

Australian Government Productivity Commission

By E-mail: tomato.safeguards@pc.gov.au

Attention: Carole Gardner / Steward Turner

Your Ref:

Our Ref: M187/20130717

Date: 17 July 2013



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Dear Productivity Commission,

SAFEGUARD INQUIRY INTO THE IMPORT OF PROCESSED TOMATO PRODUCTS

I refer you to the above matter.

I confirm that I am submitting this submission on behalf of the South African Fruit and Vegetable Canners' Association.

A. Increase in imports

- I. An increase in imports is the normal and indeed the expected consequence of trade liberalisation. As such it is not any increase in imports that allow for safeguard action to be taken, but only increases in imports qualified by certain conditions and circumstances.

- II. The first condition is that the increase in imports must result from "unforeseen developments" as set out in Article XIX:I of the GATT 1994. We note that the WTO Appellate Body¹ concluded that the meaning of the phrase "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 means that the increased quantities of imports should have been "unforeseen" or "unexpected". In this regard the Appellate Body noted that the phrase "in such increased quantities" in Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 is meaningful to this determination. As such the Appellate Body found 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

¹ Argentina – Footwear (EC) - WT/DS121/AB/R
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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 fulfil 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, 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".

- III. In addition the WTO Appellate Body² stated that the ordinary meaning of the phrase "as a result of unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected". This must be demonstrated as a matter of fact in order for the safeguard measure to be applied.
- IV. It is submitted that the increase in imports as contained in the Australian Notification under Article 12.1 (A) of the Agreement on Safeguard on Initiation of an Investigation and the Reasons for it (the "Safeguard Notification")³ does not comply with these conditions.
- V. Firstly the information presented on page 2 (and indeed elsewhere) of the Safeguard Notification does not show whether the increase in imports are as a result of unforeseen developments and are therefore unexpected. If one indexes the information using the 2007/2008 year as a base year⁴, the data shows that the increase in imports is indeed not due to unforeseen developments.
- VI. The data reveals the increase in imports has been rather small and constant. The overall increase from the base year is rather minute and as one may expect in the normal course of trade. The trend that the data does reveal is that the increase has been constant and is thus not due to unforeseen developments⁵. As the trend in the increase can be observed for some time, it cannot be considered to be a sudden increase as is required under the WTO Agreement on Safeguards. This much is admitted in the Safeguard Notification. It is thus legitimate to infer that the problem experienced by the Australian domestic industry (SPC-Ardmona) is not one of a surge in imports.

² Korea – Dairy - WT/DS98/AB/R

³ G/SG/N/6/AUS/3

⁴ Please refer to Annexure A annexed hereto.

⁵ We elaborate in this submission on other factors to be considered showing that the increase in imports are not due to unforeseen developments.

- VII. As stated in the Productivity Commission's Issues Paper, anti-dumping and countervailing duties were imposed on canned tomatoes from Italy (which duties applied over the 1992-2002 period) and Spain and China (which applied over the period 1992-1997). This suggests that the problem lies with either dumped or subsidised goods. Spain and China previously faced anti-dumping duties and countervailing measures. As we have only found out about this investigation later in the afternoon on 16 July 2013, we have not yet had time to find out if SPC-Ardmona imports the subject product. However we suspect that SPC-Ardmona does import the subject product based on the adverse climatic conditions the producers of tomatoes face within Australia. There may also be other economic considerations why importation may occur. This should be taken into account by the Productivity Commission.
- VIII. Secondly⁶, the increase in the imports does not occur in such increased quantities to cause or threaten to cause serious injury. Annexure A and the information presented on page 2 (and indeed elsewhere) of the Safeguard Notification reveals that the increase in imports is therefore not recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively, to cause or threaten to cause serious injury.
- IX. We draw the Productivity Commission attention to the fact that a correct approach to evaluating the trend in imports would be to consider the imports over a recent period such as from the 2007/2008 financial year to the most recent financial year. In addition one cannot just compare the beginning of the period (2007/2008) with the end of the period (2011/2012) as one is required to consider the trends in imports over the period of the investigation. It is submitted that such a consideration will lead to a finding that the increase is not recent enough, sudden enough, sharp enough or significant enough to support a finding to impose safeguard measures due to serious injury being suffered or an imminent threat of serious injury.
- X. The supporting data⁷ on which reliance is placed does not contain the data for the calendar years 2001 to 2012. We hereby request the Productivity Commission to provide us with the complete data set. This will allow us to conduct a detailed analysis of the data and to comment thereon in a comprehensive fashion. As we only recently became aware of the deadline we cannot obtain this information in time to consider it either from the Productivity Commission, the Australian Customs Service or the Australian Bureau of Statistics.

⁶ As stated *supra*.

⁷ <http://www.pc.gov.au/projects/inquiry/fruit-safeguards/data> - accessed on 17 July 2013.

B. Serious Injury

I. Article 4 of the WTO Agreement on Safeguards requires that all relevant factors of an objective and quantifiable nature having a bearing on the situation of the Australian domestic industry must be considered in order to determine whether there is serious injury or a threat thereof.

