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Dear Mr Bracic

ANTI-DUMPING INVESTIGATION INTO PREPARED AND PRESERVED TOMATO PRODUCTS

Introduction

1. This submission has been prepared in response to the SEF and the Exporter Verification Reports on the Public Record.

Issues

2. The methodology and conclusions in the visit reports around the determination of normal values, ordinary course of trade, the definition of like goods and other matters, and the findings on material injury are discussed in this submission. Some of these matters were discussed at the meeting with SPCA and its adviser Blackburn Croft & Co in Melbourne on Tuesday 11th February. The discussion at that meeting may have included some of the issues noted below. To avoid any misunderstanding SPCA has repeated some comments and queries discussed at that time.
3. Before commenting on the Visit Reports SPCA wishes to record its views on own brands and private labels. While it is not always clear how own brand (proprietary labels) and private labels have been treated in the Visit Reports, SPCA's view is that both these products form one type and that it is not justifiable to decide that own brand and private label should be examined differently. A single normal value is expected to be obtained from own brand and private label sales. This single normal value is then expected to be compared with a single value export price, which may or may not include own brand and private label data. The like goods include own brand and

private label and the industry in Australia produces own brand and private label, and material injury caused by the like goods includes injury to all of SPCA's prepared and preserved tomato business (as defined).

4. The brand on the product does not affect the production cost. Some manufacturers maintain flexibility to react to the 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 cost of all prepared or preserved tomatoes, irrespective of where those products are sold. While an own brand tomato product may be sold at a premium, this does not mean that the own brand tomato product, is not a like good to the private label brand tomato product. Just as in the same way, a higher priced private label prepared or preserved tomato product, is still a like good to a lower priced private label prepared or preserved tomato product.
5. Any differences in some of the cost elements can be adjusted such as marketing/promotional costs which are clearly identifiable to a particular sale.
6. 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 s.269TAC(1) has been obtained.
7. 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 other provisions for calculating dumping in the ADA and the Act. The fact that one can has a brand that possibly allows it to be sold at a higher price, does not remove it from the total sales used to determine a normal value.
8. 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%, and a private brand domestic sale will be expected to contribute a gross margin of 22% if a contract is accepted. This combined gross margin (where the own brand allows a lower margin contribution from the private label brand) 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 differing gross margin/net profit to be adjusted – if there was then a finding of dumping would be unlikely in all cases.
9. It is a simple commercial reality that domestic sales of like goods (in Italy and Australia) will include some products at a high price and some products at a low price. In certain prescribed situations costs affecting the price can be adjusted. But the existence of different price points leads to a normal value that merely reflects the

correct mathematical outcome for the price paid or payable for the like goods in the domestic market.

10. The Visit Reports (and other sources) also contain some helpful comments to allow the Commission to analyse own label and private brand sales as one type. Again, these comments are made for completeness based on the difficulty in following the methodology in the various Visit Reports.
 - Feger outlined that the domestic market for prepared or preserved tomato products is separated into three tiers: a premium brand product; a mid-range private label; and an economy brand. (Feger p26)
 - Feger outlined that retailers will often stock one economy product, which can be a private label or the retailer's or an independent brand. (Feger p26)
 - Feger outlined that quality products can be both private labels and brands. (Feger p26)
 - Private labels are owned by the retailer. Feger explained that a retailer will often stock a brand as well as its private label. The pricing between the private labels and the branded products will depend on the strategy of the retailer; if the retailer has a strong private label with a loyal customer following it can be priced higher than a brand. (Feger p26)
 - Following an examination of the supplementary cost to make and sell information, we noted that the product codes listed in the supplementary cost to make and sell identified branded labels being Valfrutta, Jolly Colombani, and Cirio sold by Conserve Italia with the same product codes as those identified for export product to Australia (Conserve p15).
 - We consider the broader range of branded products should also be considered like goods following the logical progression of the coding system identified in the like goods section of Conserve Italia's EQR. (Conserve p16)
 - Conserve Italia stressed to the Commission that the private label versus branded label (Conserve Italia's proprietary labels) is a critical distinction to use to identify like goods. (Conserve p16)
 - With regard to competition, we were informed that Conserve Italia's branded labels do compete against private label products on the same shelves in the same retail space (Conserve p16).
 - From an examination of the physical, functional, production and commercial likeness, pursuant to Subsection 269T(1) like goods definition, we are satisfied that the prepared or preserved tomatoes produced by Conserve Italia for domestic sale in Italy are like goods to those exported to Australia (Conserve p16).
 - In Conserve Italia's first EQR submission we noted that it did not include all of its domestic sales, in particular sales of its Cirio brand. In its EQR Conserve Italia stated that its Cirio, De Rica and Valfrutta brands were not similar to the goods

exported to Australia because the prices for these brands were considerably higher and they have strong brand loyalty. Furthermore, the selling effort is considerably more than that for the export sales to Australia than the private label sales made on the domestic market (Conserve p30).

