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Safeguard investigation concerning processed or preserved tomatoes

Submission on behalf of the Italian National Industry Association of Conserved Vegetables

29 July 2013

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1. INTRODUCTION

1. By request dated 21 June 2013, a reference was made to the Productivity Commission (hereinafter the ***Commission***) to undertake an inquiry into whether safeguard action is warranted against imports of processed tomato products. The safeguard investigation was notified to the WTO Committee on Safeguards by communication dated 27 June 2013 (hereinafter the ***Notification***). The investigation was initiated following a request lodged by food processor SPC Ardmona (hereinafter ***SPCA***).

2. The product under investigation is tomatoes, whole or in pieces, prepared or preserved otherwise than by vinegar or acetic acid, in packs not exceeding 1.14 l., falling within tariff subheading 2002.10.00.60 of the Australian Customs Tariff.

3. The present submission is filed on behalf of the Italian National Industry Association of Conserved Vegetables – the Associazione Nazionale Industriali Conserve Alimentari Vegetali (***ANICAV***). An initial set of comments reflecting the views of ANICAV has been submitted to the Commission on 17 July 2013, in the framework of the European Organisation of Tomato Industries of which ANICAV is a member organisation.

4. The purpose of the present submission is to expand upon those initial comments and to highlight some further concerns about the present investigation. ANICAV will subsequently argue that the imposition of provisional safeguard measures is not warranted (section 2) and that the requirements for the imposition of safeguard measures have not been met (section 3). ANICAV will end this submission with some additional comments on the investigation (section 4).

5. ANICAV appreciates the opportunity to submit these comments, and to submit its further comments during the remainder of the proceeding.

2. THE IMPOSITION OF PROVISIONAL SAFEGUARD MEASURES IS NOT WARRANTED

6. Pursuant to the Terms of Reference, the Commission is to consider and provide an accelerated report on whether critical circumstances exist where delay in applying measures would cause damage which would be difficult to repair. The Commission is to recommend if provisional safeguard measures would be appropriate.

7. In this respect, ANICAV wishes to submit that the imposition of provisional safeguard measures is not warranted in this case.

8. Pursuant to Article 6 of the WTO Agreement on Safeguards, provisional

safeguard measures can be imposed "*[i]n critical circumstances where delay would cause damage which it would be difficult to repair … pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury*." During the period of imposition of the provisional measures, "*the pertinent requirements of Articles 2 through 7 and 12 shall be met*."

9. Consequently, it can be deduced from Article 6 that the following requirements have to be met in order to justify the imposition of provisional measures:

- there need to be critical circumstances where delay would cause damage which it would be difficult to repair;
- there needs to be clear evidence of:
  (i) an increase in imports
  (ii) which has caused or is threatening to cause serious injury; and
- the requirements of Articles 2 through 7 and 12 have to be met.

10. It is respectfully submitted that in the present case these requirements have not been met and, consequently, that the imposition of provisional safeguard measures is not warranted.

2.1 There is no "clear evidence" of an increase in imports which has caused or is threatening to cause serious injury

11. ANICAV points out that reference is made to "clear evidence" of a notable increase in imports, without any mention of "prima facie" evidence or further use of any similar wording. Accordingly, provisional safeguard measures can only be adopted if there is conclusive evidence of the fact that all conditions imposed by the Agreement on Safeguards for the imposition of safeguard measures have been met. The explicit requirement of the need for "clear evidence" before provisional measures can be adopted imposes a high burden of proof on an investigating authority. Indeed, the adoption of a provisional measure, prior to the final conclusion of the investigation, should be considered an exceptional measure. Adoption of a provisional measure cannot be justified without there being clear evidence that the imposition of safeguard measures is warranted. This cannot be said to be the case in the present investigation.

2.1.1 There is no "clear evidence" of an increase in imports

12. In the Notification, only import statistics up to the year ending 30 June 2012 are provided, with an indication that an increase occurred between 2010-2011 and 2011-2012. However, this cannot purport to constitute clear evidence of an increase,

given that no more recent figures are provided, i.e. import figures after June 2012. As a result, the initiation of the case has been based on figures which are obsolete as they concern data for a period which ended more than a year ago.

