Australian Government
Anti-Dumping Review Panel

ADRP REPORT NO. 56

Certain Prepared or Preserved Tomatoes Exported From Italy by AR Industrie Alimentari S.p.A and by all Exporters other than by Feger di Gerado Ferraioli S.p.A and La Doria S.p.A.

January 2018

Review of a Decision of the Parliamentary Secretary to alter a Dumping Duty Notice in relation to Prepared or Preserved Tomatoes (PPT's) Exported from Italy by AR Industrie Alimentari S.p.A. (ARIA) and by all exporters other than by Feger Di Gerardo Ferraioli S.p.A. (Feger) and La Doria S.p.A.

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Abbreviations

Term	Meaning
Act	*Customs Act 1901*
ADA	Anti-Dumping Agreement
ADC	Anti-Dumping Commission
ADN	Anti-Dumping Notice
AGEA	Italian Agency for Agricultural Payments
ANICAV	Associazione Nazionale Industriali Conserve Alimentari Vegetali
ARIA	AR Industrie Alimentari S.p.A.
AUD	Australian Dollar
Appellate Body	Appellate Body of the World Trade Organisation
AEP	Ascertained Export Price
ANV	Ascertained Normal Value
CAP	Common Agricultural Policy
CTMS	Cost to Make and Sell
Commissioner	The Commissioner of the Anti-Dumping Commission
Conserve Italia	Conserve Italia Soc. Coop. Agricola
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
EC	European Commission
EPR	Electronic Public Record
Feger	Feger Di Gerardo Ferraioli S.p.A.
FOB	Free on board
GAAP	Generally accepted accounting principles
GOI	Government of Italy
IDD	Interim dumping duty

La Doria	La Doria S.p.A.
LSI	Le Specialita Italiane Sri
Manual	Dumping and Subsidy Manual (November 2015)
Minister	Minister for Industry, Innovation and Science
Mutti	Mutti S.p.A
NIP	Non-injurious price
Parliamentary Secretary	The Parliamentary Secretary to the Minister for Industry, Innovation and Science ('the Minister')
PPT's, or the goods	Certain Prepared or Preserved Tomatoes, the goods the subject of the Reviews
CIO Regulation	*Customs (International Obligations) Regulation 2015*
REP 349/354	The report published by the Commission in relation to the Review of Anti-Dumping Measures relating to Prepared or Preserved Tomatoes exported from Italy by AR Industrie Alimentari S.p.A and by all Exporters other than by Feger Di Gerardo Ferraioli S.p.A and La Doria S.p.A and dated 5 April 2017
Reviewable Decision	The decisions of the Assistant Minister made on 4 May 2017
SCM	Agreement on Subsidies and Countervailing Measures
SEF 349/354	Statement of Essential Facts 349 and 354
SPCA	SPC Ardmona Operations Ltd
WTO	The World Trade Organization

Summary

1. I consider that the reviewable decision in respect of Mutti S.p.A ("Mutti") was not the correct and preferable decision, in that:

    - The Ascertained Export Price ("AEP") should have been adjusted downwards by deducting the amounts of the deferred rebates that Mutti paid to certain Australian importers, with a resulting downwards adjustment to the Ascertained Normal Value ("ANV") and increase in the dumping margin from 3.2 per cent to 3.9 per cent.

    Accordingly I recommend that the Parliamentary Secretary revoke the decision and substitute for the Reviewable Decision a decision declaring that the dumping duty notice applicable to Mutti's goods be taken effect as if the relevant variable factors had been fixed in accordance with Confidential Schedule A.

2. I consider that the reviewable decisions in respect of Le Specialita Italiane Sri ("LSI") was not the correct and preferable decision, in that;

    - LSI's domestic sales should have been considered suitable for the purposes of calculating a normal value under s.269TAC(1) of the Act adjusted in accordance with s.269TAC(8)(b), resulting in a lower ANV.

    Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted, I recommend that the Parliamentary Secretary revoke the decision and substitute for the Reviewable Decision a decision declaring that the dumping duty notice applicable to LSI's goods be taken effect as if the relevant variable factor had been fixed in accordance with Confidential Schedule A.

3. I consider that all other reviewable decisions relating to REP 349/354 that are being challenged in this review are the correct and preferable decisions and accordingly I recommend that they be affirmed.

Introduction

4. Applications were accepted from the following Applicants who applied in terms of s.269ZZC of the *Customs Act 1901* ("the Act"), for review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science ("the Parliamentary Secretary"), to alter a Dumping Duty Notice following a review enquiry pursuant to s.269ZDB(1) of the Act in respect of Prepared or Preserved Tomatoes ("PPT's") exported from Italy by AR Industrie Alimentari S.p.A. ("ARIA") and by all exporters other than by Feger Di Gerardo Ferraioli S.p.A. ("Feger") and La Doria S.p.A. ("La Doria") ("the Reviewable Decisions"):

    - SPC Ardmona Operations Ltd ("SPCA");
    - Conserve Italia Soc. Coop. Agricola ("Conserve Italia");
    - Mutti S.p.A ("Mutti"); and
    - Le Specialita Italiane Sri ("LSI").

5. Notice of the Reviewable Decisions were published on the Anti-Dumping Commission ("ADC") website on 5 May 2017.[1]

6. The Senior Member of the Review Panel directed in writing, pursuant to s.269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

7. Notice of the proposed review as required by s.269ZZI of the Act, was published on 11 July 2017.

Background

8. Anti-Dumping measures applicable to PPT's exported from Italy, except by Feger and La Doria, were established following an anti-dumping investigation (Investigation No. 217) completed in 2014 by the ADC. The relevant measures were imposed by notice published on 16 April 2014 by the then Parliamentary

[1] ADN 2017/46 and ADN 2017/47.

Secretary to the Minister for Industry.[2] On 20 March 2014, the Commissioner of the ADC ("the Commissioner") decided to terminate the investigation in so far as it related to Feger and La Doria in accordance with subsection 269TDA(1) of the Act.[3]

9. After accepting a request by certain parties to review the then Parliamentary Secretary's decision, the Review Panel recommended that the then Parliamentary Secretary affirm the decision. The then Parliamentary Secretary decided on 21 October 2014 to affirm the decision to impose dumping duties on prepared or preserved tomatoes exported to Australia from Italy (except by Feger and La Doria). These measures were due to expire on 15 April 2019.

10. On 10 December 2014, SPCA lodged an application for the publication of a dumping duty notice in respect of PPT's exported to Australia from Italy by Feger and La Doria. Following consideration of the application, the Commissioner decided not to reject the application and initiated the investigation[4] ("Investigation No. 276"). The final report to the Parliamentary Secretary was made by the ADC in ADC Report No. 276 ("REP 276"). The ADC recommended to the Parliamentary Secretary that a Dumping Duty Notice be published in respect of PPT's exported from Italy by Feger and La Doria. The Parliamentary Secretary accepted the recommendations and a Dumping Duty Notice under subsections 269TG(1) and (2) of the Act was published on 10 February 2016.[5] There were also a number of accelerated reviews for new exporters of PPT's.[6]

11. On 1 April 2016, ARIA lodged an application requesting a review of the anti-dumping measures as they applied to its exports of PPT's to Australia from Italy. ARIA claimed that certain variable factors relevant to the taking of the anti-dumping measures had changed. The application related to the measures

[2] ADN 2014/32.
[3] ADN 2014/22.
[4] ADN 2015/05.
[5] ADN 2016/13.
[6] Of relevance to this review is the accelerated review of LSI, Investigation No. 351 which was initiated on 26 April 2016, ADN 2016/46.

imposed following the investigation set out in REP 217. The Commissioner initiated the review of measures regarding the goods exported by ARIA on 21 April 2016.[7] On 5 May 2016, SPCA lodged an application requesting a review of the anti-dumping measures as they apply to all exports of PPT's to Australia from Italy except by Feger and La Doria. SPCA claims that certain variable factors established in REP 217 had changed and should be reviewed. The Commissioner initiated the review of measures regarding the goods exported by all exporters other than Feger, La Doria and ARIA on 25 May 2016. [8] Due to the reviews examining the same goods exported to Australia during the same time periods, the ADC established a single electronic public record ("EPR") for both reviews.

12. Following applications from Feger, La Doria and the Government of Italy, on 13 April 2016, the Review Panel initiated a review of the then Parliamentary Secretary's decision and the findings in REP 276 on which it relied. The Review Panel subsequently requested that the Commissioner reinvestigate certain findings, the results of which are recorded in the Commissioner's Reinvestigation Report No. 360 ("REP 360"). The Review Panel accepted the findings of the Commissioner in REP 360, in part, and the Parliamentary Secretary accepted the Review Panel's recommendations, contained in ADRP Report No. 35.

13. The Commissioner sought an extension to publication of the Statement of Essential Facts (SEF's) in respect of Investigation No. 349 and Investigation No. 354 pending the outcome of the Review Panel review in respect of REP 276 (ADRP Report No.35). This was so the approach taken in these reviews would be consistent with the Parliamentary Secretary's decision following ADRP Report No. 35. The Parliamentary Secretary granted such an extension, requiring the SEF's to be published by no later than 45 days after the Parliamentary Secretary's decision following ADRP Report No.35.[9] The Parliamentary Secretary's decision was made on 4 January 2017, and therefore SEF 349/354

[7] ADN 2016/41.
[8] ADN 2016/55.
[9] See ADN 2016/76 dated 8 August 2016.

was placed on the public record on 20 February 2017,[10] and the final report was provided to the Parliamentary Secretary on 5 April 2017.

14. The reviews were completed and findings and recommendations were reported to the Parliamentary Secretary in ADC Report No. 349/354 ("REP 349/354). The ADC recommended to the Parliamentary Secretary that the dumping duty notice have effect as if different variable factors had been ascertained, for all exporters covered by Reviews 349 and 354, and further that the form of measures, being the combination of fixed and variable duty, not be changed.

15. The Parliamentary Secretary accepted the recommendations and reasons for the recommendations, including all material findings of fact or law set out in the REP 349/354 and such decision was published on 5 May 2017.[11]

The Review

16. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister (or as in this case, the Parliamentary Secretary) either affirm the decision under review or revoke it and substitute a specified new decision.

17. The Review Panel must determine whether the decision to publish was the correct or preferable one. If it is concluded that the decision is the correct or preferable one, then the Review Panel must report to the Parliamentary Secretary recommending that he or she affirm the decision. If the Review Panel is not satisfied that the decision was the correct or preferable decision, the Review Panel must report to the Minister recommending that he or she revoke the decision and substitute a specified new decision.

