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**Investigation No. 276 - Prepared or preserved  
tomatoes exported from Italy by Feger di Gerardo  
Ferraioli S.p.A. and La Doria S.p.A.**

**Feger di Gerardo Ferraioli S.p.A. and La Doria  
S.p.A. - Observations on the initiation of the  
investigation**

**[20 February 2015]**

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## 1. INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission (the 'Commission') initiated the anti-dumping investigation No. 276 concerning imports of prepared and preserved tomatoes (the 'product under investigation') exported from Italy by Feger di Gerardo Ferraioli S.p.A. ('Feger') and La Doria S.p.A. ('La Doria').

The initiation of the investigation follows the filing of an anti-dumping complaint (the 'complaint') by the only Australian producer of the product under investigation, i.e. SPC Ardmona ('SPCA' or the 'Complainant'). The Complainant maintains to have suffered material injury as from '*many years*'<sup>1</sup> due to the exports from Italy by Feger and La Doria (hereinafter, collectively referred as the 'two exporters') at allegedly dumped prices.

However, it is important to note that the current proceeding follows another investigation – i.e. anti-dumping investigation No. 217 concerning prepared or preserved tomatoes exported from Italy (the 'previous investigation') – targeting the same country and the same goods which are the object of investigation No. 276.

The previous investigation was initiated by the Commission on 10 July 2013. During the proceeding, it was found that in the investigation period (1 July 2012 to 30 June 2013) the dumping margin of both La Doria and Feger was *de minimis*. The Commission therefore rightly decided, on 20 March 2014 – *i.e. less than one year ago* - to terminate the investigation with respect to the two exporters, in accordance with Subsection 269TDA(1) of the Act.

As regards the other Italian exporters, on 16 April 2014 the Parliamentary Secretary to the Minister for Industry decided to impose anti-dumping measures on prepared or preserved tomatoes exported from Italy. These measures are due to expire on 15 April 2019. As a result, La Doria and Feger are the only two Italian manufacturers of the product under investigation currently not targeted by anti-dumping duties.

The present submission presents the views of Feger and La Doria with regard to elements which call for an immediate and urgent assessment on the part of the Commission,<sup>2</sup> since they relates to the unlawful initiation of the investigation. In particular, the submission will demonstrate that anti-dumping investigation No. 276 should not have been initiated and, therefore, should be terminated forthwith without the imposition of anti-dumping measures for the following reasons:

- first, the initiation of the investigation violates WTO law for being limited to two exporters;

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<sup>1</sup> Complaint, Section A-8.

<sup>2</sup> For this reason, this submission is filed well ahead the deadline of 28 February 2015.

- second, the initiation of an investigation targeting two exporters which were found to be *de minimis* in a previous investigation amounts to conducting a disguised review against these exporters in violation of WTO law;
- third, the initiation of the investigation violates WTO law in light of the absence of sufficient *prima facie* elements to trigger an investigation.

## **2. THE INITIATION OF THE INVESTIGATION VIOLATES WTO LAW FOR BEING LIMITED TO TWO EXPORTERS**

Feger and la Doria wish to draw the Commission's attention to the fact that that limiting the scope of an investigation to one or more particular exporter(s) of an exporting country, as opposed to an investigation covering all exporters of that country, violates WTO law.

Although the WTO Anti-Dumping Agreement (hereinafter, the 'ADA') does not explicitly mention that anti-dumping investigations have to be conducted with respect to all exporters from an exporting country, it can be inferred from several WTO provisions that investigations should necessarily cover all exporters (or at least the known exporters) of that country. A different conclusion would indeed lead to practical difficulties and inconsistencies making impossible the factual determinations and examinations that are normally carried out in an anti-dumping investigation. In this respect, the following should be noted.

### **2.1 The wording of the GATT 1994 and of the WTO Anti-dumping Agreement demonstrates that the scope of a fresh anti-dumping investigation must necessarily be country-wide**

The exports covered by a 'fresh' investigation (that is, an investigation initiated pursuant to Article 5 of the ADA) are determined by two elements: (i) the definition of the product under consideration; and (ii) the exporting country or countries concerned. It is not possible to further limit the scope of the exports covered by a fresh investigation to the products exported by certain identified exporter(s).<sup>3</sup> Investigations under the ADA can only be limited to specific exporters when this is explicitly provided for by in the Agreement. This is, for instance, the case of the so-called 'new exporter reviews' initiated pursuant to Article 9.5 of the ADA.

The above is confirmed by the wording of Article VI of the General Agreement on Tariffs and Trade 1994 (the 'GATT 1994'), which reads as follows:

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<sup>3</sup> The fact that all imports of the product concerned originating in a country should be covered by the investigation does not alter the fact that, for instance, an individual margin of dumping may be determined for each exporter.

*'1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'* (emphasis added).

It is therefore clear that a fresh anti-dumping investigation should cover all the products under consideration originating in the exporting country, and not the products manufactured by one or more producers of that country.

