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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.

Comments on the Statement of Essential Facts and Preliminary Affirmative Determination

24 September 2015

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1. INTRODUCTION

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

The initiation of this 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 (the 'Complainant', or 'SPCA'). The Complainant claims to have suffered material injury for 'many years' due to the exports by La Doria S.p.A. ("La Doria") and Feger di Gerardo Ferraioli S.p.A. ("Feger") at allegedly dumped prices.

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

In the previous investigation, which was initiated on 10 July 2013, the Commission concluded that during the investigation period (*i.e.* from 1 July 2012 to 30 June 2013) the dumping margin of La Doria and Feger was less than 2%. Therefore, on 20 March 2014, the Commission terminated the investigation with respect to the two exporters.

Likewise, a safeguard investigation conducted in June 2013 concluded that the injury suffered by the domestic industry had been caused by a combination of factors other than the imports of PPTs.

In the framework of the current investigation, the Commission published, on 4 September 2014, its Statement of Essential Facts ('SEF'). The present submission contains comments common to Feger and La Doria regarding the cost adjustment section 43 of the Customs (International Obligations) Regulation 2015 ("Regulation 43") applied by the Commission and the injury assessment included in the SEF. Comments relating to specific claims of the two companies concerning the dumping margin calculation were submitted in separate submissions.

2. THE ADJUSTMENT OF THE RAW TOMATOES COST APPLIED BY THE COMMISSION IS ILL-FOUNDED

At the outset, it should be emphasised that the cost adjustment applied by the Commission on the basis of Regulation 43 is seriously and irremediably flawed. Not only does it infringe WTO law, but it also rests on a completely wrong understanding of the CAP and is based on data which are obsolete and not applicable to the ongoing investigation.

Below, all such flaws will be discussed in detail. Before doing so, it is appropriate to draw the attention to just one of the flaws, the simplest and most straightforward flaw, which is sufficient to strike down the arguments put forward in the SEF.

The investigation period of this investigation is calendar year 2014. The SEF elaborates upon (alleged) subsidies relating to 2012 without discussing or referring to any figure or data regarding 2014. It goes without saying that to confirm the cost adjustment on the basis of data - let alone incorrect and inappropriate - concerning a period different from the investigation period would, by itself, irremediably flaw the resulting antidumping measures.

2.1 The cost adjustment infringes WTO law

The decision to adjust the cost of raw tomatoes used in the production of prepared and preserved tomatoes pursuant to Regulation 43 infringes WTO law. In fact, such a decision amounts to analysing an alleged subsidy in the framework of an anti-dumping investigation. Moreover, the cost increase applied by the SEF is not permitted by the WTO Anti-Dumping Agreement ('ADA'). Both arguments will be addressed below.

2.1.1 To assess the impact of the SPS in the framework of an anti-dumping investigation rather than in a countervailing investigation is contrary to WTO law

To analyse the impact of the SPS on the prices of raw tomatoes in the framework of an anti-dumping investigation is contrary to WTO law. In this respect, it should be recalled that Article 32.1 of the Agreement on Subsidies and Countervailing Measures stipulates that '*no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1944, as interpreted by this Agreement*'. The fact that the Commission's analysis is undertaken to evaluate the impact of alleged subsidies in the form of direct payments on the costs of an input (i.e. upstream product) is irrelevant. The nature of the payments, and their alleged impact, can only be addressed in the framework of a countervailing investigation.

Our clients refer to their previous submissions for additional comments in this respect.

2.1.2 The 'cost replacement' applied by the Commission is not compliant with the WTO Anti-Dumping Agreement

The SEF states that '*the cost of raw tomatoes contained in Feger and La Doria's records do not reasonably reflect competitive market costs associated with the production or manufacture of like goods*'. According to the Commission '[…] *the magnitude of the CAP payments made to tomato growers is such that those CAP*

payments have affected the prevailing market prices in Italy for raw tomatoes.'[1] As a result, the cost for raw tomatoes resulting from our Clients' records was increased in accordance with Regulation 43, whose relevant part reads as follows:

> *'(2) If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> > *(i) are in accordance with generally accepted accounting principles in the country of export; and*
> >
> > *(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.'*

The above provision was inspired by Article 2.2.1.1 of the ADA, according to which '[…] *costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration* […]'.

To interpret the above provision, the principles of treaty interpretation should be followed. Thus, the interpretation of legal texts should be based on the ordinary meaning of the words, and on the context and objective of said text. These principles shall guide the interpretation of the condition that the records '*reasonably reflect the costs associated with the production and sale of the product under consideration*'.

(A) The 'costs' referred to in Article 2.2.1.1 are the charges actually incurred by the producer

Article 2.2.1.1 of the ADA expressly refers to the 'costs', which is defined in the Shorter Oxford English Dictionary as 'charges, expenses'. This is supported by the French and Spanish versions of the ADA which use the word *'frais'* or *'costos'*, *i.e.* charges incurred. As a result, the notion of 'costs' under Article 2.2.1.1 has to be interpreted as <u>expenses actually incurred by the producer</u>. Whether such a cost is distorted is not relevant. What matters is the charge actually incurred by the producer.

[1] SEF No. 276, p. 25.

This is further confirmed by the requirement that the costs must be associated '*with the production and sale of the product under consideration'*. Indeed, the 'costs' incurred are the sums that were actually paid for ('associated with') the production of the product targeted by the anti-dumping investigation.

> (B) The 'costs' referred to in Article 2.2.1.1 are those associated with the production and sale of the product under consideration, not with the production and sale of the upstream product

From the wording of Article 2.2.1.1 it emerges that the records have to reflect the costs associated with the production of the product being investigated, as opposed to the costs associated with the production of any input. Whether the price paid by the producer of the product under investigation reasonably reflects the costs normally incurred by the supplier of an input is irrelevant for the purposes of Article 2.2.1.1.

Therefore, what matters is to determine whether the records reasonably reflect the charges incurred by the producers of PPTs for their supply of raw tomatoes. Whether the price paid by our Clients reflects the actual costs of production of raw tomatoes is irrelevant and not caught by the scope of Article 2.2.1.1.

This is confirmed by the WTO case law which has clarified that:

> *'[…] the fact that GAAP-consistent records, which reasonably reflect costs 'associated with the production and sale' of the like product, must 'normally' be used to calculate cost of production, implies that the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product.'.*[2] (our emphasis)

> *'[…] we believe that the provision itself makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation. This determination in turn hinges on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question in that case.'*[3] (our emphasis)

In view of the foregoing, the costs which according to the SEF would have been incurred by the Italian producers of raw tomatoes in the absence of the alleged subsidy are irrelevant and cannot be used in the calculation of the costs of productions of PPTs. The costs incurred for the production of raw tomatoes are not associated with the production and sale of prepared and preserved tomatoes and are not actually paid by the producers of prepared and preserved tomatoes.

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2 Panel Report, *EC – Salmon*, para. 7.483.

3 Panel Report, Egypt – Steel Rebar, para. 7.393

(C) The notion of reasonableness in Article 2.2.1.1 refers to the obligation to reflect the costs, not to the costs themselves

Article 2.2.1.1 provides that the records should 'reasonably reflect the costs'. It is clear that the word 'reasonably' refers to the verb 'reflect', not to the noun 'costs'. In other words, Article 2.2.1.1 does not require that the costs reflected in the records of the exporting producer should be 'reasonable' or that they should reflect the actual costs of production of any input used by the exporting producer. Rather, Article 2.2.1.1 indicates that the exporting producer's records must reflect all the costs associated with the production and sale of the product under investigation.