18. In undertaking the review, s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it

[10] This SEF was prepared in response to both applications for a review of the anti-dumping measures (in the form of a dumping duty notice) applying to PPTs, that is, from ARIA Industrie Alimentari and SPCA.
[11] See ADN 2017/46 and ADN 2017/47.

was the Minister, having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

19. An applicant is required to set out reasons for believing that the reviewable decision is not the correct or preferable decision, and failure to do so may result in rejection of the application. However, as it was stated in ADRP Report No.15,[12] because an application is not rejected it does not follow that all grounds advanced in the application are to be viewed, or have been accepted as reasonable grounds for the reviewable decision not being the correct or preferable decision. It is also pointed out in ADRP Report No.15 that the obligation on an applicant to set out the reasons is linked to the task the Review Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

20. On 11 July 2017, a request was made to the ADC to provide copies of confidential documents which were referenced in REP 349/354 and SEF 349/354 or were created during the investigation. This correspondence with the ADC was made publicly available. Copies of the documents provided by the ADC were not made publicly available as they dealt with confidential information. Following review of these documents, a further request was made to the ADC on 14 December 2017 to provide copies of confidential documents which fell within the scope of the 11 July 2017 request, but were not provided in the initial document transfer. Copies of the further documents provided by the ADC were not made publicly available as they dealt with confidential information.

21. In making its recommendation the Review Panel must not have regard to any information other than the "relevant information" as defined in s.269ZZK(6) of the Act, that is, information to which the ADC had regard or was required to have regard when making its findings and recommendations to the Minister. The Review Panel must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application

[12] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16.

for review and any submissions received under s.269ZZJ of the Act.[13] The Review Panel may also have regard to further information obtained at a conference held under section 269ZZHA of the Act to the extent that it relates to relevant information and any conclusions reached at the conference based on relevant information.[14]

22. The following conferences were held with the ADC under s.269ZZHA of the Act:

No.	Reason for Conference	Date	Description
1	Clarification of certain findings in REP 349/354 regarding applicants' grounds	05/09/2017	First Conference
2	Clarification of certain calculations and aspects of the Reinvestigation Report.	22/12/2017	Second Conference
3	Confirmation of calculations and clarification of aspects of the Reinvestigation Report.	03/01/2018	Third Conference
4	Confirmation of Calculations.	08/01/2018	Fourth Conference

Non-confidential summaries of each conference will be publically available on the ADRP website.

23. In conducting this review I have had regard to the applications (including documents submitted with the applications) and to the submissions received pursuant to s.269ZZJ of the Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 349/354 and documents and information relevant to the review which were referenced in REP 349/354, including the Statement of Essential Facts ("SEF 349/354") and to documents referenced in SEF 349/354. I have also had regard to the information and clarifications obtained during the Conferences.

[13] See s.269ZZK(4) of the Act.
[14] See s.269ZZHA(2) of the Act.

24. The time for submissions by interested parties under s.269ZZJ is 30 days after the public notice. As the public notice was given on 11 July 2017 the time for submission expired on 10 August 2017. Submissions were received in this period from:

- The ADC;
- SPCA;
- Conserve Italia;
- Mutti;
- LSI;
- Associazione Nazionale Industriali Conserve Alimentari Vegetali (ANICAV)[15]
- Government of Italy (GOI); and
- European Commission (EC)[16].

Non-confidential versions of the submissions were made publicly available on the Review Panel's website.

25. After reviewing the applications, submissions and other material described above, on 11 September 2017, pursuant to s.269ZZL of the Act, I required the ADC to reinvestigate various findings in REP 349/354 (Reinvestigation Request). I requested the ADC's reinvestigation in this regard by 26 October 2017. The

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[15] ANICAV is the industry association of Italian PPTs producers and is considered to be an "interested party" in relation to the reviewable decision and entitled to make submissions, in accordance with either category (d) or (e) of the definition of "interested party" in s.269ZX of the Act.

[16] The European Commission (EC) noted in its submission that it was an interested party throughout the anti-dumping investigation subject of this review (Investigations 349/354), in the original investigation involving all exporters (Investigation 217) and also in a separate investigation involving the exporters Feger and La Doria (Investigation 270). The definition of "interested party" is in s.269ZX and the question arises if the EC can be considered to be an "interested party" for the purpose of s.269ZZJ. The EC represents the European Union (of which Italy is a member) in trade negotiations, is a party to the WTO Anti-Dumping Agreement (ADA), has competence in respect of trade in agriculture and handles disputes under that agreement for its members, so it understandable that it could be regarded as an interested party with respect to anti-dumping investigations involving its members. It is possible that the EC comes within (d) of the definition of interested party. However, as the information and conclusions put by the EC in its submission were similar to those put by ANICAV and the GOI or were made in previous submissions to the ADC, it has not been necessary to resolve the issue of the EC's standing in this review. In any event, the GOI has stated in its submission that it *"fully supports the views expressed in the submission filed by the European Commission*", and therefore I consider the EC's submission to be incorporated by reference into the submission of the GOI.

ADC in a letter dated 5 October 2017, requested an extension to provide the Reinvestigation Report, which was granted by the Review Panel for a period of 46 days until 11 December 2017. The request for reinvestigation and correspondence relating to the extension were made publically available. A copy of the Reinvestigation Report, which was received on 11 December 2017 (the Reinvestigation Report), is attached as Attachment A.1 to this report.

26. Subsection 269ZZK(3) of the Act requires the Review Panel to make its decision within 30 days after receiving the reinvestigation report under s.269ZZL(2).

Grounds of Review

SPCA

27. SPCA is the Australian manufacturer of PPT's (which are the goods that are the subject of the reviewable decision application) and is an "interested party" in relation to the reviewable decisions within the meaning of s.269ZX of the Act.[17]

28. The grounds of review relied upon by SPCA that the Review Panel accepted as reasonable grounds for the reviewable decision are as follows:

    a. The ADC inappropriately relied on data to the exclusion of other data in concluding that the evidence supplied by Feger and La Doria in REP 360 was reliable in assessing the impact of historical tomato Common Agricultural Policy ("CAP") payments and new payments received by tomato growers supplying other exporters in REP 349/354;

    b. The data supplied by Feger and La Doria in REP 360 and applied in REP 349/354 was not properly analysed in REP 349/354 and led to the incorrect conclusion which was applied to the other exporters;

[17] See the definition of interested party in s.269ZX(a)

c. When compared with other data, the Feger and La Doria analysis applied to REP 349/354 is inconsistent with other information and should not have been used in the reviewable decision;

d. The ADC did not take into account SPC's arguments on the data and analysis used in REP 349/354 which originated in REP 360;

e. The ADC's conclusion that an exporter (not a selected exporter and not a residual exporter) was selling at arm's length was not based on an examination of the exporter's accounts and therefore the ADC could not investigate the claims made in the confidential application for review; and

f. The assessment that there was no market situation was not sound as a result of the errors in the ADC's understanding of the Single Payment scheme (SPS) in 2014 and the new Basic Payment Scheme (BPS) in 2015.

Conserve Italia

29. Conserve Italia is an exporter of PPT's and is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX of the Act. [18]

30. The grounds of review relied upon by Conserve Italia that the Review Panel accepted as reasonable grounds for the reviewable decision are as follows:

a. The ADC wrongly included certain domestic sales in the normal value calculation of a particular model, thus causing a distorted assessment of Conserve Italia's dumping margin;

b. The ADC wrongly dismissed Conserve Italia's claim for a physical adjustment in order to reflect the existing difference between the net drained weight of a particular product sold in the domestic market and exported to Australia; and

[18] See the definition of interested party in s.269ZX(c)

c. The ADC did not take into account the claims raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia.

Mutti

31. Mutti is also an exporter of PPT's and is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX. [19]

32. The ground of review relied upon by Mutti that the Review Panel accepted as a reasonable ground for the reviewable decision is as follows:

    a. The ADC failed to correctly work out Mutti's Ascertained Export Price ("AEP") insofar as the amounts of the deferred rebates that Mutti paid to certain Australian importers have not been deducted from the FOB price paid by such importers.

LSI

33. LSI is also an exporter of PPT's and is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX. [20]

34. The grounds of review relied upon by LSI that the Review Panel accepted as reasonable grounds for the reviewable decision are as follows:

    a. The methodology followed by the ADC to ascertain LSI's variable factors in Review 354 is flawed in that:

        - The ADC should have calculated LSI's normal value on the basis of the data provided by LSI and previously verified by the ADC, resulting in the same normal value ascertained in the framework of ADC Review No. 351 (which concerned the same investigation period of ADC Review No. 354); and

[19] See the definition of interested party in s.269ZX(c).
[20] See the definition of interested party in s.269ZX(c).

- The ADC's calculation of LSI's ascertained export price on the basis of the export prices of other exporters is unwarranted and LSI's export price should have been established at the same level of LSI's weighted average normal value, in line with well-established practice.

b. The reviewable decision is incorrect since LSI's dumping margin was established as negative and therefore the investigation should be terminated and no anti-dumping measure should be imposed.

Consideration of Grounds of Review

SPCA

35. I will now deal with the grounds of review put forward by SPCA. It should be noted that SPCA's first four grounds of review are effectively challenging the ADC's finding in REP 360 that the cost of raw tomatoes recorded in Feger and La Doria's accounting records reasonably reflected competitive market costs for the purpose of s.43(2) of the *Customs (International Obligations) Regulation 2015* ("CIO Regulation") and the application of this finding to the exporters in Reviews 349 and 354.

36. The summary of SPCA's arguments below are drawn from both its application for review and its s.269ZZJ submission to the Review Panel. It should be noted that there is an element of overlap in SPCA's arguments in respect of its first four grounds.

Ground 1: The ADC inappropriately relied on data to the exclusion of other data

37. SPCA contends that the ADC inappropriately relied on data to the exclusion of other data in concluding that the evidence supplied by Feger and La Doria in REP 360 was reliable in assessing the impact of historical tomato CAP payments and new payments received by tomato growers supplying other exporters in REP 349/354.

38. This ground of review will be considered under the three sub-headings used by SPCA in its application for review. It should be noted that all the three components of this ground of review relate to SPCA's contention that the evidence it refers to in its submissions demonstrates that the value of CAP payments received by growers is so significant (and much higher than that found by the ADC) that the costs of raw tomatoes do not reasonably reflect competitive market costs.

Lack of consideration of 2014 as the base year for the new BPS

39. SPCA contends that the ADC did not consider that 2014 became the base year for the new BPS introduced in January 2015.

40. SPCA states that the period of dumping in Reviews 349 and 354 was 1 April 2015 to 31 March 2016 and that from the beginning of 2015 a new scheme to administer CAP payments was introduced and replaced the SPS. According to SPCA this new scheme (referred to as the BPS) established 2014 as the base year for the new entitlements based on the historical entitlements available in 2014. SPCA claims that the historical amount allocated to tomatoes (€183,970,000) would continue in 2014 (the period of the dumping investigation in Investigation No. 276) with the new BPS and further payments were also based on the amount the farmer received in 2014.

41. In its application for review, SPCA provides information on the *"national ceiling in Italy"* (which it contends includes the tomato allocated payment and other sector specific payments). SPCA contends that in practice the value of the entitlements to the tomato farmer remain similar under the new BPS and despite the changes to the scheme in 2015, sector specific payments can still be identified including the historical tomato payment. In addition, according to SPCA, from 1 January 2015 tomato farmers had access to a new subsidy of €160 per hectare coupled to the growing of tomatoes. SPCA contends that the historical subsidies and the new entitlements under the BPS remain essentially coupled and concludes that

this additional income to the tomato grower contributes to the grower being able to supply tomatoes.[21]

42. Through Table 1 in its application for review, SPCA attempts to demonstrate that it can be shown that the historical sector specific amount allocated to tomatoes in 2014 has continued under a new delivery system in 2015. [22] SPCA contends that the ADC did not examine the changes in 2015 and that if it had it would have found that the updated hectare amount was more reliable than the selected information supplied by exporters in REP 360, which was an average value of all farm subsidies, not just tomatoes.

