Anti-dumping investigation No 217 - Prepared or preserved tomatoes from Italy – Response to the Statement of Essential Facts – Our client Lodato Gennaro & C. S.p.A.

The present submission is filed on behalf of Lodato Gennaro & C. S.p.A. (hereinafter, "Lodato"), in response to the conclusions contained in the Statement of Essential Facts (hereinafter "SEF") adopted by the Australian Anti-Dumping Commission (hereinafter, the "ADC") on 4 February 2014.

1. LODATO SHOULD BE TREATED AS COOPERATIVE PARTY

The present Section demonstrates that the ADC erred in considering Lodato as a non-cooperating party and, in any event, erred in imposing an anti-dumping duty of 26.35% on Lodato's imports.

In particular, it is submitted that Lodato should be considered a residual exporter. In addition, even admitting that Lodato should be considered as a non-cooperating exporter, *quod non*, it is submitted that the anti-dumping duty imposed on Lodato's imports should be considerably lower than 26.35%.

1.1 Introduction

First of all, we would like to draw the ADC's attention to some important circumstances in light of which the attitude held by Lodato during the whole course of the investigation process should be evaluated.

First of all, it should be noted that Lodato is a relatively small family business with only 90 permanent employees. Moreover, the present anti-dumping investigation was the first ever faced by Lodato. Lodato has always been fully aware of the importance of such an investigation. Furthermore, Lodato was not able to devote the attention and the efforts it would have liked to reserve to the investigation since when the case was initiated it was fully absorbed by the tomatoes harvesting season which last year presented, for the company, unexpected difficulties.

Finally, Lodato's position should be evaluated in light of the existing linguistic constraints and of the inconvenience of the period of completion of the questionnaire, which happened to be in the middle of the harvest and processing period.

1.2 Legal framework

It is appropriate to briefly recall the legal framework relevant to the present case, as enshrined in the WTO Anti-Dumping Agreement (hereinafter "ADA") and interpreted by the WTO jurisprudence. It is in the light of the following principles that the cooperative attitude of Lodato throughout the investigation should be evaluated.

As regards the cooperation degree which the investigation authority can legitimately request, it is to be pointed out that Article 6.13 of the ADA provides that "*the authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable*" (emphasis added). As clarified by the Appellate Body in *US – Hot-Rolled Steel*, *"Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation"*[1] (emphasis added).

As concerns the right of the investigation authority to resort to 'facts available' in order to calculate the dumping margin, it should be noted that article 6.8 provides that "*in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available*" and sets the applicability of the provisions contained in Annex II.

1.3 Factual background

Once illustrated the legal principle that should be applied in evaluating the cooperative attitude of Lodato, it is worth to recall the main facts that led to the ADC's decision to consider Lodato as a non-cooperating party.

In this respect, the following should be noted:

- on 10 July 2013, the ADC initiated an anti-dumping investigation regarding prepared or preserved tomatoes exported to Australia from Italy following an application lodged by SPC Ardmona Operations Limited;

[1] See Panel Report, Egypt — Steel Rebar, para. 7.305.

- upon communication of the initiation of the investigation on 12 and 16 July 2013, Lodato promptly manifested its intention to cooperate with the ADC by submitting, on 29 July, the duly completed Part I of the questionnaire;

- in consideration of the considerable workload related to the need to complete the tomato processing for the season 2013-2014, Lodato asked and obtained – like all other cooperating producers – a 30-day extension of the time-limit for the submission of Part II of the questionnaire. The extended deadline was set on 30 September 2013 for all cooperating parties. In the meanwhile, exchanged correspondence reveals that arrangements were discussed in order to schedule a date for the verification visit;

- on 19 August, Lodato replied confirming its availability to organise the verification visit in the dates proposed by the ADC (21-25 October).

- on 1 October, Lodato sent an email to the ADC communicating that, due to technical issues with the company's data server, it was not able to submit Part II of the questionnaire, and asking for a 5-day extension.

- on the same day, the ADC replied subjecting the granting of the extension to the acceptance of a different date for the verification visit. The ADC also pointed out that, to that date, it did not receive any reply on the part of Lodato concerning the choice of dates for the verification visit.

- on 2 October (Australian time), the ADC contacted Lodato and gave notice that if no reply concerning the verification visit day would have followed by the close of business of the same day (Australian time), it would have treated Lodato as an uncooperative exporter. At the close of business, another email informed Lodato that it was considered as an uncooperative exporter.