(D) The methodology followed by the SEF is inconsistent with the requirement that the dumping margin calculation should comply with the principle of fair comparison

Article 2.4 of the ADA provides that '*[a] fair comparison shall be made between the export price and the normal value*'. This obligation is, according to the Appellate Body in *EC – Bed Linen*, '*a general obligation that […] informs all of Article 2*'.[4] Therefore, the obligation of fairness also applies to the calculation of the constructed normal value under Article 2.2.1.1.

The word 'fair' was defined by the Appellate Body in *US – softwood Lumber V* as being '*generally understood to connote impartiality, even-handedness, or lack of bias*'.[5] The same Panel then provided a description of an inconsistent – that is, unfair – practice:

> *'In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased'.*[6]

Therefore, a calculation method that results in an artificially higher dumping margin cannot be considered 'fair'. The use of an inflated cost of input – on the alleged ground that it is distorted – which results in an increased normal value of the product under investigation produces an artificially increased dumping margin and thus entails a biased determination to the detriment of the exporting producer.

In that regard, it is worth recalling that in the previous investigation, the cost adjustment under consideration was not made even though exactly the same legal and factual scenario existed. It should also be borne in mind that the regime of direct payments to tomato growers did not change since the last investigation. Therefore, it

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4 Appellate Body Report, *EC – Bed Linen*, para. 56.
5 Appellate Body Report, *US – Softwood Lumber V*, para. 138.
6 Appellate Body Report, *US – Softwood Lumber V*, para. 142.

is clear that the adjustments on costs undertaken in the framework of the current investigation are biased, and result in an unfairly and artificially inflated dumping margin.

2.2 The SPS is a income support scheme fully WTO-compatible, which cannot give rise to any market distortion

Contrary to what has been alleged in the SEF, the SPS is a fully legal scheme which has no trade distorting effects.

In this respect, it must be recalled that the SPS is a 'green-box' measure compliant with the requirements of Annex II to the WTO Agreement on Agriculture, which provides the rules for determining when a *'[d]omestic support measures [has] no, or at most minimal, trade-distorting effects or effects on production'*. It follows that the SPS is compliant with Annex II to the Agreement on Agriculture and, as such, it has no trade distorting effects.

In this respect, it has been demonstrated that:

- the SPS is a non-specific income support. Indeed, whether a farmer grows tomatoes, pears, pumpkins, apples or even leaves the land unplanted has no relevance on the support he or she may receive. In other words, the direct payments are not granted only to tomato growers;

- second, the direct payments granted under the SPS are fully decoupled from production, as has been explained at length in our Clients' previous submissions. Again, whether or not a farmer produces tomatoes is irrelevant to determine whether he or she will receive a payment. Therefore, the SEF is wrong in stating that '[…] *total farm assistance for tomatoes has not been fully decoupled. EU CAP payments continue to be based on historical levels received by farmers in previous years, which were based on the past system of coupled payments*'.

Moreover, the interpretation according to which the SPS would be implicitly coupled since the amount of the payment is calculated on the basis of a reference period is flawed. By following this line of reasoning, it should be concluded that any 'green-box' income support measure compliant with Annex II to the WTO Agreement on Agriculture is coupled. Indeed, the Agreement on Agriculture itself refers to a defined and fixed base period.[7]

[7] Paragraph 6 of Annex 2 to the WTO Agreement on Agriculture reads: *'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. […] (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.'*

In any case, even assuming that the reference to a base period would entail some form of coupling, *quod non*, it is recalled that the entitlements on the basis of which a farmer can receive a direct payment can be, and indeed are, traded. Therefore, for instance, a farmer who just started producing tomatoes could buy an entitlement from another farmer, and be granted direct payments even though this farmer did not produce any tomato in the past. On the other hand, a farmer which did produce tomatoes in the past may sell its entitlements and thus ceasing benefiting from the SPS.

It is therefore crystal clear that the direct payments granted under the SPS cannot be considered to be linked – explicitly or implicitly - to the production of tomatoes and, as a result, cannot be considered to have distorting effects.

This conclusion is further supported by the actual prices for raw tomatoes on the Italian market. Indeed, if it were true that the SPS have a trade distorting effect, *quod non*, then the prices of raw tomatoes in Italy should be at an artificially low level. However, the Commission itself concluded, in the previous investigation, that *'the prices in the Italian market were found to be similar or higher than the Australian prices paid'.* [8] Moreover, in our Clients' previous submissions it has been demonstrated that the prices of raw tomatoes in Italy are the highest in the world.

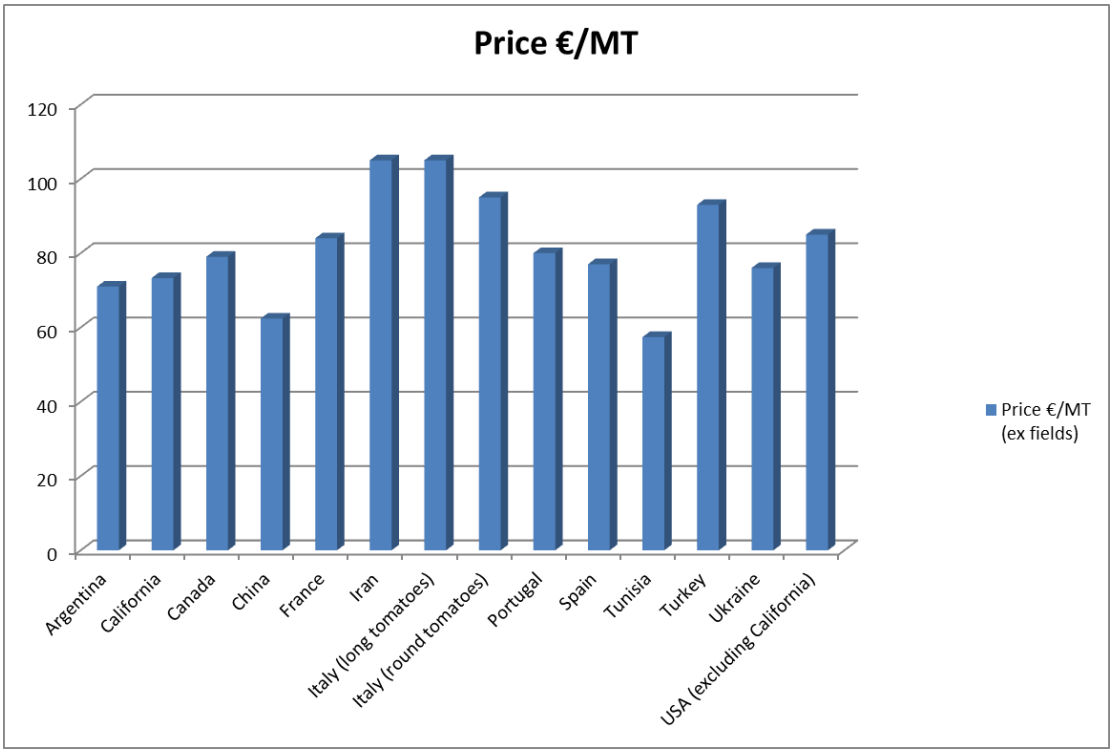

Chart 1: Prices of tomatoes in 2014. Source: World Processing Tomato Council

[8] SEF No. 276, p. 57.

In light of the foregoing, it is hard to understand how the SEF can conclude that the Italian price for raw tomatoes, i.e. the highest price in the world, does not '*reasonably reflect competitive market costs'* and, as such, should trigger an increase of the raw tomatoes cost incurred by our Clients.

Common sense suggests that a correction of prices to make them more competitive should trigger a downward adjustment, certainly not an upward adjustment, as surprisingly the SEF does.