43. ANICAV in its submission under s.269ZZJ of the Act does not dispute SPCA's submission that, as from the year 2015, the SPS has been replaced by the BPS, in combination with the Greening Payment Scheme ("GPS") and the Young Farmer Payment ("YFP"). However, ANICAV makes it clear (as does the GOI and the EC in their respective submissions) that they are *"non-specific and fully decoupled from production."* According to ANICAV this means that all the eligible farmers – whether or not tomato growers – are granted a payment, irrespective of what they produce, and the volume of their production, with the amount of the payment depending on the number and value of the entitlements held by each particular farmer.[23]

44. ANICAV does, however, refer to the fact that:

> *'……...in addition, the Italian Government has introduced a coupled support scheme for a limited number of agricultural products, including tomatoes for processing. The coupled support for tomatoes amounts to 160 €/ton.'*

[21] See paragraphs 1.9 to 1.18 of SPCA's application for review.
[22] See Table 1 in SPCA's application for review, page 21.
[23] See paragraphs 1.1 of ANICAV submission, pages 4 – 6.

According to ANICAV, “this coupled payment granted to Italian tomato growers is clearly negligible as it amounts to 160 €/ha only, i.e. about 0.0022 €/kg (the production yield being 73,000 kg/ha)”.

45. ANICAV points out that despite the reform of the CAP, the total budget allotted to direct payments to farmers has not increased, with the new schemes introduced in 2015 financed with the same resources previously used to finance the SPS. Moreover, ANICAV contends that the available evidence demonstrates that the newly introduced coupled payment has not produced distortive effects and that *in 2015* the market price of raw tomatoes in Italy was amongst the highest in the world. [24]

46. The GOI also confirms in its submission that the direct support granted to farmers under the BPS - which has replaced the SPS - continues to be non-specific and fully decoupled. The GOI further states:

- The 'ad hoc' national fund dedicated to tomatoes no longer exists, as it has been integrated into a single national fund aimed at financing the SPS (now BPS).
- The SPS/BPS entitlements give farmers the right to receive a direct support, irrespective of the crop(s) produced, and the volume of production. Therefore, SPCA's allegation that Italian farmers would hold different payment entitlements for different crops is ill-founded;
- The value of the SPS/BPS entitlements is not fixed but varies considerably (each entitlement having a different value and covering a different number of eligible hectares); and
- The information about the exact value of the entitlements held by each particular grower is of little relevance. As concluded in REP 360, the alleged subsidy received by tomato growers, irrespective of the amount of

[24] See Chart on page 6 of ANICAV’s submission. It is also stated in the GOI’s submission that SPCA's allegation that the price for raw tomatoes in Italy would be artificially low due to Government influence and that "the tomato price at €0. 0921kg is not a competitive price" is clearly contradicted by publicly available information showing that in the year 2015 (like in the year 2014) the price for raw tomatoes in Italy was amongst the highest in the word. See GOI submission, page 2.

the subsidy, was not transferred downstream (i.e. there was no pass-through) and such a conclusion is equally applicable in REP 349/354.[25]

47. The EC states in its submission, with regard to 2014 as the base year for the BPS:

> *'……..the year as the base year for the new BPS had a rather limited importance; it related only to identifying an individual reference amount, from which a share is "spread over" all eligible hectares (=entitlements) of the farmer in 2015 and further modified according to the internal convergence objectives of the new system (i.e. more equal distribution of direct payments amongst farmers).*
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> *In this regard, the European Commission re-iterates that the recurrent claim by the domestic industry that current direct payments to farmers are implicitly coupled [footnote omitted] since the decoupling was made on the basis of historical production is clearly wrong.'* [26]

48. The EC in its submission refutes SPCA's claim relating to a tomato component under the national ceiling for direct payments in Italy in both 2014 and 2015, contending that it is based on wrong evidence for 2014 and a deduction from this evidence for the figure for 2015, making *"some completely misleading calculation on the alleged tomato payment per hectare in the two years*". The EC claims that SPCA is using "*misused evidence and misinterpretation of legal documents as basis for any findings."* The EC confirms that there is no possible way to make an estimation of the annual CAP direct payments to tomato growers in Italy since payments are decoupled from production and based on land declared, irrespective of whether any production existed or not, and states that there is *"simply no track or link of such payments according to crop".*[27]

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[25] See GOI submission, page 2.
[26] See Section 2.3 of the EC Submission, page 6.
[27] See Section 2.4 of the EC Submission, page 7.

49. The EC also refutes SPCA's similar claim relating to the existence of tomato entitlements [28] and states that the only direct payment related to production is the Voluntary Coupled Support ("VCS") which Italy decided to apply to tomatoes for processing:

> *'This is the only direct payment related to tomato production in Italy in 2015. Given the low value per hectare and the results of the flow-on effects analysis disclosed by the ADC, this payment does not seem to be very relevant to this review.'*[29]

(This would appear to tie up with ANICAV's submission, which also makes reference to what is considers to be a "negligible" coupled payment granted to Italian tomato growers, as referred to above.)

50. The ADC in REP 349/354 and its s.269ZZJ submission, does not directly address SPCA's submissions relating to 2014 as the base year for the new BPS. It would appear, however, that the ADC does not as such dispute SPCA's contention that that 2014 became the base year for the new BPS introduced in January 2015, but rather that it placed more emphasis on the actual payments received by tomato growers Feger and La Doria rather than the theoretical value of the SPS payments to which the evidence provided by SPCA relates:

> '*The evidence provided by SPCA relates entirely to the theoretical value of SPS payments being made, whereas the evidence submitted by Feger and La Doria was with regard to the actual payments received by tomato growers.*' [30]

51. In its submission, the ADC states:

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[28] See Section 2.5 of the EC Submission, page 8.
[29] See Section 2.6 of the EC Submission, page 8.
[30] See REP 349/354, page 15.

'*SPCA's claims appear to proceed from a misunderstanding of the Commission's approach in REP 360. As noted at section 4.4.2 of REP 360, the Commission calculated a per kilogram value of the actual SPS payments received based on the actual volume of tomatoes purchased. The Commission was satisfied that the evidence presented to it by the growers supplying to Feger and La Doria demonstrated that the actual payments received were less than contended for by SPCA.'*[31]

52. During the First Conference, I requested clarification from the ADC in respect of its response to certain SPCA contentions such as 2014 being the base year for the new BPS. The ADC stated that in REP 349/354 it did not analyse or compare BPS and SPS, noting the strong disagreement between SPCA and the EC in this regard. The ADC confirmed that it is not disputing SPCA's claim about 2014 being the base year for the BPS, but rather considers that it does not impact the ADC's decision because the ADC preferred to use the actual data relating to the growers that supplied Feger and La Doria in Reinvestigation 360. The ADC acknowledged, however, that there is no explicit consideration of SPCA's claims relating to 2014 being the base year in REP 349/354.[32]

53. I therefore requested that the ADC, during its reinvestigation of the findings relating to SPCA's grounds of review, have regard to the relevance to its finding of SPCA's submissions relating to 2014 becoming the base year for the new BPS introduced in 2015 as well as the new "coupled" payment to Italian tomato growers of 160 €/ha (the existence of which both the EC and ANICAV did not dispute), which was referenced in this first component of SPCA's first ground of review. I requested that in its reinvestigation, the ADC should take into consideration SPCA's relevant submissions to the ADC during the Reviews, other relevant information and documents and as well as other interested parties' relevant submissions to both the ADC and the Review Panel.

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[31] See ADC submission, page 2.
[32] See First Conference Summary.

54. In the Reinvestigation Report, the ADC firstly pointed out that it maintains that submissions made by SPCA in REP 349/354 continue to prosecute the argument that the theoretical value of entitlements was more reliable information than the data supplied by the exporters. The ADC then set out how it went about verifying the data and certificates submitted by Feger and La Doria in regard to the payments received by its suppliers, with particular reference to the Italian Agency for Agricultural Payments ("AGEA") data. The ADC set out how it was able to trace the entitlements pertaining to each grower through to the volume and value of raw tomatoes that they sold to Feger and La Doria, and was satisfied as to the accuracy and completeness of the information provided. The ADC further stated that to accept SPCA's contention would be to conclude that the certificate information obtained by the ADC was somehow incomplete (i.e. that other payments were also received by growers, but not revealed in the AGEA certificates pertaining to their landholdings). The ADC considers that the likelihood of this having occurred is extremely low. Specifically addressing SPCA's submission of 2014 being the base year for the new BPS, the ADC stated*:*

'The base years (as posited by SPCA) identify the total pool of funds devoted to CAP payments to tomato growers (i.e. a coupled payment). This apparent pool of funds, when worked out on a per kg basis, is far in excess of what growers supplying Feger and La Doria actually received. SPCA's explanation is that the actual amounts received must be erroneous because they do not align (when extrapolated) to the total pool identified by SPCA.

The Commission notes that the EC has emphatically rejected any suggestion that the base years operate in the way contended for by SPCA. The detailed evidence available to the Commission (and referred to above) is, in the Commission's view, more persuasive than the evidence presented by SPCA. Having relied on the verified value of CAP payments actually received, the

Commission does not consider it necessary to re-examine the question of which year is the "base year".'[33]

55. With regard to SPCA's submissions relating to the new "coupled' payment to Italian tomato growers, the ADC stated:

'Finally, although the Commission accepts that a "young growers" payment is available and is coupled to tomato production, the Commission has no information which would enable it to ascertain what proportion of growers supplying tomatoes in Italy are "young growers". The apparent impact of the additional €160 / ha payment on tomato prices would be extremely small (assuming a consistent yield rate of 73,000 kg / ha, the value of the additional payment is approximately €0.0022 / kg), and would be diluted further in line with the proportion of growers that actually received the payment.' [34]

56. I am satisfied that in reinvestigating this issue, that the ADC took into consideration SPCA's relevant submissions relating to 2014 being the base year for the new BPS as well as SPCA's submissions relating to the new *"coupled payment."* I consider that the ADC's analysis is thorough and its conclusion reasonable, that the detailed evidence available (in the form of the verified value of CAP payments actually received by the suppliers of raw tomatoes to Feger and La Doria) is more persuasive than the theoretical value of CAP entitlements presented by SPCA, which was also vigorously disputed by the GOI, ANICAV and the EC. In this regard I noted that the ADC provided comprehensive information of the data provided by Feger and La Doria relating to the CAP payments received by its suppliers, as well as details of its 'three-pronged' verification process of the information, set out in various documents[35] and clarified during the First Conference.[36]

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[33] See Section 4.3.3 of the Reinvestigation Report, page 17 and 18.
[34] See Section 4.3.3 of the Reinvestigation Report, page 18.
[35] See Section 3.2.2 of SEF 349/354, page 14 and Section 2.5.3 of REP 349/354, page 14. (in response to SPCA's claims that the certificates provided by Feger and La Doria were self-selected and unreliable).
[36] See First Conference Summary which refers to the explanation of the ADC of its three-pronged verification process being:

57. The first component of SPCA's first ground of review that the ADC did not consider that 2014 became the base year, therefore fails.

