladoria.it
Telephone number:	+39 081 5166332 +39 342 6946889 (mobile)

3. Set out the basis on which the applicant considers it is an interested party

La Doria S.p.A. ('La Doria') is one of the two Italian exporters of prepared or preserved tomatoes targeted by investigation No. 276, upon which the Minister has imposed antidumping measures by virtue of a notice published under Section 269TG(1) and (2) of the Customs Act 1901. Accordingly, La Doria is directly concerned with the importation of the goods subject to the reviewable decision, and is therefore an 'interested party' under Section 269ZX of the Act.

4. Is the applicant represented?

Yes ☑ **No** ☐

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☒ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☐ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

The goods which are the subject of the reviewable decision are:

Tomatoes (peeled or unpeeled) prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume (prepared or preserved tomatoes), exported from Italy by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. The following tomato products do not form part of this application: pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

The reviewable decision contains the following further information in relation to the goods:

The common container sizes of the imported prepared or preserved tomatoes the subject of this application are 300grams to 850grams, but the application covers all container sizes up to and including 1.14L.

7. Provide the tariff classifications/statistical codes of the imported goods

The goods which are the subject of the reviewable decision are classified to the following tariff subheadings in Schedule 3 to the Customs Tariff Act 1995: 2002.10.00 (statistical code 60).

8. **Provide the Anti-Dumping Notice (ADN) number of the reviewable decision**
   If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

The reviewable decision was published in Anti-Dumping Notice No. 2016/13.

9. **Provide the date the notice of the reviewable decision was published**

The reviewable decision was published on 10 February 2016.

Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application

A copy of the ADN published in accordance with Sections 269TG(1) and (2) is provided under **Attachment A**.

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

10. **Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

See **Attachment B** (NON-CONFIDENTIAL)

11. **Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

See **Attachment B** (NON-CONFIDENTIAL)

12. **Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

See **Attachment B** (NON-CONFIDENTIAL)

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

PART D: DECLARATION

~~The applicant~~/the applicant's authorised representative *[delete inapplicable]* declares that:

- The applicant has paid the application fee and attached a copy of proof of payment to this application;
- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature:.....

Name: Gabriele Coppo

Position: Associate

Organisation: Van Bael & Bellis

Date: 10/03/2016

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representatives:	Fabrizio Di Gianni Gabriele Coppo
Organisation:	Van Bael & Bellis
Address:	Glaverbel Building Chaussée de La Hulpe 166 1170 Brussels Belgium
Email address:	fdigianni@vbb.com gcoppo@vbb.com
Telephone number:	+ 32(0)2.647.73.50

Representative's authority to act

A separate letter of authority may be attached in lieu of the applicant signing this section

Please refer to **Attachment C**.

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....

(Applicant's authorised officer)

Name:

Position:

Organisation

Date: / /

VAN BAEL & BELLIS

Anti-Dumping Review Panel – Application for review – Prepared or preserved tomatoes exported from Italy by Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A.

La Doria S.p.A.

10 March 2016

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INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission ('ADC') initiated the antidumping investigation No. 276 on imports of prepared and preserved tomatoes (the 'product under investigation', or 'PPTs') exported from Italy by Feger di Gerardo Ferraioli S.p.A. ('Feger') and La Doria S.p.A. ('La Doria').

Such investigation closely followed another investigation – i.e. investigation No. 217 on prepared or preserved tomatoes exported from Italy (the 'previous investigation') – targeting the same country and the same goods, which was initiated on 10 July 2013 and was terminated on 20 March 2014 with regard to Feger and La Doria, on the ground that their dumping margins were *de minimis*.

On 18 January 2016, the ADC concluded the antidumping investigation No. 276 by adopting the Final Report No. 276 ('Final Report'), in which the ADC determined that dumped imports of PPTs exported from Italy by Feger and La Doria have caused material injury to the Australian industry producing the like goods ('SPCA') during the investigation period.

On 10 February 2016, based on the ADC's recommendations contained in the Final Report, the Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the 'Parliamentary Secretary') published the Anti-Dumping Notice No. 2016/13 imposing antidumping measures in relation to imports of PPTs exported from Italy by the two Italian exporters targeted by the investigation No. 276 (the 'reviewable decision'), i.e. Feger and La Doria (also, 'the two exporters').

