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BY EMAIL
Director Operation 2
Anti-dumping Commission
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Dear Sir,

STATEMENT OF ESSENTIAL FACTS: ALLEGED DUMPING OF PREPARED OR PRESERVED PEACH PRODUCTS EXPORTED FROM SOUTH AFRICA

1. This correspondence relates to the above SEF and also raises issues arising from the exporter visit reports for Langeberg and Ashton Foods (Pty) Limited (L&AF), and Rhodes Food Group (Pty) Ltd (RFG). After receiving a further review of the SEF and discussions with our advisers, Blackburn Croft & Co, some issues became apparent to SPCA which had not been apparent in its meeting with the Commission on 11 November or included in its submissions of 19 and 26 November. SPCA approached the Commission on Thursday 28 November and Friday 29 November. The Commission agreed to receive this submission by close of business on Tuesday 3 December.

Relevance of the Anti-dumping Agreement (ADA) and the Customs Act 1901 (The Act)

2. The provisions of Part XVB of the Act can be interpreted by reference to the relevant international treaty (ADA). This interpretive approach was summarised most recently in Pan Asia Aluminium (China) Limited v Attorney-General of the Commonwealth (2013) FCA 870 (Pan-Asia) [8-9].

Like Goods

3. The goods, subject of the application (the goods) are:

4. Prepared or preserved peach products either whole (peeled or unpeeled) or in pieces (including halves, slices, diced), with or without added sugar or other sweetening matter or spirit, prepared or preserved in container sizes from 300 grams up to and including 1.5 kilograms.

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5. This definition is important as it relates to how the margin of dumping is obtained from an examination of the domestic and export sales transactions of the like goods.

6. The Act provides (s269TAC):

> (1) Subject to this section, for the purposes of this part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

7. That is to say the like goods cover all types and varieties of prepared or preserved peach products sold on the domestic market in South Africa. This means that all the domestic sales transactions, by both the exporters need to be examined across all prepared or preserved peach products, as defined in the application in order to arrive at a margin of dumping. Pan-Asia included a reference to one of the several WTO decisions which support this interpretation:

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the level of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer (Pan-Asia before [152]).

8. The products under investigation are prepared or preserved peach products of various types and the industry producing like goods in Australia produces these products for different customers' private label brands and its own brand (or proprietary brands). Sometimes the Australian industry only produces its own brands, if it is unsuccessful in obtaining private label contracts. The South African producers have a varied product mix. If sales of all prepared or preserved peach products in South Africa are not part of the investigation, then it is difficult to see how a margin of dumping, for the products as a whole, can be obtained. If only a proportion of the domestic sales in South Africa are included then the weighted average normal value (and a "weighted" transaction to transaction normal value) for the like goods will be understated.

9. The failure to aggregate the dumping margins by type led the Federal Court to conclude that dumping margins applied to different types of aluminium extrusions were wrong. The Commission corrected this in ADN 2013/80.

10. The Commission has not examined the dumping margins of different types of prepared or preserved peaches to obtain a margin of dumping for the like goods. It has simply compared matching products and in doing so has excluded sales transactions of many like goods from the assessment of normal value. By inference, all types of the like goods must be examined and none excluded. The Panel in EC – Salmon AD Measures concluded:

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> We see no basis for the conclusion that the treatment of the product under consideration "as a whole" means anything more than that where an investigating authority splits the product under consideration into different sub-categories in the course of its "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping" it is not entitled to discount any of these sub-categories when performing the ensuing analysis. [7.04]
>
> 232 This view is consistent with the views of the Appellate Body in US – Hot-Rolled Steel that an investigating authority may, in its analysis of injury, look at different sectors of the domestic industry, but it must make its determination after an analysis of each of those sectors, so that the decision relates to the entire domestic industry, and not just some sector or sectors. Appellate Body Report, US – Hot-Rolled Steel, para 204.

