



EUROPEAN COMMISSION

DELEGATION OF THE EUROPEAN COMMISSION TO AUSTRALIA AND NEW ZEALAND

Head of Delegation

Canberra, 4 December 2007
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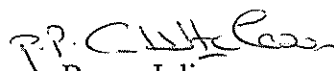
Mr Garry Banks
Chairman
Productivity Commission
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MELBOURNE VIC 8003

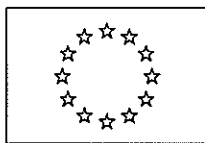
Dear Mr. Banks,

Subject: Safeguards inquiry into the import of swine meat

Further to the oral hearing held in Canberra on 27 November on the above, please find attached answers to your questions we took on notice which clarify certain specific aspects of the European Commission's methodology and practice in the few safeguard investigations it has carried out in the recent years, together with some comments refuting again the claims that EU subsidies played a role in this case.

Yours Sincerely


Bruno Julien



EUROPEAN COMMISSION

Directorate-General for Trade

Brussels, 3 December 2007

Submission by the European Communities after the first hearing

Initiation by Australia of a safeguard investigation into swine meat

During the first hearing of the Australian safeguard investigation into swine meat, which took place in Canberra on 27 November 2007, the Productivity Commission requested the European Commission ('the Commission') to clarify certain specific aspects of its own methodology and practice in the few safeguard investigations it carried out in the last years.

In particular, the Productivity Commission requested information concerning 1) the methodology used for the calculation of provisional safeguard measures in the canned mandarin case, 2) the criteria used for the establishment of critical circumstances in the same case, and 3) the Commission's practice in terms of the 'non attribution' of injury caused by other factors. Furthermore, the Commission will also take the opportunity of this letter to refute again the claims that EU subsidies played a role in this case.

Before going into the substance of these questions, the Commission would like to re-iterate the concerns it raised in its previous submission, in particular with regard to the need to comply with the relevant WTO jurisprudence concerning the definition of the industry, as well as the importance to identify and separate the effect of other causes of injury. These are indeed key aspects of this investigation, which were not problematic in the EC canned mandarin case. The similarities between the latter and the Australian swine meat case are, therefore, rather limited.

I. The approach used by the Commission for the calculation of (provisional) safeguard measures against imports of canned mandarins.

The Commission would like to underline that, before determining the level and form of any safeguard measure, it is a prerequisite that the legal conditions laid down by the WTO Agreements for the imposition of such measures are met.

Before contemplating any measure, the Productivity Commission should therefore firstly establish the existence of unforeseen developments, sudden and sharp increase of imports, serious injury to the relevant Australian industry, as well as the existence of a causal link between the imports and the situation of the industry. Other factors causing injury should also be identified and separated in order to ensure that any measure only addresses that part of the injury attributable to imports.

In this respect, and as already mentioned in its submission, the Commission has strong doubts that the legal conditions to impose any provisional or definitive measures are met in this case.

Having said this, the Commission wishes to clarify that the safeguard measures imposed in the EC canned mandarins case took the form of a tariff quota, and not just of an *ad-valorem* duty. In other words, a duty was only applicable when the imports exceeded a certain threshold. This approach was systematically followed in each EC safeguard case, because it preserves traditional trade flows, guarantees continuous market access and availability of supply while removing injury at the same time. The quantitative threshold for the duty free quota should normally correspond to the average imports of the last three years.

The level of the *ad-valorem* duty applicable beyond the quota was established on the basis of the difference between import prices and the so-called EU industry non-injurious price. The latter was calculated on the basis of the costs of production plus a 'normal' profit level. The normal profit corresponds to the level of profit achieved by the industry at a time when it did not suffer from injury caused by imports. In the canned mandarins case, the Commission used the profit that was achieved by the industry a couple of years before the surge of imports. More details on this can be found in Commission Regulation (EC) No 1964/2003¹. The Official Journal of the European Union can be obtained from the Commission's internet site, although, should that be necessary, the Commission's delegation in Canberra could provide you with a copy thereof, if so requested.

For the sake of completeness, it should also be noted that, pursuant to Article 7(4) of the WTO safeguard agreement, any measures should be progressively liberalized during the period of application.

Finally, the Commission would like to reiterate its claim that a measure taken against imports of meat of swine into Australia would in any event not address the alleged injury suffered by the Australian pig farmers given that their difficulties are not caused by imports but rather by other factors, and in particular by the significant increase in feed costs.