The present document sets out the reasons why, in La Doria's view, the reviewable decision is not the correct or preferable decision within the meaning of Section 269ZZE of the Customs Act 1901 (the 'Act').

1. FIRST GROUND: THE INITIATION OF THE INVESTIGATION LACKS OF LEGAL BASIS UNDER WTO LAW.

La Doria submits that the initiation of antidumping investigation No. 276 lacks of legal basis under WTO law. Therefore, the ADC should not have initiated the investigation against Feger and La Doria and, as a consequence, the Parliamentary Secretary should not have adopted the reviewable decision.

1.1 Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision [Application form, question 10]

The initiation of the antidumping investigation No. 276 by the ADC is contrary to the WTO Anti-Dumping Agreement ('ADA') for the following reasons.

- **SPCA's complaint did not meet the standard of evidence necessary to trigger the initiation of an investigation pursuant to Article 5.2 of the ADA**.

SPCA's complaint did not meet the standard of evidence set out by Article 5.2 of the ADA, with respect to both (i) the normal value calculation, and (ii) the 'market situation' assessment. In fact, SPCA's complaint was based on incomplete and outdated information, not relating to the investigation period. Moreover the non-confidential attachment B.4.2 – discussing the direct payments ('SPS') that Italian tomato growers receive under the Common Agricultural Policy ('CAP') administered by the European Commission - did not provide any information and/or evidence regarding the impact of the alleged 'market situation' on the prices for raw tomatoes in the investigation period. Therefore the ADC should have concluded, in accordance with Article 5.3 of the ADA, that there was no sufficient evidence to justify the initiation of an investigation against the two exporters.

- **The investigation was initiated less than 12 months after the conclusion of another investigation targeting the same product and the same country which resulted in a negative determination.** The initiation of investigation No. 276 is at odds with the Decision adopted by the WTO Ministerial Conference in Doha on 14 November 2001, according to which *'investigating authorities shall examine with special care any application […] where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application […] unless […] circumstances have changed, the investigation shall not proceed'*. [1] Thus, the initiation of the investigation No. 276 was not warranted because circumstances had not changed as from the investigation No. 217, targeting the same country and the same product, which was terminated with regard to Feger and La Doria on 20 March 2014 on the ground that their dumping margin was *de minimis*. Although the ADC argued to have received new information concerning the CAP, the only new element that the ADC referred to is the CAP Regulation itself, which was already publicly available at the time of the previous investigation. Moreover, the SPS was already scrutinised in the context of the previous investigation and qualified as providing benefits only to tomato growers. It follows that the initiation of investigation No. 276 was unlawful since the ADC wrongly concluded that there was *prima facie* evidence showing a change of circumstances from the previous investigation, in violation of Article 5.3 of the ADA as interpreted by the Decision of 14 November 2001.

[1] This decision may qualify as a *'subsequent agreement between the parties'* regarding the interpretation or the application of the WTO Anti-Dumping Agreement (namely Articles 5.1 and 5.3) pursuant to Article 31(3)(a) of the Vienna Convention of the Law of the Treaties. Therefore, Articles 5.1 and 5.3 of the ADA have to be interpreted in the light of the clarifications provided by paragraph 7.1 in the Doha Ministerial Declaration. The Appellate Body in *US - Clove Cigarettes* reached the same conclusions with regard to another paragraph of the same Ministerial Decision (paras. 241 - 275).

- **The scope of a fresh investigation must necessarily be country-wide.** The initiation of investigation against Feger and La Doria was not warranted since the scope of an investigation pursuant to Article 5 of the ADA cannot be limited to the products exported by certain identified exporter(s). This conclusion is supported by a systematic interpretation of several WTO provisions, such as Article VI(1) of the GATT 1994 and Articles 5.2, 5.5, 5.8, 6.1.3, 6.10, 6.11, 9.5, 12.1, 12.1.1 of the ADA. For instance, Article 9.5 of the ADA requires the investigating authorities to carry out a review of exporters that did not export during the investigation period of a fresh investigation. This means, *a contrario,* that any fresh investigation should cover all the known exporters in the exporting country.

