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SPCA has reviewed the comments by the exporters in the submission of 27 February 2015 (EPR 017). The exporters' submission consists of two parts. One part dealing with injury, and the other part dealing with market situation.

1. The injury part covers a number of arguments. The exporters argue that in assessing injury, the Anti-dumping Commission (ADC) should use as the injury analysis period, a fourteen month period beginning on 1 July 2013 and ending on 31 December 2014. SPCA does not agree with the logic of this argument and notes that the injury period is set out in the Consideration Report. The injury part continues with arguments that were covered, in some instances, in the Application and in Investigation 217.
2. The second part deals with market situation.
3. The exporters argue (on page 4) that the subsidies can only be addressed in a countervailing investigation. This issue has been addressed adequately in the Consideration Report and in REP 217. On page 28 of REP 217 it was noted:

*The Commission believes that the criticisms submitted by the EC and Italian Government reflect a collective misunderstanding of the differences between:*

- (a) Analysis of government policies which are appropriately characterised as subsidy programs for the purposes of determining countervailable subsidies and the calculation of applicable countervailing duties under s.269TJ; and*
- (b) Consideration of subsidy programs for the purposes of market situation analysis for the purposes of s.269TAC(2)(a)(ii).*

*The Commission emphasises that consideration of the existence and operative effect of government administered benefits upon a domestic market is distinctly different to specific investigation of subsidy programmes under s.269TJ.*

4. On the same page the exporters refer to arguments in other submissions and submissions by other parties relating to the Agreement on Agriculture:

*...'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.'*

SPCA's submission of 13 March addressed a similar claim.

5. The observation that the SPS is compatible with a "Green-Box measure" is a self-interested one by the exporters and is not an endorsement of the compatibility of the SPS with the 'Green Box measure'. 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)*

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

**6. Decoupled income support**

- (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.*
  - (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]*
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(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.*

7. The base period used for the SPS is based on a reference period of 2004-2006 (see paragraph 21 of the application). Firstly this reference period is clearly beyond the “base period” in subparagraph (b) of Paragraph 6 of Annex 2 of the Agreement on Agriculture. Secondly 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*

8. 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.*

9. Having shown that the SPS direct payments do not conform with subparagraph (b) of paragraph 6 of Annex 2, it should be also noted that there is a strong indication that the provisions of subparagraph (d) are also not met. The exporters describe on page 5 that the direct payment is based on “...the hectares of land owned...” As land is a factor of production the conditions in subparagraph (d) are not met.

10. The exporter submission also refers to “no trade distorting effects or effects on the production” (page 4) and then concludes that the “Green-Box” definition in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture is met.

11. Paragraph 1 of Annex 2 reads as follows:

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*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;*

12. It is emphasised here that the comments made by La Doria publicly and referred to in SPCA's application contradict the assertion that the SPS has no trade distorting effects or effects on the production of tomatoes. In the application the reference in La Doria's 2011 Annual Report highlighted the very clear trade distortion that the exporters have not commented on (paragraph 38 of the Application):

*The key role played by the 2011 introduction of the European Horticultural Reform (OCM) which (sic) resulted in a decrease in tomato production. The reform aimed at avoiding excessive production, which was the main cause of the final canned tomato price pressure. As from 2012, market conditions have significantly improved for the group and are reflected in the final tomato product sales price increase and higher volumes both in Italy and abroad. This should lead to a significant increase in the group's profitability and, overall, to a more balanced market context in terms of supply and demand.*

13. This outcome reflects the purpose of the SPS as described in paragraph 10 of the application. The purpose of the SPS has not altered, whether or not the payments are coupled or decoupled.

14. As demonstrated in the application, Italy elected to phase out the coupled payment in the years 2008 - 2010. 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. Indeed, in the application, paragraph 29(e), it was noted:

*La Doria's statement in 2014 Half Annual Report acknowledges the subsidy payment: "...the partial return of coupled aid to support competitiveness and sustainability of the Italian tomato sector. The coupled subsidy which will be granted to farmers (in addition to the current decoupled subsidy which will be reduced with the entry into force of the new measures) is expected at Euro 160/ha".*

That half-yearly Report went on to say that the "coupled subsidy":

*...acts as a financial support to further stimulate the re-organisation of an entire chain in terms of rules, and increased efficiency and competitiveness, while at the same time not creating a future risk of overproduction due to its limited size.*

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15. If the SPS payment was withdrawn then, as shown in paragraph 34 of the application, the tomato farmer's income could decrease by 50 percent. **There has been no evidence presented that contradicts the clear assertion that this loss of income would severely affect the viability of tomato growers.** The argument that the SPS has no trade distorting effects and is considered to be a Green-Box measure does not in any way address the market situation evidence in the Application.