11. If an artificial subset of sales is used to determine a normal value then the resulting value will not be "normal" but will only reflect a small part of the South African manufacturer's sales of like goods. The interchangeability and identical sales channels of own and private label brands indicate that the proper examination of dumping is to include all products that could materially injure the Australian manufacturer of own and private label brands.

12. The like product in this investigation are prepared or preserved peach products sold for consumption in South Africa. To exclude the sales of own brand products, is to effectively redefine the products under consideration and "zero" the dumping calculations for own brands.

13. We are not aware of other dumping investigations in Australia, where price has been used to principally determine a sub-category of like goods even though function, usage and marketing are similar. (RFG Exporter Report, Folio 83) Most, if not all, manufacturers of consumer products will need to provide products that could be referred to as "price fighting" brands.

Examination of <u>all</u> Sales

14. The Panel in Argentina – Poultry Anti-dumping Duties addressed Argentina's claim that a sample of domestic sales transactions was statistically valid and was able to be used in determining a weighted average normal value. The Panel referred to Article 2.1 and its reference to normal value, being "the comparable price, in the ordinary course of trade, for the like product when it is deemed for consumption in the exporting country". Establishing two categories, own brand and private label, is similar to examining like goods according to 'high price' and 'low price'. This categorization will not lead to appropriate assessment of 'comparable price' of the goods in the exporting country.

15. The Panel addressed the examination of all transactions as follows:

> 7.272 In examining what is meant by "a weighted average normal value", we attach particular importance to the meaning of the term "normal value". We note that Article 2.1 of the *AD Agreement* refers to normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.1 therefore defines normal value in terms of domestic sales transactions in the exporting Member (although Article 2.2 provides

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that alternative methods to establish normal value may be used in certain circumstances).[197] Article 2.1 does not specify, however, whether or not all domestic sales transactions need be included. This issue is addressed by Article 2.2.1, which sets out the conditions to be met before domestic sales may be treated as not in "the ordinary course of trade", and therefore excluded for the purpose of establishing normal value in accordance with Article 2.1. Article 2.2.1 states that domestic sales "may be disregarded in determining normal value only if" the relevant conditions are met. We understand these provisions to mean that there are only specific circumstances in which domestic sales transactions may be excluded from normal value. We consider that these provisions constitute relevant context for interpreting the phrase "a weighted average normal value", since they indicate that "a weighted average normal value" is a weighted average of all domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the *AD Agreement*.

[197] These methods are not relevant in the present proceedings, since the DCD established normal value on the basis of domestic sales transactions.

16. The Panel then concluded:

> 7.275 In the present case, the DCD established weighted average normal values on the basis of statistical samples of domestic sales transactions. The DCD did not establish weighted average normal values on the basis of all domestic sales transactions other than those it was entitled to exclude under Article 2.2.1.

17. Also, supporting the argument to use all of the domestic sales in South Africa of preserved or prepared peach products (both own brand and private label brand sales) is that L&AF and RFG incur the same production costs, for products sold in South Africa and those exported to Australia. The brand on the product does not affect the production cost. Some manufacturers maintain flexibility to react to market demand and pricing opportunities by labelling the product, not at the time of production, but at the time of sale. Production volumes of both proprietary and private label brand products, lowers the unit product costs of all prepared or preserved peaches, irrespective of where those products are sold. While an own brand peach product may be sold at a premium, this does not mean that the own brand peach product, is not a like good to the private label brand peach product. Just as in the same way, a higher priced private label prepared or preserved peach product, is still a like good to a lower priced private label prepared or preserved peach product.

18. Including all sales transactions for the like goods means that the comparable price in Article 2.1 and the price paid for like goods in s269TAC(1) has been obtained. However, the Commission's decision to divide the like goods into those goods with a high price and those goods with a low price (and exclude the high price goods) is inconsistent with the ADA and the Act.