- on 2 October (Italian time), i.e. few hours upon reception of the ADC's emails, Lodato replied confirming its availability to hold the verification visit on the date chosen by the ADC and informing that it would supply Part II of the questionnaire by 4 October.

- on 3 October, Lodato explained that the delay in the replies were due to the time difference and once again offered its availability to cooperate. Thereafter, Lodato never received any reply on the part of the ADC. It appears clearly from the relevant correspondence:

  (i) that Lodato experienced language-related difficulties;

  (ii) that Lodato experienced some technical issues with its server, which made the timely submission of Part II of the questionnaire impossible;

  (iii) that Lodato was willing to cooperate, to submit further information and to arrange the verification visit.

In light of the above, it is evident that Lodato always acted in good faith and to the best of its abilities and that the ADC's decision to consider Lodato as uncooperative is unwarranted, as will be illustrated in the following Section.

1.4 The decision to consider Lodato as uncooperative is unwarranted

In light of the factual background (described in Section 1.3 above) and the legal principles of application (summarised at Section 1.2 above) it must be concluded that the decision to treat Lodato as an uncooperative exporter is unjustified.

In deciding not to grant a 4-days extension for the submission of Part II of the questionnaire to Lodato, the ADC infringed Article 6.13 of the ADA, which requires the investigation authorities to provide *"any assistance practicable"*, taking into special account the difficulties faced by small companies like Lodato. While not denying that the ADC did make certain allowances towards Lodato (i.e. the granting of the 30-day extension of the time-limit for the submission of Part II of the questionnaire - like to all other cooperating producers), the ADC's decision of 2 October 2013 to treat Lodato as uncooperative is unjustified for the following reasons:

- the ADC failed to take into due account the technical issues faced by the company, as invoked by Lodato in the email of 1 October;

- the ADC did not take into sufficient consider Lodato's efforts to cooperate, notwithstanding the difficulties posed by the period in which the completion of the questionnaire was due (i.e. in the middle of the tomato harvesting season), as proven in the emails of 2 and 3 October where Lodato accepted the verification dates set by the ADC and offered its availability to cooperate by sending Part II of the questionnaire by 4 October.

In conclusion, it is submitted that Lodato's behaviour did not fulfil the conditions set by the Article 6.8 of the ADA, which justify the application of the status of non-cooperation, consequently allowing the authorities to resort to "facts available" for the final determination of the dumping margin. It manifestly appears from the available evidence that the overall attitude of Lodato towards the investigation was cooperative, diligent and characterised by a high level of good faith.

1.5 Conclusion

As a consequence of the qualification of Lodato as an uncooperative exporter, in the Statement of Essential Facts 217 released on 4 February 2014, the ADC determined a dumping margin of 26.35% based on 'facts available'.

However, as explained above Lodato should not be considered uncooperative. As a consequence, Lodato should be considered as a cooperative residual exporter, subject to the "residual exporters" duty rate.

In any event, even considering Lodato as uncooperative, the applicable duty rate should be lower than the 26.35% calculated by the ADC in consideration of the good faith demonstrated by Lodato throughout the investigation.

2. THE INJURY ASSESSMENT IS FLAWED

According to Article 3.1 WTO ADA, a determination of injury *"shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products"* (emphasis added).

In addition, pursuant to Article 3.5 WTO ADA, the investigation authority must demonstrate that *"the dumped imports are, through the effects of dumping […] causing injury […]. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also 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. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry"* (emphasis added).

The present Section will demonstrate that in carrying out the injury assessment the ADC has violated Articles 3.1 and 3.5 WTO ADA. In particular, it is submitted that the ADC's injury analysis is irremediably and entirely flawed since:

(a) the ADC erred in assessing the volume of dumped imports;

(b) the ADC erred in assessing effects of dumped imports on prices;

(c) the ADC erred in attributing the injury caused by other factors to the dumped imports.

In light of the foregoing, it is submitted that the whole investigation should be terminated forthwith.