13. In the submission of SPCA to the Commission of July 2013, it is claimed that "*imports of canned tomatoes have increased in absolute and relative terms over the period from 2010-2012 and into 2013*". However, the charts provided demonstrate a decrease in imports from 2011 to 2012.[1] Moreover, looking at the charts provided by SPCA, the trend of imports in 2008, 2009, 2010, 2011 and 2012 is stable. The only exceptional year seems to be 2009 where there was a strong decrease of imports.

14. Although imports seem to have increased from 2010 to 2012, it is clear that there is no conclusive evidence demonstrative of any further increasing trend in 2012 and 2013 which would justify the imposition of provisional safeguard measures, nor is there any evidence of a general increasing trend, looking at the 5 years immediately prior to the investigation.

2.1.2 There is no "clear evidence" of serious injury caused by the alleged increase in imports

15. In addition, ANICAV submits that there is no "clear evidence" of an injurious situation. In the Notification, the only reference to the alleged injury caused to the domestic industry is a decrease in production and profit. In the submission of SPCA when "demonstrating" the serious injury suffered, SPCA mentions only a loss in market share, loss of economies of scale and a decline in profitability.

16. However, in order to demonstrate that serious injury has been caused, several injury factors have to be taken into account. This is particularly true for the assessment of whether provisional safeguard measures are warranted.

17. In the present investigation, there has been no evidence submitted regarding sales of the domestic industry, employment, productivity, capacity utilisation, profits and losses, etc. Moreover, Article 3.1 of the WTO Agreement on Safeguards requires that interested parties be given a fair opportunity to respond to the evidence and views presented by other parties. That opportunity must be made equally available in the case of any consideration of provisional measures as it must be made available in the case of a decision about final measures. SPCA, which claims to constitute the entire domestic industry, has so far failed to address the entirety of the injury indicators which are required to be examined pursuant to a properly constituted and properly conducted safeguard measures investigation. The Commission is not in a position to impose the provisional measures that have been sought without a demonstration of injury from the industry concerned which - after due consideration of all the injury factors specified under the Agreement on Safeguards - can be

[1] Submission SPCA July 2013, p. 26, 28 and 29.

adjudged to be "serious". If the industry does provide this information, it needs to be reviewed and tested by interested parties, again before any provisional measures are considered.

2.2 There are no critical circumstances where delay would cause damage which would be difficult to repair

18. Furthermore, it follows from the wording of Article 6 of the Agreement on Safeguards, referring to "critical circumstances", that the imposition of provisional safeguard measures constitutes an exceptional measure that can be imposed only in urgent situations. Indeed, the use of the word "critical" reveals that the standard to be met in this respect is very high. This is also consistent with the extraordinary nature of safeguard measures, which do not counteract any unfair trade, but indeed constitute a remedy against *fair* trade.

19. In its submission, SPCA highlights as a critical circumstance, or as critical circumstances:

- the impact on brand loyalty to "Ardmona";
- the fact that, allegedly, SPCA's current investor threatens to cease the support of further investments;[2] and
- the fact that, allegedly, the viability of SPCA's tomato operations will come under threat.

20. The first of these claims is incapable of proof because it relates to the value of goodwill in a brand. ANICAV submits that brands are things of value that endure irrespective of the position or the survival of the entity which holds them at any particular time. For example, it does not indicate on what basis it considers that brand loyalty will be lost and could not be maintained in the future, whether in the hands of SPCA or another entity. The second of these claims is self-serving and is also unable to be tested. SPCA also does not indicate why no new investors could be found. SPCA does not provide any evidence to substantiate these claims. The third of these claims – as has already been pointed out - is not supported by the kinds of evidence that the Agreement on Safeguards requires. These unsubstantiated claims are not sufficient to justify the imposition of a highly exceptional measure as is the provisional safeguard measure, which would shield the domestic industry against fair trade.

21. In the present case, it cannot be maintained that there are critical circumstances justifying the immediate imposition of provisional safeguard measures. In this respect, ANICAV emphasises once again the extraordinary nature of provisional measures and the high burden on the Commission.

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[2] Submission SPCA July 2013, p. 10.

