



EUROPEAN COMMISSION

Directorate-General for Trade

Directorate H - Trade defence

Investigations IV Relations with third countries for Trade defence matters

Brussels, 17 July 2013

**SAFEGUARD INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON IMPORT OF
PROCESSED TOMATO 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 tomato products.

The Commission does not contest the right of Australia to make use of the WTO Trade Defence Instruments. It is however quite surprising that Australia decided to open in parallel both a safeguard and an anti-dumping investigation concerning the same product, in particular because at least one of the EU Member States appears to be a significant exporter to Australia and is directly targeted by the Anti-dumping investigation. The Commission would like to better understand the situation and why Australia decided to initiate these two investigations in parallel.

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 28 June 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 injury¹.

According to the data reflected in the WTO initiation notice, it is manifest that there has been an increase in imports in the financial year 2011-2012. However, the Commission has strong doubts that an increase of 12% in one year is significant and sharp enough to justify the imposition of safeguard measures.

In any case, any increase in imports needs to be proven **recent**. 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.

This point becomes even more important in the light of data obtained from the Australian Bureau of Statistics on imports of code 2002.10.00.60 (attached to this submission), which includes figures for calendar years up to December 2012. Given the fact that the figures notified to the WTO are not given for financial years (1st July to 30 June) it is difficult to reconcile them with the import statistics available. The Commission however notes that on the basis of import data including all sources of imports except New Zealand and Singapore, there is no recent significant increase in imports; more so, imports even decrease slightly in 2012.

When referring to imports in terms of its market share of domestic consumption, the WTO notification mentions shares in relation to imports of all processed tomato products. The Commission does not understand why the market share is given for all tomato products and not exclusively for the products under investigation. Therefore, it questions that the percentages presented are significant for this particular case.

2. Serious injury to the domestic industry

As already mentioned in the Issues paper, it is key 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 the Commission's opinion a suitable approach in this case would be to restrict the definition of the domestic industry to the producers of canned tomato products. In other words, the Commission strongly questions the fact that producers of fresh tomato (mentioned in the notice of initiation) are taken into consideration for the definition of the domestic industry producing like product or directly competitive to canned product. The Commission's understanding coincides fully with the findings of the AB, which concluded in the US – Lamb

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

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 ASA².

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. From one side, the production figures cover the whole of the processed tomato industry and not only the industry of canned tomatoes, which in the Commission's understanding should be the most suitable approach. From the other side, some information on operating profits are being provided – although no data – for the canned tomato industry only, which does not allow for a coherent analysis on injury as figures are not comparable to each other. Figures are even less recent than the ones provided for imports as they are limited to the period ending June 2011, which impedes an accurate analysis on recent developments³. 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 domestic industry. Finally, numbers given in the Issues Paper refer to the canned fruit market situation only and does not say anything about the position of the industry with regards to the tomato market.

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 measure⁴.

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 tomatoes (inconsistent volumes or price increase). 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. The Commission has strong reasons to think that the inconsistent supply, favoured the big customers to turn to imports to be able to ensure a reliable supply to their end customers. 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.

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

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

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

3. Conclusion

To conclude, the Commission deeply regrets that the Australian authorities have decided to initiate this investigation, in particular because an anti-dumping investigation has been initiated in parallel against imports from Italy. It also regrets that the basis on which this investigation has been open are not as strong as a safeguard case would require.

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

Annex 1:

Australia Import Statistics							
Commodity: 2002100060, Tomatoes, Whole Or In Pieces Prepared Or Preserved Otherwise Than By Vinegar Or Acetic Acid In Packs Not Exceeding 1.14 L							
Annual Series: 2007 - 2012							
Partner Country	Unit	Quantity					
		2007	2008	2009	2010	2011	2012
World	T	32888	44214	36335	44573	45792	44703
Italy	T	29844	33284	28316	37917	39411	43620
New Zealand	T	511	537	483	480	356	425
Germany	T	0	0	0	0	0	276
Turkey	T	513	381	103	148	197	211
United States	T	268	7924	6507	1651	3900	140
China	T	75	263	53	1	36	28
Russia	T	0	0	0	0	0	1
Macedonia	T	0	0	0	0	0	1
Poland	T	2	2	1	0	1	0
Mexico	T	4	0	0	0	0	0
Peru	T	0	0	0	0	0	0
Malta	T	0	18	0	16	0	0
Lithuania	T	0	0	2	0	0	0
Greece	T	89	100	159	39	36	0
India	T	5	1	0	0	0	0
Iran	T	0	2	0	0	0	0
Argentina	T	1572	1678	676	4293	1795	0
Australia	T	0	0	0	0	36	0
Bulgaria	T	0	0	8	0	0	0
Canada	T	3	0	0	0	0	0
South Africa	T	0	1	4	2	2	0
Spain	T	1	0	19	7	0	0
Syria	T	0	0	0	0	20	0
Thailand	T	0	17	0	0	2	0
Tunisia	T	0	0	0	0	0	0
Ukraine	T	0	0	1	1	0	0
United Arab Emirates	T	0	0	0	17	0	0
United Kingdom	T	0	5	0	0	0	0

Source of Data: Australian Bureau of Statistics