2.1 The ADC erred in assessing the volume of dumped imports

At Section 8.8.1, the SEF, reports that the volumes of goods exported by the Italian producers found to be *de minimis* (i.e. La Doria and Feger) accounted for about 44% of the total volumes Italian exports to Australia during the investigation period. It follows that such imports do not have to be taken into account for the purpose of the

injury analysis. This is confirmed by the case law of the WTO, which clarified that in cases where some imports are found to be dumped below the *de minimis* threshold, *"it would be illogical to treat such imports as 'dumped' imports for purposes of the injury determination, when they cannot be considered as 'dumped' for purposes of imposition of anti-dumping duties as a result of the investigation".*[2]

In light of the above, at Section 8.6.1 the SEF concludes that *"[i]n order to assess the impact of dumped imports, the Commission estimated the volume of Italian dumped goods to be approximately 56% of the total Italian goods exported to Australia during the investigation period"*. However, the ADC's decision to consider 56% of Italian imports as dumped for the purpose of the injury determination is irremediably flawed. In this respect, the following should be noted.

At Section 7.3 the SEF, indicates that the sampled exporters (i.e., Conserve Italia, Corex, De Clemente, Feger, IMCA, La Doria and Lodato Gennaro & C.) accounted for approximately 70% of the volumes exported to Australia during the investigation period. This means that the "residual exporters" (i.e. the exporters not included in the sample) accounted for approximately 30% of total exports from Italy.

As regards the exporters included in the sample (representing 70% of total exports), the following should be further noted. Since - as explained above - the goods exported by La Doria and Feger accounted for about 44% of total Italian exports, it follows that the remaining five exporters included in the sample (i.e., Conserve Italia, Corex, De Clemente, IMCA and Lodato Gennaro & C.) accounted for approximately 26% of total exports from Italy during the investigation period.

The overall picture is summarized in the table below.

Exporters	Share of imports (in volume)	Share of examined imports (in volume)
La Doria + Feger	44%	63%
Conserve Italia + Corex + De Clemente + IMCA + Lodato Gennaro & C.	26%	37%
Residual cooperative exporters	30%	0%
TOTAL	100%	100%

As it can be easily observed from the above table, only 26% of total Italian exports were actually found to be dumped following the analysis of the questionnaires replies

[2] Panel Report. EC - Salmon (Norway) para. 7.625

by the ADC. On the contrary, no evidence supports the conclusion that also the goods exported by the (unexamined) residual exporters – representing 30% of total exports of tomato products from Italy - should be considered as dumped. Such conclusion is fully supported by the relevant case-law of the WTO

In *EC — Bed Linen*, the Appellate Body found that the right of the investigating authorities to resort to sampling pursuant to Article 6.10 WTO ADA and the right to impose a "residual duty" to unexamined exporters pursuant to Article 9.4 WTO ADA *"cannot be read as permitting a derogation from the express and unambiguous requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports — including dumped import volumes attributable to non-examined producers — on the basis of "positive evidence" and an "objective examination"*. The Appellate Body concluded that *"Article 9.4 does not provide justification for considering all imports from non-examined producers as dumped for purposes of Article 3".*[3]

Applying the above principle to the circumstances of that case, the Appellate Body concluded that the fact that producers accounting for 47% of total imports attributable to examined producers were found to be dumping was not a sufficient basis to justify treating imports from unexamined exporters as dumped for the purpose of the injury analysis. The Appellate Body determined that an objective examination of that evidence alone could not lead to the conclusion that imports from unexamined producers were dumped, and concluded that there must be other evidence to justify treating imports from unexamined producers as dumped for purposes of the injury investigation.[4]

It is submitted that the above conclusion should be applied *a fortiori* in the present case, where only 37% of total exports attributable to examined producers (i.e. 26% out of 70%) were found to be dumped by the ADC, while 63% of total exports attributable to examined producers (i.e. 44% out of 70%) were found to be undumped.

Since the SEF does not provide any additional "objective evidence" supporting the conclusion that the exports attributable to unexamined producers were dumped, it must be concluded that such exports should be considered as undumped for the purpose of the injury analysis. The above conclusion is further supported by the following elements:

- as illustrated above, during the investigation period only 37% of the examined Italian exports were found to be dumped. Such percentage would be even lower considering that Corex, although sampled, was finally found to be a trader rather than an exporting producer (SEF, Section 7.3.6). It follows that

[3] Appellate Body Report, EC — Bed Linen (Article 21.5 — India), paras. 124-127.
[4] Appellate Body Report, EC — Bed Linen (Article 21.5 — India), para. 133.

the exporting producers with a dumping margin higher than *de minimis* during the investigation period were only four, totally amounting for even less than 37% of the examined exports

- the dumping margin established with respect to the (small) part of Italian exports which were found to be dumped is extremely low (between 3 and 4.54%).