- Conserve Italia noted that as a result of the above considerations, a range of price points are developed for the market. It is a highly competitive market in which Conserve Italia's brands must compete. Private labels are generally X% lower than branded products and represent up to X% of total prepared or preserved tomatoes sold in Conserve Italia's portfolio (Conserve p31).
- In its EQR Conserve Italia outlined three types of discounts on domestic sales of its private labels. We found branded labels also received deferred discounts and are significantly larger than those received for the private labels. (Conserve p33)
- De Clemente advised it labelled its product according to customer specifications. De Clemente advised that it produces products under two general label categories:
 - (a) Proprietary label – being product label with “De Clemente” branding, the proprietary rights and associated intellectual property which is owned by the company itself;
 - (b) Private label – product produced and labelled according to particular product branding and quality specifications required by specific customers. (De Clemente p15)
- La Doria advised that the majority of their products are produced for private labels which are distributed domestically and internationally. (La Doria p8)
- Eugea manufactures canned tomato products without labels that are subsequently purchased, labelled and sold to market by La Doria. (La Doria p8)
- La Doria advised that when sold to market, the finished product is either a private label product or a proprietary label product. It explained that the private label product is commercially branded according to the customer's specifications (La Doria p11).
- Private label demand will remain high thanks to changes in consumer trends; private labels are no longer just a cheaper alternative to branded products, but rather true brands in their own right; private labels are today an important part of distributors' differentiation strategies and confer value to the brand; large supermarkets need to continue to attract consumers focused on quality and price, in addition to the need to improve profit margins.
La Doria will focus on becoming a leading player in the Italian market for tomato and vegetable-based private label products. (La Doria website, Press release 2013 Half-Year Results)
- The success of the private labels lies with consumer behaviour, which today is based not just on price, but in a large part on the awareness of consumers in relation to the quality and guarantees that the private label products can provide.

The large supermarkets are also increasingly focused on products which can gain the loyalty of clients through recognised quality and competitiveness. (La Doria 2012 Annual Report, p10).

- In 2012 we continued to work on innovations for the private labels, through the development of products with high service content and more responsive to the demand of the modern consumer for healthy products... (La Doria 2012 Annual Report, p11).
11. Although some manufacturers have different views on private label and own brand an objective assessment would conclude that own brand and private label sales are indistinguishable. This applies both in the exporter's domestic market and in the market of the Australian industry producing like goods.

Analysis of Exporter Visit Reports

Without limiting the comments on individual visit reports the following general comments are made:

- The OCOT should be applied to all sales of the domestic like goods before goods are excluded from those sales.
- This should give data consistent with the data used in obtaining the CTMS by model/type.
- After the 5% test has been applied to those qualifying sales the domestic model/types (which is the normal value) should then be used to compare (with adjustments) the export/model types.
- The Italian domestic like goods are the same as at the start of the investigation. That is preserved tomatoes in all variants and packaging formats.
- There are comparable like goods sold in Italy such that a constructed normal value is not justified

La Doria (PAD negligible Report – 0.5% Notice negligible)

12. La Doria's exports are discussed as follows:

3.3 Goods exported to Australia by La Doria

La Doria explained that almost all of the canned tomato exports to Australia in the investigation period were either 400 gram or 800 gram cans that contained cherry, peeled, or chopped tomatoes. However, a small proportion of exports were in 390g 'combi safe' packaging.

13. There is no indication whether or not the 390g product was included in the calculation of a normal value.

3.4 Like goods sold domestically by La Doria

We noted that tomato products with added ingredients (value-added tomato products) were not present in La Doria's domestic sales during the investigation period. La Doria informed us that value-added tomato products are manufactured for export sales only as there is no demand for them in the domestic market.

Prior to the visit we identified several variations in can sizes. Two sizes — 400g and 800g — were present in both domestic sales and export sales to Australia. We noted that other sizes sold domestically in the investigation period included 230g, 680g and 690g products. The latter two are in glass bottles only. La Doria confirmed during the meeting that the size of the can affects the sale price per kilogram.

14. There is no indication whether or not the 230g or the 400g size was used to calculate a normal value for the 390g “combi safe” exports. The approach here would be to make adjustments to the domestic 400g type of the like goods. The fact that the value added tomato products are not sold on the domestic market, merely indicates that the comparable non recipe products can be adjusted from the price paid or payable to get a normal value for the value added product.

The OCOT should be applied against all sales of the like goods as defined (whether in glass jars or in different shipping packs) before any domestic/export model/type analysis proceeds. The like goods have been defined at the start of the investigation for both the Australian industry and the Italian industry. The definition of like goods in the Act is materially the same as in the ADA (Panasia at[125]). The obligation to treat like goods consistently was emphasised in EC-Bed Linen (at[57-58]). That is, for analysis purposes such as the OCOT the like goods do not become limited to the exported goods via a narrow interpretation of “goods under consideration”. (Refer to the Manual where the 5% volume test is first applied to all sales of the like goods in the OCOT and then the 5% test is applied to models/types. This suggests that the OCOT is applied against all like goods before the model analysis begins)

15. In discussing how the domestic models have been chosen the following explanation is on page 16 of the verification report:

This approach to categorisation resulted in 20 export model groups. We regarded only those domestic sales of products that fell within these model groups as directly comparable models.

16. This suggests that the export model groups have been used to determine the normal value model groups. This seems to be in contradiction of the Act/ADA which proposes that the like goods are identified (if appropriate) by model/type (after the various qualifying tests have been done), and then adjusted to reflect differences with the export models. To do it, as explained in the report, means that there is no need to have the comparability provisions in the Act or in the Agreement.

While there are not recipe tomatoes sold domestically this does not mean that there are not comparable like goods. There are like goods, and while not identical, have characteristics closely resembling those of the goods under consideration (3.5). All goods are comparable.