1.2 Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be [Application form, question 11]

Based on the arguments illustrated under section 1.1 above, La Doria submits that the correct decision would have been not to initiate the antidumping investigation No. 276. This means that, once initiated, the investigation should have been immediately terminated or that, in any event, the Parliamentary Secretary did not have the power to publish notices under Sections 269TG(1) and (2) against Feger and La Doria.

The Review Panel is therefore respectfully requested to recommend to the Parliamentary Secretary that the reviewable decision should be revoked and substituted with a decision not to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy La Doria.

1.3 Set out the reasons why the proposed decision is materially different from the reviewable decision [Application form, question 12]

La Doria submits that the difference between the reviewable decision and the proposed decision is material. The reviewable decision is a decision to publish notices under Section 269TG(1) and (2) whereas the proposed decision is a decision not to publish notices under Section 269TG(1) and (2).Therefore, based on the proposed decision no antidumping measures should be imposed against La Doria.

2. SECOND GROUND: THE INJURY AND CAUSALITY ASSESSMENT CARRIED OUT BY THE ADC IS FLAWED

La Doria submits that the injury and causality assessment undertaken by the ADC suffers serious methodological flaws and is inconsistent with the WTO law requirements. This, in turn, resulted in vitiated conclusions based on which the Parliamentary Secretary adopted the reviewable decision.

2.1 Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision [Application form, question 10]

The Final Report reached incorrect conclusions with regard to the injury allegedly suffered by SPCA and to the causal link between such alleged injury and the dumped imports of Feger and La Doria, for the following reasons.

- **The injury assessment should not have covered the period before 1 July 2013.** The injury analysis period (1.01.2010 - 31.12.2014) of investigation No. 276 substantially overlaps with the injury analysis period of the previous investigation No. 217 (1.01.2009 - 30.06.2013). However, in the previous investigation the ADC determined that the dumping margin of both Feger and La Doria was *de minimis* and concluded that the exports from La Doria and Feger did not cause any injury to the Australian industry until 30.06.2013. Considering that a conclusion regarding the injury suffered by the Australian industry until 30.06.2013 had already been reached, the ADC should have limited the injury analysis period of the new investigation between 1.07.2013 and 31.12.2014. On the contrary, the ADC's decision to re-investigate the injury and causality with regard to the period before 30.06.2013 violates Articles 3.1 and 5.8 of the ADA.

- **The ADC's undercutting analysis is vitiated by several flaws**, e.g.:

  - the analysis was based on sales and cost data of importers. However the ADA requires the injury analysis to be based on the prices of dumped imports, and not on the re-sale price of such imports;

  - FIS prices are not a suitable benchmark for the undercutting analysis, since they are affected by factors (e.g., the importer's profit, the effects of the exchange rate) upon which the two exporters have no control;

  - the ADC used data *'ascertained from verified importers data from the previous dumping investigation'*. It is unclear why the ADC had to use data not relating to the investigation period.

- **The ADC's conclusions on price suppression and profitability are unsubstantiated.** In particular, the ADC failed to investigate a key factor such as why SPCA's unit CTMS increased over the investigation period despite the fact that, in the same period, also SPCA's sales volumes significantly increased. In any case, the Final Report lacks of any analysis on SPCA's profitability. Moreover, the ADC failed to demonstrate that the price suppression allegedly suffered by SPCA was significant as required by Article 3.2 of the ADA.

- **The ADC failed to evaluate all relevant economic factors** having a bearing on the state of the industry which must be analyzed pursuant to Article 3.4 of the ADA in order to determine to what extent the weak performance of the

domestic industry has to be attributed to dumped imports. However, the ADC failed to properly take into account some of these factors, such as:

- **actual and potential decline in output***:* not a single word was spent on this factor. This alone amounts to a blatant violation of Article 3.4 of the ADA;

- **magnitude of the margin of dumping**: the ADC did not explicitly address this factor;

- **actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments**: with regard to these factors, the ADC just provided unsubstantiated assertions without a meaningful analysis.