In light of the foregoing, the ADC's decision to consider 56% rather than 26% of total Italian exports, and even low as a result of Corex's exclusion from the group of sampled producers, as dumped for the purpose of the injury assessment is unwarranted. No evidence whatsoever supports the conclusion that the 30% of imports attributable to unexamined producers was dumped.

Keeping the above in mind, the finding at Section 5.3 of the SEF that *"[w]hen examined in totality the volume of the goods exported from Italy increased 16.4% since June 2010, whilst SPCA and other countries' volumes decreased by 39.7% and 84.9% respectively"* is totally irrelevant for the purpose of the injury determination. As extensively explained, indeed, for that purpose only the Italian exports found to be dumped (i.e. 26% of total Italian exports) should be taken into account.

The same holds true with regard to the ADC's considerations regarding the market share of Italian products (*"[t]he volume for the Italian goods has increased during the injury analysis period by 16% to June 2013 whilst SPCA's volume has fallen by 39% in the same corresponding period"*) at Section 8.6.1 of the SEF.

Moreover, also the ADC's conclusion at Section 8.8.1 of the SEF that *"it is reasonable to expect that dumped prices offered to importers/retailers during contract negotiations would have influenced and impacted on prices being tendered by exporters of un-dumped product. In a market unaffected by dumped prices of prepared or preserved tomatoes from Italy, the Commission would consider that prices of un-dumped goods would be higher"* is flawed. Indeed, it seems very unlikely that players representing only 26% of imports (and, therefore, an even lower share of the overall Australian market) may affect the prices offered by their competitors.

For all the above reasons, it is submitted that the injury analysis carried out by the ADC is irremediably vitiated and that the investigation should be immediately terminated.

2.2 Effect of dumped imports on prices

At Section 8.3, the SEF explains that *"[i]n assessing whether dumped goods have caused material injury, the Commission has relied on purchasing and retail shelf pricing information submitted by Coles and Woolworths which represent approximately 60% of the total imported volume and 73% of goods sourced from selected exporters".*

It follows that in evaluating the effect of dumped imports on prices the ADC has taken into account the retail prices of all Italian imports marketed by Coles and Woolworths during the investigation period. However, such an approach violates again Articles 3.1 and 3.2 WTO ADA.

According to Article 3.1 WTO ADA, a determination of injury involves an objective examination of *"the effect of the dumped imports on prices in the domestic market for like products"*. Moreover, Article 3.2 WTO ADA provides that *"[w]ith regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree"* (emphasis added).

Therefore, the ADA clearly requires that the injury analysis should be based on prices of dumped imports only. On the contrary, the ADC's assessment regarding the hypothetical magnitude of undercutting was carried out on the basis of shelf/retail prices of the goods marketed by Coles and Woolworths, which include undumped goods. It follows that the ADC's assessment regarding price effects is flawed.

In addition, the assessment was carried out on the basis of the unproved assumption that a correlation would exist between wholesale prices and retail prices. However, the WTO jurisprudence specifies that when determinations are made upon assumptions, *"these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified"*. In this case, even if the assumption was made upon the examination of available information gathered during the investigation, its objectivity cannot be verified because the SEF provides no sufficient explanation.

In light of the foregoing, it must be concluded that the analysis of price effects does not comply with the applicable WTO rules and it is vitiated by a wrong methodological approach which, in addition, has not been justified.

2.3 Injury, if any, has been caused by factors other than dumped imports

According to the SEF, the dumped tomatoes exported from Italy would have caused material injury to the Australian industry producing like goods despite the fact that important factors other than dumping were found to have contributed to the injurious effects experienced by SPCA (SEF, Section 8.10). Such factors include, *inter alia*:

- the appreciation of the Australian dollar (AUD) towards the Euro (EUR);
- supermarkets' private label strategies,
- the extreme weather events, and

- the decrease of SPCA'S export sales.

We wishe to emphasise 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 Italy rather than by other factors (see infra). In doing so, the SEF violates Article 3.5 WTO 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 order to comply with the above-mentioned provision, the authorities must make an assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.

In the case at issue, it is clear that a correct and objective application of Article 3.5 WTO 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 dumped imports. The other factors causing injury will be briefly analysed below.

2.3.1 The appreciation of the AUD towards the EUR

As it is very clear from paragraph 8.8.3 of the SEF, as from 2007 the AUD/EUR exchange rate has started appreciating significantly. In particular, in the period 2009-2013, the AUD appreciated by 37% and reached its peak in 2012, when it appreciated by a stunning 42% against the EUR.