What the ADC appears to have done is to say that the comparable export models are used to define “comparable” like goods. But as in EC-Bed Linen: [at 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 of 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."

17. On p34 the following statement appears. "La Doria also provides cans to Eugea." These cans are presumably transferred at cost price or lower and would impact possibly on the CTMS of Eugea.

La Doria explained that it manufactures its own cans at its Angri and Sarno plants. Therefore we sought to verify the cost of the raw material - tinplate.

18. What is not clear is whether the transfer price of the cans from the integrated processors being situated at Angri and Salerno is reasonable after taking into account the full cost of production of the can and then further the transfer price of 'providing' cans to Eugea
19. The relationship with Eugea was discussed on page 35:

La Doria explained that its SAP system can identify both the actual cost of production for Eugea products, and the purchase price of brite can products from Eugea by La Doria....

The purchases of model X from Eugea were further supported by a schedule of all Eugea sales in 2012; a listing of La Doria purchases of in 2012; and an invoice for one of those transactions. La Doria also provided a copy of the Income Statement for Eugea for 2012. We noted the total Eugea revenue shown in the schedule matched the corresponding Income Statement amount. We noted the Eugea sales revenue and volume for model X matched the listing of La Doria purchases, indicating that all Eugea sales of X in the year were to La Doria.

20. It is suggested that La Doria's SAP system can only identify those costs of production that are in the system. However, it appears that Eugea's costs have not been fully recorded.

The influence of La Doria on Eugea's sales revenue and cost to make and sell is evident in the following third quarter 2012 report:

Eugea Mediterranea S.p.A.

Lavello (PZ)
(held 98.3%)

Eugea Mediterranea S.p.A. produces tomato-based products and fruit purées. The sales for the first nine months of 2012 of Eugea amounted to Euro 4.3 million, in line with Euro 4.8 million in the first nine months of 2011. The low level of revenues in the period considered, evident also in the same period of the previous year, is due to the decision taken in previous years, also to adequately support the centralised stock planning and management by the purchasing Parent Company La Doria S.p.A., to proceed with the sale and the consequent invoicing of production ordered and comprising tomato-based products and fruit purées by the end of the year in which, during the summer processing campaign, the production is carried out. The Ebitda in the first nine months of 2012 was Euro 730 thousand, a decrease compared to Euro 1.2 million in the same period of 2011. The Ebit, after amortisation/depreciation and

write-downs of Euro 842 thousand (Euro 1.4 million in 9M 2011), amounted to a loss of Euro 112 thousand, compared to a loss of Euro 3 thousand in 9M 2011.

The net result, after net financial charges of Euro 245 thousand (Euro 192 thousand in the first nine months of 2011), reports a loss of Euro 408 thousand compared to a loss of Euro 249 thousand in the first nine months of 2011.

(<http://tinyurl.com/m9d6ugc>)

21. The CTMS and ordinary course of trade for La Doria needs to be reconsidered by ADC.
22. Eugea is a major supplier of finished product to La Doria. It is evident from the 2012 Annual Report that La Doria treats Eugea as a non-arm's length supplier. 2012 Annual Report, states on page 222 trade payables (the amount owed by La Doria) to Eugea are Euro 22.0 million and trade receivables are Euro 4.8 million. It is unusual for a company with such low sales to have a large amount of outstanding debts. La Doria guarantees Eugea to the amount of Euro 24.9 million. Included in La Doria's 2012 profit and loss is Eugea's revenue of Euro 4.9 million and costs of purchases Euro 24.4 million. Trade payables to Eugea account for almost all of La Doria's annual trade payables. Eugea is a significant supplier of La Doria's red line products.

As Eugea is a non-arm's length supplier, non-commercial payment terms and non-commercial aspects such as holding stock for La Doria in Eugea's accounts and providing guarantees need to be considered.

23. In subsection 6.1.2 the following statement is made (p40):

We also noted that La Doria makes domestic sales to its related party, Eugea, and that all such sales were for brite can products.
24. However, this seems to contradict section 2.2 (p8) where it is stated that "Eugea does not engage in the direct sales of the goods". So the question is why Eugea purchases brite cans? On p48 the sales of brite can products (including sales to Eugea) have been excluded from the domestic sales data. It would be expected that La Doria could simply request Eugea to supply details of Eugea's customers for these brite can products. This may reveal if the products are sold for home consumption.
25. In Section 6.6 the ordinary course of trade is discussed. The CTMS is noted as excluding year-end bonuses, promotional expenses and promotions for free. In the explanation on cost to make and sell on page 30 and page 31 these are referred to as "off invoice discounts". The exclusion of the on invoice discounts from the CTMS is understood as is the exclusion of year-end bonuses on the assumption that these represent rebates. However, "promotionals and promotions for free" are not generally considered as off invoice discounts. Such marketing/promotion costs are a selling expense and should be included in the CTMS.
26. On page 49 the following selection of products is shown:

The domestic sales data in the blue boxes relates to domestic sales of models that comprise the two most common categories of exports to Australia:

- 400gram cans, pack type x12; and
- 800gram cans, pack type x12.

These categories contain data for the only domestic sales of directly comparable models to the goods exported to Australia.

Several other export models are not sold domestically, as follows:

- 400gram can, pack type x12, chopped with added ingredients;
- 400gram can, pack type x12, peeled — organic;
- 390gram combi-safe, pack type x 16, chopped;
- 800gram can, pack type x12, chopped

The table shows that there are sufficient volumes of sales made in the ordinary course of trade for nine (9) directly comparable models to those exported.