➢ **The ADC's non-attribution analysis is ill-founded**. The ADC failed to conduct a proper and meaningful economic analysis to assess the actual impact of a number of factors, in respect of which the Final Report reached unsubstantiated conclusions. These factors include, for instance:

- **the strategy of the retailers**. The Australian market is dominated by few retailers which tend to favour their own private labels at the expense of SPCA's proprietary labels. This had a negative impact on SPCA as acknowledged by the ADC, the Productivity Commission in the safeguard inquiry and SPCA itself, according to which *'[t]here's been in recent years a dramatic shift of value from food suppliers to retailers and consumers'*.

- **the appreciation of the AUD**. SPCA acknowledged that the imposition of antidumping duties would not be sufficient to offset the injury suffered by the Australian industry and caused to large extent by the appreciation of the AUD;

- **SPCA's lack of investments**. SPCA acknowledged the failure to invest in its tomato lines. This was only remedied in the past few months (SPCA received 22 mio AUD from the Victorian Government). The ADC disregarded this factor on the ground that SPCA did not provide data specific to its tomato branch. In doing so, however, the ADC unduly released SPCA from the burden of proving the injury it alleges to have suffered.

2.2 Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be [Application form, question 11]

Based on the arguments illustrated under section 2.1 above, La Doria submits that the correct or preferable decision would have been to terminate the investigation No. 276

on the ground that the injury suffered by the Australian industry, if any, was not caused by the dumped imports from Feger and La Doria.

The Review Panel is therefore respectfully requested to recommend to the Parliamentary Secretary that the reviewable decision should be revoked and substituted with a decision not to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria.

2.3 Set out the reasons why the proposed decision is materially different from the reviewable decision [Application form, question 12]

La Doria submits that the difference between the reviewable decision and the proposed decision is material. The reviewable decision is a decision to publish notices under Section 269TG(1) and (2) whereas the proposed decision is a decision not to publish notices under Section 269TG(1) and (2).Therefore, based on the proposed decision no antidumping measures should be imposed against La Doria.

3. THIRD GROUND: THE ADJUSTMENT TO THE COST FOR RAW TOMATOES IS ILL-FOUNDED

The ADC adjusted upwards the cost of production of Feger and La Doria in order to reflect the alleged distortion of the raw tomatoes prices in Italy which would be due to the SPS that Italian tomato growers receive under the CAP. Such cost adjustment, applied on the basis of Section 43(2) of the *Customs (International Obligations) Regulation* (the 'Regulation'), is seriously and irremediably flawed. This in turn affected La Doria's dumping margin computed by the ADC and La Doria's individual duty rate determined by the reviewable decision.

3.1 Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision [Application form, question 10]

La Doria submits not only that the above-described cost adjustment infringes WTO law, but also that it rests on a completely wrong understanding of the CAP and lacks of adequate evidentiary support.

3.1.1 The cost adjustment infringes WTO law

The decision to adjust upwards the cost of raw tomatoes a as a component of the overall cost of production of La Doria infringes WTO law for the reasons below:

- **Assessing the impact of the SPS in the framework of an antidumping investigation rather than in a countervailing investigation is contrary to WTO law.** As extensively claimed throughout the investigation, Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures ('SCMA') stipulates that *'no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1944, as interpreted by*

this Agreement'. The fact that the ADC's analysis is undertaken to evaluate the impact of alleged subsidies in the form of direct payments on the costs of an input (i.e. upstream product) is irrelevant in this respect. The nature of the payments, and their alleged impact on the raw tomatoes price, can only be addressed in the framework of a countervailing investigation.

- **The SPS is a fully WTO-compatible income support scheme which does not give rise to any market distortion.** As repeatedly explained throughout the investigation, the SPS is a 'green-box' measure fully compliant with the requirements of Annex II to the WTO Agreement on Agriculture, which provides the rules for determining when a *'[d]omestic support measures [has] no, or at most minimal, trade-distorting effects or effects on production'*. It follows that the SPS is fully legal and, therefore, is deemed to have no trade distorting effects. In this respect, it has been extensively explained and demonstrated that the SPS is a non-specific and fully decoupled income support. Indeed, whether a farmer grows tomatoes, pears, pumpkins, apples or even leaves the land unplanted has no relevance on the support he or she may receive.

