VAN BAEL & BELLIS

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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.

Injury submission on behalf of Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A.

27 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'* due to the exports from Italy by Feger and La Doria (hereinafter, collectively referred to 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 on 10 July 2013. During the proceeding, it was found that in the investigation period (1st 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.

As regards the other Italian exporters, on 16 April 2014 the Parliamentary Secretary to the Minister for Industry decided to impose definitive 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, filed on behalf of La Doria and Feger, will demonstrate that the current situation of the Australian industry does not call for the adoption of anti-dumping measures against these two exporters for the following reasons:

- first, the present investigation is characterised by fundamental flaws which make it impossible to carry out a proper injury and causality assessment pursuant to the rules set of by the WTO Anti-Dumping Agreement ("ADA");
- second, the available evidence shows that the Australian industry did not suffer any injury in the period to be taken into consideration for the injury and causality assessment;

- third, there the available evidence shows that there is no causal link between the allegedly dumped imports from the two producers and the alleged injury suffered by the Australian industry.

Our clients reserve their rights to submit further comments in addition to the arguments presented in this document.

2. THE INVESTIGATION IS AFFECTED BY FLAWS WHICH MAKE IT IMPOSSIBLE TO CONDUCT A PROPER INJURY AND CAUSALITY ASSESSMENT

At the outset, Feger and La Doria wish to point out that the fundamental flaws which characterise the initiation of the present proceeding, namely:

(1) the fact that investigation N. 276 is limited to two exporters only, and;

(2) the fact that investigation No. 276 closely follows another investigation targeting the same product and the same country, in which the dumping margins of the two exporters concerned were found to be *de minimis,*

make it impossible for the Commission to carry out a proper injury and causality assessment, for the following reasons.

2.1 The injury and causality assessment must necessarily be country-wide

Pursuant to Article 3.1 of the ADA, a determination of injury shall 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.

In this respect, it must be noted that the concept of 'dumped imports' necessarily refers to the dumped imports originating in a specific country or countries.

Indeed, Article 5.8 of the ADA clarifies that the volume of 'dumped imports' is negligible (i.e. *de minimis*) when *"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"* (emphasis added). 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. Moreover, if the investigation authorities were allowed to conduct the injury assessment vis-à-vis the goods exported by particular producers only - as opposed to all goods originating in a country - said authorities would never be able to investigate those exporters whose exports volumes are *de minimis* since it would be always presumed that their exports do not cause injury. This, again, would make very little sense.

Therefore, in view of the inherent country-wide nature of the injury and causation analysis it would make no sense to conduct an investigation limited to the alleged injury caused by one or more particular producers, like in the present case.

This is confirmed by the fact that pursuant to Article 3.5 of the ADA, the Commission is obliged to examine any known factor other than the dumped imports in its causation analysis. Such factors include the volume of imports from other exporters, whether dumped or not. However, having limited the investigation to Feger and La Doria, the Commission will not be in the position to collect and analyse comprehensive data in order to assess the injury and causal link as required by the ADA. Indeed, the exporters not targeted by the investigation will have no interest in cooperating in the investigation and providing the necessary information. It will be therefore be impossible for the Commission to know whether, for instance, these exporters are causing injury.

It is hard to understand how the Commission could isolate and quantify the injury caused by the exporters targeted by the investigation, and distinguish this injury (if any) from the injury caused by the other Italian exporters, without being provided with the necessary information. This may result in part of the injury, caused by exporters not targeted by the investigation, being attributed to Feger and La Doria, thus violating the principle of non-attribution.

Therefore it must be concluded that in the present investigation the Commission is not in a position to conduct a proper injury and causation analysis as requested by the ADA. For this reason, the investigation should be terminated forthwith.

2.2 The period of reference identified by the Commission does not allow for a proper injury and causality assessment

As already pointed out, prior to investigation No. 276, the Commission conducted the investigation No 217, targeting the same country and the same product. This has important consequences with respect to the period to be considered for injury analysis purposes.

2.2.1 The period preceding 1 July 2013 cannot be taken into account for the injury and causality assessment

In the present proceeding, the injury assessment covers the period 1 January 2010 – 31 December 2014. The period taken into account for the injury assessment in investigation No. 217 was 1st January 2009 - 30 June 2013 (i.e. the end of the investigation period). It follows that the period taken into account for injury analysis purposes in investigation No. 276 overlaps to a very large extent with the injury period taken into account in investigation No. 217.

However, in the previous investigation the Commission determined that the dumping margin of both Feger and La Doria was *de minimis*[1] and concluded that:

(1) the exports from La Doria and Feger did not cause any injury to the Australian industry in the period 2009-2013;

(2) the injury suffered by the Australian industry in the period 2009-2013 was caused by other factors, including, *inter alia,* the exports from the Italian manufacturers of the product concerned.

In light of the above, it is hard to understand how the Commission may reach a different conclusion in the present proceeding, since it is not imaginable that the Commission would now consider that the exports from Feger and La Doria did cause injury during the period 2010-2013, *i.e.* the same injury period taken into account in the previous investigation. This would clearly contradict the findings of the Commission itself.

Therefore, since the Commission has already reached a conclusion as regards the injury suffered by the Australian industry until 30 June 2013, the injury analysis period of investigation No. 276 should necessarily be limited to the period between 1 July 2013 and 31 December 2014.

A different conclusion not only would run against the findings of the Commission in the previous investigation, but would also violate WTO law. In this respect, it must be recalled that in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (21.5*) the WTO Appellate Body clarified that "*imports attributable to a producer or exporter for which a* de minimis *margin of dumping is calculated may not be treated as "dumped" for purposes of the injury analysis".*[2]

Since the imports of Feger and La Doria were found to be *de minimis* in the previous investigation, thus not causing injury to the Australian industry, it goes without saying that in the present proceeding this conclusion cannot be modified. As a result, the injury analysis should not cover the period preceding 1 July 2013.