2.3 The calculation of the average payment per hectare under the SPS is affected by serious errors and inconsistencies which entirely flaw the Commission's conclusions

In addition to the serious flaws discussed above, the SEF is irremediably vitiated by several factual errors and inconsistencies which are illustrated below. The SEF misinterprets the existing legal framework and draws ill-founded consequences.

2.3.1 The calculation of the alleged subsidy is based on wrong and obsolete data

The Commission's calculation of the above-discussed cost increase is based on wrong and obsolete data and, as such, must be disregarded.

(A) The Commission's calculation relies upon an incorrect legal basis

Section 6.3.4 of the SEF computes the amount of the average per-hectare payment made to growers of tomatoes in Italy under the CAP on the basis of Article 54(2)(b) of Regulation 73/2009, according to which *'75% of the national ceiling for tomatoes was available to growers of tomatoes as of 1 January 2012'*. The provision referred to by the SEF reads as follows:

> *'(b) from 1 January 2011 until 31 December 2012, up to 75 % of the component of the national ceilings referred to in Article 40 of this Regulation corresponding to support for the production of fruit and vegetable crops other than annual crops listed in the third subparagraph of this paragraph which are supplied for processing and were eligible under the aid schemes set out in Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organization of the markets in processed fruit and vegetable products (1) and Council Regulation (EC) No 2202/96 of 28 October 1996 introducing a Community aid scheme for producers of certain citrus fruits (2).*
>
> *In this case and within the ceiling determined in accordance with Article 51(2) of this Regulation, the Member State concerned shall make, on a yearly basis, an additional payment to farmers. The additional payment shall be* ***granted to farmers producing one or***

> ***more of the following fruit and vegetables****, as determined by the Member State concerned, under the conditions provided for in Section 8 of Chapter 1 of Title IV:*
>
> *(a) fresh figs;*
>
> *(b) fresh citrus fruits;*
>
> *(c) table grapes;*
>
> *(d) pears;*
>
> *(e) peaches and nectarines; and*
>
> *(f) 'd'Ente' plums'*

Therefore, from the wording of Article 54(2)(b) of Regulation 73/2009 it clearly emerges that the payment mentioned under letter (b) was only applicable to farmers producing one or more of the following fruits and vegetables: '*(a) fresh figs; (b) fresh citrus fruits; (c) table grapes; (d) pears; (e) peaches and nectarines; and (f) 'd'Ente' plums*'. Thus, Article 54(2)(b) of Regulation 73/2009 and the '75% ceiling' referred to therein does not apply to the tomato growers.

As a matter of fact, the provision of Regulation 73/2009 which concern tomatoes is paragraph 1 of Article 54. This was explained, *inter alia,* in our Client's submission dated 14 August 2015, where it was made clear that:

> *'A transitory exception to the […] decoupling obligation was granted for the tomato production. In particular, according to Article 54 of Regulation No 73/2009 '[m]ember 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'. Therefore, until 31 December 2011, EU Member States were allowed to use 50% of their old ad hoc fund (i.e. national ceiling) for tomatoes to grant direct payments coupled to the production of tomatoes, while the other 50% was immediately transferred to the SPS fund. This is acknowledged by the Complainant, which explained that '[…] during the three years 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'*

In light of the above, it is clear that the legal basis relied upon by the Commission in order to calculate the amount of the alleged subsidy per hectare is wrong for at least two reasons:

- the ceiling of the last coupled payments to tomatoes growers was 50%, and not 75%. As a matter of fact, the SEF itself acknowledges that *'a proportion*

(seemingly 50%) of the national ceiling was absorbed into the SPS'. Therefore, the Commission's statement that *'growers of tomatoes still have access to approximately €138 million, that being 75% of the full ceiling allocated to tomatoes in 2011, as part of the SPS'* is not only legally and factually wrong, but also contradictory;[9]

- the last year in which member States were allowed to grant coupled payments was 2011, and not 2012 as wrongly concluded by the Commission. In this respect, it must be further pointed out that that Italy did not use such a possibility, and decided to decouple the payments to tomatoes growers as from 1 January 2011 already, as confirmed by the attached note of the Italian Ministry for Agriculture (see **Annex 1**). Therefore, the last year in which coupled payment were granted to Italian tomatoes growers was 2010;

- the 50% celling mentioned in Article 54(1) of Regulation 73/2009 is just a ceiling. To assume all that ceiling was used up amounts to an unsubstantiated speculation. As will be seen *infra*, as a matter of fact many tomato growers received very low payments or did not receive any payment.

The above-described flagrant mistakes vitiate the SEF and render the conclusions contained therein not applicable to our Clients.

(B) The SEF incorrectly estimated the hectares dedicated to the production of tomatoes for processing

As explained in section 6.3.4, the SEF based its calculation of the alleged subsidy per hectare on the number of hectares dedicated to the production of raw tomatoes for processing in 2012, as estimated in the GAIN report. These figures are inadequate as they do not relate to the investigation period.

As a matter of fact, in 2014 the number of hectares dedicated to tomatoes was higher than in 2012, as can be easily verified from official Eurostat statistics[10] which are publicly available.

(C) The SEF calculation is based on data and figures concerning periods other than the investigation period

The dumping margin calculation (including the CTMS) is to be based only and exclusively on the data relating to the period of investigation, which in the present case is 1 January 2014 to 31 December 2014. This has been acknowledged 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*

[9] SEF No. 276, p. 62.
[10] See http://ec.europa.eu/eurostat

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'.[11]

However, surprisingly, the calculation at section 6.3.4 of the SEF is entirely based on figures which do not refer to the investigation period. Indeed:

- the total amount of the alleged subsidy (137,975,250 EUR) has been calculated on the basis of the year 2012;

- the number of hectares grown is based on the year 2012;

- the yield (tonnes of tomatoes per hectare) was determined in the Complaint on the basis of data relating to the year 2013.[12]

It follows that the entire calculation is based on data relating to periods outside the period of investigation. Also in this respect, our Clients feel obliged to express their serious concern regarding the Commission's approach in conducting the present investigation.

Had the Commission conducted the exercise in respect of 2014 it would have concluded that no illegal subsidy had been granted to tomatoes growers since in 2014 the national ceiling for tomatoes did no longer exist. Furthermore, in 2014 the payments granted under the SPS were fully decoupled from production and, therefore, could not have any distorting impact on the market for raw tomatoes. Therefore, it would have been also impossible to calculate any impact of the payments on the price for raw tomatoes for the simple fact that in 2014 no such impact occurred.

2.3.2 The actual data collected from Feger and La Doria's suppliers show a significantly lower payment per hectare

For the sake of completeness and to provide an additional indication of the unreliable nature of the data and allegations contained in the SEF, it is submitted that the amounts of the decoupled payment actually received by our Clients' suppliers in 2014 were very modest. This is also due to the fact that the amount of payment depends on a number of factors, such as the number of entitlements owned by each farmer (in this respect, it is recalled that the entitlements can be traded) and the value of each entitlement (which is calculated on the historical use of the land in respect of which the entitlement was originally issued). Having the above in mind, to assume that ALL the suppliers of the two exporters received the maximum theoretical amount of subsidy calculated on the basis of Regulation 73/2009 is ill-founded. Had the Commission requested and checked this information during the on-the-spot visits

[11] Anti-Dumping Notice No. 2015/05, p.2.

[12] Non-Confidential Attachment B 4.2 to SPC Ardmona Anti-dumping application for Prepared or preserved tomato products exported by La Doria S.p.A and Feger di Gerardo Ferraioli SpA, p. 8.

carried out at the premises of the two exporters, it would have found that many suppliers of the two exporters indeed received small amounts or even no amount at all.

As the SEF claims that the evidence previously supplied do not constitute a representative sample, in a spirit of full cooperation a representative selection of 15 more certificates collected from La Doria's suppliers is provided under confidential **Annex 2**.