- **The 'cost adjustment' applied by the ADC is not compliant with Article 2.2.1.1 of the ADA.** The ADC resorted to Section 43(2) of the Regulation, which mirrors Article 2.2.1.1 of the ADA, as the legal basis for applying the cost adjustment. However, the ADC should have not departed from the figures in the official records of the two exporters for the following reasons:

    - Article 2.2.1.1 requires the records of the exporting producers to *'reasonably reflect'* the costs associated with the production and sale of the product under consideration and not the costs associated with the production of any input (which are not under the control of the exporting producers). It follows that whether the price paid for an input reasonably reflects the costs normally incurred for the production of that input is irrelevant for the purpose of Article 2.2.1.1;

    - Article 2.2.1.1 provides that the *'records kept by the exporter […] should reasonably reflect the costs'*. The word 'reasonably' refers to the verb 'reflect', not to the noun 'costs'. Therefore, Article 2.2.1.1 does not require that the costs in the records of the exporting producer should be 'reasonable' or that they should reflect the actual costs of production of any input. Rather, it indicates that the exporting producer's records must reflect all costs associated with the production and sale of the product under investigation in a reasonable way (for instance, by using the correct allocations).

  It follows that Article 2.2.1.1 does not allow the ADC to scrutinise whether the costs duly recorded by La Doria reflect the costs which La Doria should have borne in the absence of the SPS and, *a fortiori* does not allow the ADC to adjust such costs.

3.1.2 The conditions for applying Section 43(2) of the Regulation are not met

In addition to the serious flaws discussed in section 3.1.1 above, the Final Report is irremediably vitiated as the conditions for applying Section 43(2) of the Regulation were not met in the present case.

- **The conclusion that the records of the two exporters *'do not reasonably reflect competitive market costs'* is ill-founded.** The ADC's conclusion that prices for raw tomatoes in Italy are artificially low due to government influence is contradicted by the evidence collected during the investigation:

  - the Final Report acknowledged that, since 2011, the Italian market for raw tomatoes was characterised by a *'decline in tomato production and high price'.* The Final Report further acknowledged that prices for raw tomatoes in Italy are *'comparatively high'*. As a matter of fact, the information submitted by the two exporters – and never contradicted by SPCA or by the ADC – shows that the prices for raw tomatoes in Italy are amongst the highest in the world (also higher than the prices in other EU countries, where growers equally benefit from the SPS);

  - as clearly explained in the Final Report, due to the high market prices in Italy, the ADC was unable to identify an alternative (and, obviously, higher) *'benchmark price for the raw material input'* (i.e. raw tomatoes) to be used for the purpose of the dumping calculation;

  - the Final Report provides no evidence or economic analysis – other than mere speculations and allegations – demonstrating that in the absence of the SPS the market prices for raw tomatoes in Italy would be higher;

  - the Final Report itself concluded that no *'particular market situation'* would exist in the Italian market for PPTs, meaning that market prices in Italy (including the market price for the main input, i.e. raw tomatoes) are not significantly distorted.

  In light of the above, the ADC's conclusions regarding the need to apply the cost adjustment are contradictory and unsubstantiated. It follows that the conditions for applying Section 43(2) of the Regulation are not warranted.

- **The cost adjustment is in contradiction with the ADC's conclusions on the 'particular market situation' in the Italian markets for PPTs.** In the course of the investigation, the ADC requested an independent expert to evaluate whether the alleged subsidy granted to raw tomato growers affected the domestic PPTs prices as to make them unsuitable for being used in the dumping margin calculation. Based on the opinion rendered by the expert, the ADC concluded that such an impact was *'insignificant'* and that, therefore, there was no *'particular market situation'* in the Italian market for PPTs. However in

the Final Report the ADC concluded that an upward adjustment of the cost for raw tomatoes (as a component of La Doria's overall cost) was appropriate. Such position flagrantly conflicts with the conclusion that no *'particular market situation'* exists in the Italian market for PPTs insofar as the cost adjustment triggers a modification – *rectius*, an increase – of the domestic PPTs prices taken into account for the purpose of the dumping comparison, even though the ADC itself had acknowledged that all these prices were suitable for the purpose of the dumping margin calculation.