2.2.2 The period to be considered for the injury and causality assessment is too short to allow for a proper investigation

As demonstrated above, in the present proceeding the period of reference for the injury analysis should be from 1st July 2013 to 31 December 2014, i.e. 18 months.

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1 Termination of part of investigation, Ter. No 217.

2 Panel Report, European Communities – *Anti-Dumping Measure on Farmed Salmon From Norway*, para. 7.625.

However, such a short period of time does not allow for a proper analysis of the injury indicators as provided for by the ADA. According to the WTO Committee on Anti-Dumping Practices, indeed, the period of data collection for injury investigations has to be at least three years, "*unless a party from whom data is being gathered has existed for a lesser period*".[3]

In the present case, not only both La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. have existed for far more than three years, their dumping margin was determined to be *de minimis* on 20 March 2014.

In light of the foregoing, it must be concluded that in the present investigation the Commission is not in a position to conduct a proper injury and causation analysis as requested by the ADA. Therefore the investigation should be terminated forthwith.

3. THE AUSTRALIAN INDUSTRY DID NOT SUFFER ANY INJURY IN THE PERIOD TO BE CONSIDERED FOR THE INJURY ASSESSMENT

According to Articles 3.1 and 3.2 of the ADA, in order to determine the existence of injury there must be positive evidence of an increase in dumped imports which impacted on the domestic prices of the like product manufactured by the Complainant. Each of these aspects will be addressed in turn.

3.1 The volume of exports from Feger and La Doria did not increase

According to the report of the WTO Panel in *Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland*, in order to conclude for the existence of injury, the investigating authority must *"give[n] attention to and take[n] into account whether there has been a significant increase in dumped imports, in absolute or relative terms*"[4] in the injury analysis period.

In the present case, Feger and La Doria wish once again to make clear that the period to be taken into consideration for the injury analysis is 1 July 2013 – 31 December 2014. With respect to this period, it is submitted that the Commission:

- on the one hand, failed to analyse whether in the reference period there was an absolute increase of exports from Feger and La Doria;
- on the other hand, concluded that there was no relative increase of such exports.

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[3] Recommendation concerning the periods of data collection for anti-dumping investigations, adopted on 5 May 2000, G/ADP/6, 16 May 2000, para. 1 (c).

[4] Panel Report, Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland, para. 7.161.

3.1.1 There is no evidence showing an absolute increase of the exports from Feger and La Doria

First, it is submitted that Consideration Report No. 276 fails to address the question of whether the exports from Feger and La Doria increased in absolute terms in the period under consideration. The Commission merely indicates that it considered the data relied on by the Complainant to be "*reliable, relevant and suitable for estimating the relative size of the Australian market for prepared or preserved tomatoes*"[5], and that the volume of imports is not *de minimis.*[6]

However, whether or not the volume of dumped imports is *de minimis* is only relevant with regard to the obligation of the investigation authority to terminate the proceeding in accordance with Article 5.8 of the ADA, which provides that "*[t]here shall be immediate termination in cases where the authorities determine that […] the volume of dumped imports, actual or potential, […] is negligible"*. Therefore, the mere determination that the volume of exports from the two exporters is not *de minimis* is totally irrelevant with regard to the injury analysis.

Instead, Articles 3.1 and 3.2 of the ADA require that there be a "*significant increase in dumped imports*". Therefore, the Complainant and/or the Commission should have provided reasonable evidence not only that imports from La Doria and Feger increased, but also that they significantly increased.

However, neither the complaint nor the Consideration Report contains any figure regarding the volume of exports of the two exporters. Therefore, it is submitted that the Commission failed to meet the standard of evidence required by WTO rules.

In addition, since no evidence at all has been provided of an absolute increase in volume of the imports from the two exporters, it is impossible for Feger and La Doria to comment further on this aspect of the investigation, but to indicate that this prevents them from having a full opportunity to defend their interests. This is however required by Article 6.2 of the ADA "*Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests*". Feger and La Doria consider that this is contrary to their rights of defence.

[5] Consideration Report No. 276, Section 4.5.2.
[6] Consideration Report No. 276, Section 5.1 and 5.5.

3.1.2 The available evidence shows no relative increase of the exports from Feger and La Doria

As regards the relative volume of allegedly dumped exports, *i.e.* the comparison between the market shares of the exports from Feger and La Doria and the like products on the Australian market, the Commission provided a chart showing SPCA's market shares between 2010 and 2014.[7] In this respect it is submitted that:

- first, the Commission's analysis is methodologically flawed in that it takes into account *non dumped imports.* Indeed, the imports from the two producers before 1 July 2013 cannot be taken into account for injury analysis purposes. This means that roughly 44% of the imports from Italy in the period 2010-2013 should be removed from the injury analysis;

- the available data actually demonstrate the absence of injury. As the Commission itself acknowledged, indeed, *"SPCA has increased its market share for each subsequent year* [following 2010]".[8] The conclusion of the Commission is even more striking: *"there does not appear to be reasonable grounds to support the claim that the Australian industry has suffered injury in the form of reduced sales volume and/or reduced market share*".[9]

Considering that the available data show *neither* an absolute increase in volume, *nor* a relative increase in volume of the allegedly dumped exports from Feger and La Doria, it is submitted that the first essential element of the injury analysis, *i.e.* a positive evidence of an increase of dumped imports, is neither proved, nor existent. Therefore, it is impossible for the Commission to conclude to the existence of injury.

3.2 The exports from Feger and La Doria had no effects on Australian prices

According to Articles 3.1 and 3.2 of the ADA, the investigation authority is required to *demonstrate* the effects of the allegedly dumped prices in the domestic market of the like products which can be done through, *inter alia*, the demonstration of a significant price undercutting, or a price depression, or a price suppression.