27. The 400gram and 800gram cans in a pack of twelve cans is said to “contain data for the only domestic sales of directly comparable models to the goods exported to Australia”. But as shown below the Act/ADA is not focussed on finding “directly comparable models”. In Section 3.4 on page 15 it was noted that:

Domestic sales of canned tomato products are in standard trays of twelve cans and La Doria explained that this pack type is more efficient to produce. In addition to the x12 pack type, we also noted in the domestic sales data that the pack types took the form of 12x2, 24x, 3x8, 4x3, 8x3, x24, x6 and x86.(sic)

28. These domestic sales in different configurations should, if not done so, be included in the like goods subject to the OCOT and volume tests.

As shown in Argentina – Poultry Anti-dumping Duties [at 7.272] all domestic sales of the like goods must be examined. The like goods are not to be redefined, by excluding models/types which are not “directly comparable”. The normal value of a type, so obtained from an examination of all domestic transactions of that type, is to be adjusted as provided in s.269TAC(8).

That provision, then means, that the price paid or payable for the 400gram and 800gram cans, in any configuration, can then be adjusted to reflect the minor additional costs (if present) from producing the exported model types.

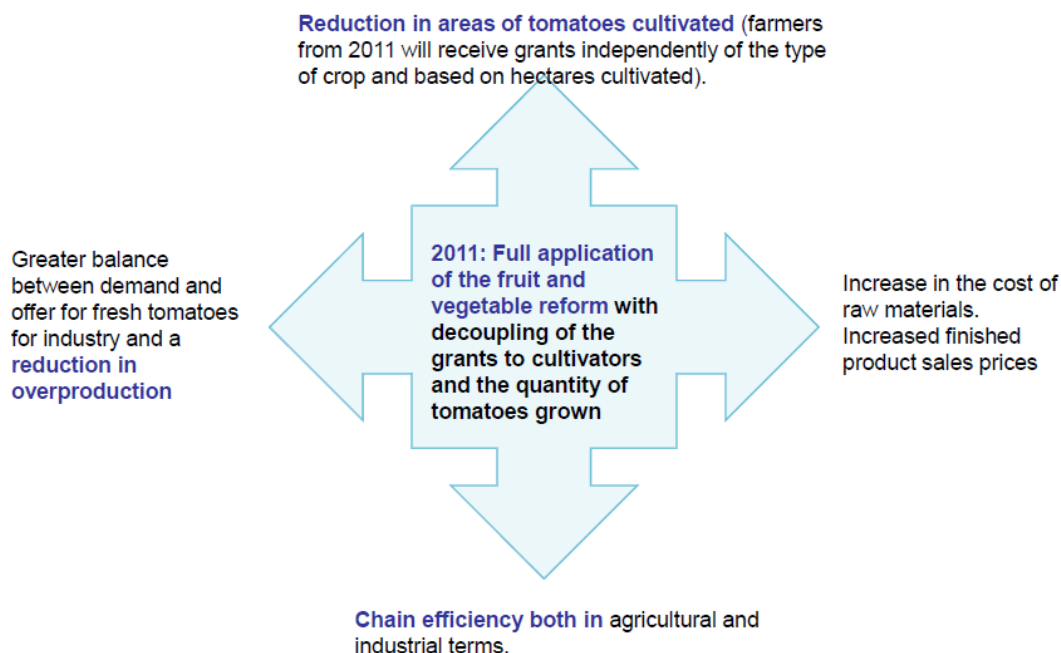
What appears to be a common theme in the Visit Reports is that the export model types have been used to reduce the domestic like goods to a particular type corresponding to the export model type. This has then resulted in a position where the like goods in Italy have only partially been examined. The value obtained is not a “normal value”. The small physical differences in the export model compared with comparable domestic models do not justify a normal value being constructed.

The use of the domestic like good to obtain a normal value for comparable export models was considered in EC-Bed Linen[at 57] and in conclusion the Appellate Body said [at 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".

29. This means that the export models while not exactly the same as the domestic models are still comparable to the domestic models and the domestic price paid can be adjusted for any differences rather than use a constructed value.
30. The approach taken in calculating normal values for the La Doria products suggests that the adjustment provisions in the Act and the Agreement are redundant. That is, if a "directly comparable" product cannot be found then the La Doria Visit Report says that it is "appropriate" to construct a normal value. But the goods sold on the domestic market are comparable after adjustments have been made, if required. There is no need to construct a normal value apart from the insufficient volume model. 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 canned tomatoes and then to assess if any differences affect price comparability. But what the Commission has done is to effectively make adjustments by seeking, in the Commission's view, "comparable" models rather than making adjustments as provided in the Act/ADA.[see EU-Footwear at 7.264] There is no explanation in the report why it has not been possible to make the adjustments to the domestic sale to reflect physical differences.
31. In Section 9.2 regarding market situation (p55) it was noted:

La Doria advised that it had not received any payments for support from any level of government in connection to the European Union's Common Agricultural Policy or related programmes. La Dora also advised that it was unaware of whether or how the tomato growers, which it stated were unrelated to La Doria, benefit from such a programme.
32. For the purpose of clarification, on the La Doria website for the year 2012 under Company Presentations (<http://tinyurl.com/mmz5x36>) an explanation of the EU reform of the tomato sector was presented in Milan, March 28 2012. The following chart was included:



- 33 This shows that La Doria has a good understanding of the EU reform and that tomato growers, as a result of the reform, benefit from higher prices – as does La Doria.