2.4 In applying the cost increase pursuant to Regulation 43 the SEF has completely disregarded the flow-on analysis

Finally, the two exporters want to bring the Commission's attention to a serious contradiction in the SEF.

When analysing the flow-on impact of the subsidy for the purpose of determining whether a market situation exists in Italy, the SEF concluded that '*in a realistic scenario* […] *73% of the 32% subsidy would flow onto the cost of raw tomatoes for prepared or preserved tomato production*'.[13] The SEF itself considers that, whatever is the calculated subsidy per kg of raw tomatoes produced, only 73% of that subsidy would flow on the price for raw tomatoes paid by the PPTs producers. This, according to the Commission, is the '*realistic scenario'*.[14]

However, for the purpose of increasing the costs of raw tomatoes in our Clients' CTM, the SEF '*has replaced the Feger and La Doria costs of raw tomatoes establishing cost of production in accordance with Regulation 43. It has done so by increasing the cost of the raw tomatoes per kilo by an amount equal to the value of the CAP payments*'.[15] In other words, the SEF considered that 100% of the impact of the subsidy flows on the price for raw tomatoes paid by our Clients. This is in stark contradiction with the SEF's conclusion that, in a realistic scenario, **only 73% of the alleged subsidy would pass on to the price for raw tomatoes**.

This flagrant contradiction is another indication of the lack of accuracy which has affected this investigation and the conclusions contained in the SEF.

2.5 Preliminary conclusions on the adjustment of raw tomatoes cost

In light of the above, our Clients respectfully submit that:

- the cost adjustment infringes WTO law. The impact of the payments granted under the SPS scheme can only be addressed in the framework of an anti-subsidy investigation. In addition, adjusting the costs of the product under

13 SEF No. 276, p. 64.
14 SEF No. 276, p. 64.
15 SEF No. 276, p. 26.

investigation due to alleged distortion on the upstream market violates Articles 2.2.1.1 and 2.4 of the ADA;

- the SPS is a fully legal income support scheme, compliant with the requirements of Annex II to the WTO Agreement on Agriculture. As a result, it cannot be considered that the SPS has a trade distorting effect;

- the calculation is incorrect since it (i) relies upon of an incorrect legal basis; (ii) uses a wrong figure of the number of hectares dedicated to the production of raw tomatoes; (iii) relies on obsolete data which are not falling in the period of investigation; (iv) assumes that the amount of (de-coupled) subsidies granted in 2014 is equal to the ceiling of (coupled) subsidies granted in 2011 while, in reality, in 2014 the (de-coupled) subsidies granted to the suppliers of La Doria and Feger were modest.

- the findings with regard to the pass-on of the impact of the direct payments to the costs of raw tomatoes are ill-founded.

3. THE INJURY AND CAUSALITY ASSESSMENT IS FLAWED

The injury assessment undertaken by the Commission suffers serious methodological flaws and is inconsistent with the WTO law requirements. This, in turn, results in vitiated conclusions regarding both the injury and the causal link.

3.1 The injury assessment should not have covered the period preceding 1 July 2013

It is recalled that in the previous investigation the Commission determined that the two exporters' dumping margin was *de minimis*. Therefore, in all logic, any injury suffered by the Australian industry before 1 July 2013 (i.e. the end of the investigation period of the previous investigation) cannot be attributed to Feger and La Doria.

In this respect it must be noted 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*'.[16] It follows that - since in the previous investigation the two exporters have been found not to export at dumped prices - it would be illegal for the Commission to consider that the injury (if any) suffered by the Australian industry before 1 July 2013 was caused by the imports of the PPTs manufactured by Feger and La Doria.

[16] Panel Report, *EC – Salmon*, para. 7.625.

This important consideration, already raised in our Clients' previous submissions, has not been addressed in the SEF, which merely discusses the question of the limitation of the scope of the investigation to our Clients. It remains that the only relevant period for the purpose of the injury analysis is the period between 1 July 2013 and 31 December 2014 (i.e. the end of the investigation period).

Since the Commission has carried out the injury assessment based on the period 2010-2014, it follows that the injury determinations contained in the SEF are irremediably flawed.

3.2 The Commission failed to demonstrate the existence of injury in the form of a significant price suppression

According to the SEF, the Australian industry has experienced injury in the form of price suppression.

In this respect, Article 3.2 of the ADA requires the Commission to consider '*whether the effect of* [the] *imports is* […] *to* […] *prevent price increases, which otherwise would have occurred, to a significant degree*'. In order to conclude that the domestic injury is suffering injury, it is therefore requested that the price suppression should be significant.

Bearing the above in mind, it must first be recalled that the prices for PPTs in Australia have *increased* as from 2012, as demonstrated by the figures provided in the Complaint.

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

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

Despite this, the Commission has concluded that *'SPCA has been unable to raise its prices to a level would enable it to either make a profit or reduce it losses'.* However, the Commission has not demonstrated that the alleged price suppression, if any, is significant.

Moreover, while the Commission claims that the alleged price suppression would be demonstrated by the *'deteriorating margin between revenue and cost to make and sell',* it must be noted that (i) this conclusion is solely based on SPCA's unverified data (see section 3.3. below), and that (ii) the SEF does not provide any figure in this respect. However, the ADA requires a non-confidential summary of the information relied upon by the investigating authority to be provided to all interested parties. The absence of such a summary is in stark contradiction with the rights of defence, and in particular with Articles 6.2 and 6.5.1 of the ADA.

In short, while the Commission wrongly concluded that our Clients' exports of PPTs have prevented price increases which would otherwise have occurred, it failed to demonstrate the significant character of such effect. As a result, the conclusion that the domestic industry is suffering injury in the form of price suppression is unwarranted and unsubstantiated.

3.3 The Commission failed to demonstrate the existence of injury in the form of loss of profits and profitability

In Section 7.6, the SEF concludes that SPCA has experienced injury in the form of loss of profits and profitability, despite the two exporters' comments with regard to the improvement of SPCA's financial situation resulting from Coca Cola Amatil's 2014 financial report.

In this respect, the Commission noted that *'the information contained in the report is not specific to prepared or preserved tomatoes. For the purposes of assessing injury to the Australian industry, the Commission's profit and profitability effects analysis is on SPCA's sales data of like goods.'*

Our Clients would like to submit the following observations in that regard:

- the information provided by SPCA and relied upon by the Commission to determine SPCA's profitability has not been verified, despite the contradiction between the data submitted by SPCA and the figures contained in Coca-Cola Amatil's Annual Report pointed out in our Clients' previous submissions;

- our Clients note a significant difference between the chart on SPCA's profits and profitability for prepared or preserved tomatoes included in the SEF, and that included in the Consideration Report, which shows a contraction of SPCA's losses in 2013. This difference, the origin of which remains unclear, would have certainly called for a verification of SPCA's data;

- it is unclear how the Commission reached its conclusion with regard to the alleged loss of profits and profitability. In particular, our Clients note the absence of any meaningful figure in that regard. This is contrary to the requirements of the ADA, since the two exporters are not in a position to verify the Commission's conclusions;

- as will be explained hereunder, SPCA's exports of the product under investigation have significantly dropped, if not collapsed. Indeed, SPCA's exports decreased by 50% over the past few years (see also section 3.5.3 below). This, logically, caused the unit cost of production to skyrocket and, as a result, the profitability to drop. It is unclear how – and if – the Commission took this important circumstance into account in its analysis.

In view of the above, it is submitted that the conclusion on the existence of injury in the form of loss of profits and profitability is unsubstantiated, based on unverified data and, as a result, should be disregarded.