As demonstrated hereunder, the allegedly dumped exports from Feger and La Doria did not have negative effects on the prices of the Australian industry in the period to be taken into account for the injury assessment, *i.e.* the period which follows 1 July 2013. Indeed, the available data show that there was neither price depression, nor price suppression on the Australian market.

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7 Consideration Report No. 276, Section 6.6.2.
8 Consideration Report No. 276, Section 6.6.2.
9 Consideration Report No. 276, Section 6.6.3.

3.2.1 The prices on the Australian market are increasing

The ADA requires the demonstration that the dumped imports "*depress prices to a significant degree*". As demonstrated by the Complainant himself, SPCA's prices on the Australian market are increasing in the last two years, as opposed to what would logically be expected if the Complainant were actually suffering injury because of dumped imports. Hereunder is reproduced a table provided by the Complainant.

*Index of **price** variations (model, type, grade of goods)*

Period	2010	2011	2012	2013	2014HY
Index	100	108	100	102	104

Therefore, contrary to SPCA's allegations, the prices increased between 2010 and 2014, and especially in the period 2013-2014 which, it is recalled, is the only relevant period for the injury analysis. The Commission itself acknowledged that "*[t]he unit prices then increased in 2013 and in the first six months of 2014*".[10] In that situation, it is hard to understand how the Complainant may allege that it is suffering injury.

3.2.2 There is no price suppression on the Australian market

On an alternative basis, the ADA indicates that the effects of dumped imports on domestic prices can be proved by showing that the dumped imports "*prevent[ed] price increases, which otherwise would have occurred, to a significant degree*". As indicated by the Commission[11], price suppression occurs "*when price increases, which would otherwise have occurred, have been prevented*".

However, as demonstrated by the Complainant himself, the prices increased on the Australian market. Again, it is hard to see how the dumped imports would have prevented price increases when the prices actually *did* increase. In addition, even if it was concluded that the allegedly dumped exports were causing a price suppression, *quod non*, such a price suppression should not be considered "significant" and therefore would not meet the threshold provided for by the ADA.

In that regard, the two exporters wish to point out that the wording used by the Commission is indicative of the flawed methodology it used. Indeed, the Commission explained that "*[p]rice depression occurs when a company, for some reason, lowers its prices*"[12] (our emphasis). This is outright wrong. For the purposes of an anti-dumping investigation, price depression occurs when a company lower its prices significantly, because of the effects of the dumped imports. The mere determination of price depression (or price suppression) does not mean that there is injury.

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10 Consideration Report No. 276, Section 6.7.
11 Consideration Report No. 276, Section 6.7.
12 Consideration Report No. 276, Section 6.7.

3.2.3 Feger and La Doria have not been placed in the position to have a meaningful understanding of the Complainant's allegations on price undercutting

Finally, the two exporters fail to understand why the price undercutting analysis undertaken by the Commission[13] has been treated as totally confidential. At the very least, an indexed table should have been provided by either the Complainant or the Commission, as to allow the interested parties to have a meaningful understanding of SPCA's claim regarding price undercutting.

In this respect it is recalled that Article 6.5.1 of the ADA requires the investigation authority to *"require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence"* (emphasis added).

In the total absence of any data in that regard, it is impossible for the two exporters to further comment on this aspect. Again, Feger and La Doria consider that this is contrary to their rights of defence pursuant to Article 6.2 of the ADA.

3.3 Conclusion on injury

In light of the foregoing it should be concluded that:

- the available data show *neither* an absolute increase in volume, *nor* a relative increase in volume of the allegedly dumped exports from Feger and La Doria. Therefore, the first essential element of the injury analysis, *i.e.* a positive evidence of an increase of dumped imports, is neither proved, nor existent;

- the alleged increase of exports from Feger and La Doria did not have significant impact on the Australian market. On the contrary, Australian prices have increased;

Therefore there is no doubt that in the only relevant period, *i.e.* 1 July 2013 – 31 December 2014, the Complainant's prices and market shares increased. Feger and La Doria fail to understand how a company whose market shares and prices have increased in the period to be taken into account for the injury analysis, may claim to have suffered injury and may require the adoption of anti-dumping measures.

[13] Consideration Report No. 276, Section 7.4.

4. THE INJURY SUFFERED BY THE AUSTRALIAN INDUSTRY IN THE PERIOD TO BE TAKEN INTO CONSIDERATION FOR THE INJURY ASSESSMENT (IF ANY) WAS NOT CAUSED BY THE EXPORTS FROM FEGER AND LA DORIA

Article 3.5 of the ADA requires the investigation authority to (1) demonstrate the existence of a causal link between the allegedly dumped imports and the injury suffered by the Australian industry and (2) examine any other known factors which are susceptible to have caused such injury.

As will be demonstrated hereunder, there is no link between the injury suffered by the Australian industry and the imports of the product under investigation from the two exporters. Rather, the injury (if any) was caused by several other factors.

4.1 The alleged injury (if any) was caused by dumped imports from other exporters

It is recalled that, while the two exporters targeted by the present investigation were found to be *de minimis* in the previous proceeding No. 217, the other Italian exporters were found to dump and were therefore, and still are, subject to anti-dumping measures.

This means, in all logic, that the other Italian exporters – which, as explained, were found to dump in the previous investigation - were causing injury to the Australian industry, at least until the provisional anti-dumping measures against these exporters were adopted on 10 November 2013. As a result, it must be concluded that the injury suffered from the Australian industry since 2010 until 10 November 2013, if any, was caused by the exports of the Italian exporters other than La Doria and Feger.