2.3 The requirements of Articles 2 through 7 and 12 have not been met

22. Finally, as will be demonstrated below in section 3, the requirements for imposing safeguard measures have not been met in the present case. Consequently, it must be concluded that the requirement of Article 6 of the Safeguards Agreement – which is that the requirements of Articles 2 through 7 and 12 themselves must be met throughout the duration period of the provisional measures - will not be satisfied.

2.4 Conclusion

23. Given that:

- there is no clear evidence of an increase in imports which has caused or is threatening to cause serious injury;
- the requirements of Article 2 have not been met; and
- no critical circumstances where delay would cause damage which would be difficult to repair have been demonstrated,

it is submitted that the imposition of provisional measures is not warranted. ANICAV therefore respectfully requests the Commission not to impose any provisional safeguard measure.

3. THE REQUIREMENTS FOR IMPOSING SAFEGUARD MEASURES HAVE NOT BEEN MET

3.1 Increase in imports

3.1.1 General

24. It is important to point out that not any increase in imports justifies the adoption of safeguard measures. The increase of imports should meet certain conditions, *i.e.* it has to be recent enough, sudden enough, sharp enough and significant enough.

25. Article 2.1 of the Agreement on Safeguards reads as follows:

> *A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.* (emphasis added)

26. This provision requires, as one of the main prerequisites for the imposition of

safeguard measures, that a product is being imported *"in such increased quantities"*.

27. On the basis of the text of Article 2.1 and the relevant case law, it should be borne in mind that a simple increase in imports is not sufficient to comply with Article 2.1 of the Safeguards Agreement. Indeed, the wording *"in such increased quantities"* by itself dictates that a mere increase in imports is not sufficient to meet the threshold. This was also confirmed by the Appellate Body at several instances. In particular, the case law has further qualified the notion of imports *"in such increased quantities"*.

28. For instance, in *Argentina – Footwear* the Appellate Body held that:

> *…the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just any increased quantities of imports will suffice. There must be "such increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".*[3] (emphasis added)

29. Therefore, the increase of imports should meet certain qualifications (i.e. it must be recent enough, sudden enough, sharp enough and significant enough), before such imports can constitute a valid ground for the imposition of safeguard measures (assuming all the other conditions are met).

30. Moreover, in *Argentina – Footwear*, the Appellate Body has clarified that the test of imports *"in such increased quantities"* requires an assessment focusing on the overall trends of imports, and not simply on the basis of a comparison from one year to another.[4] Therefore, in assessing the presence of the required increase in imports, the *"rate and amount"* of the increase should be taken into account. The Appellate Body considered in this respect that:

> *For instance, if the starting point for the period of investigation were*

[3] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ("Argentina – Footwear") para. 131.

[4] *Ibid*, para. 129.

> *set at a time when import levels were particularly low, it would be more likely that an increase in import volumes could be demonstrated. The use of the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the "rate and amount" of the increase, make it abundantly clear, however, that such a comparison of end points will not suffice to demonstrate that a product "is being imported in such increased quantities" within the meaning of Article 2.1.*[5]

31. In view of the foregoing, before safeguard measures can be adopted, it must be demonstrated that:

- there has been an increase in imports *"in such increased quantities"*;
- the increase in imports is recent enough, sudden enough, sharp enough and significant enough;
- the assessment must be carried out over a certain period of time, allowing the examination in trends and thus not merely comparing two end points.

3.1.2 There is no increase in imports in this case

32. In the present case, the conditions as set out above have not been met. It is clear that there has been no increase in imports which is recent enough, sudden enough, sharp enough and significant enough.

33. In the submission of SPCA, it seems that an increase in imports has been claimed on the basis of a trend of imports for the last 12 years.[6] However, the purpose of a safeguard measure is to cope with a *"sudden"* and *"recent"* increase in imports. Indeed, trends must be assessed in order to determine whether there has been an increase in imports, but this assessment cannot be based on data that is too old for these purposes. If the increase took place over a period of 21 years, it is clear that there is no need for urgent measures, since the increase is not *"recent enough"* and *"sudden enough"*.

34. To determine whether an increase is *"recent enough"*, the import data of the last years should be assessed. Typically, the period of five years prior to the investigation is examined.

35. Table 1 below reports the import of goods recorded under code 2002.10.00.60, excluding imports from New Zealand and Singapore. This table and the graph below (with imports for 2013 "annualised" on the basis of the information

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[5] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 355.