3.4 The Commission failed to establish a causality link between the allegedly dumped imports and the alleged injury

The causality assessment contained in section 8 of the SEF appears to be vitiated by several flaws, which will be discussed below.

3.4.1 The Commission's price undercutting analysis is flawed

According to section 8.5.2 of the SEF, in order to conduct its undercutting analysis the Commission compared the price of PPTs from Italy at FIS ('free into store') terms and the price per Kg of comparative SPCA products at delivered terms for the 2014 calendar year. Our Clients consider that the Commission's analysis is flawed, due to a number of factors:

- it must be noted that the Commission used sales and cost data of importers in relation to sales in Australia of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria. This is contrary to Article 3 of the ADA, which clearly states that a determination of injury shall be based on positive evidence of the effects of the imports. In other words, the ADA clearly requires that the injury analysis should be based on the prices of dumped imports, and not on the re-sale price of such imports. It follows that the Commission's undercutting analysis is ill-founded;

- it is unclear how the Commission has constructed the FIS prices where the exporters sell directly to retailers. In particular, our Clients fail to understand why the Commission would need to construct the selling prices by adding amounts for anti-dumping duties (where applicable). This suggests that the Commission took into consideration data relating to imports from other Italian exporters already subject to anti-dumping measures in the undercutting analysis. Such construction methodology appears to be questionable, at best;

- the Commission undertook a comparison between the FIS prices and the prices of comparative SPCA products at delivered terms. Our Clients submit that the FIS prices are not a suitable benchmark for this comparison. Indeed, the prices at this level of trade are affected by a number of factors (such as, e.g., the importer's profit) upon which the two exporters have no control. Moreover, it is unclear whether in carrying out the price undercutting analysis at FIS level the Commission took in due account the effects of the appreciation of the Australian dollar (see section 3.5.2 below);

- our Clients note that, in some cases, the Commission has used data *'ascertained from verified importers data from the previous dumping investigation'*. Our Clients fail to understand why the Commission had to use data not relating to the investigation period for the purpose of the price undercutting analysis;

All the above flaws cast serious doubts on the reliability of the undercutting analysis carried out by the Commission.

3.4.2 The Commission's analysis on profit and profitability is flawed

The SEF also concludes that the allegedly dumped imports caused injury to the domestic industry in the form of reduced profits and profitability, due to the price suppression occurring on the Australian market.

This reasoning is based on the premise that price suppression would exist. As explained above, however, the Commission failed to demonstrate the existence of significant price suppression. Moreover, the Commission's conclusion is based on unverified data from SPCA, which are contradicted by publicly available information (see section 3.3 above).

As a result, the finding that the allegedly dumped imports would have caused injury to the domestic industry in the form of reduced profits and profitability is unsubstantiated and, as such, should be disregarded.

3.5 The injury, if any, has been caused by factors other than the allegedly dumped imports

In addition to the above, it is submitted that the SEF does not provide sufficient evidence as to demonstrate that the injury suffered by the Australian industry was caused by the allegedly dumped imports from the two exporters rather than by other factors. In doing so, the SEF violates Article 3.5 of the ADA, according to which the investigating authorities must '*examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*'. In the case at issue, it is clear that a correct and objective application of Article 3.5 of the ADA would inevitably lead to the conclusion that the vast majority of the injury suffered by the Australian industry is caused by factors other than the allegedly dumped imports produced by our Clients.

3.5.1 The injury has been caused by the strategy of the Australian major retailers

Our Clients would like to recall the particular structure of PPTs market in Australia, and its consequences for the Complainant:

- the Australian retail market is dominated by a very small number of large purchasers which enjoy an extensive market power.[17] Approximately 82% of all PPT sales occur via the major supermarkets, especially Coles, Woolworths, and Aldi,[18] which exercise a strong buying power towards the PPTs producers.

- retailers tend to favour their own private labels, at the expense of SPCA's proprietary labels. This allows the retailers to offer a competitive alternative product to branded products, increase their profit margin and purchasing power, and retain the loyalty of their customers by offering products which are not available in competitors' store. In addition, retailers tend to diversify their source of supply in order to ensure the constant supply of PPTs.[19]

This particular market structure entails several negative consequences for SPCA, amongst which: (i) downward pressure on prices; (ii) placing of SPCA's products in unfavourable locations on shelves, which results in lower sales performance; (iii) important decline in profitability. This is confirmed by independent sources:

- the Productivity Commission of the Australian Government which, in its report on the imports of processed tomato products in the framework of a safeguard inquiry, noted that '*developments in supermarket private label strategies could cause injury to the domestic industry without any increase in imports*. […] *It is likely that any supermarket strategy that leads to consumers switching from SPC Ardmona's branded products to domestically sourced private label products would reduce SPC Ardmona's margins and its profitability. Any such injury would not be attributable to increased imports, but rather to choices made by supermarkets about branded and private label products, and by consumers*.'[20];

- the Commission itself, in the framework of the previous investigation, considered that '*factors other than dumping, including* […] *the retail strategies of the major supermarkets have played a contributing role to the injury experienced by SPCA during the investigation period*'.[21] It also added 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. The Commission considers that the*

17 SEF No. 217, p. 56.
18 SEF No. 217, p. 20.
19 It is recalled that Australian growers of tomatoes are mostly located in northern Victoria and Southern New South Wales, which exposes them to period of low production due to bad weather. This was for example the case in 2011.
20 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, pp.57-58.
21 SEF No. 217, p. 55.

strategy of shelf placement by the retailers is not related to their purchase of dumped imports from Italy. As a result, lost sales due to the unfavourable placement of SPCA's products on the retail shelf cannot be attributed to dumped imports.'[22]

More importantly, the Complainant itself recently acknowledged that: ***'[t]here's been in recent years a dramatic shift of value from food suppliers to retailers and consumers**. So, a report that was issued by Morgan Stanley in October last year suggests that **Australian food suppliers to the grocery industry declined in profitability by close to 40% over a five year period, while retailers grew their profits by 30% in the same period**. These Morgan Stanley findings were supported by a report published by the AFGC in May 2014 which also concluded that profitability in the Australian food processing sector had declined collectively by 30% since 2010'* (see **Annex 3**).

In light of the foregoing, the Commission's conclusion that, despite the downward pressure on prices exerted by the supermarkets, the allegedly dumped prices of Feger and La Doria are the main cause of the injury suffered by the Complainant appears to be clearly ill-founded.[23] As previously explained, a correct analysis would have concluded that the injury suffered by the Complainant was caused – to the largest extent - by the strategy of the Australian retailers and that this specific injury cannot be attributed to the two exporters.

3.5.2 The injury has been caused by the appreciation of the Australian dollar

As repeatedly submitted by our Clients, the injury suffered by SPCA was mostly due to the appreciation of the Australian dollar. This has been acknowledged by Coca-Cola Amatil and SPC themselves. Our Clients fail to understand how the Commission may simply overlook such an important factor, given the numerous statements of the Complainant in that regard:

- '*the stronger Australian dollar has materially impacted SPCA's competitiveness against cheap imported brands and private label categories in the domestic market*.'[24];

- '*the stronger Australian dollar continues to impact SPCA's competitiveness against cheap imported brands and retailer private label categories in Australia and its earnings from international operations with export sales declining by over 20% over the last 12 months*.'[25];

22 SEF No. 217, p. 60.
23 SEF No. 217, p. 42.
24 Coca-Cola Amatil, Annual Report 2010, p.2.
25 Coca-Cola Amatil, Annual Report 2011, p.2.