It is difficult to see how a different conclusion would be reached, since the very fact that the Commission decided to adopt anti-dumping measures against some exporters, and to terminate the investigation against other exporters, entails that the Commission concluded that the former were causing injury through their dumped imports, while others were not.

4.2 The alleged injury (if any) was caused by the strategy of the Australian major retailers

In addition, it is submitted that the injury suffered by the Australian industry, if any, was caused by the commercial strategies of the major Australian supermarkets. In this respect, the following characteristics of the Australian market should be noted:

- according to the information gathered in investigation No. 217 *"approximately 82% of all prepared or preserved tomato sales occur via the major*

supermarkets".[14] The Commission also found that the three major Australian supermarkets (i.e. Coles, Woolworths and Aldi) exercise a strong buying power towards the tomatoes producers as a result of the size of their purchases and sales volumes in the downstream market, *i.e*. the retail sector.[15] The Australian retail market for prepared or preserved tomatoes is therefore dominated by a very small number of large purchasers which enjoy an extensive market power (which includes, e.g., setting the purchase prices, fostering the retail sales of specific brands in lieu of others, organising marketing campaigns, etc.);

- the prepared or preserved tomatoes sold in the Australian market can be grouped in two different categories:[16]

  a) private labels, i.e. brands created and owned by the retailers (supermarkets) with the goods being made under toll type arrangements. Private labels products are purchased by the retailers by means of a tendering procedure, in which the certified producers are invited to tender based on product specifications and volumes required by the retailer. It must be noted that the vast majority of the tomatoes imported from Italy are marketed under private labels; and

  b) proprietary (or branded) labels, i.e. brands created and owned by the tomatoes manufacturer (or distributor). Proprietary label products are purchased through normal negotiations between retailers and suppliers (or distributors). It must be noted that the vast majority of SPCA's products are branded label products.

As noted by the Productivity Commission in the framework of the Safeguard Inquiry into import of processed tomatoes, in recent years the major supermarkets implemented a strategy to promote their private label products (therefore, at the expense of SPCA's proprietary label products) in order to (i) offer a competitive alternative product to branded products; (ii) increase their profit margins; (iii) retain the loyalty of their customers by offering products which are not available in competitors' stores; and (iv) increase their purchasing power.[17] It follows that the recent developments of the Australian market forced SPCA to cut its prices in order not to lose sales volumes. This reduced the Complainant's *"ability […] to achieve premium prices for [its] products"*[18], and reduced its margins and profitability.

This was in turn confirmed by the Commission in the framework of investigation No. 217, where it was found that "*factors other than dumping, including […] the retail*

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14 Final Report No. 217, page 20.

15 Final Report No. 217, page 56.

16 Final Report No. 217, page 20.

17 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 56.

18 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 56.

strategies of the major supermarkets have played a contributing role to the injury experienced by SPCA during the investigation period".[19] The Commission explained that "*the major supermarkets determine the shelf placement of all products within a range of goods. In doing so, retailers tend to provide the prime locations to the highest volume selling goods, often being their own private labels. Consequently SPCA's products have been moved to unfavourable locations on shelves within the prepared or preserved tomato range of goods which can exacerbate the lower sales performance".*[20] In this respect, it is worth to note that *"the strategy of shelf placement by the retailers is not related to their purchase of dumped imports from Italy"*[21].

In addition, supermarkets' decision to diversify their sources of supply for the private label products put additional pressure on the Complainant, because of this partial shift to other sources. This forced the Complainant to lower the price of its products destined for private labels[22]. This diversification of supply was not only due to economic considerations, but also to the necessity to ensure a constant and reliable supply, which cannot be guaranteed by SPCA. Indeed, Australian growers of tomatoes are mostly located in northern Victoria and southern New South Wales, which exposes them to periods of low production due to bad weather[23].

The foregoing leads to the conclusion that any injury that SPCA may have suffered is the direct consequence of the supermarkets' commercial strategies. The few players active in the retail market for prepared or preserved tomatoes, which hold a strong buying power, are in competition with SPCA in the branded segment. The fact that they prefer to sell their own labelled tomatoes in lieu of those of SPCA constitutes a conduct which cannot be addressed with anti-dumping measures.

4.3 SPC Ardmona is a long-term loss-making company

The Annual Reports of Coca-Cola Amatil, shed light on the financial setbacks suffered by the Complainant. Indeed, since 2010, the Annual Report consistently highlighted the Complainant's problematic situation.

In 2010, CCA reported lower revenues for the Complainant as the business exited a number of unprofitable activities. The Annual Report also emphasised on the appreciation of the Australian dollar, which impacted the Complainant's competitiveness.[24]

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19 Final Report No. 217, section 8.4.3.
20 Final Report No. 217, section 8.6.1.
21 Final Report No. 217, page 60.
22 Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.
23 Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.
24 Coca-Cola Amatil, Annual Report 2010, p.2.

The same observation was made in the 2011 Report, and a decrease of export sales of 20% was also reported. Again, in 2012 "*[t]he ongoing impact of the high Australian dollar on the competitiveness of SPC Ardmona has led to a write-down of assets and goodwill in the business which was recognised as a significant item in the accounts*".[25]

In 2013, it was reported that "*[w]hile CCA has undertaken a substantial restructuring of the SPCA business with initiatives undertaken to materially reduce the cost of doing business, the write down of assets has been made having regard to the ongoing impact of the high Australian dollar and the associated impact on the business' competitiveness*".[26]

These statements are further substantiated by the charts provided by the Commission itself in Consideration Report No. 276.