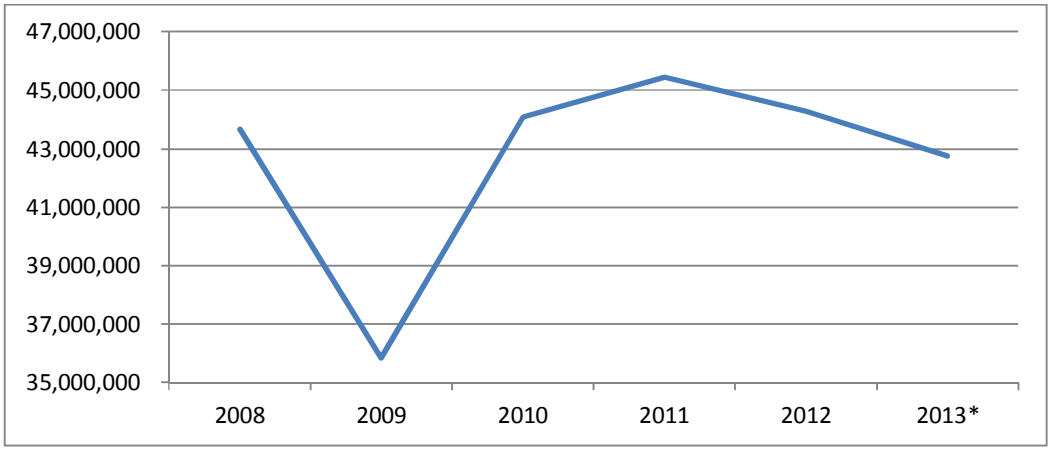
[6] Submission of SPCA, July 2013, p. 26.

available for the first half of 2013) clearly demonstrate that imports of the product concerned have been stable and that only a minor increase took place from 2008 to 2011. From 2011 to 2012, there has even been a decrease in imports, a trend which seems to continue in 2013.

Table 1

Imports from the world (excluding New Zealand and Singapore), quantity in kg:

2008	2009	2010	2011	2012	2013 (Jan-June)
43,676,254	35,851,269	44,092,131	45,436,578	44,277,933	21,370,966



Source: ABS

36. The above import data excludes imports from New Zealand and Singapore, in order to be comparable with the data provided by the Australian delegation in the framework of the Notification to the WTO Committee on Safeguards. However, ANICAV disagrees with the practice of excluding the import data of certain countries for the purpose of this investigation. Article 2.2 clearly stipulates that safeguard measures shall be applied to a product being imported "*irrespective of its source*". In this respect, ANICAV emphasises that footnote 1 to Article 2.2 is not applicable in this investigation given that this case has not been initiated by a customs union.

37. The abovementioned data demonstrates that no recent increase of imports has occurred. Quite the contrary, imports decreased by 2.55% in 2012 as compared to 2011. Moreover, the most recent data available indicates that this downward trend continued in the first half of 2013.

38. In addition, even when directly comparing 2008 with 2012, the increase of

imports is negligible, i.e. around 1%. In comparison, this is a slower growth than the annual population growth in Australia.

39. In conclusion, ANICAV strongly submits that the fundamental test of the Agreement on Safeguards, as interpreted by constant WTO case law, is not met in the present case. Over a reasonable amount of time, i.e. the last five years, imports have remained stable. Over the most recent years there has been no surge in imports at all. Accordingly, there is no requirement to assess whether the type of increase meets the relevant standards as explained above, since no increase has taken place. And it goes without saying that if that assessment is undertaken, it is readily apparent that there has been no increase of the necessary magnitude, nor certainly one of the necessary suddenness in either the rate or the amount of imports.

3.2 The imposition of safeguard measures in the present case would violate the "unforeseen developments" requirement of Article XIX of the GATT 1994

3.2.1 General

40. Article XIX: 1(a) of the GATT 1994 stipulates that emergency action such as safeguard measures can only be adopted if "*as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities […]*". (emphasis added)

41. Consequently, before safeguard measures can be adopted it must be demonstrated that there have been unforeseen developments as a result of which imports increased.

42. Although SPCA seems to put into question the necessity to demonstrate the existence of unforeseen developments,[7] it is well-established WTO case law that any safeguard measure imposed without the demonstration of such unforeseen developments would be illegal because of its non-compliance with WTO law.