This interpretation is the only one that is compliant with the principles of treaty interpretation, according to which *'[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the state parties to the treaty must first be sought'*.<sup>4</sup>

In the case under discussion, several other provisions of the ADA provide the relevant context for the interpretation of Article VI of the GATT 1994 and confirm the conclusion that the scope of a fresh investigation should necessarily be country-wide.

Article 12.1 explicitly refers to *"the Member or Members the products of which are subject to [anti-dumping] investigations"*. This provides strong support for an interpretation according to which fresh investigations should cover all exports of the product concerning originating in the exporting Member.

Article 5.2 of the ADA, which set the standards to be complied with by any application for initiation of a fresh investigation, requires the application to provide, *inter alia*, the following information:

*'(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;'* (emphasis added)

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<sup>4</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 114.

This wording shows the importance of the precise identification of the exporting country or countries concerned by the investigation. Again, this reflects the idea that an anti-dumping investigation has to cover all imports of a product from a particular country or countries. Indeed, the country-wide nature of the scope of the investigation is reflected in the application, which forms the basis and prelude of a possible anti-dumping investigation. Moreover, the obligation for the complainant to provide the *'identity of each known exporter or foreign producer'* would make little sense if an investigation could cover imports from a more limited group of exporters than all known exporters of the country concerned.

In a similar vein, Article 12.1.1 of the Anti-Dumping Agreement requires the public notice of the initiation of an investigation to contain adequate information above all on *"the name of the exporting country or countries and the product involved"*. It is not accidental that these two elements are exactly those that determine the scope of the investigation. If an investigation could cover only a particular exporter, the drafters of the ADA would have referred to the *"exporters covered by the investigation"*.

Further support for the position that the scope of a fresh anti-dumping investigation is country-wide and cannot be limited to certain exporters if there are other known exporters in the country concerned, can be found in Article 6.1.3 of the ADA and footnote 16 thereto. These provisions oblige investigating authorities to *"provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member"*, specifying that *"where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member"*. Again, the reference to the exporting Member and the obligation to provide the application to all known exporters would make little sense if an investigation could cover imports from a more limited group of exporters than all known exporters of the country concerned.

Furthermore, Article 6.11 defines the concept of "interested parties" as including, *inter alia*, *"an exporter or foreign producer or the importer of a product subject to investigation"* and *"the government of the exporting Member"*. Interested parties are granted specific rights throughout an investigation. It would make no sense if exporters whose exports are not covered by the investigation would be granted specific rights. Indeed, they would no longer have any interest in the procedure, so there would be no reason why they should be considered to be an interested party. In addition, the reference to the *'exporting Member'* confirms once again the country-wide nature of the scope of a fresh investigation. The same applies to Article 5.5 of the ADA, which also contains a reference to the *'exporting Member'*.

In addition, Article 6.10 of the ADA requires that authorities “*determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation*”. If an initial anti-dumping investigation could be limited to a specific exporter or a group of specific exporters while there are other known exporters in the country concerned, it would be meaningless to require the investigating authorities to determine an individual dumping margin for the other known exporters.

Article 5.8, requires immediate termination in cases where the authorities determine that the volume of dumped imports, actual or potential, or the injury, is negligible. This Article further states that the volume of dumped imports shall normally be regarded as negligible *‘if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member’* (emphasis added). Also in this case, it would make no sense to establish a requirement with respect to the volume of imports *‘from a particular country’*, if an investigation could be limited to a subset of exporters of that country.

Finally, Article 9.5 of the ADA requires authorities to promptly carry out a review of new exporters that were not covered by the initial investigation which has resulted in the imposition of anti-dumping measures. This *a priori* means that all producers of a particular country which exported during the investigation period considered in the initial fresh investigation, should be included in the scope of imports examined in this investigation.

## **2.2 Any other interpretation of the wording of the GATT 1994 and of the WTO Anti-dumping Agreement would make the injury and causation analysis impossible**

In accordance with Article 3.1 of the ADA, a determination of injury shall be based on positive evidence and involve an objective analysis of both the volume of the ‘dumped imports’ and the effect of the ‘dumped imports’ on prices in the domestic market, and the consequent impact of ‘these imports’ on domestic producers. According to Article 3.5 of the ADA, it must be demonstrated that the ‘dumped imports’ are, through the effects of dumping, causing injury.

The concept of ‘dumped imports’ refers to the dumped imports originating in a specific country or countries. In view of the inherent country-wide nature of the injury and causation analysis, it would make no sense to conduct an investigation not targeting all known exporting producers of the exporting country.

By limiting the investigation to a limited number of exporters, the investigating authority could not collect and rely upon comprehensive data in order to assess the dumping, injury and causal link as is required by the ADA. Indeed, the exporters not targeted by the investigation would have no interest in providing the necessary information. It would therefore be impossible to know whether these exporters are dumping their exported products and causing injury. This could result in part of the injury, caused by exporters not targeted by the investigation, being attributed to the exporters subject to the investigation, thus violating the principle of non-attribution.

It is hard to understand how the investigation authority could isolate and quantify the specific injury caused by the exporters targeted by an investigation, and distinguish this injury (if any) from the injury caused by the other producers of the same country, without being provided with the necessary information. It would be impossible to properly determine the injury caused by some specific imports when the investigation authority does not have all the required data to undertake such an analysis.