II. In particular the following factors need to be taking into account:

a. the rate and amount of the increase in imports

As mentioned in paragraph A hereof, there has been a slow, minor and constant increase in the imports. It is submitted that neither the rate nor the amount of the increase is responsible for any alleged serious injury or threat thereof.

b. the share of the domestic market taken by the increased imports

The Safeguard Notification states that the imports share of the domestic consumption rose. It is claimed that the current market share is 70%. It is not understood why this is estimated. As SPC-Ardmona is the only producer and all the imports statistics have been available to SPC-Ardmona this percentage should be known. We further draw the Productivity Commission's attention to the fact that it is not correct to consider the 2001/2002 financial year as the beginning period as a more recent period needs to be considered in order to show that there has been a sudden and recent surge in imports.

c. changes in the level of sales

We do not have data on the level of sales and thus cannot comment hereon.

d. changes in the level of production

i. The Safeguard Notification states that there has been drought (2008) and floods (2011). As such the production would have been lower than normal during this period. This is particularly significant as the floods in 2011 would have had an effect on the domestic supply in 2012. It is submitted that this information accounts for the slight increase in imports and not that exporters

where taking advantage of the obligations Australia committed to under the GATT 1994. As mentioned above, it may very well have been SPC-Ardmona that imported the subject product to make up the domestic shortfall.

- ii. There has also been a decrease in the number of growers whose fruit is used in the canning of the subject product. We submit that this decrease is however as a result of supplier rationalization. In other words it is the reorganisation by the only canner (SPC-Ardmona) of suppliers (growers) in order to increase its efficiency. As such the reduction is related to an efficiency decision by SPC-Ardmona and not by the imports. Other factors mentioned in this submission could also likely contribute to the reduction of suppliers and these factors are more likely the cause than any imports.
- iii. The decline in production is clearly due to the factors mentioned above and not as a result of any imports contrary to that claimed in page 3 of the Safeguard Notification.

e. *changes in the level of productivity*

It would seem as if the changes in the level of productivity have been influenced by the factors listed in this submission and not by any imports. It is also significant to note that the production forecast for Spain, which has previously faced anti-dumping and countervailing duties, remains high. This country, which accounts for the majority of the imports, is clearly taking advantage of the fact that these duties no longer apply. As such it is submitted that the injury should be addressed by the more appropriate trade remedies of anti-dumping duties or countervailing measures and not safeguard measures.

The Productivity Commission Issues Paper notes that SPC-Ardmona states that there will be less demand for canning fruit which has led SPC-Ardmona to forecast a reduction in intake tonnage for 2014. It would thus appear as if the demand is not due to any imports, but rather due to consumer preferences or circumstances.

f. *changes in the level of capacity utilization*

We do not have data hereon, however due to the adverse climatic conditions we submit that the capacity utilization or at the very least the realisation thereon

would not have been optimal. This would however not be due to any increase in imports.

g. changes in the level of profits and losses

We do not currently have data hereon and as such we cannot comment hereon.

h. changes in the level of employment

We submit that wages account for the majority of the cost. This is clearly a factor which would result in injury to the domestic industry and cannot be attributed to the imports.

III. It is submitted that the factors listed above in paragraph II do not support a finding that there is serious injury or a threat thereof. These factors also detract from a finding that there is in fact a causal link between the increased imports and the serious injury or threat thereof.

IV. Article XIX of the GATT 1994 not only requires that the increase should have been as a result of unforeseen developments but also due to the effect of the obligations incurred by Australia under the GATT 1994. It is submitted that the increase is not as a result of the obligations incurred but as a result of the factors listed in this submission. One additional factor is worth mentioning in this context. The Safeguard Notification clearly states that the Australian dollar has appreciated significantly over the last four years. This will clearly have an effect on the volume of imports and will be a key consideration for exporters and not the tariff commitments of Australia on the subject products.

V. Article 4 of the WTO Agreement on Safeguards further requires that there be a causal link between the increased imports and the serious injury. Some of the factors listed in this submission clearly cause injury, which should not be attributed to the imports of the subject products. It is submitted that there is no causal link or indeed any factual evidence (mere conjecture is insufficient) that the imports are in fact causing the serious injury or clearly imminent threat thereof. The Productivity Commission should not attribute the injurious effects of all the other factors contained this submission to the imports.

C. Conclusion

Due to the submissions made above, it is clear that there hasn't been any surge in imports as required by the WTO Agreement on Safeguards, nor has the domestic industry suffered any serious injury or threat thereof. It seems clear that there are numerous other factors which cause injury to the domestic industry; however this is unrelated to the imports. The imposition of a safeguard measure in this instance would not conform to the WTO Agreement on Safeguards. As a result WTO Member Countries would be able to rely on Article 8 of the WTO Agreement on Safeguards which would allow them to insist that Australia maintains a substantially equivalent level of concessions and other obligations, failing which, they will be able to suspend substantially equivalent concessions or other obligations. Alternatively they may have recourse to the WTO's dispute settlement body.

I thank you for the opportunity to submit our submission and look forward to hearing from you in due course.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Rian Geldenhuys', with a stylized flourish at the end.

Rian Geldenhuys
Director

Annexure A

Indexed results using 2007-2008 as the base year					
Imports of tomatoes 2002.10.00.60	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012
Total Volume	40602633	40111911	40031441	41023158	46006962
percentage	100.00%	98.79%	98.59%	101.04%	113.31%