The ADC failed to examine the Regulations

58. SPCA contends that the ADC failed to examine the Regulations which show that the value of individual historical entitlements is recorded at the time a farmer applies for the total subsidy.

59. In its application for review, SPCA referred to REP 349/354 contending that the ADC did not acknowledge the requirement that applications for the single payment required evidence of the farmer's access to different entitlements of different values. SPCA further contends that the ADC accepted the EC's assurances that this information was not available and not recorded, relying on selected information provided by the exporters which was not specific to tomatoes. SPCA claims that the Regulations show that entitlements have different values and must be declared in order to receive a single payment. SPCA claims that it has been shown that information on the value of different entitlements is recorded and could have been made available to the ADC. However, according to SPCA, the ADC proceeded to use selected information supplied by the exporters, which used an average of all subsidies paid to a tomato farmer. SPCA contends that the subsidy was not solely related to tomatoes, and that using an average value meant that the actual tomato subsidy would be lower.[37]

60. ANICAV in its submission, states that with this 'second limb' of SPCA's first ground of review, SPCA claims that the conclusions contained in REP 349/354 were based on 'selected information' provided by Feger and La Doria in REP 360, which was 'not specific to tomatoes'. According to ANICAV this argument

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(i) the spreadsheets submitted by Feger and La Doria, relating to 100% of the data of the growers;
(ii) certificates covering a certain percentage of what was in the spreadsheets; and
(iii) full access to the AGEA database with respect to the relevant growers, all of which aligned and provided cross verification.

[37] See paragraphs 1.20 to 1.32 of Attachment A of SPCA's application for review, pages 4 – 6, for SPCA's detailed arguments and references.

appears to be based on the assumption that the value of the SPS (now BPS) entitlements would vary depending on the particular crop produced, and that it is possible to calculate the value of the entitlements relating to tomatoes as distinct from other crops. In response to this ANICAV states:

'*However, it has been repeatedly explained by the relevant exporting producers, the European Commission and the Government of Italy, that SPCA is wrong. The payment attached to each SPS/BPS entitlement is not linked to a particular crop. All farmers receive a payment based on the hectares of land they own and the entitlements they hold, irrespective of the crop(s) produced, and the volume of production. Therefore, contrary to what SPCA suggests, entitlements relating to tomatoes do not exist under the current legislative framework.*'[38]

61. ANICAV further states that SPCA's allegation that Italian farmers would hold different entitlements for different crops has no legal or factual basis. With regard to SPCA's allegation that REP 349/354 would have 'failed to examine the Regulations which show that the value of individual historical entitlements is recorded at the time a farmer applies for the total subsidy', ANICAV provides clarification as follows:

'*As is well known, the value of the entitlements is not fixed but varies considerably (each entitlement having a different value and covering a different number of eligible hectares). Hence, the weighted average payment per hectare received by each single grower is different, as it depends on the value of the entitlements held by that particular grower.*'

ANICAV confirmed that the information concerning the value of each entitlement owned by each grower is recorded in an online database administered by AGEA and therefore, contrary to what SPCA argues, the information on the value of all the entitlements owned by all Italian tomato farmers is recorded and is available

[38] See Section 1.2 of ANICAV's submission, page 7.

to the ADC. Further ANICAV noted that the large number of tomato growers in Italy with each grower holding dozens, or even hundreds of entitlements. It pointed out that examining all the entitlements one-by-one would be extremely burdensome, and of little use and the only conclusion that could be reached by examining all the entitlements under discussion is the same as was reached in REP 360, that is, that the weighted average payment per hectare received by each single grower is different, as it depends on the value of the entitlements held by that particular grower." [39]

62. With regard to this sub-ground, the EC points out in its submission that:

- Allegations that a farmer received the BPS payment entitlements based on the type of production, and that a farmer was allocated payment entitlements of different value are wrong.
- In respect of the registration of entitlements it is not necessary and hence not required to include anything related to production or the cultivation of crops in the register.
- The legal text provided by SPCA does not mention that the type of crop should be included in the payment entitlement register, but on the contrary, this is "*another misleading assumption made by SPCA*".
- The database is administered by the AGEA and, to the knowledge of the EC, it was made available to the ADC in the framework of the reinvestigation No. 360.
- The most accurate and reliable information concerning direct payments to growers through the SPS or the BPS has already been analysed by the ADC.[40]

63. As discussed with regard to the first component of SPCA's first ground of review, it appears that the ADC placed more emphasis on the actual payments received by tomato growers supplying Feger and La Doria rather than on the theoretical

[39] See Section 1.2 of ANICAV's submission, pages 7 – 8.
[40] See Section 2.8 of the EC submission, pages 9 and 10.

value of the SPS payments to which the evidence provided by SPCA relates, including the Regulations referred to in SPCA's submissions. The ADC came to the conclusion in SEF 349/354 that:

> *' ……. SPCA has based its claims for an adjustment on the evidence of SPS payments made which were also relied upon in REP 276. These findings have been superseded by the findings made in REP 360, and the Commission does not have any further evidence that would result in a change to those findings or those in ADRP Report No. 35.'* [41]

64. SPCA's contention that the information provided by Feger and La Doria were self-selected and unreliable, and the ADC's response thereto, together with details of the ADC's verification process relating to value of the CAP entitlements received by the Feger and La Doria's suppliers have been discussed above in the consideration of the first component of SPCA's first ground of review.

65. During the First Conference I sought clarification from the ADC on its approach to SPCA's argument relating to the ADC using the average subsidy value, which resulted in an "underestimation" of the tomato subsidy amount. The ADC stated that it was only relevant if SPCA's claim of a specific "coupled" tomato payment was correct, but the ADC had accepted the EC's evidence that the payment amount was based on the land holding, not a product.[42] Nevertheless I requested the ADC during its reinvestigation of the findings relating to SPCA's grounds of review to have regard to and take into consideration the relevance to its finding of SPCA's submissions relating to the contention that the use by the ADC of an average value resulted in a lower tomato subsidy. In this regard, the ADC stated:

> *'The Commission notes Table 2 in Attachment A to SPCA's application, which creates a hypothetical farm growing tomatoes, wheat and maize to illustrate the difference between its approach and the "averaging" approach that SPCA*

[41] See Section 3.2.4 of SEF 349/354, page 16 (last paragraph).
[42] See First Conference Summary.

considers was used by the Commission. The hypothetical farm is also intended to show the apparent effect of fallow land; SPCA contends that a doubling of the apparent subsidy amount is required to establish the true impact of CAP payments on raw tomato prices.

The Commission rejects SPCA's approach. The Commission has no data pertaining to the actual land area used to cultivate crops, nor what crops were cultivated, by the growers that supplied tomatoes to Feger and La Doria. SPCA's hypothetical farm is therefore not "evidence" of the circumstances of those actual tomato growers and the CAP payments they received. In the Commission's view, the verified information on which the Commission relied in REP 360 is the more reliable evidence of payments actually received."[43]

66. As mentioned above, there appears to be some overlap with the first component of SPCA's first ground of review, and I will not repeat the discussions under this component. As in the discussion above, I consider that the ADC's analysis is thorough and its conclusion as confirmed in the Reinvestigation Report is reasonable that the detailed evidence available (in the form of the verified value of CAP payments actually received by the suppliers of raw tomatoes to Feger and La Doria) is more persuasive than the theoretical value of CAP entitlements presented by SPCA, based on its interpretation of the Regulations. It is noted that SPCA's interpretation of the Regulations is vigorously disputed by the GOI, ANICAV and the EC. The ADC's consideration that the evidence of the EC in respect of the operation of the CAP is more persuasive than the submissions put forward by SPCA, is in my opinion reasonable. I also consider that any criticism that could be levelled at the ADC for a failure to take into consideration and address any of SPCA's contentions relating to this component of SPCA's first ground of review, is not applicable in regard to the reinvestigated finding.

[43] See Section 4.3.1 of the Reinvestigation Report, page 14.

67. SPCA's claim that the ADC failed to examine the Regulations which show that the value of individual historical entitlements is recorded at the time a farmer applies for the total subsidy, therefore fails.

The ADC ignored evidence

68. SPCA contends that the ADC ignored evidence which showed an amount for tomatoes which was similar to the per hectare amount of the subsidy under the BPS.

69. SPCA claims that evidence of the different value of entitlements has been found in an application for assistance under the young farmer provisions with a date relevant for the Reviews, but was ignored. [44] According to SPCA, this document reflects the recording of the value of different entitlements and the tomato payment in the application for assistance is shown as €2,970.87 per hectare. SPCA claims that this is evidence which is more reliable than the selected data supplied by the exporters, as the subsidy applying only to tomatoes is identified.

70. SPCA contends that the actual tomato subsidy was understated when the ADC used average subsidy values applying to other crops, and further contends that the effective subsidy increases, when adjusted for fallow land. SPCA contends that the relevant Regulations were not cited or cross checked to test the assertions of the EC in REP 349/354. Further SPCA alleges that the ADC has used an average single payment value which could not be reliably used as a proxy for the actual tomato subsidy.[45]

71. ANICAV in its submission vigorously challenges this third component of SPCA's first ground of review. It contends that as the alleged evidence submitted by SPCA has no relationship whatsoever with the young farmer provisions or with the CAP in general, and the document referred to is an application form that can be used in order to request financial assistance under a regional scheme

[44] SPCA refers to Document EPR #064b/354.
[45] See Table 2 in paragraph 1.39 of Attachment A of SPCA's application for review, as well as paragraphs 1.33 – 1.41 for SPCA detailed arguments in this regard.

adopted by the Italian region Emilia Romagna.[46] Therefore, according to ANICAV, in light of the purpose and scope of the scheme under discussion, *"it is clear that the amount of € 2,970.87 which is mentioned in the application for assistance quoted by SPCA has no link whatsoever with the direct payments granted to tomato farmers under the CAP*", and further that the values reported in the application form are nothing more than the parameters that should be used to determine the maximum amount of the loans which are eligible for the contribution. [47]

72. ANICAV reasons that SPCA manifestly misinterpreted the document under discussion, and reiterates that the CAP entitlements do not relate to any particular crop.[48] ANICAV also challenges SPCA's claim that the alleged subsidy granted to tomatoes farmers should be doubled as tomatoes cannot be grown on the same land in successive years, as ill-founded, and points out that different crops may be grown on the same piece of land, giving the example of a piece of land grown with tomatoes may be used to grow wheat the following year.

73. The ADC in its submission disputes SPCA's submission that the ADC did not correctly consider the impact of fallow land or SPS payments received in respect of other crops, thereby underestimating the amounts received in respect of raw tomatoes. The ADC confirms that all payments received by the grower were allocated on a per kilogram basis to the actual volume of raw tomatoes sold to Feger and/or La Doria, and refers to its observation in Section 2.5.3 of REP 349/354, that the evidence provided by SPCA relates entirely to the theoretical value of SPS payments being made. The ADC further states that SPCA appears

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[46] ANICAV explains in its submission that the scheme is financed with a modest budget (€ 1,500,000 in total) and is only available to undertakings in Emilia Romagna and the maximum amount of the eligible loans is determined on the basis of fixed parameters including, inter alia, the surface of land owned by each undertaking and the crop(s) produced on that land. See Section 1.3 of AMICAV's submission, pages 9 – 10.

