

**Non Confidential**



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Dear Sir/Madam

The submission lodged by the exporters (dated 9 June 2015) contained a number of comments further to SPC's recent submissions. SPC with the assistance of its trade consultants, Blackburn Croft & Co is of the view that some of the exporters' comments need clarification and comment.

1. The exporters refer to the information supplied by SPC regarding the effects on costs and prices of illegal labour in the Italian tomato industry. SPC's view is that in examining whether a "market situation" exists all factors affecting the production of canned tomatoes should be considered.
2. The exporters repeat their argument that examining a "market situation" can only be examined "within the framework of a countervailing investigation". The ADC's view on this was made in the last investigation and throughout the current investigation. The provisions of Australia's Customs Act are clear and comply with the reference to a market situation in the Anti-dumping Agreement.
3. The exporters' opinion that "the SPS is fully WTO compatible" is not universally shared. The WTO merely observes that the SPS is "classified as Green Box support **by the EC**" (SPC's submission dated 25 March, paragraph 5) A number of commentaries have been made subsequent to the Upland Cotton Appellate Body. For example the UK House of Commons Environment, Food and Rural Affairs Committee noted:<sup>1</sup>

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<sup>1</sup> The Common Agriculture Policy after 2013. Fifth Report of Session 2010-11 Volume 11 at Ev156.

17. *There are two ways in which the EU's classification might be challenged in a WTO dispute. First, it might be argued that the scheme does not meet the detailed criteria set out in Annex 2 to the Agreement on Agriculture: this was a problem the United States faced when Brazil challenged its subsidy schemes for Upland Cotton (Daugbjerg and Swinbank, 2009: 117–9). Second it might be argued that the SPS flouts the overarching criterion that green box measures should “meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production”.*

18. *The detailed, policy-specific, requirements for decoupled income support in Annex 2 include the requirements: (i) that “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”; (ii) “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”; and (iii) “No production shall be required in order to receive such payments”.*

19. *However the SPS is an annual scheme under which SPS entitlements are only activated by matching them with eligible agricultural land at the farmer's disposal. Thus it might be said that payments are based on “factors of production employed” in particular years after the base period, violating the green box criteria.*

20. *Furthermore the Commission is caught between the European Court of Auditors and the WTO. SPS recipients must be farmers, and as the Court of Auditors (2009: paragraph 5.47) has pointed out: “In order to be eligible for aid, farmers must carry out an agricultural activity. An agricultural activity is defined to mean the production, rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition (GAEC).” However (paragraph 5.49) it “found shortcomings concerning the Member States” definition of what is required to maintain land in GAEC such that certain beneficiaries are paid aid...without doing anything with the land concerned.” The Commission, in response, pointed out that “national criteria should not create an obligation to produce which would not be compatible with the WTO requirements” (in Court of Auditors, 2009, paragraph 5.49); but in its recent Communication (p 9) it has suggested that “changes in the design of direct payments should go hand in hand with a better definition and targeting of support to active farmers only, responding to the criticism of the European Court of Auditors.” Quite how this can be done without further compromising the SPS's green box claims is unclear.*

21. *The Commission is well aware that it cannot say that direct payments (eg the SPS) result in a larger volume of agricultural output in Europe than would otherwise be the case, for it knows that any such statement would flatly contradict the EU's claim that, as genuine green box payments, they meet “the*

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*fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production". Its discussion of food security in its Communication, however, comes close to implying that direct payments do result in more EU food production. Furthermore, an earlier—leaked—draft of its Communication<sup>16</sup> had said of reform option 3 (which was there labelled "abolished market and income support"; p 11) that: "Those requesting a more radical reform of the CAP advocate moving away from income support and most market measures, and focussing entirely on environmental and climate change objectives. This alternative could have the advantage that it would allow for a clear focus of the policy. However, this would lead to a significant reduction in production levels, farm income, and the number of farmers for the most vulnerable sectors and areas, as well as cause land abandonment in some areas..." As both versions of the Communication had earlier assured the reader that "to a large extent the market measures, which were the main instruments of the CAP in the past, today provide merely a safety net only used in cases of significant price declines" (p 4 of the official text, with similar wording on p 3 of the leaked text), it is difficult to avoid the conclusion that the Commission does believe that direct payments do have some impact on production.*