Feger (PAD margin 9.11% Report 1.3% 4 February Notice negligible)

34. In examining the ordinary course of trade the report notes:

6.9 Ordinary course of trade

Before considering the tests of profitability contained within s. 269TAAD of the Act, we considered the nature of the sales of canned tomatoes made domestically. We noted that for the [CONFIDENTIAL TEXT DELETED – “value added” product types] products exported to Australia, there were no comparable like goods based on the [CONFIDENTIAL TEXT DELETED – number] factors considered to define the essential characteristics of the various models.

However, Feger did have a very small volume of ([CONFIDENTIAL TEXT DELETED – product type] products that differed from the exported goods in terms of the size and type of packaging. The domestic goods were [CONFIDENTIAL TEXT DELETED – product types] compared to [CONFIDENTIAL TEXT DELETED – product types] exported to Australia.

35. The OCOT test is used to obtain a population of qualifying profitable sales from all domestic like goods which normally will be assisted by the domestic like goods being analysed by model/type. Presumably the OCOT has been done on whole and plain chopped only.

The report suggests there is an issue, with comparing value added export with a comparable domestic type for OCOT purposes. It is understood that there are a small

volume of domestic sales of recipe products, in packaging different from the exported product, that are most like or similar to the exported recipe goods. Because of the use of essential characteristics, the report observes there are no comparable like goods to the exported recipe goods. However, the recipe goods are comparable to the sales of other types on the domestic market. Comparability is not limited to identical sales or a subset of goods with particular characteristics. The comparable models are to be found in the types derived from the domestic like goods. If these domestic models are different from the exported models then adjustments to the price paid is provided in the Act/ADA.

In EC-Bed-Linen the Appellate Body considered the Commission's decision to treat some models as being not comparable. "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." [at 58]

36. So the price paid for domestic like goods should be examined to calculate a normal value for the recipe type that is exported.
37. What the ADC has done is to essentially ignore the adjustment provisions in the Act/ADA, by taking the view that it can only examine the price paid for identical goods as opposed to comparable goods. As a starting point, to determine a normal value, all domestic sales need to be considered [see Argentina-Poultry Anti-Dumping Duties at 7.272] Having identified the like goods by type (if appropriate), the approach should be to adjust the domestic types for any differences with the export types.[see EU-Footwear at 7.264] With this data available, then there is no need to use the less reliable constructed value approach. The like goods are by definition the goods under consideration. There is no definition in the Act that says the goods under consideration (and by definition the like goods) now become only the exported goods. Such an interpretation contradicts WTO precedent and common sense. The Visit Report does not make any argument as to why "differences in physical characteristics" cannot be made. It merely states, in effect, that because identical goods are not present then there are no comparable like goods.
38. In the third paragraph in section 6.9 it was noted:

Further, we note that the low volume of **[CONFIDENTIAL TEXT DELETED – product type]** products sold domestically reflects the lower demand for **CONFIDENTIAL TEXT DELETED – product types]** products by Italian consumers. This is in contrast to the Australian market where the **[CONFIDENTIAL TEXT DELETED – product type]** products are increasing in popularity with Australian consumers. This is reflected in Feger's export sales with **[CONFIDENTIAL TEXT DELETED – product type]** products representing approximately **[CONFIDENTIAL TEXT DELETED – number]** of its total export volume.
39. It is not clear if the low volume of, presumably, recipe cans, resulted in a constructed value being used to get a recipe normal value. But even if this is the case there are

plenty of comparable sales of non-recipe cans that could be used by adjusting the physical characteristics. Again there is no explanation why these physical differences cannot be made from the price paid.

40. In the fourth and fifth paragraphs of Section 6.9 it was noted:

Feger also sold **[CONFIDENTIAL TEXT DELETED – product types]** tomatoes on the domestic market. However, these products had a drained weight of **[CONFIDENTIAL TEXT DELETED – number]**, as opposed to the exported products that had a drained weight of **[CONFIDENTIAL TEXT DELETED – number]**%.

In the absence of relevant domestic sales of **[CONFIDENTIAL TEXT DELETED – product types]** products, we conducted our ordinary course of trade tests in terms of s. 269TAAD of the Act only in respect of **[CONFIDENTIAL TEXT DELETED – product types]** products sold domestically.

41. Paragraph 3.2.1 of the Report shows that most products have a drained weight of 60% with 70% mostly sold on the domestic market. This different physical characteristic should be adjusted and not used as an excuse to exclude like good types. What appears to be a common theme in the Visit Reports is that the export model types have been used to redefine the domestic like goods to a particular type corresponding to the export model type. This has then resulted in a position where the like goods in Italy have only partially been examined. The correct approach is to start with the sales of all domestic like goods. The domestic like goods are comparable to the exported goods and adjustments should be made to the domestic goods to account for any physical differences with the exported goods.

42. But there are relevant domestic sales, as shown in the product range in paragraph 3.2.1. of the Report and as discussed above. The OCOT is a test initially applied to the price paid for all like goods (s.269TAC(1)). If a subset of sales has been identified for one purpose, in this case the assessment of whether this type was in the OCOT, then presumably this subset can be used for another purpose, being the calculation of a normal value for the exported recipe product without recourse to a constructed normal value.