- '*the 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*.'[26];

- '*the strengthening of the Australian dollar over the past three years has regrettably led to a significant increase in the volume of cheap packaged fruit and vegetable products being imported into Australia. It has also led to a material increase in the share of the private label category which is being supplied primarily by imported products*.' […] '*The stronger dollar has also negatively impacted the competitiveness of SPC Ardmona's export business with exports halving over the past four years*.'[27];

- '*the stronger Australian dollar continued to affect SPCA's competitiveness* […] *SPCA's exports sales had fallen 35 per cent over the last 12 months* […] *The review* [of SPCA's business, conducted by Coca-Cola Amatil] *also found that, as a consequence of the stronger Australian dollar, SPCA is currently not competitive in many export markets and has seen domestic grocery private-label contracts move to imported products* […] *SPC has put measures in place to maintain its competitiveness but I guess the Australian dollar the way it has been, has been a hard one to tackle*'[28];

The above is further confirmed by other independent sources:

- '*Decreased domestic supply and the appreciation of the Australian dollar led retailers to source private label products from imports. Sales of domestically produced private label products have not recovered to date*';[29]

- '*The high Australian dollar makes food manufacturers less competitive against imports in the domestic market and competition in export markets*'.[30]

In light of the foregoing, it is difficult to understand how the Commission may conclude that '*the degree of appreciation in the AUD relative to the EUR over the timeframes described above is moderate'* and that '*this does not detract from its finding that dumping of prepared or preserved tomatoes exported to Australia from Italy by Feger and La Doria has caused material injury to the Australian industry*'.[31] In this respect, it must be noted that according to Article 3.5 of the ADA, '[…] *the authorities shall also examine any known factors other than the dumped imports*

26 Coca-Cola Amatil, Annual Report 2012, p.1.

27 Statement of Terry Davis, Coca-Cola Amatil's Group Managing Director, 'Mooroopna to shut, but CCA to build SPC Ardmona as premium brand'; see also Coca-Coca Amatil, Media Release, 9 August 2011.

28 'Coca-Cola Amatil to close SPCA facility, cut 150 jobs, pay millions in redundancies'.

29 Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.

30 AFGC, submission of 11 October 2011 to the Senate select committee on Australia's food processing sector, in response to the inquiry into Australia's food processing sector, p.4.

31 SEF No. 276, p. 43.

which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports'. The question, therefore, is not whether the allegedly dumped imports detract the Commission from its findings, but whether the injury suffered by the Complainant can, totally or partly, be attributed to the appreciation of the Australian dollar. In order to answer that question, the Commission cannot overlook the numerous statements confirming that the high Australian dollar did cause significant injury to the domestic industry.

In this respect, it must be further noted that in recent statements Reg Weine, SPCA Managing Director, explained that the adoption of the provisional duties in the current investigation, '*coupled with a depreciating Australian dollar'* will close the gap between SPCA's and our Clients' prices.[32] In other words, Reg Weine himself considers that **the imposition of anti-dumping measures against Feger and La Doria would not be sufficient to offset the injury suffered by the Australian industry because, as a matter of fact, such injury is caused to a large extent by appreciation of the Australian dollar**.

In light of the foregoing it is submitted that the Commission has manifestly erred in concluding that the injury suffered by the Complainant, if any, is not due to factors other than the allegedly dumped imports from Feger and La Doria such as the appreciation of the Australian dollar.

3.5.3 The injury has been caused by the drop of SPCA's exports

Another well-documented cause of injury is the drop of SPCA's exports. This is not only acknowledged by the Complainant (see section 3.5.2 above), but also by the Productivity Commission, which considered that '*Exports of Australian processed tomatoes have decreased significantly over the past five years* […]. *This has likely caused injury to SPC Ardmona through decreased production volumes, sales, revenues and profits*.'[33]

The same authority stated that Australian exports of processed tomato products decreased by 45% between 2008-2009 and 2010-2011.[34] The impact of this collapse – on which our Clients have no bearing – cannot be underestimated. This sharp decrease of export volumes is likely to have entailed an increase of average costs of production, and, as result, losses of revenues, profits, and profitability.

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32 '*If you look at the average price today, the retail price of a can of tinned tomatoes ranges anywhere on average from 80 cents through to 1 dollar 40 cents a tin. So at 7.5% coupled with a depreciating Australian dollar you have to think that there's going to be a 10-15 cent differential in the price going forward from where we've been in the past, and that will substantially close the gap between the prices between our wonderful brand of tomatoes, Ardmona, and the competition which is a good thing*', see www.abc.net.au/news/2015-09-07/reg-weine-spc-dumped-italian-tomatoes/6754350

33 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, p.13.

34 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, p.60.

It is surprising to note that the SEF does not contain one single word on this important factor.

3.5.4 The injury has been caused by a lack of investment in SPCA's tomato processing branch

In our Clients' previous submissions it was claimed, *inter alia*, that the injury suffered by the Australian industry was also caused by lack of investment.

In this respect, the SEF explains that *'SPCA provided information on the value of capital investment representative of the whole company'* and that this information shows '*a reduction in the value of capital investment from a companywide perspective'.* However, despite this finding, the Commission noted that *'SPCA has not separated the data specific to the production of prepared or preserved tomatoes'* thus concluding that *'it cannot make any injury assessments in relation to capital investment that may be particular to prepared or preserved tomatoes'*.[35]

The above statement is very surprising. The Commission's approach in conducting the investigation raises serious doubts in the accuracy and reliability of the conclusions contained in the SEF. In particular, our Clients fail to understand why the Commission – being well aware of the lack of investment in the food processing sector in Australia – did not request SPCA to provide data on investment specific to the production of PPTs.

Our Client's concern is *a fortiori* justified in light of the fact that the lack of investment in the PPT sector has been repeatedly acknowledged by the Complainant itself. In a recent statement, Alison Watkins declared '*[r]einventing the business would enable us to continue our Australian employment, and the value that we generate in Victoria's 'Golden Valley', but it would also require serious investment to modernise the plant and equipment in the ageing Shepparton facilities'.*[36] Moreover, publicly available information demonstrates that SPCA failed to invest in its tomato processing facilities in the last few years, and decided to remedy this situation only recently. In particular, it appears that the recent closing of the Mooroopna plant is due to the building of a '*state-of-the-art tomato line at Shepparton, as part of* [SPCA's] *$100M modernisation program*'[37] partially financed by the Victorian Government. These investments, as the Commission could easily verify with the relevant authorities, have been long awaited. It is therefore clear that the injury suffered by SPCA, if any, is due to a serious lack in investment which was only recently remedied thanks to subsidies granted by the Australian government.

Finally, with respect to the Commission's observation that, in any case, '*the decision to invest is guided by a range of considerations, including prevailing market*

35 SEF No. 276, p. 36.
36 See **Annex 3**.
37 'SPC Mooroopna plant concludes operation', 19 August 2015, www.sheepadviser.com

conditions, and that the presence of dumped goods in the market may discourage investment'[38] it is sufficient to note that:

- while it is true that market conditions may discourage investment, the opposite is also correct: a lack of investment can create disadvantageous market conditions;

- by following the Commission's reasoning, it should be concluded that SPCA's recent decision to invest shows that the prevailing market conditions in the last few months are good, thus contradicting the finding that the Australian industry is suffering injury.

In light of the foregoing it is submitted that the Commission has manifestly erred in concluding that the injury suffered by the Complainant, if any, is not due to factors other than the allegedly dumped imports from Feger and La Doria, such as the lack of investment by SPCA.

3.5.5 The injury has been caused by exports of PPTs from the Italian producers already facing anti-dumping duties

According to the Commission, exports of PPTs from the Italian producers already subject to anti-dumping duties are undercutting the domestic prices for PPTs in each months of the investigation period.[39] This circumstance – also pointed out by our Clients at the very beginning of the investigation – cannot be overlooked. Indeed, this entails that the imports which are already subject to anti-dumping duties are still causing injury to the Australian industry.