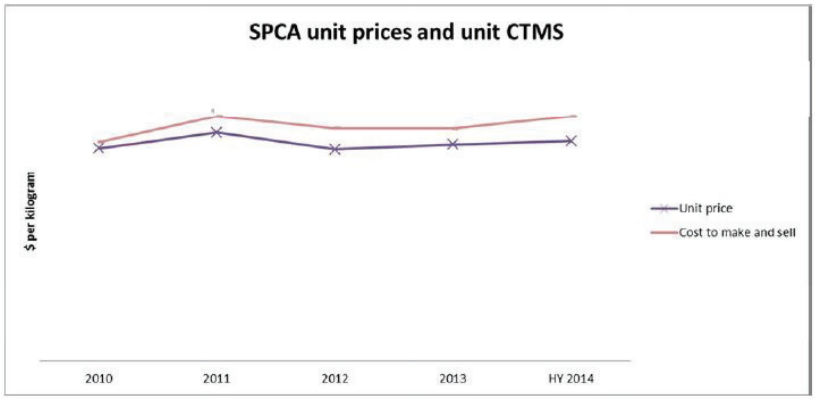

Chart 1: SPCA's unit price and unit cost for prepared or preserved tomatoes. Source: Consideration Report No. 276

Contrary to what the Consideration Report infers from the above chart, *i.e.* that the Australian injury is suffering injury due to the exports from Feger and La Doria, this chart merely shows that SPCA is a chronic, long-term loss-making inefficient company, and has been since 2010. It also shows that, despite the adoption of anti-dumping measures against the large majority of exports of the product under investigation from Italy, the Complainant has been unable to take advantage of such an opportunity since in 2014 SPCA's unit cost to make and sell increased more than SPCA's unit prices.

4.4 The alleged injury (if any) was cause by several other factors

On a subsidiary basis, it is also submitted that the injury suffered by the Complainant (if any) was caused by several other factors.

25 Coca-Cola Amatil, Annual Report 2011, p.1.
26 Coca-Cola Amatil, Annual Report 2013, p.2.

4.4.1 The appreciation of the Australian dollar and its impact on the Australian market

According to the Commission's findings in investigation No. 217, *"[s]ince 2007 the AUD/EUR exchange rate has appreciated significantly. Information available from the Reserve Bank of Australia […] reveals that the AUD appreciated 37% between 2009 and 2013 and at its peak in 2012 the AUD had appreciated in excess of 42% over the EUR"*.[27] The appreciation of the Australian dollar had two negative effects on the Australian industry.

First, it entailed a reduction in price of imported processed tomatoes compared to domestically produced products, therefore making them less competitive on the Australian market: "*[g]iven the majority of prepared or preserved tomatoes exported from Italy were sold in euros, the Commission examined the impact of the appreciation on FOB prices. It shows that unit FOB prices in Australian dollar terms decreased by up to 45% since 2009*" [28] . The Productivity Commission also acknowledged this circumstance: "*[…] the FOB unit value of imports expressed in Australian dollars decreased over the period 2009-2013, almost entirely due to the appreciation of the Australian dollar*".[29] Coca-Cola Amatil itself further confirmed that *"[…] the high Australian dollar relative to the South African Rand and the Euro as well as the high cost of operating in Australia continued to materially impact SPCA's competitiveness […]*"[30].

Second, the appreciation of the Australian dollar also had a direct negative effect on exports of the product under investigation from Australia. One of the causes of injury is the Complainant's reduced exports volumes in the last years (around 45% in the recent years[31]). This is line with the Commission's past findings that "*other factors evident in the Australian market that may have contributed to the injurious effects experienced by SPCA […] include […] a decrease in SPCA'S export sales*"[32]. This is further confirmed by the figures provided by the Complainant.

27 Final Report No. 217, section 8.8.3.
28 Final Report No. 217, section 8.8.3.
29 Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.
30 Coca-Cola Amatil, Annual Report 2013, p.20.
31 Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.
32 Final Report No. 217., Section 8.10.

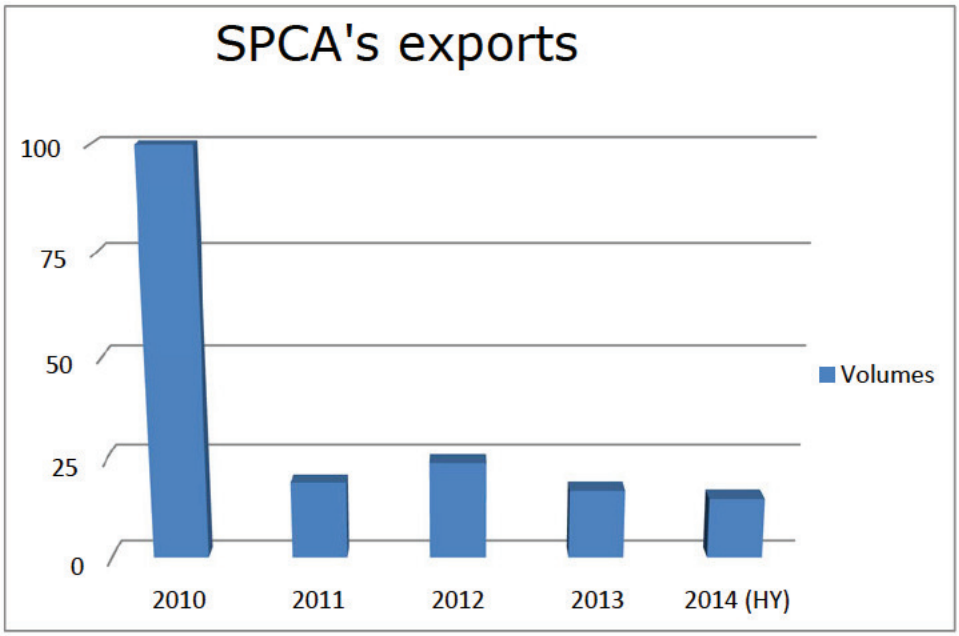

Chart 2: SPCA's export volumes. Source: Complaint

It is submitted that SPCA's decrease in export volumes reduced the Complainant's throughput and therefore increased its overhead unit costs of processed tomatoes, decreased the production volumes, sales, revenues and profits.