[47] According to ANICAV this means, for instance, that any loan eligible for a contribution under the above-described regional scheme cannot exceed € 2,970.87 per hectare of land used to grow tomatoes, € 726.46 per hectare of land used to grow wheat, etc. See Section 1.3 of AMICAV's submission, page 10.

[48] ANICAV points out that this also affects the arguments developed at paragraphs 1.38-1.41 of SPCA's application for review (including the calculations contained in Table 2) which it contends are based on incorrect assumptions.

to assume that the amount referred to in the "application for assistance" is indicative of the amount which is received by all growers, claiming that the ADC has instead used an average single payment value and has therefore grossly underestimated the amount of subsidy being received. The ADC points out that REP 360 demonstrated that the value of SPS payments actually received by growers supplying to Feger and La Doria varied considerably, from €287 / ha to €3872 / ha and further that there were also a number of growers that appeared to have not received any payment, although these are a very small proportion overall (less than 5 per cent by volume supplied). The ADC therefore concludes that whilst it had regard to the information provided by SPCA in REP 349/354, the ADC preferred to rely on the verified payments actually received by tomato growers and the verified volumes of raw tomatoes subsequently sold.[49]

74. The issue of average single payment value has been addressed above in respect of the second component of the first ground of review and will not be repeated.

75. During the First Conference I sought clarification from the ADC of SPCA's contention that the ADC had not considered the issue of fallow land, noting that it was referred to and explained in the ADC submission to the Review Panel, but not referred to in REP 349/354. The ADC stated that the fallow land claim was taken into account in REP 360, by virtue of the calculation (also referred to in its s.269ZZJ submission), although not explicitly referred to in REP 349/354. It was stated that SPCA's claims broadly fall under Section 2.5.3 of REP 349/354 where essentially it is stated that the findings in REP 360 were correct regardless of SPCA's views on the amount of the subsidy. The ADC repeatedly stated that whilst it had regard to the information provided by SPCA in REP 349/354, it preferred to rely on the verified payments actually received by tomato growers and the verified volumes of raw tomatoes subsequently sold.

76. While AMICAV refuted SPCA's claim relating to fallow land as "ill-founded" and pointed out that different crops may be grown on the same piece of land, I was

[49] See Section 1 of ADC submission, pages 2 – 3.

still was uncertain as to how the ADC treated this issue it in own calculations (based on the actual verified information). In its submission the ADC stated:

> *'In my opinion, a review of the evidence received and calculations undertaken in REP 360 will show that this is not the case. All payments received by the grower were allocated on a per kilogram basis to the actual volume of raw tomatoes sold to Feger and / or La Doria*.' [footnote omitted]

The ADC, in a footnote to the above passage then provided an example of its calculation and stated:

> *'The evidence obtained by the Commission showed that the actual amount paid to the grower was based on a defined land holding, so whether the land was fallow or used to also produce other crops, the total amount received has been captured within this calculation and applied solely to tomato sales.*' [50]

77. Since there was no explicit reference to this issue in REP 349/354, I requested the ADC during its reinvestigation of the findings relating to SPCA's grounds of review to have regard to and take into consideration the contention that the ADC did not correctly consider the impact of fallow land or SPS payments received in respect of other crops.

78. In the Reinvestigation Report, the ADC stated:

> *'The Commission notes Table 2 in Attachment A to SPCA's application, which creates a hypothetical farm growing tomatoes, wheat and maize to illustrate the difference between its approach and the "averaging" approach that SPCA considers was used by the Commission. The hypothetical farm is also intended to show the apparent effect of fallow land; SPCA contends that a doubling of the apparent subsidy amount is required to establish the true impact of CAP payments on raw tomato prices.*

[50] See ADC submission, page 3 and footnote 1.

The Commission rejects SPCA's approach. The Commission has no data pertaining to the actual land area used to cultivate crops, nor what crops were cultivated, by the growers that supplied tomatoes to Feger and La Doria. SPCA's hypothetical farm is therefore not "evidence" of the circumstances of those actual tomato growers and the CAP payments they received.

In the Commission's view, the verified information on which the Commission relied in REP 360 is the more reliable evidence of payments actually received. To accept the amount contended for by SPCA as the amount of the CAP payment actually received in respect of a kilogram of raw tomatoes is to take the most charitable reading possible of the relevant Regulations and SPCA's interpretation of them. As has been noted previously, the EC is vehement in its rejection of SPCA's interpretation. The Commission considers the evidence of the EC in respect of the operation of the CAP to be more persuasive than the submissions put forward by SPCA.'[51]

79. As in the discussions above relating to the first two components of SPCA's first ground of review, I consider that the ADC's analysis in its reinvestigation is thorough (and includes consideration of SPCA's relevant submissions). Its conclusion that the verified evidence of the growers supplying raw tomatoes to Feger and La Doria is more persuasive in establishing the quantum of the CAP payments actually received, than the data presented by SPS which it regarded as circumstantial in nature and theoretical, is in my opinion reasonable. I also consider that any criticism that could be levelled at the ADC for a failure to take into consideration SPCA's contentions relating to this component of SPCA's first ground of review in REP 349/354, would not be applicable in regard to the reinvestigated finding.

Conclusion on SPCA's First Ground of Review

80. In conclusion, since all three components of SPCA's first ground of review, relating to the value of CAP payments received, have been unsuccessful, I

[51] See Section 4.3.1 of the Reinvestigation Report, page 14.

consider that SPCA's first ground of review that the ADC inappropriately relied on data to the exclusion of other data, in totality fails. The decision of the ADC to rely on the verified evidence of the growers supplying raw tomatoes to Feger and La Doria in preference to the evidence presented by SPCA, in establishing the quantum of the CAP payments actually received, is affirmed.

Ground 2: Data from REP 360 not properly analysed leading to incorrect conclusion

81. SPCA contends that the data supplied by Feger and La Doria in REP 360 and applied in REP 349/354 was not properly analysed and led to the incorrect conclusion which was applied to the other exporters.

82. The details of SPCA's claims are set out in its application for review[52] and supplemented by SPCA's submission,[53] the main points of which are:

- The data did not allow an accurate calculation of the income support received by tomato growers, as the SPS payments received and revealed to the ADC related not only to tomatoes but other products as well.
- The ADC used an average value for the single payment, thus the actual value of the tomato entitlement received is reduced, because the value of a tomato entitlement is often higher than other crops.
- The ADC assumed that the farms from which the data was provided only grew tomatoes, and the calculation failed to take into account that the subsidy per hectare is still paid for a tomato plot that is at rest, thus understating the tomato payment.
- The ADC was allowed limited access to the AGEA website which showed the total subsidy received by each farm and could also reveal how the single payment was comprised.
- As part of its analysis, the ADC considered whether growers that received an SPS payment would be selling tomatoes at a lower price, which demonstrated a lack of understanding of the SPS as an income support

[52] See paragraphs 1.44 to 1.61 of Attachment A of SPCA's application for review.
[53] See paragraphs 2.1 to 2.23 of SPCA's submission.

payment based on historical values sheltering tomato growers from any shortfall in the tomato farm income due to negotiated price variability.

- Even though the data was flawed, the ADC's finding of a subsidy of €0.0142/kg is a significant proportion of the negotiated price for tomatoes, being 15.4%, the magnitude of which the ADC did not examine.
- The negotiated price of tomatoes does not reflect a competitive cost.
- The data analysed in order to show a relationship between the average SPS value and the negotiated market price was not suitable for a regression analysis and certain fundamental conditions relating to regression analysis were not present.
- SPCA's expert analysis on the errors made by the ADC in using a regression analysis were ignored as the ADC was of the view that it was not appropriate to comment on the interpretation of data from REP 360 even though it was applied in REP 349/354.

83. I note that many of these contentions were set out in SPCA's submission to the ADC of 14 March 2017[54] in commenting on SEF 349/354. A number of these contentions have already been addressed in SPCA's first ground of review.

84. The ADC in its submission:

- confirms that it considers that any SPS payments received in respect of fallow ground and / or for other crops have been included in the calculation, and clarified that it accepted the submissions by the EC that the SPS payments made are in respect of the land holding, rather than the crops actually grown; and
- clarifies that if a grower received an SPS payment and did not, in fact, produce tomatoes in that year (either due to the production of other crops or leaving the ground fallow), those growers would not be present in the data provided by Feger and La Doria (as no tomatoes would have been supplied).*[55]*

[54] See Document #063, EPR 354.
[55] See ADC submission, page 3.

85. The ADC also notes SPCA's argument that, but for the subsidy, tomato farms are not economic and therefore the subsidy bolsters farm incomes (which in turn means that the negotiated price for raw tomatoes is artificially low). The ADC states that the argument has been put in similar terms previously, with SPCA ultimately concluding that Italian farms growing tomatoes would be unprofitable if not for the SPS.[56] It states:

> *'On a practical level, the Commission's analysis is inevitably limited to the evidence which it has obtained; to address SPCA's argument completely would require the Commission to now also obtain evidence relating to the SPS payments received by, and the profitability of, the growers which supplied raw tomatoes to the cooperating exporters in the reviews of measures, and to then consider whether farms are profitable generally (i.e. without the SPS payment) in order to apply those findings to all exporters the subject of REP 349/354. I note that such information was not provided by the growers to those cooperating exporters and therefore was not provided to the Commission. Having found that the SPS payments received did not distort the costs paid by Feger and La Doria, two of the larger purchasers of raw tomatoes from amongst the exporters examined in these cases, I submit that it was reasonable to conclude that there was no distortion to raw tomato prices caused by the SPS generally.*'[57]

86. ANICAV states that its view is that SPCA does not want to understand that the SPS entitlements are not linked to a particular crop, and therefore calculating the amount of the direct SPS payments specifically relating to tomatoes is just not possible. Further, ANICAV states that the argument that the ADC '*failed to take into account that the subsidy per hectare is still paid for a tomato plot that is at rest*' is also pointless and points out that when a piece of land cannot be used to grow tomatoes, other crops (typically, wheat) are produced on that land. Finally, ANICAV wonders how SPCA can argue that the '*the tomato price of €0.092 kg is not a competitive price'* when that price is amongst the highest prices in the

[56] The ADC is referring to Document #070 of EPR 276).
[57] See ADC submission, page 4.

world, and it is also significantly higher than the price SPCA pays to Australian tomato farmers for the supply of raw tomatoes. It contends that this simple fact suggests that SPCA's claims are ill-founded.[58]

87. I also note that the contentions in relation to this ground of review (except for those reflected in the last three bullet points in paragraph 82 above) have already been addressed under the various components of SPCA's first ground of review, and were also addressed in some way by the ADC in REP 360, SEF 349/354, REP 349/354 or the Reinvestigation Report. With regard to the various components of SPCA's first ground of review that address these claims, I have found the ADC's approach, analysis and methodology to be reasonable. The same is applicable to SPCA's second ground of review, which is also rejected.