In this respect, it should be noted that since the vast majority of prepared or preserved tomatoes exported from Italy were sold in EUR, the appreciation of the AUD had a clear impact on the economic situation of the Australian industry. In fact, the appreciation reduced the price of imported processed tomatoes relative to domestic products, making the domestic products less competitive on the Australian market.

The SEF itself considers that the appreciation of the AUD was a "*significant contributing factor to the injury suffered by the Australian industry by reducing the FOB value in Australian dollar terms thereby improving the competitiveness of the imported goods*".

This having been clarified, it is evident that the injury caused by the above-described exchange rate fluctuations must be separated and distinguished in the present case and cannot be attributed to imports from Italy.

2.3.2 Private label strategies

The SEF recognizes that one of the causes for decreasing prices in the domestic market is the private label strategy of the major supermarkets. In particular, the ADC agreed with the view that the private label strategy of the supermarkets has "*contributed to the competitive environment in the Australian market*" and thus to "*suppliers of Italian imports seeking to secure the fixed volume contracts at prices less than the normal value*".

As it is well-known, supermarket chains have developed their own label products to compete with branded products. Thus, major supermarkets were forced to seek the lower possible prices in order to advance their private label product strategies. This reduction of prices has led to an increase of supply of non-Australian sourced goods.

This issue was also taken into account the APC in the framework of the recent Safeguards Inquiry into the Import of Processed Tomato Products, who concluded that "*private label strategies can cause injury irrespective of imports*" and that this strategy "*has affected the ability of local manufacturers to charge premium prices for their own label products*".

2.3.3 Extreme weather events

The preserved tomato production in Australia, in recent years, has seen considerable fluctuations and, in 2011, did not reach 90,000 tons (0.23% of the world production of tomato for processing). The drop in production can be traced to the bad weather conditions that the country has suffered. Indeed, in the last 10 years, there has been a period of severe drought, followed by severe flooding. It is evident that this reduction in the domestic production has been substituted by imports to meet the demand of the domestic market, which has remained constant.

In this respect, it should be noted that, as it has been clarified by the APC, sales of domestic private label products have not recovered to their pre-flood levels. It is therefore clear that the floods caused significant injury to the domestic industry, and that the injury has persisted since Australian products have failed to regain market share even after production levels recovered in the following years.

2.3.4 The decrease of SPCA's export sales.

Another cause of the injury suffered by SPCA is the decrease in exports of its products. In fact, Australian exports of processed tomato products dramatically decreased by 45% between 2008-09 and 2010-11, coinciding with the appreciation of the AUD.

In this respect, it is important to note that the APC noted that the decrease of SPCA's export sales "*has likely caused injury to SPC Ardmona through decreased production volumes, sales, revenues and profits*".

2.4 The conclusions reached by the ADC are inconsistent with the findings of no injury of the APC

In addition to the above considerations, it is submitted that the conclusions reached in the SEF as regards the impact of the other factors on injury are unwarranted and clearly contradict the findings on no injury of the APC.

At the outset, it is to be noted that the "other factors" have been properly analysed by the APC in the framework of the above-mentioned Safeguards Inquiry into the Import of Processed Tomato Products. Considering that in its final report the APC concluded that the combination of such factors was the sole cause of the "serious injury" experienced by the Australian industry, the SEF should have justified and substantiated with adequate evidence the reason why it departed from the conclusion reached by the Australian government in December 2013.

The ADC's only explanation in this respect the is a generic assertion contained in the SEF as regards the difference between anti-dumping investigations and safeguards investigations and the different tests applied for the two types of trade remedies. In essence, the ADC – by referring to the December 2013 report of the APC – stated that, even though what serious injury is has not been clearly defined, the word *serious* indicates at least that the injury threshold is higher for safeguards cases than for anti-dumping cases (material injury). Moreover, according to the ADC, since the two systems are intended to deal with different circumstances, there should be no expectation that the findings reached with regard to one system would lead to a similar findings under the other system.

Although the above assertions cannot be disputed, we would like to highlight that the existing differences between safeguards and anti-dumping proceedings do not affect in any way the "causality test" to be carried out by the investigating authority. Indeed, in both safeguards and anti-dumping proceedings, the investigating authority is under an obligation to consider whether the injury on which it intends to base its findings actually derives from imports of the product concerned and must disregard any injury deriving from other factors.