4.4.2 The injury was caused by severe weather conditions

In 2011, flooding around the tomato growing region of Victoria reduced the quantity of harvested tomatoes by approximately two third, therefore decreasing the Complainant's production volumes significantly. This event coincided with an increase in sales of private label products in supermarkets, which the Complainant has not been able to win back. It is also clear that, as indicated above, this kind of event encouraged the supermarkets to diversify their source of supply and to turn towards imported tomatoes to ensure constant supply for their own labels.

4.5 Conclusion on causality

It stems from the above that the alleged injury suffered by the Complainant was caused by several factors which, in the words of Coca-Cola Amatil's 2013 Annual Report[33], created the *"perfect storm"*. In particular, the appreciation of the Australian dollar coupled with the private label strategy of the Australian supermarket had a severe impact on the Complainant's margin and profitability.

33 Coca-Cola Amatil, Annual Report 2013, p.23.

In addition, the Commission found that the dumped imports from other Italian exporters indeed caused injury to the Complainant, and therefore adopted anti-dumping measures against said imports. It is however recalled that the Commission also concluded that the imports from La Doria and Feger did not cause any injury to the Australian industry.

5. CONCLUSION

To conclude, it is submitted that the exports from La Doria and Feger did not cause any injury to the Australian industry. Therefore, this investigation should be terminated forthwith, without the imposition of anti-dumping measures. This conclusion is supported, in particular, by the following elements:

- the fundamental flaws which characterise the initiation of the present proceeding make it impossible for the Commission to carry out a proper injury and causality assessment. For this reason, investigation No. 276 should be terminated forthwith;

- in any event, the injury analysis period cannot cover the period preceding 1 July 2013. This stems from the conclusions of the Commission in the previous investigation, where the Commission indicated that the two exporters' dumping margin was *de minimis* (while the other exporters were found to be dumping), therefore causing no injury to the Australian industry;

- there is no evidence of injury in the period to be considered for injury analysis purposes. On the contrary, as from July 2013, the Complainant was able to increase its prices and market shares. In 2014, the Complainant's results were significantly better than in the previous years;

- no causal link can be established between the alleged injury suffered by the Australian industry and the allegedly dumped imports from La Doria and Feger. Indeed, the injury suffered by the Complainant, if any, was caused by other factors such as the dumped imports from other exporters, the commercial strategy of the Australian supermarkets, the appreciation of the Australian Dollar.

In light of the above, it should be concluded that the exports from Feger and La Doria did not cause any injury to the Australian industry. Therefore, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. respectfully request the Commission to terminate the investigation forthwith.

VAN BAEL & BELLIS

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

Observations on the alleged 'market situation' submitted on behalf of Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A.

27 February 2015

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1. INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission ("Commission") initiated an anti-dumping investigation concerning imports of prepared and preserved tomatoes ("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 an anti-dumping complaint ("complaint") filed by SPC Ardmona ("SPCA" or the "Complainant").

The Complainant alleges, *inter alia*, that in the investigation period (i.e. the calendar year 2014) the supply and prices for raw tomatoes on the Italian market were distorted due to the payments that the tomato growers received under the Single Payment Scheme (the 'SPS') pursuant to the Common Agriculture Policy ('CAP') and that, as a result, the domestic prices of the product under investigation should not be used for the calculation of the normal value. As a consequence, according to the Complainant, the Commission should have recourse to a constructed normal value in light of the alleged particular 'market situation' on the Italian market for raw tomatoes.[1]

However, it is important to note that the issue of the 'market situation' was already analysed by the Commission in 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.

In such investigation, which was concluded on 16 April 2014 - i.e. less than 10 months ago - 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*" and that "*the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)*".[2]

The present document will demonstrate that (1) addressing the matter of the 'market situation' in the framework of an anti-dumping investigation rather than in a countervailing investigation is contrary to WTO law; (2) the SPS has no impact on the prices for raw tomatoes in the Italian market; (3) the information provided b the Complainant is irrelevant for the purposes of the 'market situation' analysis and; (4) the Complainant failed to provide evidence demonstrating a change of circumstances since the last investigation. These points will be addressed hereunder.

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1 Complaint, Section B-4.

2 Final Report No. 217, p.34.

2. ADDRESSING THE MATTER OF THE 'MARKET SITUATION' IN THE FRAMEWORK OF AN ANTI-DUMPING INVESTIGATION RATHER THAN IN A COUNTERVAILING INVESTIGATION IS CONTRARY TO WTO LAW

At the outset, Feger and LA Doria wish to emphasise that the question of whether the SPS constitutes a subsidy to tomato growers should not be addressed in the framework of an anti-dumping investigation but, rather, in the framework of a countervailing proceeding.

Indeed, addressing questions concerning subsidies in an anti-dumping investigation would be in breach of WTO rules, which state clearly that *"no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement"* (Article 32.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement")). It is understood that the above provision covers all possible subsidies and does not make any difference on the basis of the "purpose" of the analysis, as the Australian authorities seem to suggest. Therefore, any alleged subsidy and/or its alleged impact on the relevant market can only be addressed in the framework of a countervailing investigation.

This having being clarified it is submitted, *quod non*, that the SPS is fully WTO compatible, since it is not specific and is a completely decoupled income support scheme to farmers, in accordance with paragraph 6 of Annex 2 to the Agreement on Agriculture. Therefore, there is no doubt on the fact that the SPS has no trade distorting effects or effects on the production and is therefore to be considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture. By accepting the logic followed by the Australian authorities, any effect that a subsidy (although not countervailable) may produce on the relevant market could always be investigated in the framework of an anti-dumping investigation. As explained above, this would be clearly not possible according to WTO law.