19. If a manufacturer can sell a blue can at a premium to the same product in a white can then the ADA does not seek to adjust for this premium or extra profit on the blue can. The reason for the blue can's higher profitability is irrelevant. The higher price is an intangible which is not an adjustment contemplated in Article 2.4. The most obvious adjustment between an own brand (blue can) and private label (white can) is the trade spend if it affects the price. To isolate the different revenue per unit and in effect treat this as a due allowance is outside of what are the provisions for calculating dumping in the ADA and the Act. The fact that one can

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has a brand that allows it to be sold at a higher price, does not remove it from the total sales used to determine a normal value.

20. The conditions and terms of sale allowance are unable to be interpreted to account for the difference between a high value product and a product of lesser value. There is no specific cost or event (such as drought affecting raw material supply) to which the price difference (after adjustment of a trade spend amount, if applicable) can be identified.

21. As part of the decision to produce own brand and private label products, a manufacturer will identify that an own brand will contribute a gross margin of say 42 per cent, and a private brand domestic sale will be expected to contribute a gross margin of 22 per cent if a contract is accepted. The export contribution may be different as the marginal cost will allow some flexibility. This combined gross margin reflects the level which will return the amount needed to cover selling, general and administration costs and profit for the industry producing like goods. The manufacturer will generally attempt to recover its operating revenue from known more profitable sales on the domestic market. The same situation would exist for a manufacturer of any other product which is aimed at different price points and value considerations in the market. But of course there is no provision in the ADA or the Act for this different gross margin/net profit to be adjusted – if there was, then a finding of dumping would be unlikely in all cases. L&AF and RFG do not argue for a level of trade adjustment (L&AF Exporter Report para 6.2, and RFG para 6.1.2

22. By effectively redefining the like goods and not examining all sales, including own brand and private label, the Commission has ignored the basic requirements of comparability.

All Types of Preserved Peaches are Comparable

23. The definition of like product and the conditions of a "fair comparison" were commented on by the Appellate Body in EC – Bed Linen and are reproduced below:

> 58 Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.
>
> 59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:
>
> > A fair *comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics,

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and any other differences which are also demonstrated to affect price comparability. (Emphasis added)

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in … physical characteristics".

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argue on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.

24. As mentioned above, if the population of sales used to determine normal value has a higher value than the sales used to determine an export price, then this is not a situation that can be adjusted by a due allowance. When a “fair comparison” is made between the normal value and the export price, both the normal value and the export price have been established. In EU – Footwear it was noted:

7.263 Nothing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price. Indeed, in our view, it is clear that the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established. We note in this regard the views of the panel in *Egypt – Steel Rebar*. Although the issue before that panel was the different question of whether Article 2.4 establishes a "generally applicable rule" as to burden of proof, the panel considered Article 2.4 in detail, and stated:

"Article 2.4, on its face, refers to the comparison of export price and normal value, i.e. the calculation of the dumping margin, and in particular, requires that such a comparison shall be "fair". A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions), but with the nature of the comparison of export price and normal value.

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Moreover, there is nothing in the provisions of the AD Agreement that specifically address the determination of normal value, most notably Article 2.2, that refers to the "fair comparison" called for by Article 2.4.

7.264 China argues, however, that Article 2.4 establishes a general "fairness" obligation that applies to all of Article 2, including all aspects of the establishment of normal value. As noted above, however, the "fairness" requirement in Article 2.4 refers to the "comparison" between the normal value and the export price. In our view, to require consideration of whether a "fair comparison" will result in the process of determining normal value, introduces a circularity into the analysis which is untenable. Indeed, in our view, the provisions of Article 2.4 are intended precisely to deal with problems that arise in the comparison as a result of, *inter alia,* how normal value was established. In such a circumstance, Article 2.4 requires investigating authorities to ensure a fair comparison between the normal value and the export price, and provides explicit guidance on how this is to be done: where there are "differences" affecting price comparability between export price and normal value, "[d]ue allowance shall be made" for those differences. These allowances can only be made after the normal value and the export price have been established.