43. The EQR notes:

“The bulk of sales in Italy and in foreign markets are made as OEM. All of the sales to Australia were OEM. Small proportions of Feger’s sales are made under business names owned by Feger. These business names include “Don Gerardo” (domestic) and “Fege” and “La Preziosa” (export).

44. In the Report (second to last paragraph of section 6.9) the following appears:

We found that all domestic sales of **[CONFIDENTIAL TEXT DELETED – product types]** tomatoes were in the ordinary course of trade as the volume of unprofitable sales did not exceed 20% of the total volume. **[CONFIDENTIAL TEXT DELETED – profitability information]**.

[CONFIDENTIAL TEXT DELETED – profitability information] were at prices paid

in the ordinary course of trade and considered relevant for establishing normal values.

45. The extract from the EQR that shows most of Feger's domestic sales are OEM and comments in Section 6.2 underline SPCA's view that proprietary and private label brand (OEM) sales are like goods and not able to be analysed separately. Were Feger's own brand sales compared with the export price of the private label (OEM) exports? Or was, as is appropriate, the combined normal value for domestic own brand and private label compared with the private label export price?

It is suggested that the OCOT should be applied against all sales of domestic like goods as defined at the start of the investigation. If the OCOT test shows that there are sufficient profitable sales of the domestic like good model/types then these can be compared with the export model/types with the appropriate adjustments. This approach results in the price paid data being essentially the same as the data used in calculating the CTMS which is derived from all sales of like goods before any products are excluded.

46. Paragraph 6.10 (page 31) says that the "volume of each product category exported to Australia" was able to be compared with "the volume of domestic sales of the comparable product category sold during the investigation period".

These product categories must be derived from the data relating to the like goods. And yet in the first paragraph of the Ordinary Course of Trade section (page 30) the report notes that for value added product exported to Australia "... there were no comparable like goods based on the factors considered to define the essential characteristics of the various models".

However, as noted above, there are comparable sales of the like goods (the definition of which has not changed by re-interpretating the like goods to being the exported goods under consideration) from which to use to obtain a normal value and to then make the required adjustments without using the less reliable constructed normal value. This normal value can be calculated from the category used in the OCOT for recipe tomatoes or from other sales such as chopped tomatoes adjusted upwards to reflect physical differences with the exported recipe product.

47. In the normal value section the following was noted:

9.2 [CONFIDENTIAL TEXT DELETED – product types] We consider that there were no relevant sales of **[CONFIDENTIAL TEXT DELETED – product types]** products made by Feger on the domestic market in Italy for the purposes of establishing normal values under s.269TAC(1).

48. As discussed above, it is clear that there are relevant sales of like goods and that there is no requirement (or any valid argument in the report) to use the provisions of s.269TAC(2)(c). A normal value can be obtained from the price paid for the recipe types (and/or non- recipe types) of the like goods adjusted as provided in s.269TAC(8). The Act and the ADA provide for such physical adjustments and past

practice seems to suggest that this is the preferred approach rather than resorting to a calculated normal value.

49. The following section discusses the profit calculation.

9.2.2 Administrative, selling and general costs and Profit

Sub-regulation 181A(2) of the Customs Regulations provides that the Minister must calculate the administrative, selling and general costs and profit using data relating to the production, manufacture, and sale of the like goods sold in the ordinary course of trade by the exporter.

Sub-regulation 181(A)(2) provides:

“For subregulation (1), the Minister must, if reasonably possible, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade”.

But it is not clear that the OCOT calculation was applied against all like goods and not just the types comparable to the exported models and therefore whether the correct profit was identified for all like goods sold in the OCOT.

Conserve Italia (PAD negligible Report 4.54% Notice 4.54%)

50. In discussing ordinary course of trade it is noted:

6.9 Ordinary course of trade summary

Before considering the tests of profitability contained within s. 269TAAD of the Act, we considered the nature of the sales of prepared or preserved tomatoes made domestically. For comparability we used the domestic sales most like to those exported to Australia. We excluded domestic sales that were out of scope above 1.14 litres in size, and those with in glass jars.

51. The OCOT should be applied against all sales of the like goods as defined (whether in glass jars or in different shipping packs) before any model/type analysis with export model/types proceeds. The like goods have been defined at the start of the investigation for both the Australian industry and the Italian industry. The definition of like goods in the Act is materially the same as in the ADA (Panasia at[125]). The obligation to treat like goods consistently was emphasised in EC-Bed Linen (at[57-58]). That is, for analysis purposes such as the OCOT, the like goods do not become limited to the exported goods via a narrow interpretation of “goods under consideration”. (Refer to the Manual where the 5% volume test is first applied to all sales of the like goods in the OCOT and then the 5% test is applied to models/types. This suggests that the OCOT is applied against all like goods before the domestic/export model analysis begins)

8.3.4 Advertising

Conserve Italia provided evidence that in addition to the sales activity on the domestic market advertising occurred for domestic sales. We consider a negative adjustment should apply.