Feger and La Doria wish to emphasise that, under Article 3.5 of the ADA, investigating authorities are obliged to examine any known factor other than the dumped imports in their causation analysis. Such factors include the volume of imports from other exporters, whether dumped or not. Therefore, the scope of a fresh investigation should necessarily be country-wide.

### **3. THE INITIATION OF THE INVESTIGATION AMOUNTS TO A DISGUISED REVIEW OF THE DUMPING MARGIN OF THE EXPORTERS FOUND TO BE *DE MINIMIS* IN THE PREVIOUS INVESTIGATION IN VIOLATION OF WTO LAW**

In addition to the above, Feger and La Doria wish to draw the Commission's attention to the fact that the initiation of the investigation No. 276 - targeting the two exporters which were found to have a *de minimis* dumping margin in the previous investigation No. 217 - amounts to conducting a disguised review against these exporters, in violation of WTO law. In this respect, the following should be noted.

Article 5.8 of the ADA reads as follows:

*“An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be de minimis if this margin is less than 2 per cent, expressed as a percentage of the export price. The*

*volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member” (emphasis added).*

In *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, the Appellate Body considered that this Article requires the immediate termination of the investigation in respect of exporters for which an individual dumping margin of zero or *de minimis* is determined.<sup>5</sup> The Appellate Body reasoned that the only way to terminate an investigation in respect of such exporters is to exclude them from the scope of the order establishing anti-dumping duties.<sup>6</sup>

The logical consequence of this approach is that exporters found to be *de minimis* “cannot be subject to administrative and changed circumstances reviews”. In the words of the Appellate Body:

*‘[w]ere an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their de minimis margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8.’<sup>7</sup>*

It follows that the exporters found to be *de minimis* cannot be ‘made subject to the anti-dumping measure’ at the moment in which this measure is imposed but also at a later stage.

This means of course that a review investigation targeting an exporter which in a previous investigation was found to be *de minimis* would be inconsistent with Article 5.8 of the ADA. However, similar to what would happen in case of a review, also the initiation of a fresh investigation against an exporter which in a previous investigation was found to be *de minimis* would effectively make this exporter subject to the anti-dumping measure. Indeed, anti-dumping measures are applied against a country (even though the measure may vary depending on the exporter). Accordingly, in case the new ‘fresh’ investigation would result in the imposition of a duty, the exporter concerned would be no longer excluded from the measure which is applied against its country, in violation of Article 5.8 of the ADA. The ‘fresh’ investigation would simply amount to a disguised interim review of the dumping margin of the exporter concerned.

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<sup>5</sup> Appellate Body report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 217.

<sup>6</sup> Appellate Body report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 219.

<sup>7</sup> Appellate Body report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, para. 305.

From another perspective, it must be further noted that the order excluding the exporters which were found to be *de minimis* from the scope of the anti-dumping duty is also part of the measure applied against the exporting country.

In this respect, it must be reminded that anti-dumping measures can only be amended by means of the specific instruments provided to this end in the ADA. For instance, the level of the measure can be amended following an interim review in accordance with Article 11.2 of the ADA. Moreover, the length of the measure can be further extended following an expiry review in accordance with Article 11.3 of the ADA. However, there is no provision or instrument in the ADA which allows to amend the order which excludes the exporters found to be *de minimis* from the scope of the measure. According to the principles of treaty interpretation, this cannot be seen as a simple omission,

The above is confirmed by the analysis of Article 9.5 of the ADA. This Article provides for a review limited to exporters or producers which have not exported the product under consideration during the investigation period taken into account in the initial investigation. This shows that the drafters of the ADA were aware of the exporters' specific concerns. Had they intended to provide for the possibility to reassess the dumping situation of one or more particular exporters, they would have done so explicitly.

In light of the foregoing, it is submitted that the initiation of investigation No. 276 amounts to a disguised interim review of the dumping margin of the two exporters concerned, in violation of WTO law. For this reason, Feger and La Doria respectfully request the immediate termination of investigation No. 276.

#### **4. THE INITIATION OF THE INVESTIGATION IS NOT SUPPORTED BY SUFFICIENT *PRIMA FACIE* ELEMENTS IN VIOLATION OF WTO LAW**

As a subsidiary argument it is submitted that, even in case it would be possible for the Commission to carry out an anti-dumping investigation limited to two exporters only, *quod non*, the initiation of the present proceeding violates WTO law due to the absence of sufficient *prima facie* elements to trigger an anti-dumping investigation.

##### **4.1 Introduction**

According to Articles 5.2, 5.3 and 5.8 of the ADA:

'5.2 [a]n application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient

to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following: [...]

(iii) *information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;*

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

[...]

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. [...]  
(emphasis added).

The content and the articulation of Articles 5.2, 5.3 and 5.8 of the ADA has been examined in details by the Panel in *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*.<sup>8</sup>

With regard to Article 5.2, the Panel considered that it referred to ‘*the contents of the application by the domestic industry requesting the initiation of an investigation*’ and that it required that the application contain ‘*[...] inter alia, information on certain specific areas to the extent that it is ‘reasonably available’ to the applicant*’. The Panel also emphasised that Article 5.2 states that ‘*[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph*’.<sup>9</sup>

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<sup>8</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*  
<sup>9</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.19.