88. However, the same does not apply to SPCA's claims reflected in the last three bullet points in paragraph 82 above. I will therefore deal with these three points relating to SPCA's arguments on the data and analysis used in REP 349 which originated in REP 360, under SPCA's fourth ground of review below.

Ground 3: The Feger and La Doria analysis is inconsistent with other information

89. SPCA contends that when compared with other data, the Feger and La Doria analysis, used in REP 360 and applied to REP 349/354, is inconsistent with other information and should not have been used in the reviewable decision.

90. SPCA summarises what it considers to be the inconsistences, in Table 3 of its submission. The table compares: (i) values used in REP 349/354 (as imported from REP 360) (ii) values used in REP 349/354 adjusted for the effect of the per hectare subsidy 'doubling' paid on land that is 'resting' (iii) values calculated by SPS using the subsidy per hectare from the application for assistance document (iv) values used in REP 276 for the calendar year 2014.[59]

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[58] See Section 2 of ANICAV submission, pages 11 – 12.
[59] See paragraphs 1.64 to 1.74 and Table 3 of SPCA's application for review for details of SPCA's arguments in respect of its third ground of review.

91. ANICAV in commenting on SPCA's third ground of review states:

> *' …….this ground of review is ill-founded insofar it has been demonstrated that the information relied upon by SPCA is out of date and/or incorrect'.*

In particular ANICAV notes that the 'ad hoc' national fund dedicated to tomatoes no longer exists, as it has been integrated into a single national fund aimed at financing the payments granted under the SPS (now BPS). Also the SPS/BPS entitlements give farmers the right to receive a direct payment, irrespective of the crop(s) produced, and the volume of production. Therefore, entitlements relating to tomatoes do not exist under the current legislative framework. Further, ANICAV states that it is not true that the land used to grow tomatoes in a given year must necessarily rest the following year, as it can be used to grow other crops such as wheat, and vice-versa. ANICAV concludes that the calculations contained in Table 3 of SPCA's application for review are meaningless, and should be disregarded.[60]

92. Having already addressed and challenged a number of the conclusions reached by SPCA, the ADC states in its submission:

> *'The Commission does not consider that the historical data referred to by SPCA, that is, relating to periods prior to the review period in REP 349/354 and the investigation period in Anti-Dumping Commission Report No. 276 (REP 276) and as reinvestigated in REP 360, is a sufficient basis on which to overturn the verified evidence of actual SPS payments received.'* [61]

93. The ADC in its submission refers to SPCA's claim that the total "ceiling" amount of the SPS for tomatoes (approximately €187 million) has been paid to growers of tomatoes. It states:

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[60] See Section 3 of ANICAV's submission, page 13.
[61] See ADC's submission, page 3.

'there is no evidence that this has actually occurred, and it is a claim that has been emphatically disputed by the EC. As a result of verifying the actual amounts paid to growers in REP 360, the Commission did not consider it necessary to resolve this disputed fact.' [62]

94. I consider that the comparisons made and the conclusions reached by SPCA are all based on information provided by SPCA in Investigation 354 and in this review, which have been refuted by the ADC, ANICAV, the Italian Government and the EC, or are not relevant in the light of the ADC's preferred methodology used and the verified data that it chose to rely on.[63] I consider the ADC's analysis and approach to be reasonable and SPCA's third ground of review therefore also fails.

Ground 4: The ADC ignored SPC's arguments on the data and analysis originating in REP 360

95. SPCA contends that the ADC did not take into account SPCA's arguments on the data and analysis used in REP 349/354 which originated in REP 360. In this regard SPCA refers to the ADC's statement in REP 349/354:

'The Commission notes that the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not consider it appropriate to revisit the interpretation of the data from REP 360 in these reviews.'[64]

96. SPCA also refers to the ADC's statement in REP 349/354, in reference to REP 360:

'*The Commissioner's Report (Anti-dumping Commission Reinvestigation Report No.360 or REP 360) found that the CAP payments received by*

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[62] See ADC's submission, page 3.
[63] See the consideration of the three components of SPCA's first ground of review as well as its second ground of review.
[64] See REP 349 & 354, page 14.

*growers of raw tomatoes **did not appear to influence** the prices paid by Feger and La Doria. **In the absence of any further evidence** to the contrary, the Commissioner found that the raw material cost of tomatoes reported in the accounting records of Feger and La Doria reasonably reflected a competitive market cost, and therefore recommended that no uplift be applied in the dumping margin calculation.'* [65](emphasis added by SPCA)

97. SPCA contends that the words "*did not appear to*" and *"in the absence of any further evidence to the contrary"* suggest that the ADC reached a tentative conclusion on the material it examined in REP 360. SPCA submits that it was not given the opportunity to comment on the ADC's analysis before REP 360 was given to the Review Panel.

98. SPCA further contends that during the review it provided the ADC with information that had not been considered in REP 360 as the period of the investigation was different and there was a new subsidy scheme in that period. SPC also submits that it provided expert opinion on the use of a regression analysis and how those statistical conclusions were not suitable for the review of all other exporters in REP 349/354. The incorrect use of an average value for the examination of the tomato subsidy in the review and other matters were also brought to the attention of the ADC by SPCA.

99. SPC contends that the Act does not endorse the ADC's interpretation that it is not appropriate to revisit the interpretation of data from REP 360 which was applied in REP 349/354. In this regard, s.269ZD(2) of the Act states:

Subject to subsection (3), in formulating the statement of essential facts, the Commissioner:

(a) must have regard to:

(i) the application or request; and

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[65] See REP 349 & 354, page 9.

(ii) any submissions relating generally to the review that are received by the Commissioner within 40 days after the publication of the notice under subsection 269ZC(4), (5) or (6); and

(iii) any other submission received by the Commissioner relating generally to the review if, in the Commissioner's opinion, having regard to the submission would not prevent the timely placement of the statement of essential facts on the public record; and

(b) may have regard to any other matters that the Commissioner considers relevant.

100. SPCA emphasises that s.269ZDA(3)(b) demonstrates that the Commissioner "*may have regard to any other matter that the Commissioner considers to be relevant to the review"* when deciding on recommendations to be made to the Minister and submits that the Act does not preclude matters to be considered because they have formed part of another report. SPCA points out in this regard that new information may have been presented and circumstances may have changed since the completion of that report.

101. I consider that SPCA's reading and interpretation of s.269ZD(2) is correct and that the Commissioner is required to take into consideration ("*must have regard to*") any submission relating to the review received within the statutory timeframe irrespective of whether it relates to matters that have formed part of another report, that has been accepted by the Review Panel and confirmed by the Minister. While the ADC is also correct in its statement that the findings in REP 360 also fall into the category of "*any other matters that the Commissioner considers relevant*", and it is clear that the Commissioner considered REP 360 to be relevant and was entitled to have regard to it in making a decision. However, that does not detract from the statutory right of SPCA to have its submissions considered in the context of Investigation 354, including its critical comments on REP 360.

102. I shall now examine whether relevant submissions of SPCA in Investigation 354, were taken into consideration by the ADC.

103. ANICAV submits that the ADC did not ignore the new evidence submitted in the framework of Investigation 354, as alleged by SPCA, but analysed that evidence and decided to disregard it. ANICAV contends that this was the correct approach since the evidence provided by SPCA was pointless or even misleading, as it demonstrated in other parts of its submission. [66]

104. The ADC in response to SPCA's fourth ground of review states:

> *'The Commission considers that SPCA is selectively quoting from REP 349/354 to suggest that there is some doubt or uncertainty about the findings in REP 360 and their application to the Reviewable Decisions. Apart from the practical impediments to doing so (requiring the voluntary cooperation of growers supplying raw tomatoes to the cooperating exporters in REP 349/354), the new information provided by SPCA was not considered compelling in reaching a different conclusion regarding the quantum of SPS payments actually received by growers, as was explained in section 2.5.3 of REP 349/354. Having established that growers obtained prices which were not influenced by the SPS, the Commission concluded that the costs were competitive – and for the reasons set out in REP 349/354, these findings were equally attributable to the present circumstances.'* [emphasis added] [67]

105. The emphasised portions of the above statement from the ADC's submission, seem to indicate, contrary to the statement from REP 349/354, that the ADC took SPCA's submissions regarding REP 360 into account, but did not find its arguments compelling. This is repeated in other parts of the ADC submission:

> *' …..whilst the Commission had regard to the information provided by SPCA in REP 349/354, the Commission preferred to rely on the verified*

[66] See Section 4 of ANICAV's submission for its detailed argument, page 14 - 15.
[67] See Section 4 of the ADC's submission, page 5.

payments actually received by tomato growers and the verified volumes of raw tomatoes subsequently sold."[68]

106. Turning to the section of REP 349/354 that the ADC referred to, it would appear that aspects of SPCA's submissions, particularly relating to the quantum of CAP payments, were undoubtedly taken into consideration, and as indicated by the ADC were not considered compelling and sufficient to detract from the findings in REP 360, and the preference of the ADC to use the verified payments to the growers which supplied Feger and La Doria, rather than theorical value of SPS payments as submitted by SPCA.

107. The ADC further refers to and addresses SPCA's submissions with regard to contracts for pricing of tomatoes between growers and producers of PPTs and its contention that tomato growers *"would not survive if not for the historical tomato payment*". It is also evident from SEF 349/354 that the ADC took into consideration and addressed SPCA's submissions relating to evidence on SPS payments, relied on in REP 276, but considered these findings to have been superceded by the findings made in REP 360. In SEF 349/354 the ADC also detailed its findings in REP 360 and the reasons for their applicability to REP 349/354.[69]

108. However, I was unable to find any indication in SEF 349/354 or REP 349/354 that the ADC took into consideration SPCA's detailed comments on the use of a regression analysis in REP 360 and how those statistical conclusions were not suitable for the review of all other exporters in REP 349/354. In its submission, the ADC stated:

> '*Further, the Commission considers that the critique of the Commission's data and statistical analysis in REP 360 (refer to para 1.58 of SPCA's application and following paragraphs) is limited. As the expert appointed by SPCA was unable to access the underlying data*

[68] See last sentence of Section 1 of the ADC's submission, page 3.
[69] See Section 3.2 of SEF 349/354, pages13 – 16.

due to its confidential nature, its analysis is based on charts with no axis markings and the Commission's explanation of its approach.'[70]

109. These observations by the ADC, would, however, appear to be subsequent to the decision being made in REP 349/354, and cannot be considered evidence that the ADC had regard to SPCA's submissions in relation to the data and statistical analysis in REP 360.

110. During the First Conference I requested clarification as to whether the ADC took into consideration SPCA's critical comments on the regression analysis used in REP 360. The ADC stated that it was convinced of the correctness of its analysis in REP 360 and its application to the Reviews, particularly in the light of the fact that the ADC found little, if any, link between the amount of SPS received and the price of tomatoes. The ADC, however, agreed that the critique of the data and statistical analysis is limited in REP 349/354 and that there is nothing in the report that specifically deals with SPCA's criticisms regarding that analysis. [71]

111. I therefore decided to request the ADC to reinvestigate its findings with regard to REP 360 and its application to REP 349/354, taking into consideration SPCA's submissions in the course of Reviews 349/354 relating to its critical comments on the regression analysis used by the ADC in REP 360, including the unsuitability of the data for a regression analysis and the absence of certain fundamental conditions relating to regression analysis. In this regard, I requested the ADC to take into consideration SPCA's relevant submissions to the ADC during the Reviews, other relevant information and documents and as well as other interested parties' relevant submissions to both the ADC and the Review Panel.