- **The ADC's calculation of the amount of the alleged subsidy is ill-founded.** The Final Report calculated the amount of the alleged subsidy per kg of raw tomatoes in the investigation period by dividing the old national ceiling for coupled payments (which was applicable before 2011) by the total volume of raw tomatoes produced in Italy in 2014:

$$\text{amount per kg (€)} = \frac{\text{Total grower payments for tomatoes in 2014}}{\text{Total production volume in 2014}} = \frac{\text{€ 183,970,000}}{\text{4,911,000,000 kg}} = \text{€0.037 per kg}$$

In this respect, the Final Report further explained that *'a national ceiling was fixed by the Italian Government under the SPS for 2014, and within that national ceiling was an allocation of €183,970,000 for direct income support payments to be made to growers of raw tomatoes'.* However, this is not correct. As clearly explained by the European Commission in its submission dated 21 December 2015 – which was completely overlooked by the ADC – the Decree of the Italian Minister of Agriculture of October 2013 relied upon by the Final Report refers to a completely different issue (i.e. the valuation method of the entitlements from the National Reserve and not yet assigned to any hectare). It follows that, as repeatedly explained throughout the investigation, in 2014 the national ceiling for tomatoes relied upon by the ADC (i.e. € 183,970,000) did no longer exist, since it was abolished and replaced by the SPS. It is therefore impossible to calculate an amount of subsidy per kg of raw tomatoes produced in the investigation period (i.e. the cost adjustment).

3.2 Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be [Application form, question 11]

Based on the arguments illustrated under section 3.1 above, it is submitted that the ADC shouldn't have adjusted the cost of production of La Doria in order to take into account the alleged impact of the SPS on the price of an input (i.e. raw tomatoes) used in the production of the product under investigation. Had the ADC relied upon the actual costs recorded in La Doria's records for the purpose of the dumping calculation, the dumping margin of La Doria would have been *de minimis*.

The Review Panel is therefore respectfully requested to recommend to the Parliamentary Secretary that the reviewable decision should be revoked and substituted with a decision not to publish a notice under Sections 269TG)(1) and (2) in

relation to PPTs exported from Italy by La Doria on the ground that its dumping margin is *de minimis*.

3.3 Set out the reasons why the proposed decision is materially different from the reviewable decision [Application form, question 12]

La Doria submits that the difference between the reviewable decision and the proposed decision is material. The reviewable decision was the decision to publish a notice under Sections 269TG(1) and 269TG(2) of the Act, whereas the proposed decision is a decision not to publish notices under Section 269TG(1) and (2) in relation to PPTs exported from La Doria.

4. FOURTH GROUND: THE ADC WRONGLY DETERMINED THE MAGNITUDE OF THE COST ADJUSTMENT AND ITS IMPACT ON THE DUMPING MARGIN OF FEGER AND LA DORIA

As a subordinate ground with respect to the ground discussed in section 3 above, La Doria submits that the Final Report wrongly determined the magnitude of the cost adjustment and its impact on Las Doria's dumping margin. This in turn affected La Doria's individual duty rate established by the reviewable decision.

4.1 Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision [Application form, question 10]

Even assuming that adjusting the cost of production of Feger and La Doria would be possible and lawful, *quod non*, La Doria submits that the ADC:

(a) wrongly determined the magnitude of alleged subsidy per kg of raw tomatoes produced in Italy in the investigation period;

(b) failed to properly investigate the actual impact of the alleged subsidy granted to tomato growers on the prices for raw tomatoes in Italy;

(c) failed to draw the correct consequences from the application of the cost adjustment with respect to La Doria's dumping calculation.

4.1.1 The ADC wrongly determined the alleged subsidy per kg of raw tomatoes produced in Italy in the investigation period

The ADC's calculation of the alleged subsidy per kg or raw tomatoes is contradicted by the evidence collected throughout the investigation.