Turning to Article 5.3, the Panel indicated that *'it makes it clear that the investigating authority has to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation'*<sup>10</sup> and that *'evidence on the three elements necessary for the imposition of an anti-dumping measure [dumping, injury and causation] may be inferred into Article 5.3 by way of Article 5.2'*.<sup>11</sup>

With regard to the articulation between the content of Article 5.2 and 5.3, the Panel stated that *'a claim under Article 5.2 may focus on whether an application contains information 'reasonably available' to the applicant, but the textual differences between Articles 5.2 and 5.3 lead us to observe that the 'reasonable availability' of the evidence to the application is not determinative as to the 'sufficiency', in the sense of Article 5.3, of that evidence as the basis for an investigating authority's decision to initiate'*<sup>12</sup>. Therefore, if the evidence reasonably available to the complainant is not enough to meet the requirement of 'sufficiency', Article 5.8 of the ADA requires the investigating authority to immediately terminate the investigation.

In summary, *'[under Article 5.2], the application must submit a degree of actual evidence of alleged dumping allegedly causing injury, [and under Article 5.3], that evidence must constitute an objectively sufficient factual basis to initiate an investigation'*.<sup>13</sup> Or, in other words *'Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation'*<sup>14</sup>.

It is therefore clear that the complaint should contain sufficient evidence of dumping, injury and causation, and that these concepts have to be interpreted in accordance with the relevant substantive provisions of the ADA (namely Article 2 for dumping and Article 3 for injury and causation).<sup>15</sup>

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<sup>10</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.19.

<sup>11</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.21.

<sup>12</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.23.

<sup>13</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.24.

<sup>14</sup> Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, para. 8.35.

<sup>15</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.21.

As explained hereunder, Feger and La Doria submit that the complaint filed by SPCA does not meet the standard required by Article 5.2 of the ADA, and that, as a result,, the Commission should have determined, in accordance with Article 5.3 of the ADA, that the evidence provided was not sufficient to justify the initiation of an investigation. It follows that the Commission should immediately terminate the investigation, as provided for in Article 5.8 of the ADA.

#### **4.2 The complaint does not meet the standard of evidence necessary to trigger the initiation of an investigation pursuant to Article 5.2 of the WTO Anti-dumping Agreement**

The present section will demonstrate that the complaint does not provide adequate *prima facie* evidence as requested by Article 5.2 of the ADA with respect to the determination of dumping as well as for triggering the ‘market situation’ investigation.

##### 4.2.1 The Complainant’s normal value calculation is not supported by adequate *prima facie* evidence

As indicated in the complaint, and further detailed in the Consideration Report No. 276, the Complainant has calculated the normal value of Feger and La Doria on the basis of the following methodology:

- a. in 2013, the Complainant’s personnel visited retail outlets in Italy and obtained 56 observations of prices;
- b. in 2014, the Complainant gathered 44 observations of prices from five online retailer websites.<sup>16</sup>

However, it is submitted that the above-listed pieces of evidence are not sufficient to meet the requirements of Article 5.2 of the ADA and, therefore, they cannot constitute *prima facie* evidence justifying the initiation of an investigation pursuant to Article 5.3 of the ADA. In this respect, the following should be noted.

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<sup>16</sup> Consideration Report No. 276, Section 5.4.1

First, with regard to the price observations gathered in 2013, it is submitted that any price information not relating to the investigation period (1 January 2014 - 31 December 2014) should be disregarded by the Commission. This is confirmed by the Anti-Dumping Notice of 19 January 2015, which indicates: “[t]he investigation period is 1 January 2014 to 31 December 2014. The Anti-Dumping Commission (the Commission) will examine exports to Australia of the goods by Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A. during that period to determine whether dumping has occurred’ (emphasis added). The WTO case law also considered that the price information taken into account in the dumping analysis must refer to the period of investigation.<sup>17</sup>

Moreover, it is no be noted that the first half of 2013 was part of the investigation period taken into consideration in proceeding No. 217 and that, in that proceeding, Feger and La Doria were found to be *de minimis*. It is striking that the same may be now be used by the Complainant and accepted by the Commission to support the initiation of a new investigation against the same producers.

This having been stressed, if the Commission were to consider that the price information gathered in 2013 can be taken into account, *quod non*, it is submitted that this information does not amount to *sufficient evidence* justifying the initiation of the investigation.

In *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, the Panel considered that temporal, volume and product coverage of the information provided by the complainant have to be taken into account when analysing the compliance of the initiation of the investigation with Articles 5.2 and 5.3 of the ADA.<sup>18</sup> The Panel considered that prices gathered within a short period of the investigation period ‘*raises substantial questions as to whether that evidence was representative of pricing during that period as a whole*’.<sup>19</sup> It added that ‘[...] *it is quite possible that [the evidence] may be an aberration from the typical prevailing prices and/or conditions, and therefore if the applicant has provided only such temporally isolated evidence, the authority should not assume without some corroboration that this evidence is representative of the period as a whole*’.<sup>20</sup> The Panel also addressed the issue of volume coverage, considering that a low amount of information is not sufficient.<sup>21</sup>

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<sup>17</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.23.