43. WTO case law has further clarified that the *"unforeseen developments"* requirement laid down in the GATT has not been superseded by the WTO Agreement on Safeguards. Rather, the conditions laid down in Article XIX still need to be complied with, together with the conditions laid down in the Agreement on Safeguards. Indeed, the Appellate Body stated that:

> *Having said that all of the provisions of a treaty must be given meaning and legal effect, we believe that the clause in Article XIX:1(a)*

[7] Submission of SPCA, July 2013, p. 6.

> *– "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions …" – must have meaning. We do not agree with the Panel's conclusion that it "does not add conditions for any measure to be applied pursuant to Article XIX but rather serves as an explanation of why an Article XIX measure may be needed".*[8]

44. In another case, the Appellate Body developed a similar reasoning, considering that the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards apply cumulatively, concluding "*that the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX: 1(a) of the GATT 1994 does have meaning*".[9]

45. The Appellate Body further held *"as a result of unforeseen developments"* is a phrase that "*describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994*".[10]

46. From the foregoing, it emerges that safeguard measures can only be imposed if the investigating authorities succeed in demonstrating that *"unforeseen developments"* have occurred.

47. *"Unforeseen developments"* should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession (in the framework of the GATT) which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated. It was clarified in *Korea — Dairy* by the Appellate Body that unforeseen developments are developments not foreseen or expected when Members incurred that obligation:

> *[S]uch 'emergency actions' [safeguard measures] are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation.* (emphasis added)

48. WTO case law has clarified that the relevant unforeseen developments must

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8 Appellate Body report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ("Korea – Dairy") para. 82.

9 Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ("Argentina – Footwear") paras 89-90.

10 Appellate Body report, *Korea – Dairy*, para. 85.

be directly linked to the specific product concerned. The developments resulting in the increase of imports should relate to imports of the specific product concerned:

> *It is evident, therefore, that not just any development that is "unforeseen" will do. To trigger the right to apply a safeguard measure, the development must be such as to result in increased imports of the product ("such product") that is subject to the safeguard measure. Moreover, any product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged "unforeseen developments" result in increased imports of that specific product ("such product").*[11]
>
> *…*
>
> *Without such a "logical connection" between the "unforeseen developments" and the product on which safeguard measures may be applied, it could not be determined, as Article XIX:1(a) requires, that the increased imports of "such product" were "a result of" the relevant "unforeseen development". Consequently, the right to apply a safeguard measure to that product would not arise.* [12] (original emphasis)

49. Therefore, in order to lawfully apply safeguard measures, investigating authorities must demonstrate that the unforeseen developments have caused the increased imports of the product concerned.

3.2.2 There are no unforeseen developments in the present case

50. First of all, ANICAV submits that the claim of SPCA that it should not be demonstrated that any unforeseen developments have taken place is entirely without grounds. The adoption of safeguard measures in the absence of any demonstration of unforeseen developments would be in manifest violation of Article XIX of GATT 1994. The fact that SPCA argues against the requirement for unforeseen developments is telling – because there are none.

51. Further, it results from the above overview of WTO case law that the developments having caused the increase in imports must have been unforeseen at the time of WTO accession or at the time of negotiating WTO concessions. Bearing this in mind, we draw attention to the fact that not one of the reasons invoked by SPCA meets this condition.

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[11] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 316.

[12] *Ibid*, para. 318.

52. For example, the first reason referred to, i.e. the fact that the Australian currency has strengthened, is not a circumstance that could be said to have been unforeseen at the time of WTO accession/WTO concession negotiations. Indeed, common sense, not to say basic knowledge about the impact of monetary fluctuations and the impact on the flows of imports and exports would have revealed without too many difficulties that imports increase when the local currency is strengthened and decrease in the opposite scenario. Moreover, it is evident that these kinds of fluctuations have a general bearing which are not specific to preserved tomatoes. The adoption of a safeguard measure by the Australian investigating authorities on the basis of currency fluctuations would be manifestly contrary to WTO law.

53. The arguments relating to alleged "dumping" are completely irrelevant in the framework of a safeguard investigation. In addition, the reference to alleged dumping is merely a statement without any factual evidence to support this claim. ANICAV strongly opposes such groundless allegations.