25. That is to say rather than deciding what "allowances" should be made before establishing a normal value or export price, the correct approach is to calculate a normal value and export price for prepared or preserved peach products and then to assess if any differences affect price comparability.

26. However, in practical terms this may be difficult to achieve when the normal value is derived from categories of like goods or types of like goods, to reach an aggregated normal value.

27. The Commission should have categorised all domestic sales (including own brand and private label) into types (ignoring halves, slices and medium differences as costs are similar and assuming all variants are shown), such as (by way of illustration using L&AF only):

400g group
825g group
1kg plastic

28. The resultant single figure for each type (after due allowances) would then be compared with the comparable export value and then aggregated to establish the margin of dumping.

29. This approach is similar to the explanation of the product margin. (Dumping and Subsidy Manual, August 2012, page 116.

Unwarranted Exclusion of Sales

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30. The exporter visit report for L&AF shows that sales between L&AF and Tiger Brands have been excluded because those sales are not arm's length transactions. Sales not in the ordinary course of trade have also been excluded.

31. Article 2.1 of the ADA provides:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when it is deemed for consumption in the exporting country.

32. Article 2.2.1 of the ADA provides for a method for determining whether sales below cost are "in the ordinary course of trade". The wording of this article is reflected in s269TAAD of the Act. However, the permissive nature of Article 2.2.1 is not provided for in s269TAAD. This suggests that having determined sales below cost that are not in the ordinary course of trade, then an alternative method should be used to calculate a normal value for those goods. This has not been done in the investigation.

33. Arm's length transactions are defined in s269TAA of the Act. This explicit description confirms that, in terms of the Act, there are separate tests for arm's length transactions and ordinary course of trade. We note in passing that Article 2.1 of the ADA merely refers to ordinary course of trade as one of the matters to be taken into account in ascertaining a normal value.

34. The Act does not specifically provide for sales found to be not arm's length to be excluded from the normal value calculation. Australian authorities, as far as we are aware, have previously used downstream sales where it was necessary to obtain a normal value for transactions between affiliates. The use of downstream sales and sales by other than the exporter were discussed in US – Hot Rolled Steel.

> The text of Article 2.1 is, however, silent as to who the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom the margin of dumping is being calculated. Nor does Article 2.1 expressly preclude those relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the Anti-dumping Agreement are satisfied, the identity of the seller of the "like product" is not a ground for precluding the use of downstream sales transactions when calculating normal value, in short, we see no reason to read into Article 2.1 an additional condition that is not expressed.
>
> We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the Anti-dumping Agreement. However, to ensure that prices are "comparable", the Anti-dumping Agreement provides a mechanism, in Article 2.4 which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself but was made by another party... [166-167 and 169].

35. The Commission should calculate normal values for sales, which were excluded as not being at arm's length, by using the first arm's length sale to the customers of Tiger Brands.

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36. The table on page 33 of the L&AF exporter report compares an exported 825g product with a domestic 410g product, even though there is a domestic 825g shown.

37. The table also compares a domestic Weighless 400g choice with an export Homebrand 1kg choice grade pack. The comparison may have been more accurate if the domestic 825g standard was compared with the 1kg choice grade export pack.

Normal Value

38. With regard to the above discussion, it is relevant to note that s269TAC(1) indicates that even if there is a subset of sales, based on the price paid or payable, this does not mean that a normal value for sales not made in the ordinary course of trade or arm's length can be excluded from the normal value calculation. However, the normal value calculation for L&AF looks at a completely different set of data (being private label sales only to two customers) and for RFG only looks at 825g cans (presumably this is for private label sales). RFG's sales of all cans should have been examined as set out in the Pan-Asia extract. The correct approach is to look at all sales/downstream sales at different price points to establish exporters' normal values so that the correct dumping margin is compared with the SPCA injury data which includes all sales at all price points. The assessment of a normal value, when looking at only selected sales of selected customers contrasts with how the injury analysis is done by looking at all products sold by SPCA. In other words, the industry is not the production of one type of prepared or preserved peach product.