<sup>18</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.37 to 7.42.

<sup>19</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.37.

<sup>20</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.37.

<sup>21</sup> Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, para. 7.38-7.39.

The complainant indicates that in 2013 it obtained 56 *price information* by visiting *retailing outlets*. This is insufficient to meet the required temporal, volume and product coverage of the information to be included in an anti-dumping complaint.

With regard to the temporal coverage, it must be noted that the data regarding the year 2013 were obtained *'by SPCA personnel visiting the supermarkets'*<sup>22</sup>. Since the price information appears to have been obtained during a single visit, and assuming that this visit was conducted in a relatively short period of time, it should be concluded that the information gathered does not allow for a correct analysis of the Italian prices in 2013. This is further confirmed by the low amount of price information obtained during the visit.

With regard to volume coverage, the information under discussion only covers 56 price observations. Such a low amount of information does not allow for an analysis which takes into account different factors. In particular, it does not allow to take into account the geographic and economic diversity of Italy. Prices in Italy differ depending on the region (e.g., prices in the north are normally higher than prices in the south), the size of the retailer (large retail shops are normally cheaper than small retail shops), the location of the retailer (e.g., the rent for a retail shop is normally higher in the major cities than in the province), or the cost of transportation (to an island, for instance).

With regard to product coverage, it must be pointed out that the price information gathered by SPCA does not relate to products manufactured by the two exporters only. The Complainant's assumption that *'[i]t is reasonable to assume that the prices paid for La Doria and Feger products would be close to the average retail price as they are significant players in the domestic market and product pricing in Italy is known to be very competitive'*<sup>23</sup> is a mere statement not supported by any piece of evidence, which should be therefore rejected.

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<sup>22</sup> Complaint, Section B-3.

<sup>23</sup> Complaint, Section B-3.

Finally, the price information gathered by the Complainant concern retail prices, *i.e.* prices which are at a different level of trade compared to the prices charged by the two exporting producers targeted by the investigation in the Italian market. In order to work out the normal value of Feger and La Doria, the Complainant adjusted the net sale retail price in order to reflect the retailer margin. Such margin was calculated '*based on SPC Ardmona's knowledge of Europe's canned category's average retailer margin*'.<sup>24</sup> However, this calculation is simply based on assertions and not supported by any objective evidence. Moreover, even assuming that SPCA's '*knowledge of Europe's canned category's average retailer margin*' may constitute a reasonable basis for calculating the retailers' profit margin to be deducted from the retail price, *quod non*, the calculation should have been based on the known average margin of Italian retailers, rather than of European retailers.

Second, with regard to the price information gathered in 2014, it is submitted that, once again, the information provided is insufficient to meet the standard required by Article 5.2 of the ADA.

With regard to the temporal coverage, it is to be noted that the price information was obtained during the month of October 2014, that is to say, the information pertain to one twelfth of the total investigation period. Even more, no further information is provided regarding the temporal coverage during the month of October. Thus it cannot be excluded that this price information was not gathered, for instance, on the same day.

With regard to volume and product coverage, the complainant seems to be satisfied with 44 price information, obtained exclusively from online retailing websites. This does not allow for a proper analysis of the normal value of the product under investigation since it is common knowledge that *online* prices of retail products such as prepared or preserved tomatoes do not adequately reflect the shelf prices (since they are normally higher than shelf prices). Considering that the vast majority of Italian customers do not purchase tomato products online, it is clearly unreasonable to base the normal value calculation on online prices only.

This having being pointed out, the other objections illustrated above with respect to the lack of reliability of the price information gathered in 2013 are equally applicable to the price information gathered in 2014. In particular, Feger and La Doria emphasise that (i) the volume coverage is insufficient, as it includes only 44 price observations; (ii) the information gathered does not relate to products manufactured by the two exporters only, and (iii) the information concern retail prices, *i.e.* prices which are at a different level of trade compared to the prices charged by the two exporting producers in the Italian market.

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<sup>24</sup> Complaint, Section B-3.

Finally, it is worth recalling that the Complainant's dumping margin calculation is clearly contradicted by the Commission's findings in investigation No. 217 which – as it is well known – was terminated only 10 months prior to the initiation of the current investigation.

In light of the foregoing it must be concluded that the normal value calculation contained in the complaint is not supported by adequate *prima facie* evidence, in violation of Article 5.2 of the ADA.

#### 4.2.2 The Complainant's 'market situation' claim is not supported by adequate *prima facie* evidence

The Complainant further claimed that, given the allegedly specific situation on the Italian market, it is appropriate to have recourse to a constructed normal value for the purpose of the dumping calculation. In this respect, the complaint indicates that the Single Payment Scheme (the 'SPS') under the Common Agriculture Policy ('CAP') would distort the price of the product under investigation on the Italian market.