In any event, it is recalled once again that the Commission has already concluded, less than 10 months ago, 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*" and that "*the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)*".[3]

[3] Final Report No. 217, p.34.

In light of the above, Feger and La Doria fail to understand how the Commission may have decided to re-open a 'market situation' investigation on the sole basis of the *"new material that had not been considered in the previous investigation"* provided by SPCA. In this regard, it is submitted that the conclusions resulting from the new information submitted by the Complainant are based on mere allegations, since they simply assume that the mere existence of payments to tomato growers has an immediate effect on the price of raw tomato, without providing any demonstration of this circumstance. This is contrary to Article 5.2 of the WTO Anti-dumping Agreement, according to which *"simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements"* for the initiation of an anti-dumping investigation.

3. THE SINGLE PAYMENT SCHEME HAS NO IMPACT ON THE PRICE OF RAW TOMATOES IN THE ITALIAN MARKET

Contrary to what the Complainant alleges, the SPS has no impact on the price for raw tomatoes on the Italian market.

Pursuant to the SPS, farmers are entitled to receive every year a direct payment on the basis of (1) the hectares of land owned and (2) the entitlements held by each farmer in that particular year. An entitlement is a conditional right to receive the payment pursuant to the SPS which is (i) not attached to the land, (ii) is al ocated to a person and is the property of that person and (iii) can be traded. The value of each entitlement is calculated on the basis of the amount of payments received during a reference period (2004-2006), by dividing this amount by the number of hectares which qualified for the support in the reference period.

Under the SPS, all farmers – whether or not tomato growers – receive a payment based on the hectares of land and the entitlement they own. These payments are *decoupled from production*. This means that all the farmers eligible for the SPS are granted a payment, *irrespective of what they produce, and of their volume of production*. The Complainant himself acknowledged that in calendar years 2011-2013 "*the payments are in 100% decoupled form under the Single Payment Scheme*".

Therefore and logically, the SPS cannot be considered to be an incentive to the production of tomatoes. On the contrary, since all farmers receive the payments irrespective of what and how much they produce, the SPS can be seen as a disincentive to production. As a matter of fact, the only reason for which the farmers may want to produce tomatoes is to make profits. In addition, since all the eligible farmers benefit from the SPS, this programme cannot be considered to have an impact on price competition amongst the Italian tomato growers.

This is further confirmed by the following considerations.

If the SPS had an impact on the prices for raw tomatoes on the Italian market, *quod non*, such effect would be that of lowering prices. This is indeed what is alleged by the Complainant. However, the prices on the Italian raw tomato market are amongst the highest in the world. In 2014, the price of long tomatoes was, on average, €105/MT, and the price of round tomatoes was about e95/MT. This is well above the average worldwide prices for raw tomatoes.

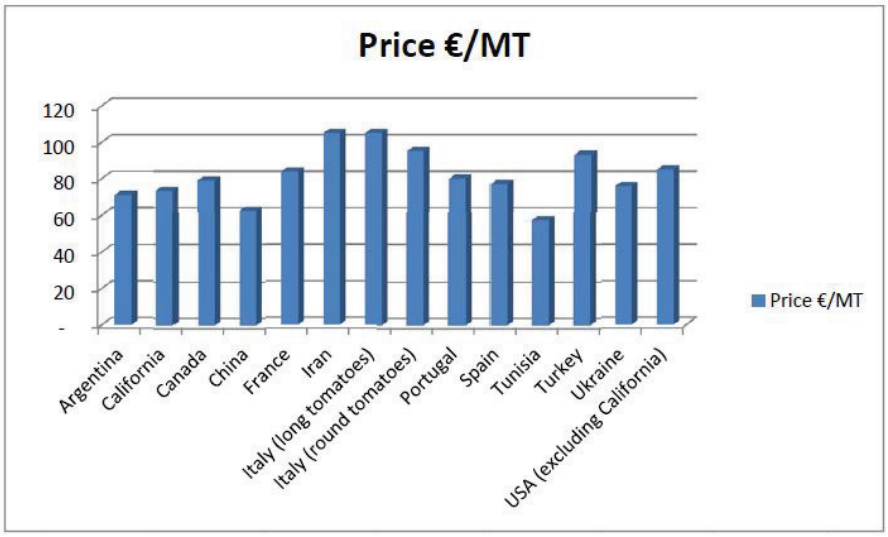

Chart 1: Prices for tomatoes in 2014. Source: World Processing Tomato Council

It is hard to reconcile the above data with SPCA's allegations regarding the alleged price distortion on the Italian market. The figures above show that, on the contrary, prices on the Italian market are higher than in most countries. This is further confirmed by the findings of the Commission during the previous investigation: "*In all instances, the Commission found that the price of fresh tomato paid by Italian processors was either similar or higher than the benchmark price of fresh tomato available in Australia*".[4]

4. THE INFORMATION PROVIDED BY THE COMPLAINANT IS IRRELEVANT FOR THE PURPOSE OF THE 'MARKET SITUATION' ANALYSIS

In non-confidential attachment B.4.2, the Complainant provided information regarding the SPS and its alleged impact on the Italian market. The Commission considered that this was *"new material that had not been considered in the previous investigation"* and decided to re-assess the existence of a 'market situation' in Italy.

Feger and La Doria respectfully disagree with this conclusion. Below, it will be demonstrated that the information provided by the Complainant is irrelevant for the purposes of the 'market situation' assessment.

[4] Statement of essential facts, No. 217., p. 33.