The Commission's conclusion that *'the aggregate volume of this category of goods was lower than the combined volume of dumped goods from Feger and La Doria in the investigation period, and the Australian selling prices of this category of goods were higher than the Australian selling prices for the dumped goods from Feger and La Doria'* – apart from being based on a undercutting analysis which is vitiated by a number of flaws (see section 3.4.1 above) - cannot justify that the injury caused by such imports is attributed to the imports from the two exporters.

The above clarified, it is worth noting that the anti-dumping duties adopted in 2013 against 103 Italian producers out of 105 appear not to have allowed SPCA to recover from its alleged injury. In view of the above, it must be concluded that (i) either the imports subject to anti-dumping were wrongly found to be the cause of the injury suffered by the Australian industry in the previous investigation, (ii) or SPCA is simply unable to take advantage of the anti-dumping duties, being an irremediably loss-making company (see section 3.5.6 below).

[38] SEF No. 276, p. 37.
[39] SEF No. 276, p. 40.

3.5.6 The injury has been caused by to the high costs in the Australian food processing industry

Finally, it is submitted that the SEF also failed to address the widely documented high costs faced by the Australian food industry. In particular:

- representatives from the Australian Food and Grocery Council declared that '*[s]uppliers are facing an environment where there's a high Australian dollar and rising input costs. These include labour and electricity, coupled with retail price deflation, increased government regulation and compliance*'[40]

- the Complainant itself acknowledged that *'[l]ooking first at the external challenges, analysis from KPMG recently concluded that out of 10 developed countries that they looked at, Australia's food processing sector has the highest costs of doing business. Australia was among the most expensive countries for labour, facility costs, transportation and energy.*'[41]

Our Clients fail to understand why such factor was completely overlooked in the SEF.

3.6 Preliminary conclusions on injury and causality

It stems from the above that the injury and causal link analysis conducted in the SEF is vitiated by a number of methodological errors which led the Commission to reach incorrect conclusions. In particular:

- the injury determinations contained in the SEF are irremediably flawed because the only relevant period for the purpose of the injury analysis is the period between 1 July 2013 and 31 December 2014;

- the Commission's conclusions regarding the existence of significant price suppression and the existence of injury in the form of loss of profits and profitability are unsubstantiated and unwarranted;

- the Commission's analysis of price undercutting and profitability appears to be vitiated by a number of flaws;

- the Commission has wrongly assessed the impact of factors other than dumped imports from the two exporters for the purpose of the injury determination. Had the other factors been carefully assessed, the Commission would have concluded that any injury suffered by the Australian industry was not caused by the imports from our Clients;

- the Commission relied upon unverified data from SPCA for the purpose of the injury assessment despite the fact that such data were found to be incomplete

[40] 'Canned : the decline of the production line', 17 June 2013, www.sproutmagazine.com

[41] See **Annex 3**.

or contradictory. It is unclear why the Commission failed to request the missing information to be provided in due time. The Commission's overall approach in this respect casts serious doubts about the accuracy and reliability of the conclusions contained in the SEF.

4. CONCLUSION

In conclusion, with regard to the cost adjustment pursuant to Regulation 43 it is submitted that:

- the cost adjustment infringes WTO law. The impact of the payments granted under the SPS scheme can only be addressed in the framework of an anti-subsidy investigation. In addition, adjusting the costs of the product under investigation due to alleged distortion on the upstream market violates Articles 2.2.1.1 and 2.4 of the ADA;

- the SPS is a fully legal income support scheme, compliant with the requirements of Annex II to the WTO Agreement on Agriculture. As a result, it cannot be considered that the SPS has a trade distorting effect;

- the calculation is incorrect since it (i) relies upon of an incorrect legal basis; (ii) uses a wrong figure of the number of hectares dedicated to the production of raw tomatoes; (iii) relies on obsolete data which are not falling in the period of investigation; (iv) assumes that the amount of (de-coupled) subsidies granted in 2014 is equal to the ceiling of (coupled) subsidies granted in 2011 while, in reality, in 2014 the (de-coupled) subsidies granted to the suppliers of La Doria and Feger were modest.

- the findings with regard to the pass-on of the impact of the direct payments to the costs of raw tomatoes are ill-founded.

Moreover, as regards the injury and causality assessment contained in the SEF it is submitted that:

- the injury determinations contained in the SEF are irremediably flawed because the only relevant period for the purpose of the injury analysis is the period between 1 July 2013 and 31 December 2014;

- the Commission's conclusions regarding the existence of significant price suppression and the existence of injury in the form of loss of profits and profitability are unsubstantiated and unwarranted;

- the Commission's analysis of price undercutting and profitability appears to be vitiated by a number of flaws;

- the Commission has wrongly assessed the impact of factors other than dumped imports from the two exporters for the purpose of the injury determination. Had the other factors been carefully assessed, the Commission would have concluded that any injury suffered by the Australian industry was not caused by the imports from our Clients;

- the Commission relied upon unverified data from SPCA for the purpose of the injury assessment despite the fact that such data were found to be incomplete or contradictory. It is unclear why the Commission failed to request the missing information to be provided in due time. The Commission's overall approach in this respect casts serious doubts about the accuracy and reliability of the conclusions contained in the SEF.

Ministero delle politiche agricole alimentari e forestali

DIPARTIMENTO DELLE POLITICHE EUROPEE E INTERNAZIONALI
E DELLO SVILUPPO RURALE
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ROMA

OGGETTO: Governo australiano - indagine antidumping su importazione pomodori
(rif. Nota ANICAV, prot. 7-10-921 del 8-09-15)

Si inoltrano di seguito le informazioni richieste con la nota in oggetto, corredate da ulteriori considerazioni inerenti la questione prospettata.

Il regolamento (CE) n. 1782/03, concernente i regimi di sostegno diretto nell'ambito della politica agricola comune (PAC) ed altri regimi di sostegno prevedeva, all'articolo 68ter, successivamente ripreso dall'articolo 54 del regolamento (CE) n.73/2009 citato nella nota di cui all'oggetto, la possibilità per gli Stati membri, a certe condizioni e per certi prodotti ortofrutticoli, di optare per un regime di pagamenti transitori a superficie prima della piena integrazione nel regime dei pagamenti diretti.

La scelta operata dall'Italia nel 2007 fu quella di avvalersi di tale opportunità e con decreto ministeriale 22 ottobre 2007, n. 1540, per il pomodoro destinato alla trasformazione, è stato adottato il regime transitorio di cui all'art. 68ter del Reg. (CE) 1782/2003, prevedendo per la durata di 3 anni (2008-2010) un aiuto per ettaro globalmente pari al 50% della componente del massimale nazionale di 98,91 milioni di euro, per coloro che coltivavano detto prodotto.

Pertanto, già a partire dal 2011, non è stato previsto più alcun sostegno accoppiato del pomodoro.

In conclusione, per il periodo cui fa riferimento codesta Associazione, ovvero 2012-2014, nessun aiuto è stato erogato ai produttori di pomodori destinati alla trasformazione in quanto il regime di aiuto transitorio legato alla superficie coltivata risultava essere terminato.

Altresì, si rileva che il riferimento fatto al comma 2(b) dell'art. 54 nel punto 6.4.3 del SEF, appare non coerente con la questione di che trattasi, in quanto per il pomodoro destinato alla trasformazione è di applicazione esclusivamente il paragrafo 1 del medesimo articolo, mentre il comma 2 dispone sui prodotti ortofrutticoli elencati al terzo comma, tra i quali non compare appunto il pomodoro.