The Complainant estimated that the amount paid in 2013 under the Single Payment Scheme would have been up to 37% of the price paid for raw tomatoes by the prepared or preserved tomato processors.<sup>25</sup> However, such calculation not only is to be disregarded, since it does not concern the investigation period (which covers the calendar year 2014), but it is also totally unreliable, since it is based on outdated (not to say 'historical') data.

More importantly, the fact that the amount paid in 2013 under the SPS amounted to 20%, 30%, 37% or even 100% of the price paid for raw tomatoes is totally irrelevant for the 'market situation' assessment. Indeed, the question which should be analysed in the context of a 'market situation' assessment is not the amount of the alleged support, but whether or not such support has materially affected the domestic sales prices of the product under investigation.<sup>26</sup>

In this respect it is submitted that the non-confidential attachment B.4.2 provides an historical overview of the PAC, describing the various schemes applicable over the years, but does not provide any information and/or evidence regarding the actual impact of the alleged 'market situation' on the prices for raw tomatoes in the investigation period.

In light of the foregoing, it must be concluded that also the Complainant's 'market situation' claim is not supported by evidence and should be dismissed.

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<sup>25</sup> Complaint, non-confidential attachment B-4.2

<sup>26</sup> See Discussion Paper – Market Situation – s. 269 TAC(2)(a)(ii) – Guidance – Claims of Government Influence

#### **4.3 The Commission initiated the investigation despite the lack of *prima facie* evidence showing a change of circumstances compared to the previous investigation in violation of Article 5.3 of the WTO Anti-dumping Agreement**

Feger and La Doria submit that the Commission should have determined, in accordance with Article 5.3 of the ADA, that there was no sufficient evidence to justify the initiation of an anti-dumping investigation against the two exporters, provided that no change of circumstances occurred since the previous investigation.

##### 4.3.1 Introduction

At the Ministerial Conference of Doha held from 9 to 14 November 2001, the Ministerial Conference decided, with regard to the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, that ‘[...] *investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.*’<sup>27</sup>

It is recalled that the previous investigation, which concerned the same product as the product targeted by the present investigation, was terminated – with respect to Feger and La Doria - on 16 April 2014, that is to say less than 365 days before the initiation of the present proceeding on 19 January 2015.

Therefore, and in accordance with the conclusions of the Ministerial Conference of Doha, the Commission shall examine the complaint with ‘*special care*’, and that, ‘*unless the circumstances have changed*’ since the termination of the previous investigation, the Commission shall ‘*not proceed*’ further with the present investigation.

##### 4.3.2 The complaint does not provide any element showing a change of circumstances as regards the dumping margin of Feger and La Doria

As a preliminary remark, it is submitted that SPCA’s complaint is very similar - in the content and with regard to the methodology applied for the calculation of the dumping margin - to the complaint which gave origin to the previous investigation.

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<sup>27</sup> Decision of 14 November 2001 - Implementation-Related Issues and Concerns - WT/MIN01/17, 20 November 2001, para. 7.1.

The two complaints contain the same type of data, statements and arguments. In particular, the two complaints relied upon the same flawed methodology to calculate the normal value, based on a few price observations conducted in the premises of a handful of retailers, out of the investigation period. In this respect, the Commission itself recognised that ‘*SPCA approach to assessing normal values based on selling prices is similar to the one contained in its application of 2013 that resulted in the previous investigation [...]*’.<sup>28</sup>

However, during the previous investigation the Commission found that SPCA’s dumping margin calculation was flawed, since the two exporters’ dumping margin was found to be *de minimis*. It is hard to imagine that the findings of the Commission would be different in the present proceeding, especially if one considers that the new investigation period closely follows the investigation period taken into account in the previous proceeding.

The complete unreliability of the data and calculations provided by the Complainant is further confirmed by the fact that the Commission itself had to recalculate and correct the dumping calculations contained in the complaint.<sup>29</sup> The difference between the two set of calculations is macroscopic: while SPCA has calculated the (alleged) dumping margin of Feger and La Doria in the range of 60%, based on the same wrong assumptions the Commission has calculated the dumping margin of the two exporters to be in the range of 4-25% depending on the products (or product mixes) being compared, that is to say a margin which is - at the very least - 60% lower than the margin calculated in the complaint.

Moreover, it is worth recalling that the Complainant’s dumping margin calculation is clearly contradicted by the Commission’s findings in investigation No. 217 which – as it is well known – was terminated only 10 months prior to the initiation of the current investigation.

Therefore, it is submitted that the calculations provided in the complaint rely upon the same methodology which was found to be manifestly wrong in the previous investigation. Therefore, the complaint should have been dismissed. In addition, and more importantly, the complaint did not provide any element and/or evidence showing that the relevant circumstances ‘have changed’ since the termination of the previous investigation.

In light of the above, it is claimed that the Commission should ‘*not proceed*’ further with the present investigation as requested by the Decision of 14 November 2001 of the Ministerial Conference in Doha.

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<sup>28</sup> Consideration Report No. 276, Section 5.4.2.

<sup>29</sup> Consideration Report No. 276, Section 5.6.