- **the calculation of the alleged subsidy per kg of raw tomatoes is in contradiction with the findings contained in the *'market situation'* assessment**. The amount of subsidy per kg of raw tomatoes calculated in the Final Report with regard to the year 2014 (€ 0.037/kg) is higher than the amount of subsidy per kg of raw tomatoes calculated by Rickard and Summer with

regard to the year 2001, when the payment to tomato growers were still coupled (€ 0.0345/kg), despite the fact that the ADC itself expressly acknowledged that *'the CAP payments have been reduced since 2011'.* This means that the ADC's conclusions are contradictory, and that the subsidy calculation is ill-founded;

- **the actual data collected from La Doria's suppliers show that the ADC overestimated the SPS**. In the Final Report, the ADC has calculated an alleged subsidy amounting to € 0.037/kg of raw tomatoes, i.e. about € 2,700/ha, despite the fact that, in the course of the investigation, the ADC was provided with sample official certificates issued by the Government Agency in charge of paying the SPS ('AGEA'), which clearly show that the amounts of the decoupled payments actually received by La Doria's suppliers in 2014 were significantly lower.

4.1.2 The ADC failed to carry out a pass-through analysis in order to establish the actual impact of the alleged subsidy on the prices for raw tomatoes

In applying the cost adjustment the ADC just assumed that 100% of the SPS had flown on the final price for raw tomatoes. However:

- **In the context of the 'market situation' analysis the ADC itself concluded that '*in a realistic scenario'* only 73% of the alleged subsidy granted to tomato growers would flow on the market price for raw tomatoes paid by the PPTs producers** (see Appendix to the Final Report). It follows that the ADC's conclusion that all the SPS had flown on the final price for raw tomatoes is ill-founded;

- **Article VI:3 of the GATT 1994 and Article 10 of the SCMA prevent any investigating authority from assuming that a subsidy granted to producers of an 'upstream' input automatically benefits unrelated producers of the downstream product**, especially if there is evidence on the record of arm's-length transactions between the two'. In this cases a pass-through analysis is required (see e.g. Appellate Body in *US — Softwood Lumber IV*). The same principle should apply in the present case, where the impact of an alleged subsidy has been analysed in the framework of an antidumping investigation. The ADC should have carried out a pass-through analysis in order to demonstrate what part of the SPS was reflected in the price for raw tomatoes paid by La Doria. Having failed to do so, the ADC infringed Article VI:3 of the GATT 1994 and Article 10 of the SCMA.

4.1.3 The ADC used a wrong profit margin for the purpose of constructing the normal value of La Doria pursuant to Section 269TAC(2)(c)

For the purpose of calculating the normal values of the models sold in the domestic market pursuant to Section 269TAC(1), the ADC carried out the 'ordinary course of trade' ('OCOT') test on the basis of the 'adjusted' cost (i.e. the cost of production

resulting from the two exporters' records plus the amount reflecting the alleged impact of the SPS). However, the ADC did not use the resulting profit margin for the purpose of constructing the normal value of the models not sold in the domestic market pursuant to Section 269TAC(2)(c). Rather, the ADC calculated the domestic profit margin resulting from the actual costs in the exporters' records (i.e. net of the 'increase' applied by the ADC to reflect the alleged impact of the SPS) and then applied the resulting (higher) profit margin to the 'adjusted' (higher) cost. However:

- the ADC's approach is contrary to Article 2.2.2 of the ADA, according to which *'the amounts […] for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'*. This means that the cost used for carrying out the OCOT test (for the purpose of establishing which domestic transactions can be taken into account for determining the normal value pursuant to Section 269TAC(1)) must also be used for calculating the domestic profit margin for constructing the normal value pursuant to Section 269TAC(2)(c). In other words, the ADA does not allow the ADC to carry out multiple OCOT tests on the basis of different costs;

- even assuming that the ADC would be allowed to carry out multiple OCOT tests for the purpose of the dumping calculation, *quod non*, the ADC's approach would be still ill-founded insofar as it applied a profit margin expressed in percentage to an 'increased' cost, thus artificially boosting the constructed normal values. In fact, the profit margin used by the ADC for calculating the normal values pursuant to Section 269TAC(2)(c) is, in absolute terms, remarkably higher than the 'actual' profits earned by La Doria and recorded in its records. This violates Articles 2.2.1 and 2.2.2 of the ADA.