112. In the Reinvestigation Report the ADC stated that it subsequently had regard to the submissions made by SPCA regarding the statistical analysis of the CAP payments received by each grower and its previous assessment of the degree to which CAP payments influenced the prices paid for raw tomatoes. It points out

[70] See Section of the ADC submission, page 4.
[71] See First Conference Summary.

that the degree of influence is relevant to assessing whether the cost of raw tomatoes recorded in Feger and La Doria's accounting records reasonably reflect a competitive market cost. According to the ADC the significant question is whether the statistical analysis of the verified data obtained from Feger and La Doria provides any basis for reaching a different conclusion to the one reached in REP 360.

113. The ADC stated in the Reinvestigation Report that noting SPCA's criticisms concerning "*influential price outliers and variations in the spread of the data (heteroscedasticity)"* and other matters raised in its submission on the statistical analysis presented in REP 360, the ADC re-examined the data presented to it. The new analysis controlled for tomato type, month of the year and order size and used a *"robust standard errors"* technique to address these concerns. The ADC stated that it accepts that this ought to have been part of the statistical analysis relied on in REP 360, and that taking this approach increases the reliability of the results. The ADC's full analysis was included at Confidential Attachment 1 to the Reinvestigation Report.

114. The following is a summary of the ADC's methodology, analysis and conclusions resulting from its reinvestigation, as contained in the Reinvestigation Report and Confidential Attachment 1:

- ADC examined the effect of CAP payments at the order (i.e. per invoice), farmer, cooperative and association levels, using only the data provided by Feger as it was sufficiently detailed to enable the level of analysis required. As a result, the ADC was able to weight the responses of individual suppliers in proportion to their market share (in terms of their supply to Feger).
- The incorporation of other information not in the ADC's possession (such as other crops produced, actual area of land under cultivation, actual tomato yield rate and greater detail on the types of tomatoes actually produced and sold, not just to Feger and La Doria but to other processors) would have provided additional confidence in this type of analysis.

However, there is no timely or practical means by which the ADC would be able to obtain this information. The ADC pointed out that its analysis nevertheless generates an r^2 of 0.9638, which suggests the additional information would have little practical impact. [72]

- At the farmer level, and only when observations have been weighted by their market share, the effect of CAP payments on the prices obtained by growers for raw tomatoes purchased by Feger is statistically significant, but small. This suggests that many farms do not reduce prices in response to the subsidy, but those that do happen to supply more tomatoes to Feger. The ADC also notes that decisions on tomato production (both to produce at all and the amount of land to allocate to cultivating tomatoes) are made at the farm level, and that there is no evidence to suggest that these decisions are influenced by the cooperatives or associations / producer organisations of which farmers are members.
- The ADC notes that tomato prices are negotiated by the associations on behalf of growers (and that a more statistically significant correlation between CAP payments and prices occurs at that level). Whilst this suggests that associations may be aware of the value of CAP payments received by their growers, the ADC's analysis does not account for the impact of aggregating and averaging across farmers, and further, this result does not make economic sense - as the size of the seller increases (from farmer to cooperative to association), it would be expected, based on economic theory, that the sellers' bargaining power compared to the purchaser (the tomato processor) would increase and the pass-through of the subsidy would be less, rather than more. This suggests that the impact of another, unidentified variable is causing the impact of CAP payments on raw tomato prices at the association level to be overstated. Accordingly, the ADC considers that the more reliable analysis is undertaken at the farmer level.

[72] The ADC states that r2 value explains how much the movement in one factor can be used to explain movement in the other, and is expressed as a fraction of 1 (i.e. a perfect explanation will be 1 and no correlation at all will be zero). This 0.9638 indicates a high degree of correlation.

- The 'upshot' of the ADC's analysis of the impact of CAP payments at the farmer level is that 8.4 per cent of the value of CAP payments received by growers is passed on to a reduced raw tomato price. REP 360 established that the weighted average value of CAP payments received by growers supplying Feger was €0.0142 / kg, based on the verified evidence of actual payments received. Accordingly, the ADC has concluded that the amount of the CAP payment that has been passed through to tomato prices paid by Feger is approximately €0.00112 / kg. The ADC therefore considers that CAP payments have had a negligible impact on the prices paid for raw tomatoes by Feger.

115. The ADC, however, stated that the absence of greater detail on the circumstances of these farms means that, whilst it has confidence in the accuracy of the analysis of the information before it, some caution must be exercised:

    - a change in the actual yield rate achieved by each grower would fundamentally impact the assessment;
    - whilst the analysis is indicative of the circumstances of the growers supplying Feger and the apparent negligible impact of CAP payments on the prices paid by Feger, the ADC does not consider that the regression analysis alone is sufficient to determine that the cost of tomatoes as recorded by Feger <u>are</u> competitive market costs;[73] and
    - The detailed analysis for Feger has little, if any, application to the circumstances which may prevail for La Doria or any other processor.

116. The ADC then proceeded to develop and complete its argument, restating passages from REP 360 indicating the following:

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[73] In the Reinvestigation Report this sentence reads:
'*The Commission does not consider that the regression analysis alone is sufficient to determine that the cost of tomatoes as recorded by Feger are <u>not</u> competitive market costs.'* (emphasis added).
During the Third Conference the ADC clarified that the insertion of the word "not" was an inadvertent error.

- there was no evidence to indicate that raw tomatoes were sold to Feger and La Doria at prices which were below cost, nor otherwise than at arms length;
- the ADC was not aware of any evidence of other influence over the market for raw tomatoes being exerted by the GOI or the European Union that would artificially depress prices for raw tomatoes; and
- there was no evidence to suggest that the producer organisations were influencing the market in such a way that would artificially depress prices for raw tomatoes.[74]

117. The ADC states further that no evidence was presented to it at any stage of the original investigation, the reviews of measures or the reinvestigation which would suggest that the bargaining which occurs between associations and tomato processors is not competitive. On the contrary, it states, the evidence before the ADC is that there are a large number of buyers and sellers in the market for raw tomatoes (265 growers across 11 producer associations supplied to Feger, which is just one amongst over one hundred previously identified exporters of PPT to Australia) which indicates a competitive market. Accordingly, the ADC concludes that the weight of the evidence before it indicates that the cost of raw tomatoes recorded by tomato processors are competitive market costs.

118. After reviewing the Reinvestigation Report relating to this issue and Confidential Attachment 1, I sought clarification from the ADC during the Third Conference on a number of issues relating to its methodology, analysis and conclusions.[75] I was satisfied with the clarifications and explanations of the ADC relating to the statistical analysis in the Reinvestigation Report, which I consider to be comprehensive and thorough. I was also satisfied that the ADC had taken note of SPCA's criticisms of its statistical analysis of the data in REP 360. The ADC re-examined and analysed the data, controlling for various factors and using various techniques to address SPCA's concerns, accepting that it ought to have

[74] This was a reference to REP 360, page 33 – 34.
[75] See Third Conference Summary.

been part of the statistical analysis relied on in REP 360. It was recognised that while taking this approach increases the reliability of the results, it also narrows the application of any findings.

119. The ADC ultimately reached the same conclusion as in REP 360, although less definitive and with a narrower application. In REP 360 the ADC found that there was no (or little) correlation between the CAP payments to the farmers and the price of raw tomatoes sold to the Feger and La Doria, while in its reinvestigation it concluded that that CAP payments had a *negligible impact* on the prices paid for raw tomatoes by Feger. Whilst expressing confidence in the accuracy of the analysis of the information before it, the ADC also made some cautionary statements relating to variable factors that could affect the assessment and its application to other exporters besides Feger.

120. It should be borne in mind that the relevant provision dealing with 'competitive market costs', s.43(2) of the *Customs (International Obligations) Regulation 2015* (CIO Regulation)[76] requires a judgement by the Minister (and therefore the Commissioner) as to whether the records of an exporter *"reasonably reflect market costs*" associated with the production or manufacture of like goods. There is no indication in the legislation that it must be definitively clear to the Minister or Commissioner that the records of the exporter reflect competitive market costs.

121. Nicholas J in *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs* [2015] FCA 885 *(Dalian)* confirms his previous view with regard to Regulation 180(2), the predecessor provision to s.43 of the Regulation, and quotes from his own judgement in the *Panasia Aluminium (China) Ltd v Attorney-General of the Commonwealth* [2013] 217 FCR 64 *(Panasia):*

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[76] Section 43(2) provides:
" *If:*
(a) an exporter or producer of like goods keep records relating to the like goods; and
(b) the records:
(i) are in accordance with generally accepted accounting principles in the country of export; and
(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;
the Minister must work out the amount by using the information set out in the records.

'... the question which is required to be answered for the purposes of reg 180 is whether the relevant records reasonably reflect competitive market costs associated with the manufacture or production of the relevant goods. Implicit in the CEO's finding is an approach to reg 180(2) which recognises that the implementation of government policy may drive down particular costs associated with the manufacture or supply of goods such that the costs might not only reflect the ordinary effects of supply and demand but also reflect the impact of government policy aimed at increasing or reducing supply or demand. In my view, this approach was open. In particular, it was open to the CEO to conclude that in the circumstances which he found to exist, the cost of primary aluminium did not reasonably reflect "competitive market costs" .....' [77] (emphasis added)

122. While in both Panasia and Dalian, the respective applicants were challenging the CEO's conclusion that the records relating to the like goods did not "reasonable reflect competitive markets costs", His Honour's statement appears to confirm that the relevant provision necessarily involve matters for judgement, and that the discretion of the Minister (and the Commissioner) is wide. Applying this principle to the decision of the Commissioner in the present review, it would seem to me that in considering the evidence (which was not definitive) it was reasonably concluded that the weight of the evidence indicated that the cost of raw tomatoes recorded by tomato processors are competitive market costs. I consider that it was open to Commissioner to do so.

123. For the reasons referred to above, I consider that the methodology, analysis and conclusions of the ADC in its reinvestigation to be comprehensive and reasonable, and not subject to the same criticisms as REP 360 read together with REP 349/351. SPCA's ground of review in this regard therefore fails. Therefore the reinvestigated decision of the ADC that the cost of raw tomatoes

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[77] *Dalian Steelforce Hi-Tech Co Ltd v Minister for Home Affairs [2015]* FCA 885 at paragraphs [41-42] and *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870, at paragraph [91].

recorded in Feger and La Doria's accounting records reasonably reflects a competitive market cost, is reaffirmed.

Ground 5: Conclusion on arm's length sales not based on an examination of exporter's accounts

124. SPCA contends that the ADC's conclusion that an exporter was selling at arm's length was not based on an examination of the exporter's accounts and therefore the ADC could not investigate the claims made in the confidential application for review, with the exporter not being a selected exporter and not a residual exporter.