54. Finally, the strategies of supermarkets to use cheaper imports for their private label product offering cannot qualify as an "unforeseen development" which has caused an increase in imports within the meaning of the GATT. If anything, it is an indication that serious injury cannot be said to have been caused by imports. Rather, if there is any injury, it could be said to be due to the pressures that a supermarket duopoly have placed on the Australian industry. In addition, it should be noted that SPCA mentions that supermarkets have moved to imported products from 2010 onwards. However, the import data provided by SPCA indicate that the strongest increase of imports took place between 2006 and 2008.

3.3 Injury

55. Pursuant to Article 2.1 of the Agreement on Safeguards, before safeguard measures can be imposed, it must be demonstrated that the domestic industry is suffering or threatens to suffer serious injury. With respect to the determination of serious injury or threat thereof, Article 4.2 of the Agreement on Safeguards stipulates as follows:

> *1. For the purposes of this Agreement:*
>
> *(a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;*
>
> *(b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote*

possibility; and

(c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and the amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

[…] (emphasis added)

56. It is submitted that in the present case, it cannot be upheld that the Australian domestic industry is suffering or is threatened to suffer serious injury in the meaning of a significant overall impairment in the position of the domestic industry.

57. First, it becomes immediately evident when looking at the submission of SPCA that SPCA fails to provide an overview of all relevant factors that must be assessed in order to determine whether it has suffered serious injury.

58. SPCA refers to a loss in market share, a loss in economies of scale and a declining profitability. However, none of the other relevant injury indicators merit even a cursive mention in its submission. This omission is significant, because the Agreement on Safeguards makes clear that the seriousness of the injury must be adjudged across a wide range of indicators. In this respect, ANICAV refers to *Argentina – Footwear*, where the Appellate Body concluded that it is only when "*the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry.*"[13]

59. Second, ANICAV wishes to emphasise that the requirement of demonstrating *"serious injury"* imposes a high burden on investigating authorities. ANICAV refers to

[13] Appellate Body Report, *Argentina – Footwear*, para. 139.

Dominican Republic – Bag and Fabric Safeguards where a WTO Panel highlighted the extent and degree of *"significant overall impairment"* that the domestic industry must be about to suffer. Indeed, the standard for the existence of serious injury has been described as "*very strict and rigorous".*

> *the word 'injury' is qualified by the adjective 'serious', which …underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met.*[14] (emphasis added)

60. Finally, the Commission must ensure that it does not include growers of tomatoes in the analysis of the serious injury suffered by the domestic industry, as this would be contrary to WTO law. Fresh tomatoes are not "like" products and are not products in direct competition with preserved tomatoes. This has also been submitted in the comments of SPCA.[15]

61. This has further been confirmed by the Appellate Body in *U.S. – Lamb Safeguard*, where the Appellate Body confirmed that, as the like product at issue was domestic and imported lamb *meat*, the *"domestic industry could* only *include the 'producers' of lamb* meat*."* (emphasis added by the Appellate Body). The Appellate Body found that the imposition of the safeguard measure imposed by the U.S. in the case was based on a determination of serious injury to an industry *other than* the relevant "domestic industry", as it was passed in part on an examination of lamb *growers* and *feeders*, and that it was therefore imposed without a proper finding of serious injury to the appropriate "domestic industry".[16]

62. Consequently, contrary to what seems to be suggested in the Notification where reference has been made to the diminishing number of growers, the situation of the Australian growers should not be taken into account to determine whether or not the domestic industry is suffering serious injury.

3.4 Causality

3.4.1 General

63. The requirement that the increase in imports must have caused serious injury or must threaten to cause serious injury to the domestic industry, as laid down in Article 2.1 of the Agreement on Safeguards, is provided for in Articles 4.2(a) and (b) of the Agreement on Safeguards, which provide that:

> *(a) In the investigation to determine whether increased imports have*

[14] Panel, *Dominican Republic – Bag and Fabric Safeguard*, para. 7.312.

[15] Submission of SPCA July 2013, p. 26.

[16] Appellate Body, *U.S. – Lamb Safeguards*, paras 95-96.