4.2 Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be [Application form, question 11]

Based on the arguments illustrated under section 4.1 above, La Doria submits, as a subordinate ground, that the magnitude of the cost adjustment should have been significantly lower than € 0.037/kg of raw tomatoes, and that the profit margin used for the purpose of constructing La Doria's normal value pursuant to Section 269TAC(2)(c) should have been determined on the basis of La Doria's adjusted cost. Based on the foregoing, La Doria's dumping margin would have been *de minimis*.

The Review Panel is therefore respectfully requested to recommend to the Parliamentary Secretary that the reviewable decision should be revoked and substituted with a decision not to publish a notice under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria, on the ground that its dumping margin is *de minimis*.

4.3 Set out the reasons why the proposed decision is materially different from the reviewable decision [Application form, question 12]

La Doria submits that the difference between the reviewable decision and the proposed decision is material. The reviewable decision was the decision to publish a notice under Sections 269TG(1) and 269TG(2) of the Act, whereas the proposed decision is a decision not to publish notices under Section 269TG(1) and (2) in relation to PPTs exported from La Doria.

5. FIFTH GROUND: THE FORM OF THE MEASURE IS NOT APPROPRIATE AND NOT WTO COMPLIANT

La Doria submits that the form of the measures determined by the Parliamentary Secretary in the reviewable decision is not appropriate and not compliant with WTO law requirements.

5.1 Grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision [Application form, question 10]

The antidumping duty imposed by the reviewable decision on the imports of Feger and La Doria is applied by using a combination of fixed and variable duty method (the 'combination method'). However, this method is not appropriate for a number of reasons. Suffices it to say that, as the ADC itself acknowledged in the course of the investigation, La Doria produces and exports different models (or presentations) of PPTs (from cheap chopped tomatoes to expensive organic tomatoes). These models relate to different tomato qualities and processing methods which, in turn, are reflected in different selling prices. In other words, not all presentations of the product under investigation have the same costs and prices, some being remarkably less expensive than others. The reviewable decision completely disregarded this simple fact and calculated a single AEP applicable to all presentations of PPTs exported by La Doria, leading to the controversial result that the amount of the duties imposed is likely to outweigh the dumping margin for the presentations with lower market value, therefore being inconsistent with the requirements of Article 9.3 of the ADA as well as with the requirements of the *Guidelines on the Application of Forms of Dumping Duty* adopted by the ADC itself.

5.2 Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be [Application form, question 11]

Based on the arguments illustrated under section 6.1 above, La Doria submits that the correct or preferable decision would have been:

(a) to impose the measures in the form of an *ad valorem* duty;

(b) as a subordinate option, to impose the measures by using the combination method, but by calculating a separate AEP for each single model or presentation exported by La Doria.

The Review Panel is therefore respectfully requested to recommend to the Parliamentary Secretary that the reviewable decision, i.e. the decision to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria by using the 'combination method' based on a single AEP should be revoked and substituted with:

(a) a decision to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria to be applied in an *ad valorem* form

or, as a subordinate option

(b) a decision to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria by using the 'combination method' based on a separate AEP for each single model or presentation exported by La Doria.

5.3 Set out the reasons why the proposed decision is materially different from the reviewable decision [Application form, question 12]

La Doria submits that the difference between the reviewable decision and the proposed decision is material. The reviewable decision is a decision to publish notices under Section 269TG(1) and (2) based on the combination method whereas the proposed decision is a decision not to publish notices under Section 269TG(1) and (2) based on the ad valorem method, or in the alternative, on the 'combination method' involving a separate AEP for each single model exported.

CONCLUSION

In light of all the foregoing, La Doria respectfully requests the Review Panel, in substance:

(i) to recommend to the Parliamentary Secretary that the reviewable decision should be revoked and substituted with a decision not to publish notices under Sections 269TG)(1) and (2) in relation to PPTs exported from Italy by La Doria;

(ii) in any case, to recommend to the Parliamentary Secretary that the form of the measures should be changed into an *ad valorem* duty or, a subordinate ground, into a combination method which provides a separate AEP for each single model or presentation exported by La Doria.

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