In particular, irrespective of the "degree of injury" (serious or material) required by the relevant legislation, the authorities are always required to assess the effects of other known factors, not only when analysing the causal link between those factors and the injury suffered by the domestic industry, but also when determining the injury suffered by the latter.

The above is confirmed by the WTO Appellate Body, which in *US — Hot-Rolled Steel* stated that:

> "*Although the text of the Agreement on Safeguards on causation is by no means identical to that of the Anti-Dumping Agreement, there are considerable similarities between the two Agreements as regards the non-*

attribution language. Under both Article 3.5 of the Anti-Dumping Agreement and Article 4.2(b) of the Agreement on Safeguards, any injury caused to the domestic industry, at the same time, by factors other than imports, must not be attributed to imports. Moreover, under both Agreements, the domestic authorities seek to ensure that a determination made concerning the injurious effects of imports relates, in fact, to those imports and not to other factors" (emphasis added).

This having been clarified, it is important to recall that in the safeguard case the APC concluded that injury suffered by the domestic industry has not been caused by imports of processed tomatoes from Italy but, rather, it *"has resulted from a combination of factors, including:*

- *sustained competitive pressure from imports*
- *supermarket private label strategies, facilitated by the appreciation of the Australian dollar*
- *extreme weather events"*

In particular, according to the APC, "*the injury to the domestic tomato processing industry coincides with, and has been caused by, a combination of long-term industry and market trends as well as recent acute events (including floods and appreciation of the Australian dollar)*" (emphasis added).

In view of the above, it is not clear on what grounds the ADC could disregard the findings of the APC. The conclusion adopted by the ADC is even more inexplicable if one considers that the "other factors" on which the APC based its findings are exactly the same as those taken into account by the ADC in the SEF.

In addition to the above, it should be noted that the ADC itself recognized that the above-mentioned factors, other than dumped imports, contributed to the injury suffered by the domestic industry.

Lastly, as regards floods of 2011, it is worth to note that the ADC merely contradicted the findings of the APC, according to which floods caused significant injury to the domestic industry, without providing any explanation in this respect.

2.5 Conclusion on injury

In the light of the foregoing, it can be concluded that the injury assessment carried out by the ADC is entirely flawed for the following reasons:

- the ADC wrongly assessed the volume of dumped imports since it treated the volume of goods exported by the Italian (unexamined) residual exporters, representing 30% of total exports of tomato products from Italy, as 'dumped imports';

- the ADC wrongly assessed effects of dumped imports on prices. In particular, the ADC's assessment regarding the magnitude of price undercutting was carried out on the basis of shelf/retail prices of goods marketed by Coles and Woolworths, which include undumped imports. This illusive approach fundamentally flaws the injury assessment contained in the SEF;

- the SEF clearly identified the other factors causing injury to the domestic industry and established that such factors other than the dumped imports contributed significantly to the injury suffered by the domestic industry. On such basis, a proper application of Article 3.5 WTO ADA would inevitably lead to the conclusion that no causal link exists between dumped imports of processed tomatoes from Italy and injury suffered by the Australian industry. In fact, as the APC has held, the injury suffered by the domestic industry was caused by a number of factors unrelated to allegedly dumped imports of tomatoes from Italy.

3. CONCLUSIONS

By way of conclusion, we wish to bring to the ADC's attention the crucial substantive issues raised in this submission.

First, the present submission demonstrates that Lodato should not be considered uncooperative but as a cooperative residual exporter, subject to the "residual exporters" anti-dumping duty rate. Moreover, even considering Lodato as uncooperative (*quod non*) the applicable duty rate should be substantially lower than 26.35% set by the SEF in consideration of the good faith and cooperative attitude demonstrated throughout the investigation, which justify a lenient approach *vis-à-vis* Lodato.

Second, the present submission demonstrates that the injury assessment carried in the SEF is irremediably vitiated. In this respect, it must be stressed that the ADC unlawfully treated as 'dumped imports' the volume of goods exported by the Italian unexamined residual exporters (representing about 30% of total exports of tomato products from Italy). This approach is unwarranted, inconsistent with the WTO case law and undermines the entire price undercutting exercise.

Third, the present submission shows how the SEF clearly identified the other factors causing injury to the domestic industry and established that such factors, other than the dumped imports, caused injury suffered by the domestic industry. Furthermore, as it has been demonstrated above, the findings of the ADC clearly contradict the conclusion reached by the APC in the recently terminated safeguards investigation on the same product.

In light of all the above considerations, the present anti-dumping proceeding should be terminated forthwith.