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SAFEGUARD INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON IMPORT OF PROCESSED FRUIT PRODUCTS

Written submission of the European Commission

The European Commission (the Commission) would like to thank the Australian authorities for the opportunity to present its comments with regard to the initiation of the safeguard investigation on imports of processed fruit products.

In general terms, the Commission would like to remind the Australian authorities that the safeguard instrument affects fairly traded imports, irrespective of their country of origin and whether or not they individually cause any injury to the domestic industry. For these reasons the WTO jurisprudence has clearly set very high standards for the application of the measures, which also reinforces the idea that the use of this instrument should be reserved to truly exceptional circumstances. The Commission trusts that Australia is aware of these very demanding standards and will strictly apply them during the course of the proceedings.

The Commission has examined the Issues Paper, published by the Productivity Commission in July 2013 and the WTO Notification under Article 12.1(A) of the Agreement on Safeguards (ASA) dated 3 July and wishes to submit to the investigating authority the following comments in view of the conclusions of the accelerated report to be provided not later than 20 September 2013.

1. Increased imports

The Commission would like to recall that the aim of the safeguard instrument is to remedy injury caused by a sudden and recent surge of imports. Article 2.1 of ASA requires the existence of an increase in imports in absolute or relative terms to domestic production, as a prerequisite for the application of a safeguard measure. This increase of imports has to be caused by unforeseen developments and has to cause a serious injury to the domestic industry.

The Appellate Body of the WTO ('AB') has established in this respect that the increase of imports must be recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury[1].

[1]Appellate Body Report, Argentina - Footwear (EC), para. 131

According to the data reflected in the WTO initiation notice, it appears that imports of processed fruit products under investigation follow different trends.

Any increase in imports thus needs be proven **recent** and this requirement is clearly outlined in question 2 of the Issues paper. According to the figures notified to the WTO, it is however not possible to assess **the most recent** development of imports. Data indeed cover a period ending the 30 June 2012, which is more than one year from today. Without taking into consideration the financial year 2012-2013, in the Commission's view, the analysis of imports is clearly not in compliance with the WTO standards.

In addition, even when considering the period covered in the WTO notification, it appears that imports for some products only slightly increased in the most recent period or even decreased. This is in particular the case for imports of citrus fruits (+5% only), peaches (+2% only) and other fruits (+5%). Imports of mixtures even decreased by 43%.

It is clear that on this basis it is simply impossible to conclude that there was a recent increase of imports and no measures would be justified for these products.

2. Serious injury to the domestic industry and causality

As per the injury analysis, the Commission is disappointed by the insufficient level of data notified to the WTO on which the initiation of the investigation has been based. The comments provided on the market situation for processed fruit (no figures at all are given) does not allow the Commission to reach any solid conclusion on the injury to the industry. Some specific figures are presented for the domestic production of fruit for all purposes (fresh and processing) but the Commissions strongly questions that the fruit for all purpose is the relevant industry to be analysed and expects to see the injury analysis based on the processed fruit industry exclusively.

This links to the importance, as already mentioned in the Issues Paper, for the injury analysis to correctly define the scope of the domestic industry. As mentioned as well, according to Article 4 of the ASA the domestic industry shall be understood as the producers as a whole of the like or the directly competitive products or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production.

In this case, the WTO notification relates the reduction of tree numbers and the fact that fruit growers are exiting the industry to the decline of the processing industry production. The Commission understands that the Australian authorities are therefore presenting figures on number of trees due to the effect fruit growers suffer in their condition of suppliers of the processing industry and not in their condition of producers of the like or the directly competitive product.

In the Commission's opinion a suitable approach in this case is to restrict the definition of the domestic industry to the producers of canned fruit products as we understand it is the approach of the Australian authorities. This line coincides fully with the findings of the AB, which concluded in the US – Lamb case that the inclusion of input producers in the definition of the domestic industry was inconsistent with Articles 2.1 and 4.1(c) of the ASA[2].

[2] Appellate Body Report, US – Lamb, paras. 77-96.

The Commission would like to remind in any case that data used to analyse the injury to the domestic industry should facilitate the analysis of recent developments[3]. In the Commission's view, the period of investigation should be the same for the analysis of increased imports and for the analysis of the injury to the domestic industry. The analysis presented in the WTO notification refers to the development of production in the period 2000-2001 to 2009-2010. This analysis is completely biased, first because it takes into consideration as starting point a period which is more than 10 years old, and second because it does not even include any indication of the data for the years 2011-2012.

Furthermore, in order to demonstrate that the position of the domestic industry is in "significant overall impairment", and as very well reflected in the Issues Paper, it is crucial to analyse all relevant factors of objective and quantifiable nature mentioned in the ASA, Article 4 and to evidence the existence of a causal link between increased imports and the serious injury. The Commission would like to see the analysis of all relevant factors duly reflected in the accelerated report and would like to recall that the level of injury necessary to impose a safeguard measure should be that of "serious injury or threat thereof", which in any case should be higher than the level of "material injury" necessary to impose an anti-dumping measure[4].

In addition to these factors, the Commission has strong reasons to think that there are sources of injury other than increased imports causing injury to the industry. For instance, weather conditions have affected the industry suppliers and consequently the conditions of supply of fresh fruit. The increase of costs of production is certainly a cause injury to the industry other than injury caused by imports and it limits the capacity of the industry to react against imports. Finally, and as mentioned in the Issues paper as a source of injury other than imports, the Commission thinks that the exchange rate has played a crucial role in the increase of imports. Imports are generally increasing when the exchange rate starts to be at significantly lower levels, as compared to the previous decade. As a consequence, the Commission asks to the Australian authorities to duly investigate other factors of injury other than imports.

3. Conclusion

To conclude, the Commission deeply regrets that the Australian authorities have decided to initiate this investigation on such weak grounds.

For instance, the analysis of increased imports has to include the most recent data (necessary to analyse a sudden and recent surge of imports). With regards to the injury analysis, the Commission considers that the lack of information at this initial stage does not allow the interested parties to draw any conclusion on the current situation of the industry, up to the point that even confronts the right of legitimate defence of the parties.

The Commission would also like to draw the attention of the Australian authorities to the fact that the European Union is a negligible contributor to the imports under investigation and therefore, it regrets to be potentially affected by measures mainly targeted at other exporting countries. Should Australia consider at a certain stage that the conditions to impose

[3] Panel Report, US — Wheat Gluten, para. 8.81.

[4] Appellate Body Report, US – Lamb, paras. 124.

safeguards should be met (which so far cannot be the case), the Commission urges the Australian authorities to avoid that exports originating from the European Union are unduly penalised by any measure.

The Commission trusts that the Australian investigating authorities will duly take all arguments outlined in this submission into account for this investigation.