4.3.3 The complaint does not provide any element or evidence showing a change of circumstances as regards the alleged ‘market situation’ in Italy

In the previous investigation, even though SPCA did not claim that a ‘market situation’ existed in Italy, the Commission analysed in depth whether the Italian exporters of the product under investigation benefited, directly or indirectly, from government support schemes and whether these programmes had an impact on the prices on the Italian market such as to require the Commission to have recourse to a constructed normal value.

The Commission found that *‘the evidence indicates that any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processors in the form of lower prices’*.<sup>30</sup> Therefore after having examined, on its own initiative, whether the CAP had an impact on the prices of the product under investigation on the Italian market, the Commission concluded negatively.

In this respect, the complaint did not provide any evidence indicating that ‘circumstances have changed’ with respect to the support schemes administered under the CAP compared to the previous investigation. Both in the complaint and in non-confidential attachment B.4.2 the Complainant merely recalls the existence of such support schemes but does not indicate how the relevant legislative framework would have changed since the previous investigation, and how this alleged change would have had an impact on the ‘market situation’ as to make it necessary to have recourse to a constructed normal value.

This having being clarified, the two exporters wish to stress that, in any case, it would be impossible for the Complainant to provide evidence relating to changed circumstances, since the European legislation regarding the CAP did not change at all as from the previous investigation.

In this respect the Commission’s attention is drawn to the fact that, as indicated in Regulation 1310/2013 quoted in non-confidential attachment B.4.2, *‘Regulation (EU) No 1307/2013 of the European Parliament and of Council, which sets up new support schemes is to apply from 1 January 2015. Council Regulation (EC) No 73/2009 therefore continues to form the basis on which income support will be granted for farmers in calendar year 2014’*. In short, the Single Payment Scheme applied in 2014 is the same scheme introduced in 2009 and analysed by the Commission in the previous investigation.

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<sup>30</sup> Final report 217 Prepared or preserved tomatoes – Italy, p. 34

Considering the above (*i.e.*, that the payment scheme referred to by the Complainant is the same as the one analysed by the Commission in the previous proceeding), no evidence of changed circumstances has been provided with regard to the ‘market situation’. Moreover, it is hard to understand how the Commission would reach a different conclusion regarding the existence of a ‘market situation’ compared to the conclusion it reached in the previous investigation.

In light of the foregoing, La Doria and Feger respectfully request the Commission not to proceed further with the present investigation, as requested by the Decision of 14 November 2001 of the Ministerial Conference in Doha.

#### 4.3.4 Publicly available *prima facie* evidence contradicts the Complainant’s claims and the Commission’s assessment

The Commission’s conclusion that *‘the application has demonstrated that there are reasonable grounds for asserting that the goods exported to Australia by Feger and La Doria have been sold at dumped prices with dumping margins that are not negligible’* is totally ill-founded.

Not only the data and calculations provided in the complaint are manifestly unreliable and wrong, as demonstrated above, but the publicly available data points to a conclusion which is exactly the opposite of what concluded by the Commission.

(A) Publicly available *prima facie* evidence show that the dumping margin of the two exporters is likely to have further decreased since the previous investigation

First, readily available data show that, contrary to what the Complainant loosely alleges, imports prices from Italy of the product under investigation *increased* steadily since 2010 (+11%) and that between 2013 and 2014, the prices increased by 5%.

Exports from Italy	2010	2011	2012	2013	2014
Quantity (tonne)	56,252	60,007	59,627	61,240	60,287
Value (euro)	36,299,064	37,877,822	41,053,453	41,661,432	43,367,291
Value/tonne	645	631	689	680	719
Value/kg	0.645	0.631	0.689	0.680	0.719