> *caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.*
>
> *(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. 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.*

64. The obligation of the investigating authorities with respect to the causation analysis is twofold. As stated by the Appellate Body:

> *Article 4.2(b) of the Agreement on Safeguards establishes two distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a demonstration of the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof ". Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.*[17]

65. With respect to the first element, i.e. the demonstration of the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof, the Appellate Body stated that:

> *…in an analysis of causation, "it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination."*[18]

66. Investigating authorities should thus assess the relationship between the surge of the imports (in absolute and relative terms) with the change in

[17] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, para. 208.

[18] Appellate Body Report, *Argentina – Footwear*, para. 144.

circumstances of the domestic industry. Clearly, a finding of a causal link requires, in principle, a coincidence in time between the increase in imports in absolute and relative terms and the deterioration of the state of the domestic industry. In this respect, the Appellate Body upheld[19] the finding of the panel in *Argentina – Footwear* according to which:

> *In practical terms, we believe therefore that this provision [Article 4.2(a)] means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation (because, inter alia, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present.*[20]

67. With respect to the second element of the causation analysis, the investigating authorities should engage in a non-attribution analysis, in which they are required to assess the nature and extent of the injurious effects of any other factors causing injury:

> *…with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.*[21]

68. Taking the above into account, ANICAV submits that there is no causal link between imports and any alleged injury and that any alleged injury has been caused by other factors. Below, both elements of the causation analysis will be assessed.

3.4.2 Imports have not caused any alleged injury

69. In its submission, SPCA does not demonstrate that imports have caused any of the alleged injury. SPCA simply refers to charts demonstrating the trends in retail sales of canned tomatoes.[22] However, from these charts, it cannot be deducted that there would be a causal link or even a coincidence in time between any increase in imports and the alleged injury suffered by the domestic industry.

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19 *Ibid*, para. 144.

20 Panel Report, *Argentina – Footwear*, para. 8.238.

21 Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, para. 215.

22 Submission of SPCA, July 2013, p. 38.

70. Since the submission of SPCA does not provide any other evidence indicative of the existence of a causal link between any alleged injury and the alleged increase of imports, ANICAV must assume that no such causal link exists.

3.4.3 Injury, if any, has been caused by other factors

(A) Exchange rate changes

71. As is made very clear in the submission of SCPA, any injury suffered by the domestic industry is a result of changes in the exchange rate, and is not caused by imports. It is evident that any injury caused by such exchange rate fluctuations must be separated and distinguished in the present case and cannot be attributed to imports. In each of its last three Annual Reports (for 2010, 2011 and 2012) SPCA's parent company Coca-Cola Amatil continually referred to the impact of the high Australian dollar on the financial results of its Food and Services Division, of which SPCA forms part.[23]

(B) Effect of weather conditions

72. The preserved tomato production in Australia, in recent years, has seen considerable fluctuations and, in 2011, did not reach 90,000 tons (representing 0.23% of the world production of tomato for processing). The drop in production can be traced to the bad weather conditions that the country has suffered: in fact, in the last 10 years, there has been a period of severe drought, followed by severe flooding. It is evident that this reduction in the domestic production has been substituted by imports to meet the demand of the domestic market, which has remained constant. This was also recognised by Coca-Cola Amatil, which in its 2011 Annual Report announced that one of SPCA's three manufacturing facilities were to close because a comprehensive review of SPCA's business had determined that it had excess manufacturing capacity.[24]

73. It is evident that these weather conditions and the subsequent drop in production have had an impact on the domestic industry. However, such impact cannot be attributed to imports and any alleged injury caused by the weather conditions cannot be attributed to imports.

(C) Consumer preferences

74. From the submission of SPCA it appears that Australian supermarkets prefer to use imported canned tomatoes as their private label brands and also prefer to promote imported (Italian) canned tomatoes in their stores.[25] This can evidently be

[23] Coca-Cola Amatil, 2010, 2011 and 2012 Annual Reports, on pages 2, 2 and 5, respectively.

[24] Coca-Cola Amatil, 2011 Annual Report, page 3.

[25] Submission of SPCA, July 2013, p. 35.

linked to changes in consumer preferences in a globalised world to have typical "world" food from the original originating country. This is also the case for typical Italian tomato products, which are well-priced and of high quality.