By-product – Inadequate Evidence

39. The Verification Report's standard for accepting the reduction in the cost of goods because of the production of a by-product for use in making puree is questionable. Mere acceptance of a market value for the by-product is not acceptable and the Commission should request further information to validate the exporter's arguments. As observed in US – Final Lumber AD determination:

> We fail to see how an unbiased and objective investigating authority could find that records regarding by-product revenue reasonably reflect the costs associated with the production and sale of the product under consideration if those records do not reasonably reflect the extent to which the existence of the by-product reduces the cost to the producer. [7.312]

Physical Specification Adjustment

40. The Commission is requested to re-examine its methodology as explained in paragraph 8.4 of the L&AF Exporter Report:

> The cost of production of the export model was deducted from the cost of production of the domestic model. The difference was uplifted by the percentage of profit representative of the domestic sale. The uplifted cost of production difference was added to or subtracted from (as appropriate) the normal value.

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41. This substitution of the cost of production may result in incomplete or inaccurate adjustments being made for differences which affect price comparability. Article 2.4 of the ADA provides a mandatory examination of differences which affect price comparability:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at, as nearly as possible, the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions in terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability...

42. This provision is reflected in s269TAC(8) where that section concludes:

> "...That price paid or payable for like goods is to be taken to be such a price adjusted in accordance with directions by the Minister so that those differences would not affect its comparison with that export price."

43. The Dumping and Subsidy Manual (August 2012) points to a detailed examination of costs which does not appear to have been followed:

> Adjustments may be based upon actual costs incurred, or selling prices achieved, for the sales transactions under examination. Where based on costs, it is subject to the principle that adjustments will be made only where evidence indicates that price comparability has been affected... (p 54).

Normal Value for RFG

44. The Exporter Report for RFG reveals that normal value was based on domestic sales of 410g (adjusted to the same unit price of an 825g can) canned peaches and 825g canned peaches. The Pan-Asia decision suggests that a normal value for the like goods is able to be obtained from an intermediate comparison of the two types, being the 410g canned peaches sales data and also from the 825g canned peaches sales data.

45. There were no export sales of a 410g pack but only export sales of the 825g pack. There were domestic sales of both types.

46. Sales in the ordinary course of trade for the 825g size (standard grade) were found to be low volume. (s269TAC(14)(c)) Because of this low volume, the normal value cannot be obtained from the price paid or payable (s269TAC(1)) but must instead rely on a constructed value as set out in s269TAC(2)(a)(i))
As argued above, the Act does not specifically allow the exclusion of sales outside the ordinary course of trade. But even if this interpretation is wrong there remains a low volume sale of the 825g size and the Act requires a constructed normal value be obtained for these transactions. This constructed value would include own and private label sales as one type with size as sub-classes.

47. Because there were no export sales of the 410g type it is arguable that an intermediate comparison cannot be made and the 410g should be excluded. The Commission's approach of adjusting the 410g unit value to the 825g unit value is inappropriate, as is the conclusion that

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by doing this the constructed value can be avoided such that the 825g pack normal value is derived from the price paid or payable.

48. Even though the 410g is a like good, there is no export price and no exportation such that the Minister can determine an export price (s269TAB(1)(c)). Including the 410g pack in these circumstances does not result in a "fair comparison" (Article 2.4.2). In paragraph 6.6 of the RFG Exporter Report it is reported that a constructed value is discussed later in the Report but this does not appear to be the case.

Product Dumping Margin

49. By only examining some domestic sales the Commission has not correctly established a margin of dumping for the like goods.

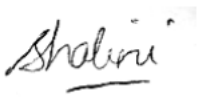
Further Consideration

50. The calculation of normal value and the margin of dumping for the like goods need to be revisited.

51. Specific comments on the Exporter Reports need to be addressed.

52. The Commission may need to consider the extension provisions of s269ZH to ensure interested parties are able to defend their interests.

Yours sincerely



Shalini Valecha

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