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SPCA has reviewed the submission by the European Commission (27 February 2015, EPR 014) and provides the following comments:

1. The EC queries the “very weak evidence” used by the Anti-dumping Commission in initiating the investigation. There is yet no substantive argument to SPCA’s well researched and documented allegations in the Application. There is also no evidence that the Anti-dumping Commission has not followed the provisions of the Customs Act 1901.

2. Further on in its submission the EC notes:

The conclusions resulting from the allegedly new information submitted by the complainant are based on mere allegations and conjecture and thus lacking a methodological approach. Indeed, it is simply assumed that the mere existence of certain income-related payments to tomato growers has an immediate effect on the price of raw tomatoes, and this is simply incorrect.

3. The EC has not demonstrated where evidence in the Application falls under its terminology of “mere allegations and conjecture”. The Application contains comments by La Doria which confirms the impact of the SPS on production and canned tomato prices (paragraph 39). Any suggestion that the SPS does not have an effect on the price of tomatoes needs to address observations such as shown in paragraph 34 of the Application. In that paragraph it is noted that “...the subsidies represented about 50 percent of the entire producer’s revenue”. If the SPS payment was withdrawn then it is reasonable to expect that the tomato grower would need a higher price in order to keep supplying processors with raw tomato.

4. If the EC is unable to assist the Anti-dumping Commission in providing factual information then its criticisms of the Application cannot be sustained.

5. On page 3 of the EC submission it is stated:

The income aid for farmers – the Single Payment Scheme ('SPS') – is a completely decoupled, non-specific income support scheme and fully compatible with the WTO requirements and with paragraph 6 of Annex 2 of the Agreement on Agriculture. The **SPS has thus no trade distorting effects or effects on production** and for that reason is considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture.

6. This statement does not in any way address the market situation evidence in the Application. The observation that the SPS is compatible with a "Green-Box measure" is a self-interested one by the EC and is not an endorsement of the compatibility of the SPS. In fact this "self-classification" was commented on in the WTO Trade Policy Review (March 2009):

The "decoupled" payments to producers under the Single Payment Scheme and the Single Area Payment Scheme, **classified as Green-Box support by the EC**, represented over 80 percent of the direct aids under the European Agricultural Guarantee Fund (EAGF) in 2007. (Paragraph 10, emphasis added)

If the SPS payment was withdrawn then, as shown above, the farmer's income could decrease by 50 percent. It is reasonable to expect that this loss of income would severely affect the viability of tomato growers. Comments made by La Doria and referred to in the Application contradict the assertion that the SPS has no trade distorting effects or effects on production.

7. As demonstrated in the Application, Italy elected to phase out the coupled payment in the years 2008 – 2010. So that until the end of 2010 the tomato payment was not decoupled. SPCA notes that from 2015 there is a provision for Member States to reintroduce coupled payments. In any event, there is no evidence that moving from coupled payments to decoupled payments, based on historical payments, is less trade distorting. In a commentary on the then post-2013 CAP reform, the Danish Institute for International Studies noted:

The direction of the evolution of the CAP is clearly influenced by the WTO farm trade regime which aims at creating a liberal, trading system for agricultural produce. However, the EU did not adopt the liberal underpinning of the Agreement of Agriculture, but responded to it by shifting to less trade-distorting domestic farm support measures. Thus, European farmers remain highly subsidised but in new ways; there has been no explicit decision to lower the level of support significantly.¹

8. Paragraph 6 of Annex 2 of the Agreement on Agriculture notes:

(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.

¹ DIIS Policy Brief : Reforming the Common Agricultural Policy in the Shadow of the WTO (April 2012)

- (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period. [The base period for reduction of domestic support measures was 1986-1988]
 - (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
 - (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.
 - (e) No production shall be required in order to receive such payments.
9. The base period used for the SPS is based on a reference period of 2004-2006 (see paragraph 21 of the application). Not only is this reference period beyond the “base period” in subparagraph (b) but there is still a clear link to historical payments based on production. In United States – Subsidies on Upland Cotton (WT/DST 67/AB/R, 3 March 2005) the Appellate Body concluded that it:
- upholds the Panel's finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the Agreement on Agriculture; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the SCM Agreement by virtue of Article 13(a)(ii) of the Agreement on Agriculture; and
10. In a submission to the Appellate Body, Australia noted:
202. Australia requests that the Appellate Body uphold the Panel's conclusion that production flexibility contract payments, direct payments, and the legislative and regulatory provisions that establish and maintain the direct payment program, do not fully conform to paragraph 6(b) of Annex 2 of the Agreement on Agriculture. Australia submits that making a payment conditional upon the non-production of a particular product is one way in which a Member can relate the "amount of ... payment []" to the current "type or volume of production". Australia contends that the argument advanced by the United States would introduce an exception into paragraph 6(b) of Annex 2 that has no textual basis.
11. The EC submission also refers to “no trade distorting effects or effects on production” and then concludes that the “Green-Box” definition in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture is met.

12. Paragraph 1 of Annex 2 reads as follows:

Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

(a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,

(b) the support in question shall not have the effect of providing price support to producers;

13. The SPS is a major support mechanism for a tomato grower's income. By extension this payment under the SPS means that the true cost of growing tomatoes is not reflected in the price, and thereby the SPS is a price support to tomato growers.

14. The effect of low priced Italian tomato products (such as tomato paste) on tomato industries in export markets is well documented, suggesting that there are unequivocal trade distorting effects.

15. The EC makes some general observations about elements of injury and causality. Without reference to actual financial information, the EC submission lacks any substantive argument.

16. In conclusion, the EC has yet to provide detailed information which would assist the Commission in analysing the persuasive evidence in the Application.