At the outset, it should be noted that non-confidential attachment B.4.2 merely contains an historical overview of the CAP which has no relation whatsoever with the calculation of the alleged domestic price distortion in the investigation period. This is confirmed by several statements, such as:

- "*Member States may retain, until 31 December 2011, up to 50% of the component of the national ceilings referred to in Article 40 corresponding to support for the production of tomatoes*";
- "*That is to say that during the three-year transition period (2008-2010), 50% of the subsidy was in the coupled form while the other 50% of the national ceiling moved to the single payment scheme"*;
- "*Tomato News estimated that the payments received by the farmer during the 2008-2010 period was 34€/Tonne[…]*";
- "*SPC Ardmona estimates that the subsidy paid in 2010 was up to 46% of the raw prices paid by the processors[…]*";
- "*SPC Ardmona estimates that the subsidy paid in 2013 was up to 37% of the raw prices paid by the processors*".

All these statements are irrelevant, since they do not concern the investigation period, *i.e.* 1 January 2014 - 31 December 2014, which is the only relevant period to be considered. Any other price related information has to be disregarded, as confirmed by the Commission itself: "*[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"*[5].

Also the Complainant's conclusion that the amounts paid in 2013 under the SPS would have been up to 37% of the price paid for raw tomatoes by the prepared or preserved tomato processors should be disregarded.[6] Indeed, such calculation not only does not concern the investigation period, but it is also totally unreliable, being based on outdated (not to say 'historical') data.

More importantly, the calculation of the amount paid under the SPS (irrespective of whether it represented 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.[7]

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5 Anti-Dumping Notice No 2015/05, p.2.

6 Complaint, non-confidential attachment B-4.2

7 See Discussion Paper – Market Situation – s. 269 TAC(2)(a)(ii) – Guidance – Claims of Governement Influence

In this respect it is submitted that non-confidential attachment B.4.2 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. The Complainant simply assumes that the mere existence of payments to tomato growers would have an effect on the price of raw tomato in the investigation period, without providing any demonstration of this circumstance

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

5. THE COMPLAINANT FAILED TO PUT FORWARD NEW EVIDENCE AND ELEMENT WITH REGARDS TO THE MARKET SITUATION

As indicated, in the previous investigation the Commission examined, on its own initiative, whether the CAP had an impact on the prices of the product under investigation on the Italian market, and concluded 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*" and that "*the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)*".[8]

Despite this conclusion, the Complainant "*is of the view that the analysis of the market situation requires reconsideration*". However, the Complainant and the Commission failed to provide evidence relating to changed circumstances, as requested by the Conclusion of the Doha Ministerial Conference regarding the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which reads as follows "[…] *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*."[9]

The complaint merely recalls the existence of the SPS but does not indicate what would have changed since the last investigation, and how this alleged change would have had an impact on the domestic prices for raw tomatoes. Feger and La Doria wish to emphasise that, in any case, this would have been impossible since the CAP has not changed since the previous investigation.

[8] Final Report No. 217, p.34.

[9] Implementation-Related Issues and Concerns – Decision of 14 November 2001, WT/MIN01/17, 20 November 2001, para. 7.1.

In the previous investigation, the Commission verified whether the CAP had an impact on the prices for the years 2011, 2012 and 2013 (year-to-date). However, the payments received by farmers during these years were governed by exactly the same rules as the ones which determine the payments granted to farmers for the year 2014. In this respect, the following should be noted:

- as acknowledged by the Complainant, the payments granted to farmers are governed by Title III of Regulation 73/2009. This Regulation entered into force on 1 January 2009. It is therefore the regime which was analysed by the Commission during the previous investigation;

- Regulation 1307/2013 sets up a new regime, the Basic Payment Scheme. However, it also provides that "*Payment entitlements obtained under the single payment scheme in accordance with Regulation […] No 73/2009 shall expire on 31 December 2014*". Therefore, in 2014 the applicable rules whethe those provided for by Regulation 73/2009, *i.e.* the Regulation which was applicable in the investigation period of the previous investigation;

- this is further confirmed by Regulation 1310/2013, which provides that "*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 […] continues to form the basis on which income support will be granted for farmers in calendar year 2014[…]*".

In other words, the regime which, according to the Complainant, should be re-assessed by the Commission is exactly the same as the one the Commission already analysed.

In stems from the above that (1) the Complainant failed to provide evidence of a change of circumstances with regard to the SPS, but also that (2) the regime is exactly the same as the one applicable during the previous investigation. Since the Commission concluded that "*any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processions in the form of lower prices*"[10], it is difficult to see how, in the present investigation, the Commission may reach a different conclusion.

6. CONCLUSION

To conclude, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. submit that, in order to undertake the dumping analysis, the Commission should have recourse to a normal value based on the domestic prices of the exporting producers, as opposed to a constructed normal value. This conclusion is supported by the following elements:

[10] Statement of essential facts, No. 217., p. 33.

- first, the question of whether the SPS constitutes a subsidy to tomato growers should not be addressed in the framework of an anti-dumping investigation but, rather, in the framework of a countervailing proceeding;

- second, pursuant to the SPS, direct payments to farmers are not coupled with production and therefore are not incentives to production. As a result, the SPS has no impact on the prices of raw tomatoes on the Italian market;

- third, the information provided by the Complainant is irrelevant for the purposes of the dumping calculation since it does not refer to the prices of 2014; moreover, the Complainant simply assumes that the mere existence of payments to tomato growers would have an effect on the price of raw tomato in the investigation period, without providing any demonstration of this circumstance;

- fourth, the Complainant failed to provide evidence of a change of circumstances with regard to the SPS; in any event, since the regime is exactly the same as the one applicable during the previous investigation, where it was concluded that no 'market situation' existed, it is impossible for the Commission to reach a different conclusion.

Considering the above, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. respectfully request the Anti-Dumping Commission to conclude, as it already did, that there is no 'market situation' which would justify the recourse to a constructed normal value.