(D) Structural impediments

75. SPCA itself exposed a broader range of impediments to the development and success of the Australian food industry in its September 2011 submission in response to the Issues Paper on the National Food Plan. In that submission SPCA expressed its strong concern about the need to address rising local production costs. SPCA submitted that strong government support for the food industry was needed:

- to conduct a value chain assessment of locally produced food as compared to imported food to highlight the gaps that impede Australia from being globally competitive;
- to ensure adequate investment in research and development;
- to examine payroll tax concessions;
- to support and encourage higher education in food technology; and
- to examine regulatory input costs of labelling laws, carbon tax and container deposits to reduce compliance costs and burdens.

3.5 Interest in imposing safeguards measures?

76. ANICAV wishes to conclude its submission with some additional remarks, questioning the interest that Australia has in imposing safeguard measures.

77. First, it must be pointed out that the Italian production of preserved tomatoes, and consequently exports, largely concerns whole peeled tomatoes processed from long tomato. Italy is the only manufacturer in the world of this specific product. The whole peeled tomato is a symbol of "Made in Italy" and is one of the most popular of Italian products abroad. Therefore, the increase in imports might concern this particular product that Australian companies do not produce. This information cannot be supported by statistical data as the Australian Tariff Code does not provide for such a distinction.

78. However ANICAV does offer the opinion that by introducing a safeguard measure on preserved tomatoes, the Commission would in essence increase the cost for Australian consumers of a product that is not available from domestic producers.

79. Second, ANICAV notes that SPCA, the complainant in this investigation and allegedly the only Australian producer of the product concerned, is mainly complaining about the fact that Australian supermarkets prefer the use of imported products (often made in Italy) for their private label brands rather than the products

produced by SPCA. In several parts of its submission, SPCA complains about this and it is even highlighted as the *"unforeseen development"* which has caused the alleged increase in imports.

80. ANICAV respectfully questions whether safeguard measures are the most appropriate way to address any brand issues the Australian producer may be having. ANICAV emphasises once again the exceptional nature of a safeguard measure and the very strict requirements that ought to be complied with before such measures can be imposed.

81. Finally, it is submitted by ANICAV that the imposition of safeguard measures will result in the protection of one producer, to the detriment of all Australian consumers using canned tomatoes in their day-to-day lives.

4. CONCLUSION

82. ANICAV regrets the initiation of the present safeguard investigation. ANICAV respectfully urges the Commission to terminate the present safeguard investigation forthwith, without the imposition of any measures, on the grounds of each of the following reasons:

- The adoption of provisional safeguard measures is not warranted since there are no critical circumstances where delay would cause damage which would be difficult to repair; there is no clear evidence of an increase in imports which has caused or is threatening to cause serious injury; and the requirements of Article 2 of the Agreement on Safeguards have not been met.
- There has not been an increase in imports which meets the *"such increased quantities"* test, as laid down by Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards and as interpreted by WTO case law. In particular, it cannot be demonstrated that there has been an increase in imports which is recent enough, sudden enough, sharp enough or significant enough for the purposes of the imposition of such measures.
- The adoption of safeguard measures in the present case would violate the *"unforeseen developments"* requirement of Article XIX of the GATT 1994 since there are no circumstances that were unexpected at the time of entering WTO obligations and that have caused an increase of the product concerned.
- The domestic industry has not demonstrated that it is suffering serious injury as required by the Agreement on Safeguards.
- No causal link between the alleged increase in imports and between

the alleged injury has been demonstrated as dictated by Articles 2.1 and 4.2 of the Agreement on Safeguards. Moreover, any alleged injury has been caused by factors other than imports.

Therefore, on the basis of the above grounds, the imposition of safeguard measures would be inconsistent with Article XIX of the GATT 1994 and the Safeguards Agreement.

83. Lastly, ANICAV wishes to express its regard for the growers of tomatoes in Australia, some of whom are themselves the families of Italian immigrants who came to Australia and established farms in your country. ANICAV acknowledges the reported difficulties Australian growers have faced and hopes that there can be better conditions for them in the future. ANICAV notes, however, that this case can only be about the processing industry, and must take place within the framework of the WTO rules. The answer to the concerns of the tomato growing community in Australia cannot and will not be found in the unjustified temporary "border measures" that SPCA seeks for its own benefit through this safeguard measures investigation.

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