Table 1: Exports from Italy to Australia. Source: Eurostat

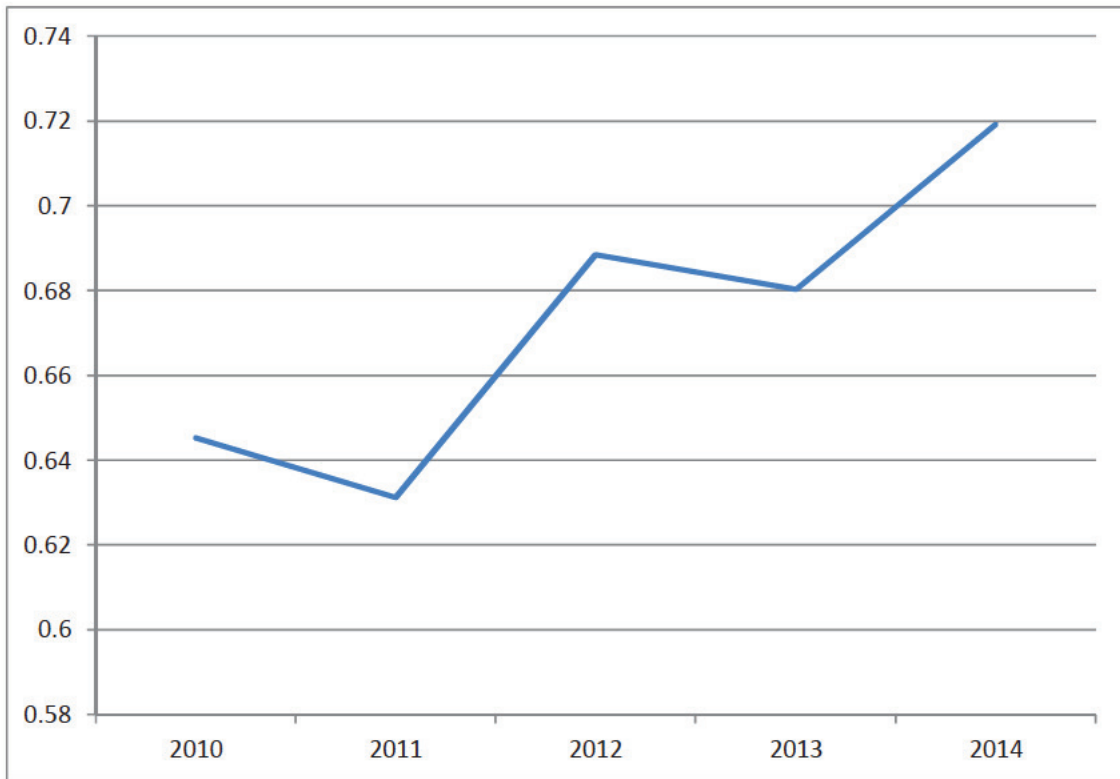


Chart 1: Exports from Italy to Australia. Source: Eurostat

In light of the above figures, it is difficult to understand how producers which were found to have a *de minimis* dumping margin a few months ago would now be dumping their imports to Australia.

Publicly available data show that, contrary to what the Complainant and the Commission allege, the dumping margin of Feger and La Doria, which in the previous investigation was found to be *de minimis*, can only have further decreased.

(B) Publicly available *prima facie* evidence show that the CAP has no impact in the level of prices for raw tomatoes in Italy

Second, the two exporters submit that the publicly available information shows that the alleged 'market situation' put forward by the Complainant does not exist in Italy.

The Complainant alleges that the payments granted to the Italian tomato producers under the CAP would '*influence the supply and prices of raw tomatoes*' and that '*in absence [of such programmes], the prices of raw tomatoes would have been higher [which would] in turn impact the normal value of prepared and preserved tomatoes in Italy*'.

If the Complainant's allegations were true, *quod non*, the Italian prices for raw tomatoes would be lower, or *at least* at the same level as the prices of the other major producing countries. However, readily available data show that the prices for raw tomatoes in Italy are the highest in the world amongst the main producing countries (including China and California). Prices for raw tomatoes in Italy vary between €95 and €105 per tonne, respectively for round and for long tomatoes.

COUNTRY	Price €/MT
Argentina	71
California	73
Canada	79
China	62
France	84
Iran	105
Italy (long tomatoes)	105
Italy (round tomatoes)	95
Portugal	80
Spain	77
Tunisia	57
Turkey	93
Ukraine	76
USA (excluding California)	85

Table 2: Prices for tomatoes in 2014. Source: World Processing Tomato Council



Chart 2: Prices for tomatoes in 2014. Source: World Processing Tomato Council.

In light of the foregoing, Feger and La Doria submit that SPCA's claim regarding the alleged 'market situation' in Italy is clearly contradicted by the available data, and therefore should be rejected.

## 5. CONCLUSION

As has been demonstrated, the investigation No. 276 against imports of prepared and preserved tomatoes exported from Italy by La Doria and Feger should be terminated forthwith. Indeed, the initiation of this proceeding violates several provisions of both the GATT 1994 and of the ADA.

First, the initiation of this investigation is unlawful in so far as it targets the exports of two Italian exporters only, as opposed to the exports of all Italian exporters of the product under consideration. The initiation of such an investigation not only violates the wording and spirit of the GATT 1994 and of the ADA, but also entails procedural disruptions which cannot be remedied.

Second, the initiation of an investigation against exporters whose dumping margin was found to be *de minimis* in a previous investigation amounts to conducting a disguised review, contrary to both Article 5.8 of the ADA.

Third, neither the Complainant nor the Commission complied with the procedural requirements of the ADA. The former failed to provide sufficient evidence of dumping as required by Article 5.2 of the ADA, while the latter failed to determine the accuracy, adequacy and sufficiency of said evidence and, as a result, failed to reject the application in accordance with Article 5.8 of the ADA. The same applies with respect to the evidence relating to the alleged 'market situation' in Italy.

Fourth, contrary to the requirements which stem from the conclusion of the Ministerial Conference of Doha, the complaint does not contain any evidence regarding a change of circumstances compared to the previous investigation. This comes as no surprise since, in fact, the situation did not change. Also in this respect, the Commission failed to reject the application in accordance with Article 5.8 of the ADA.

Finally, readily available data actually demonstrates the opposite of what is alleged in the complaint. Not only did the export price from Italy of the product under investigation increase during the year 2014, but also the prices on the Italian market are amongst the highest when compared to the main producers.

In light of the above, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. respectfully request the Commission to terminate the investigation forthwith.