II. The criteria used by the Commission to establish critical circumstances in the canned mandarins case.

The Productivity Commission enquired whether the criteria used by the Commission to establish the existence of critical circumstances in the canned mandarins case were also relevant in this case. The establishment of critical circumstances is indeed a prerequisite for the imposition of provisional measures in accordance with Article 6 of the WTO Safeguard Agreement.

In this respect, the Commission wishes to underline that, contrary to what seems to be suggested, temporary or permanent closure of facilities and the impact on regional employment were not the sole criteria used for the establishment of critical circumstances in that case.

¹ OJ L2690 of 8.11.2003, p.24, recital 119 to 124.

The determination that critical circumstances existed is explained in detail in Council Regulation (EC) No 1964/2003², and mainly consisted of the following elements.

Firstly, there was a preliminary determination that Community producers were suffering from serious injury in terms of decline of production, sales volume, unit prices and profitability as a result of a surge of imports of the product concerned. There were also indications that this trend continued after the period analysed, in particular given the oversupply on the Community market.

Finally, there were also obvious indications that large-scale improvement programmes in China would have had the effect of further increasing imports in a near future, thus causing even more injury to the EU industry.

From the above, it is clear that critical circumstances consisted of more than just closure of facilities. Indeed, it was also established that the Community producers suffered serious injury and that such injury was exclusively the result of surge of imports, which were going to continue their increasing trend in the near future. Such circumstances are not present in the Australian swine meat case, in particular because imports are far from being the sole cause of injury, if at all, and in addition it should firstly be determined that the relevant Australian industry, i.e. the meat industry rather than just farmers, are suffering from serious injury. Therefore, the Commission believes that no critical circumstances within the meaning of WTO rules can be established in this case and therefore no provisional measures should be imposed.

III. The 'non-attribution' analysis.

Article 4.2 (b) of the WTO Safeguard Agreement requires that "when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports". The WTO jurisprudence also noticeably confirmed the need to distinguish and separate the effect of the other factors.

This non-attribution analysis is systematically carried out by the Commission in each of its safeguard investigations by following a two step approach.

Firstly, the Commission analyses any known factors other than imports that may also have caused injury. These factors normally consist, *inter-alia*, of the following: changes in consumption, export performance, excess of capacity, lack of supply, demand by the processing industry, competition between the local producers, higher production costs, transport costs, etc.. The objective of this analysis is to determine to what extent those other factors contributed to the injury.

Secondly, on the basis of the above, the Commission ensures that the effect of these other factors, if any, are not attributed to increased imports and that there is a genuine and substantial causal link between the situation of the domestic industry and the increase in imports.

The detailed non-attribution analysis in the three safeguards inquiries undertaken by the Commission can be found under the 'causation' heading of the relevant regulations: Commission Regulation No 1694/2002³ for measures against imports of certain steel

² OJ L290 of 8.11.2003, p. 21, recitals 102 to 108.

³ OJ L261 of 28.9.2002, p.1

products, Commission Regulation No 658/2004⁴ for measures against imports of canned mandarins and Commission Regulation No 206/2005⁵ for measures against imports of farmed salmon.

The Commission hereby urges again the Productivity Commission to also perform such analysis in order to identify and quantify separately all the other factors having a bearing on the state of the industry. These seem, indeed, to be of decisive importance in the swine meat case.

IV. Subsidies

The Commission would like to recall once again that the alleged existence of subsidies granted to the EU industry is absolutely irrelevant in a safeguard case. Some parties made reference to the Private Storage aid scheme, and the Commission would like to insist on the following points:

1. This scheme was only introduced at the end of October 2007 and therefore could in any event not have influenced exports during the period investigated by the Productivity Commission;
2. The purpose of this scheme was to address the fall of internal market prices and maintain the level of prices on the EU market, which could in no circumstances affect the Australian market;
3. The impact of this aid is negligible since only around 0,4% of the whole EU production of meat of swine benefited from this scheme;

In the light of the above, it is clear that subsidies have no relevance to this case and the European Commission urges the Australian Productivity Commission to disregard the corresponding allegations.

The Commission trusts that the above replies duly address the questions asked by the Productivity Commission and hopes that the elements provided will be duly taken into account for the remainder of the investigation. The Commission is, of course, ready to provide any additional information if needed.

⁴ OJ L104 of 8.4.2004, p.67.

⁵ OJ L33 of 5.2.2005, p. 8

To facilitate looking at the cases referred to in the letter please see:

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_290/l_29020031108en00030031.pdf

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_261/l_26120020928en00010123.pdf

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_104/l_10420040408en00670094.pdf

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_033/l_03320050205en00080029.pdf