52. SPCA notes that an adjustment for advertising for domestic sales should be carefully analysed such that the adjustment can only relate to advertising costs specifically related to a transaction. That is, there should be an adjustment, if applicable, for advertising such as trade spend, but not for advertising classified as a general cost of doing business.
53. The report discusses the normal value:

9 NORMAL VALUE

We consider that information gathered from all sources and detailed in this report and its attachments, can be relied upon to establish normal values. Normal values have been established under s. 269TAC(1) using sales in the domestic market that were arm's length transactions and sold at prices that were in the ordinary course of trade. We compared products that were identical or most like to those goods exported to Australia. For private label sales of crushed and peeled, we found that no sales were made on the domestic market and sold in sufficient volumes in the ordinary course of trade. For crushed and peeled private label we established the export price pursuant to s.269TAC(2)(c) and constructed the normal value based on the cost to make of crushed canned tomatoes exported to Australia and used the domestic selling, general and administrative expenses as if they were sold on the domestic market. A rate of profit was calculated based on those domestic sales sold in the ordinary course of trade.

54. Subsection 6.7 of the report notes that: "We consider that Conserve Italia makes sales of like goods on the domestic market". SPCA interprets the above paragraph as including sales of like goods in both branded and private label configurations. This conclusion is based on an adjustment being made for "domestic commission" and the observation in Section 6.2.7 that "... no commissions are paid to agents in respect of private label sales".
55. In subsection 6.8 under the subheading "Sufficiency of Sales" it was recorded: "We compared the volume of Conserve Italia's export sales with like models sold on the domestic market in the categories of diced, crushed, cherry and whole peeled. We found for these models there was a sufficient volume of domestic sales." As noted in the Feger comments the domestic like goods should be the starting point for finding the models similar to the exported models.
56. In this situation SPCA is of the view that these sales should be used for "private label sales of crushed and peeled". The fact that there were no sales made on the domestic market for private label, does not justify a "type" being established for private label sales of crushed and peeled. It is considered that a normal value should have been obtained by making the appropriate due allowance to the comparable price paid or payable of the like goods sold on the domestic market. There is no discussion in the report why domestic sales could not have been adjusted as provided in the Act/ADA. It would seem that a more accurate normal value could be obtained by making adjustments to the price paid.
57. Whether or not there is a higher price for a private label or an own brand is irrelevant. As noted in Van Bael and Bellis at p128 footnote 419:

The comparison between export price and normal value which leads to the dumping margin is based on an examination of the economic and accounting data of the undertakings concerned and in no way extends to looking into the reasons for domestic and export price levels. See Case T-274/02 Ritek Corp. and Prodisc Technology Inc. v. Council, 2006 E.C.R.II-4304 (General Court) at paragraph 59.

58. In the Conserve Italia normal value extract it was noted: “A rate of profit was calculated based on those domestic sales sold in the ordinary course of trade”. In the section on ordinary course of trade, it is not clear whether the domestic sales were limited given the wording of the relevant paragraphs in section 6.9 which states:

We applied the product code to limit the number of models sold on the domestic market and identified models that corresponded with the naming conventions associate (sic) with the export models. We excluded all models that had been identified as deleted lines.

We sought to compare models that were of 400g net in size with easy open lids, lacquered tins in either peeled, diced, crushed, and cherry models which were sold in trade sizes of 12 cans. (p37)

59. However it would appear that domestic sales include some or all of the products in Section 3.2.1 (p12). If this is the case then these are the domestic sales that should have been used in the ordinary course of trade test and to establish a profit. Section 6.9 also says that preserved tomatoes in glass jars were excluded from the sales on which the OCOT test was done. It would appear that as these glass jars are part of the like goods they should not have been excluded. It is correct to exclude packaging above 1.14 litres.

De Clemente (PAD 6.5% Report 3.5% Notice 3.25%)

60. The CTMS is discussed in the following paragraph:

7.5.3 SG&A conclusion

The team considers that De Clemente’s allocation methodology for SG&A was reasonable. However, the team notes that delivery costs and certain selling costs, such as rebates and commissions are only applicable to certain sales. Therefore, the team considers that these costs should be deducted from the CTMS and that selling prices should also be assessed at an ex-works (EXW) level, net of discounts and commissions.

61. For a CTMS to be obtained it would be expected that all cost are included. The adjustments for delivery costs and commissions are appropriate to normal value adjustments.
62. The reasons for excluding “ significantly different” domestic sales is not clear as referred to in the discussion on p24 of the report.

5.3.2.1 Products

De Clemente confirmed that, in contrast to the product varieties exported to Australia, it sells a wider variety of product variants in the Italian domestic market including;

[domestic product mix] Using the complete domestic sales listing, the team developed a summary report of all unique product codes sold during the period of investigation and confirmed the unique codifiers which De Clemente used to identify each product variant. Following this methodology, the team was satisfied that the essential characteristics of the following products sold on the domestic market were significantly different from those products exported to Australia and should appropriately be excluded from the domestic sales listing: **[excluded domestic product types]**

63. There is a possible interpretation that the “unique product codes” took on more of a significance than justified in determining models/types within the like goods and in obtaining the population of sales to begin the process of finding the qualifying sales by the OCOT and 5% tests. Although products may be significantly different from those exported to Australia, it is incorrect to exclude these sales from the like goods before the normal value process commences. The blanket exclusion of these products could materially affect the proper calculation of the OCOT and profit. To immediately exclude types because they are not similar/identical to the exported types ignores the intention of the Act/Agreement. Presumably these products were not excluded from the data used in the CTMS calculation.
64. The only product that could be excluded from the product range in Section 3.2.3 (p8) would be passata and product exceeding 1.14 litres in volume.
65. For the reasons stated in Argentina-Poultry Anti-dumping Duties [at 7.272], all domestic sales should be examined and yet it appears that domestic sales that do not have “characteristics identical” have not formed part of the examination of domestic sales of like goods.
66. Under the subheading “Inventory Holding Variables” on page 30 it was noted:

Price of goods sold will be influenced by the current inventory levels of stock held in storage by De Clemente.
67. It is not clear how this price variance has been analysed with respect to its influence on the export price. Usually an adjustment for export inventories is difficult to evidence unless, for example, there are separate and distinct cost centres for an export warehouse. Most inventory cost is a general cost of doing business for which an adjustment is not available.
68. On page 49 of the report the following conclusion is reached after examining cost to make and sell:

7.5.3 SG&A conclusion

The team considers that De Clemente’s allocation methodology for SG&A was reasonable. However, the team notes that delivery costs and certain selling costs, such as rebates and commissions are only applicable to certain sales. Therefore, the team considers that these costs should be deducted from the CTMS and that selling prices should also be assessed at an ex-works (EXW) level, net of discounts and commissions.

69. It would be expected that “delivery costs” are a selling expense and cannot be removed from the CTMS, and are quite different from discounts and rebates being deducted off the revenue invoiced. These adjustments are provided in s.269TAC(8) of the Act. It is incorrect to exclude items from the cost to make and sell analysis because they are “only applicable to certain sales”. The cost to make and sell is by definition exactly as it says.

This incorrect calculation of cost to make and sell affects the ordinary course of trade assessment.

70. The report discusses the products and normal value as follows:

8.1.3 Product differentiation

As discussed previously, De Clemente (via indent sales arrangements **[Australian customer]**) in Australia during the period of investigation. In summary these were

- ‘ ;
- ; and
-

[Exported products]

In comparison, De Clemente produces and sells both private label and its own proprietary label (‘De Clemente’ labelled product) of the GUC to other customers in the Italian domestic market in a variety of can sizes and cut profiles.

11 NORMAL VALUE

As previously explained all variants of prepared and preserved tomato produced by De Clemente and exported to Australia (via FOB sales to **[trader]**) were capable of direct correlation to product variants sold in the domestic market that are relevantly identical and directly comparable. On the basis of the above we consider that information gathered and detailed in this report and its attachments can be relied upon to establish normal values, and be compared to product exported to Australia during the investigation period, under s. 269TAC(1) in relation to , and **[product variants]**. We consider those domestic selling prices require adjustment in terms of s.269(TAC)(8).

71. In subsection 8.1.3 it is shown that De Clemente sells both private label and its own proprietary label on the Italian domestic market.
72. In the Normal Value section, normal values have been calculated under s.269TAC(1) and this single normal value should be derived from sales of both private and proprietary labels. Only private label products were exported to Australia. However, it is not clear if the normal value was calculated just on the models sold domestically that were “relevantly identical and directly comparable” to the exported model types and whether this means that a private label normal value was compared with a private label export price.. The combined normal value should have been compared with the export price.

Material Injury

73. SPCA believes that the application of dumping duties will have an impact, [REDACTED] [Confidential strategy] This in turn will:

Impact the [REDACTED] [Confidential strategy indication]

74. The proposed final measures will reduce [REDACTED] This reduction in price undercutting [REDACTED] material injury caused to SPCA by the dumped products. [Confidential strategy]

75. Reducing the level of price undercutting is expected to [REDACTED] Evidence has been submitted to ADC during the visits highlighting the fact that as [REDACTED] price differences [REDACTED] preserved and prepared tomatoes, [REDACTED] [Confidential market observations]

76. An illustration of how an improvement in price undercutting will benefit SPCA is shown in the following example. [REDACTED] [Confidential financial observations]

Illustrative Example of an Improvement in Price Undercutting

Product \$/kg	A	B	C	Value Add D
Price Undercutting [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
P/Undercutting Undumped difference (%) (example)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Impact SPCA's ability on current products

77. [REDACTED] It is expected [REDACTED] that the dumping margin is appropriately applied. No doubt criticisms will arise at the level of dumping margin on some of the larger exporters. However, this is merely the mathematical outcome

provided in the Act and reflects, to a degree, the "... inflexible nature of the anti-dumping and countervailing system as a whole" (Panasia at [146]). **[Confidential financial comments]**

Impact SPCA's ability [REDACTED]

78. SPCA's improved position will be reflected in a reduction in the level of price undercutting and price suppression. [REDACTED] **[Confidential market observation]**

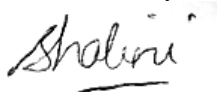
Consumer research evidence submitted to ADC during the [REDACTED] **Italian and Australian products,** [REDACTED] **[Confidential market information]**

79. The SEF directly identifies the price sensitivity of the market [at page 46]. [REDACTED] between SPCA products and imported product will, undoubtedly, provide a reason [REDACTED] but also from the fact [REDACTED]. The volume [REDACTED] evident in addressing the material injury assessment which was summarised in the SEF in Section 8.6.2: **[Confidential comments relating to market research]**

80. It highlights the impact of [REDACTED] direct competition with both imported private and proprietary labels. In effect, the price discounting had a significant impact on SPCA's financial performance, eliminating the effect of achieved operational efficiencies. (at page 50) **[Confidential strategy]**

81. SPCA is available to discuss any matters relating to these comments on the SEF.

Yours sincerely



Shalini Valecha