16. SPCA would also like to assert that moving from coupled payments to decoupled payments, based on historical payment, is 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.<sup>1</sup>*

17. Actual evidence of these payments to tomato growers is available through producer organisations and the effect of those payments on the price that producer organisations negotiate with processors is available from the same source. In the absence of evidence or cooperation from producer organisations, then the information in the Application must be considered as reliable.

18. The market situation part on page 5 observes that payment is made “irrespective of what they produce, and of their volume of production”. The exporters suggest that “these payments are decoupled from production”. But these payments are not decoupled from the historical production/growing of tomatoes. The direct payment is demonstrably a major factor in distorting the price of raw tomatoes to the benefit of the processor. In any event, as the preceding sections show, decoupling when it is based on historical production is not in itself a definition of decoupling.

19. Page 5 of the market situation part suggests that the SPS is a “disincentive to production”. The tomato payment is a distortion in the market and is sufficient as relevant evidence as per the requirement of the market situation claim.

20. The SPS encourages tomato farmers to continue to invest in the business of growing tomatoes, including factors of production. There is no dispute in the exporters' claim that “...the only reason for which the farmers may want to produce tomatoes is to make profits”. But, as the SPCA application points out, farmers are only able to make “profits” because of the SPS. In the absence of the SPS the farmers would not make the same profits as without it. As noted in the application (paragraph 34), subsidies represent a large part of the revenue of a tomato grower:

(a) *The reform has been particularly relevant for the processed tomato sector (in Italy), where the subsidies represented about 50 percent of the entire producer's revenue (stated in reference to the tomato grower).*

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<sup>1</sup> DIIS Policy Brief : Reforming the Common Agricultural Policy in the Shadow of the WTO (April 2012).

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(b) *Recently, however, the subsidy has been half the grower's price, or to put it another way, once the costs are accounted for (fertilizer, labour), any profit that the growers make for the labour, is the subsidy itself.*

21. If total costs are not covered then a tomato grower would have to make a decision that would contradict the exporter's observation (page 5) that farmers only want to produce tomatoes in order to make profits.
22. The exporter submission compares the Italian average price for raw tomatoes with average prices from other countries (page 6). SPCA disagrees with this analysis. This comparison does not take into account differences in growing conditions, scale, crop health, operating conditions/costs and government programs in other countries. These and other factors would have an impact on the price paid by the processors for tomatoes in those countries. In addition, the Italian average raw tomato price used for comparison already has benefited from the SPS component, therefore making the comparison meaningless.
23. The market situation part on page 7 seeks to exclude information in the application because it does not relate to the investigation period. SPCA disagrees with this observation and the argument. SPCA's application provides evidence of the impact of the SPS and other CAP policies over the injury years and the investigation period. SPCA's application presents a detailed calculation on the level of the subsidy impact in 2013 and then points ADC to the 2014 transition period identified in Article 21(2) of 1307/2013. Para 13 of the application's attachment on market situation highlights

*'Payment entitlements obtained under the single payment scheme in accordance with Regulation (EC) No 1782/2003 and with Regulation (EC) No 73/2009 shall expire on 31 December 2014'*

Therefore, for the investigation period and the injury years, Regulation (EC) No 73/2009 was applicable.' This transition period carried over the national ceiling referred to in paragraph 20 of the application. The exporters have not provided any evidence to support their contention that the data used in the application does not apply to the dumping investigation period.

24. The exporters repeat an argument originally shown in their submission of 20 February 2015 that "...It is not the amount of the alleged support, but whether that support has 'materially' affected the domestic sales prices of the canned tomatoes".
25. SPCA's application carefully demonstrates the link between raw material prices (raw tomatoes) and the final product. The application provides a clear demonstration of the effect of government intervention via the SPS on the price of tomatoes.

The application contains many references which re-enforce this observation.

- A USITC report (Mixtures Conditions of Competition between US and Principal Foreign Supplier Industries, 2007), found that EU payments to various fruit processors were "equivalent to approximately seven or eight percent of the canner's total production cost". The USITC observed that the payments to growers contributed to a more stable supply and are passed on as lower costs for EU processors and that the CAP was essentially delivering
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similar levels of assistance, albeit via a different architecture as, applying in 2014. (USITC pages 3-10, 3-11). (Application footnote 35). This USITC report can be a useful proxy for analysing the extent of the impact on the tomato price, in the absence of any further information.

- La Doria's acknowledgement of the impact of CAP is well documented publically and is highlighted in para 38, 39 and 40 of the application.

## **Conclusion**

26. The SPS paid to tomato growers impacts the price and supply of the tomatoes used in the canned product exported to Australia. The self-classification of these payments as Green-Box is not relevant to deciding if a market situation exists. Very strong evidence that the market is not normal has been submitted by SPCA in its application and subsequent submissions.
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