4. Therefore, the House of Commons Report takes issue with the claim that the "SPS is fully WTO compatible" by querying whether it is correct that the conditions in paragraph 6 of Annex 2 of the Agreement on Agriculture are met and, importantly, notes that it is difficult to argue that the SPS does not have some impact on production.
  5. Whether or not the SPS is compatible with a Green Box measure is irrelevant to the analysis of a market situation. What is relevant is that payments made under the SPS influence the price of raw tomatoes which in turn affects the price of canned tomatoes, thereby making the price paid or payable unreliable for the purposes of determining a normal value. (The exporters make a similar observation in their submission on page 4, paragraph 4) The exporters take issue with the base period referred to in paragraph 6 of Annex 2 of the Agreement.
  6. The reasoning used by the exporters to suggest that there is more than one base period (other than 1986-1988) in the Agreement on Agriculture is not convincing. Although the exporters do not assist the ADC by pointing the ADC to what is a "defined and fixed base period" it is helpful to note that in United States – Subsidies on Upland Cotton the legitimacy of updating of base acres was raised but ultimately not decided by the Appellate Body (paragraph 344).
  7. In its submission the exporters argue that the type of subsidies in US – Subsidies on Upland Cotton "have nothing in common with the SPS". However, the extracts from the UK House of Commons Environment, Food and Rural Affairs Committee (see above paragraphs 17-21) suggest otherwise.
  8. Similarly, the exporters' interpretation of "a factor of production" is at variance with the Environment, Food and Rural Affairs Committee interpretation (see above paragraph 19).
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9. The exporters refer to payments being made prior to the investigation period as being irrelevant. SPC expects the investigation into a market situation to take into account the historical nature of the SPS and how, despite decoupling, the payments to farmers have created a market situation. It is important to remember that the SPS for tomato growers is based on historical payments to tomato growers and this means that the payments to tomato growers are different to the dollar amount paid to other recipients in the SPS.
10. The exporters refer to “SPC’s calculation” regarding the possibility of a 50 percent decrease in the income of a tomato grower. In fact this is not SPC’s calculation but as shown in the footnote in the Application (paragraph 34), its origin is from an independent source. The exporters suggest that this possible reduction in income is “totally irrelevant” but provide no reasons for this conclusion. SPC’s view is that this independent assessment of reduced income emphasises the inevitable price effects on tomatoes supplied to processors and the price of the canned tomatoes.
11. The exporters take issue with SPC’s assessment of the profits of a tomato grower. Again, SPC’s comments in the Application are referenced in paragraph 34 from a publication “Pomodoro – History of Tomato in Italy”. The author of that publication would no doubt have a different view to his comments being described as “... a simple allegation unsupported by any evidence”. Rather than contradicting the author’s conclusions, the exporters elect to criticize SPC:

As a matter of fact, SPC has not been able to demonstrate that, in the absence of the SPS, the price for raw tomatoes in the Italian market during the investigation period have been higher. Moreover, SPC has not been able to quantify the alleged price distortion in the investigation period.

12. SPC does not have access to this information and despite requests from the ADC, such information does not appear to have been provided. In the absence of that information the evidence from expert commentators becomes important. As an aside, the exporters have not been able to demonstrate that the volumes and price for raw tomatoes in the Italian market during the investigation period would have been the same if payments were not made under the SPS.
  13. The exporters argue that because “prices for raw tomatoes for processing in Italy are amongst the highest in the world” there is no distortion on production and prices. Firstly, in the Application SPC showed that Regulation 73/2009 carried through the tomato ceiling payments until the end of 2014. There is no evidence that these payments of around Euro 183 million were not made to tomato growers. Secondly, the fact that Italian raw tomato prices are high reflects the cost of growing tomatoes in Italy and, as has been argued in other submissions, if a subsidy was not paid then it is not unreasonable to expect that the price for raw tomatoes paid by the processor would be higher.
  14. The exporters comment on the information supplied by AIIPA and ANICAV. In submissions from these parties the exporters refer to “framework agreements” and that the price mentioned in these agreements is “merely indicative”. The exporters then note that “... Any Agreement fixing the prices of raw tomatoes would be contrary to EU competition law”. However, the exporters do not comment on the observation by SPC in its submission of 9 April that there appears to be an exemption to EU
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competition law as explained in paragraph 7 of SPC's submission dated 9 April:

The ability of POs to "planning and adjusting production to demand" and "stabilising producer prices" without breaching competition rules is permissible as an inter-branch organisation is exempt from the Anti-trust Provisions of the Treaty on the function of the European Union (Article 101(1)).<sup>4</sup> This exemption permits the PO to enforce and control prices and other market factors with tomato growers. (Footnote 4 omitted)

15. The exporters then point out that the framework agreement for the 2015 harvest is irrelevant as it does not fall within the investigation period. While this is correct, no information has been supplied by the exporters as to the framework agreement in 2014 and so it is reasonable to conclude that the 2015 information is the best information available.

16. The exporters take issue with the interpretation in SPC's submission of 19 May about extracts in La Doria's Annual Report for the year 2014. The exporters conclude that the extracts in the SPC submission of 19 May 2015 should be disregarded:

As a matter of fact, all the alleged evidence submitted by SPC with respect to the "market situation" assessment does not concern the investigation period and, as such, should be disregarded.

17. SPC can only provide information to the ADC that is available to SPC and it is up to the exporters and government agencies to provide the information requested by the ADC for the investigation period.

18. SPC stands by its interpretation of the information in La Doria's 2014 Annual Report.

19. The comments by La Doria are consistent with the extract from the 2011 Annual Report that was in the application (paragraph 38) and that contradicted La Doria's statements in the first investigation (paragraph 40 of the application).

La Doria's statement in the 2011 Annual report:

***'The key role played by the 2011 introduction of the European Horticultural Reform (OCM) which 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.*<sup>27</sup>  
(Footnote omitted)

20. SPC disagrees with the exporters' conclusions that SPC's submissions should be disregarded. The exporters have not yet provided information to the ADC which would clarify or contradict any of the information that has been sourced by SPC in

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support of SPC's submission that there is a "market situation" which will affect the use of domestic prices in establishing normal values.