In allegato sono riportate, ad ogni buon fine, le superfici e le produzioni di pomodoro da industria, negli anni 2012, 2013 e 2014 in Italia.

IL DIRETTORE GENERALE
Felice Assenza

Object: **Australian government – antidumping investigation on tomatoes import (ref. Note ANICAV, prot. 7-10-921 of 8 September 2015)**

We hereby file the requested information, together with further considerations concerning the matter at stake.

Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending other Regulations, provided at Article 68ter - now replaced by Article 54 of Regulation No 73/2009 quoted in the Note referenced above - the possibility for Member States to opt for a transitional coupled payment system before the full integration into the direct payments system.

Italy took advantage of this possibility in 2007 and adopted the transitional system provided by Article 68ter of Reg. No 1782/2003 through the Ministerial Decree No. 1540 of 22 October 2007 concerning tomatoes for processing. According to this Decree, a coupled support globally amounting to 91.98 million, equal to 50% of the national ceiling, was granted for a period of three years (2008-2010).

Therefore, since 2011, there is no coupled support for tomatoes.

In conclusion, in the period mentioned by this Association, i.e. 2012-2014, no support has been granted to raw tomatoes farmers because the transitional coupled payment system was over.

Furthermore, we note that the reference to paragraph 2(b) of Article 54 in section 6.3.4 of the SEF seems to be not coherent with the matter at stake. Only paragraph 1 of Article 54 applies to tomatoes for processing while paragraph 2 concerns the fruits and vegetables referred to in paragraph 3, where tomato is not mentioned.

Extracts of the statement of Coca-Cola Amatil CEA, Ms Alison Watkins, before the Center for Independent Studies

"[…]

Productivity in food manufacturing has been under much greater pressure. There are a number of reasons for this: external factors and then also factors that go to the producer/commodity-oriented mentality that many food processors have had.

Looking first at the external challenges, analysis from KPMG recently concluded that out of 10 developed countries that they looked at, Australia's food processing sector has the highest costs of doing business. Australia was among the most expensive countries for labour, facility costs, transportation and energy. And, adding to that, there's been in recent years a dramatic shift of value from food suppliers to retailers and consumers. So, a report that was issued by Morgan Stanley in October last year suggests that Australian food suppliers to the grocery industry declined in profitability by close to 40% over a five year period, while retailers grew their profits by 30% in the same period. These Morgan Stanley findings were supported by a report published by the AFGC in May 2014 which also concluded that profitability in the Australian food processing sector had declined collectively by 30% since 2010. So, these shifts have resulted in a number of Australian food processors really struggling to make an investment case to invest new capital that would enable them to continue manufacturing in Australia, and instead we've seen a number of them close down or relocate their manufacturing offshore.

[…]

In the years following the acquisition by CCA, SPC has really faced very very significant challenges to its ongoing viability. In fact, it was hit with a perfect storm, really, which included intense import competition; the sustained, high Australian dollar; a liberal tariff regime, which led to dumping by overseas competitors, particularly in tomatoes; and increased global sourcing and private labels by the major domestic retailers. These factors created a spiral of decline of reduced volume which led to increased unit costs, excess inventory required prices to go up even further which led to further loss of market share. The issues facing SPC became so overwhelming that we had to make a choice: we could take the course chosen by other food manufacturers and relocate SPC's processing in lower cost countries; or, we could completely reinvent SPC from a sort-of "stack 'em high, watch 'em fly" commodity business to one that understood its consumers, engaged with them and responded to these changing consumer preferences, through innovation, thereby reducing its reliance on the dusty declining canned fruit categories, and getting serious about capitalising on the health and convenience trends that are so evidently driving consumers today.

Reinventing the business would enable us to continue our Australian employment, and the value that we generate in Victoria's "Golden Valley", but it would also require serious investment to modernise the plant and equipment in the ageing Shepparton facilities. That led SPC to seek Victorian and Commonwealth Government financial assistance to retain its manufacturing in Australia and became part of an intense debate in late 2013 on the merits of governments providing industry assistance. Had CCA decided to move SPC's manufacturing offshore, the wider ramifications for the Shepparton region would have been quite devastating. Shepparton is one of the 10 most disadvantaged areas in

Australia, and SPC employs around 1,500 people in the region, and its economic impact supports another 2,700 or thereabouts jobs within the region.

So following a period of intense lobbying the Victorian Government agreed to provide SPC with 22 million of Government funding, as part of an overall 100 million dollar three year investment programme committed to by CCA, and that will result in the implementation of a transformation plan, that will reduce costs, improve productivity, modernise the production facilities, revitalise the brand portfolio, and, we hope, return the business to profitability.

The Federal Government decided not to provide funding for SPC, on the basis that governments shouldn't intervene, which for me did hold a shade of irony, given I'd just been on the receiving end of Joe Hockey's decision that Government should intervene on the proposed acquisition of GrainCorp by the New York Stock Exchange-listed agribusiness Archer Daniels Midland.

We believe that we can create a diversified and sustainable business both in Australia and internationally, that is PC. And there's some early promise that we might just be on the right track in our financial results for SPC last year which saw us deliver a close to break-even result after years of quite significant losses.

[…]

It's really good to see that Australian consumers are actually thinking much harder, in a way that I haven't seen through my time in the food industry, about where their food actually comes from.

So there's still a long way to go, and time will tell if SPC can deliver year-on-year growth. But what is certain is that while CCA actually owns SPC, there are so many others on whom we depend for this business to survive and thrive. So clearly it does start with us and as a management team we've needed to have the foresight and confidence to identify and enter new product categories and to come up with innovative marketing approaches and all the risks that go with trying to grow the top line. We've also needed our Board of Directors to of course back the investment and from a shareholder point of view to make that decision, but also I was very struck by the way our Board considered their social responsibilities to the Shepparton region in the way they went about deciding the future of the business.

Our employees have had and will have a vital role to play in this. We've had great support from our employees, for example they agreed to a pay freeze last year, that's helped us manage our costs, but we have a lot more work to do with our employees to create the kind of culture and work practices that will allow us to have a safe and modern workplace.

[…]

The support of our retail partners is also essential, and we've relied on their commitment to stock "Australian Made", and their continuing commitment is going to be important. I think retailers have every right to expect us to operate modern, competitive facilities, and we need them to respect and value Australian quality and food safety standards which do impose a premium. SPC announced in 2014 that we'd entered into a five year, 70 million dollar agreement with Woolworths. This was for their private label product, where they've committed to make it 100% Australian, and that contract

boosts our annual production alone by about 5%, and will triple the tonnage of Australian grown tomatoes that SPC supplies to Woolworths, so very very material move by Woolworths there.

I think given that Australian consumers are now demanding more local products there is a real opportunity for retailers and Australian food processors to work much more closely together, and build the Australian grown, and made, brand offering through their stores. And, last but least, the Government does have a critical role to play in the future of Australian food processing, and I think, you know, very much for me that role is not at all about propping up ailing industries or businesses. They can assist greatly in improving our competitiveness, promoting investment and growing exports.

[…]

To wrap up today I'll leave you with a positive message. SPC is the story of "the little train that could", and, like many Australian food processing businesses, it's dealt with many many challenges over the past decade, and it's fortunate to have had many many supporters, not only its owners, who've persevered and adopted a "can do" attitude. It is moving with the times, and leaving behind the outdated attitudes of the co-operative culture, which is a legacy that takes a long time to disappear. It's moved into a new era of placing the consumer at the forefront of all of its business decisions. It is an exciting time for SPC and you can really feel the excitement among our employees, our growers, our consumers, our suppliers, and even our retail partners. We have overcome a lot of adversity and I think a successful future lies ahead for the business."

Source: https://www.youtube.com/watch?v=mZPfu6bW4lU