125. SPCA states that in confidential attachment 4 to the review application, SPC explained that the named exporter had supplied PPTs in 400g cans which had similar (and sometimes lower) retail prices in the Australian market prior to the imposition of the 26.35% dumping duty in April 2014. SPCA claims that it demonstrated what the impact on the retail price could be if dumping duties were applied. SPCA then refers to the ADC's conclusion in REP 349/354 that the sales by the importer were found to be profitable and that no evidence was found to support a theory that the exporter was reimbursing dumping duties, thus the ADC regarded the sales in question as arms length and did not treat them as being at a loss.[78]

126. SPCA contends that if the ADC did not actually examine the relevant financial data then there is no justification to state there is no evidence of that fact. SPCA states that evidence in this regard was not referred to in SEF 349/354 and accordingly in SPCA's response to the SEF it questioned if the matter had been addressed.

127. In response to this ground of review the ADC in its submission stated:

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[78] See section 2.5.12 of REP 349 & 354, page 21 and paragraphs 1.92 to 1.94 and Table 5 of SPCA submission.

'*The claims made by SPCA are referred to in REP 349/354 at section 2.5.12. I can confirm that this ground was investigated in the course of the reviews of measures, and that there is no factual basis to the allegation. My reasons for so finding are included at Confidential Attachment 1*.'[79]

128. I examined Confidential Attachment 1 to the ADC's submission with regard to SPCA's fifth ground of review, which sets out the approach taken by the ADC in investigating SPCA's claim in its confidential application. I was satisfied that the ADC's investigation of this claim was comprehensive and that its finding that the claim had no basis in fact, was reasonable. Therefore, SPCA's fifth ground of review does not succeed.

Ground 6: The assessment that there was no market situation was not sound

129. SPCA contends that because of the errors in the ADC's understanding of the SPS in 2014 and the new BPS in 2015 the assessment that there was no market situation was not sound.

130. SPCA sets out what it considers as errors in the ADC's understanding:
    - The ADC examined 'average' SPS payments which covered subsidies for tomato and other crops/livestock. The actual tomato subsidy was not properly examined and the effect of the subsidy on the price paid by tomato processors for raw tomatoes was ignored.
    - The ADC did not take into account the increased influence of the GOI on the tomato sector in 2015 with the introduction of a payment to the tomato farmer coupled to raw tomato production and a contract with a processor.
    - The tomato subsidy was understated due to the fact that a historical tomato payment was still paid on fallow land.
    - The ADC's analysis in REP 349/354 did not identify the importance of the subsidy to a farm growing tomatoes.

[79] See section 5 of ADC's submission, page 5.

131. SPCA in Table 6 of its application for review sets out a comparison of various subsidy calculations. SPCA states that it shows the subsidy as a percentage of the selling price of raw materials (after taking into account REP 360), found to be 14.5% in REP 349/354. SPCA claims this is a significant subsidy but was not fully analysed as the ADC incorrectly used regression analysis in its examination of the effects of the subsidy. Further, SPCA claims that despite knowing that the subsidy was paid on fallow land the ADC did not adjust its data, which would have increased the subsidy to 31.5%. SPCA submits that if the subsidy was based on the known amount of the tomato payment and the effect of fallow land is taken into account then the subsidy is nearly the same as the price paid by the processors to purchase raw tomato (88% of the raw tomato price).

132. SPCA further contends that the tomato subsidy is a significant element of the economics of growing tomatoes in Italy. It contends that this subsidy is a result of a directive from the Government of Italy to ensure supply and continuing investment in the tomato crop required by tomato processors, and that if the subsidy was not paid then tomato processors would have to increase the price paid to the growers of tomatoes.

133. SPCA's opinion is that a tomato farm cannot be economic without the subsidy and that the farmer cannot offset the subsidy with a higher price from the processors. Therefore, it concludes that the raw tomato price paid by the processors is a distorted price directly linked to a government mandate and that the market for processed tomato should be considered to be a market situation.

134. The GOI in its submission states:

> '*as regards SPCA's claim that a "market situation" would exist in the Italian market for PPTs, it is worth recalling that this matter was analysed in detail in the framework of investigation No. 276, and the conclusion was negative. In particular, the absence of "market situation" was confirmed by an independent expert appointed by the Anti-Dumping Commission. The conclusions reached by the expert and confirmed by REP 276 cannot be*

questioned on the basis of the unsubstantiated allegations made by SPCA.'[80]

135. ANICAV submits that the allegations of SPCA are ill-founded and should be rejected for the following reasons:

- It has been demonstrated that the analysis carried out by SPCA is flawed as it is based on out of date and/or incorrect information and, on a wrong understanding of the CAP.
- The coupled support to tomato farming introduced in 2015 is negligible and the available evidence demonstrates that it has not produced distortive effects.
- SPCA's claim that a 'market situation' would exist in the Italian market for PPT's is based on the assumption that 'a tomato farm cannot be economic without the subsidy. However, a tomato farm 'as such' does not exist as all tomato farmers also grow other crops as a piece of land cannot grow tomatoes for two consecutive years. Therefore, SPCA's claim that a historical tomato payment was still paid on fallow land which means that the subsidy was understated, is ill-founded.
- A comprehensive assessment was made in Investigation No. 276 to establish whether a 'market situation' exists, and the conclusion was negative, confirmed by an independent expert appointed by the ADC. [81]

136. In REP 349/354 it is stated:

'The Commissioner has considered SPCA's market situation claim, as well as other information considered relevant pursuant to subsection 269ZDA(3)(b). The Commissioner has considered the submissions and other evidence relating to market situation claims in Investigation 276 in these reviews of measures, given that both cases concern the same

[80] See GOI submission, page 2.
[81] See Section 6 of ANICAV's submission, pages 15–16.

market, the same country, and the same goods. The time periods considered in both cases are similar to one another. After considering the available evidence, the Commissioner is of the view that there is not a market situation in Italy such that sales in that market are not suitable for determining a price under subsection 269TAC(1).'[82]

137. In its submission the ADC states:

'The Commission explained its reasons for not finding a market situation in Section 2.5.3 of REP 349/354. The Commission considers that the evidence presented by SPCA was considered in the course of the reviews of measures and was not preferred, and therefore I consider that there is no basis for reaching a different conclusion.'[83]

138. It appears that in Investigation No. 276, the ADC conducted a full evaluation of whether there was a particular situation in the market in Italy that made sales of PPT's in that market unsuitable for use in determining a price under subsection 269TAC(1). After conducting a comprehensive investigation taking into consideration all available relevant evidence, including expert advice, the ADC concluded that in its view there was not a particular market situation.[84] The ADC considered SPCA's market situation claim in Reviews 349/354 together with other relevant information, including the submissions and other evidence relating to market situation claims in Investigation 276, given that both cases concerned the same market, the same country, the same goods and similar time. The ADC concluded that there was no basis for reaching a different conclusion in Reviews 349/351.

139. A number of the arguments in SPCA submissions in regard to market situation were similar to SPCA's challenge of the ADC's finding relating to competitive market cost, and were considered by the ADC in REP 349/354 and in the

[82] See Section 2.5.3 of REP 349/354, page 15.
[83] See Section 6 of the ADC submission, page 5.
[84] See Section 6.3.3 of REP 276 and Appendix 1 thereto.

Reinvestigation Report, as well as being strongly contested by the GOI, ANICAV and the EC. For the reasons discussed above, SPCA's grounds challenging the quantum of the SPS payments as well as the effect of the payments on the price of raw tomatoes sold to the processors have not been accepted and the ADC's conclusion that the cost of raw tomatoes recorded in the exporters' accounting records reasonably reflects a competitive market cost, is reaffirmed.

140. Therefore, having regard to REP 276 and its Attachment 1, as well as SPCA's submissions to the ADC and the Review Panel as well as those of other parties, I consider that the ADC's conclusion that it was not satisfied that there is a situation in the market in Italy for prepared or preserved tomatoes that makes sales of prepared or preserved tomatoes in that market unsuitable for use in determining a price under subsection 269TAC(1), is reasonable. SPCA's sixth ground of review therefore fails.

Issue Arising from SPCA's Submission

141. In the introduction to SPCA's s.269ZZJ submission to the Review Panel it was stated:

> *'As a procedural matter, SPC wishes to draw to the attention of the Panel Secretariat that the Panel Member examining this reviewable decision is the same Panel Member who examined the reviewable decision in ADRP Report No.35 (5 January 2017). That ADRP Report accepted the findings of REP 360. The methodology and conclusions of REP 360 were applied in REP 349 & 354 and the criticism and appropriateness of that methodology is a significant part of SPC's submission that some of the conclusions in REP 349 & 354 were not the correct or preferable decisions.'* [85]

142. The Review Panel noted these comments. It was also noted that SPCA stated that it was merely drawing this "*procedural matter*" to the attention of the Review Panel Secretariat. The Review Panel does not consider this to be a formal

[85] See SPCA submission, page 1.

objection to the relevant Review Panel Member conducting the review as no proper basis for such an objection was set out in SPCA's submission.

143. The Review Panel in any event considers that it cannot be a valid objection that a Review Panel Member has already considered some of the issues in a previous review. There are too many reviews involving the same industry, industry players or the same issues for there not to be cases where the same Review Panel Member deals with the particular industry or issues more than once.

Conserve Italia

144. I will now deal with the grounds of review put forward by Conserve Italia.

Ground 1: The ADC wrongly included certain sales in the normal value calculation

145. Conserve Italia submits that the ADC wrongly included certain domestic sales in the normal value calculation of a particular model, thus causing a distorted assessment of Conserve Italia's dumping margin in REP 349/354. Conserve Italia further submits that the Minister, in turn, accepted the ADC's recommendations drawn up on the basis of such "*inaccurate assessment*", thereby creating an unfair result for Conserve Italia.

146. This ground of review will be considered under the two sub-headings used by Conserve Italia in its application for review.

Sales of a certain brand should be excluded from the normal value calculation

147. Conserve Italia contends that despite the ADC distinguishing between (i) premium-brand sales (under CIRIO trademark) and (ii) private-label sales, for the purpose of model matching for the dumping margin calculation,[86] the ADC included Conserve Italia's domestic sales of a particular brand to calculate the

[86] Conserve Italia refers to Section 2.3 of its Verification report.

normal value of the product model, which concerns private-label sales. Conserve Italia contends that this is not correct, since the brand concerned is a brand (i.e. a trademark) owned by Conserve Italia, like CIRIO (even though CIRIO is an historical brand with a much higher value).

148. Therefore, Conserve Italia contends that as treated in its domestic sales table submitted in response to the anti-dumping questionnaire, the particular brand of the product model concerned should be treated as brand products and not private-label products. Conserve Italia states that this is clearly confirmed by a very simple price analysis with the average unit ex-works sales price of the private-label product being lower than price of the particular branded product. [87]

149. Conserve Italia further submits that the particular branded product is not exported to Australia, and as a result, is not comparable to the private-label product produced by Conserve Italia and sold on the Australian market. Therefore, Conserve Italia claims that a fair normal value calculation should not include these sales among the private-label sales of this particular product model made on the domestic market.

150. Conserve Italia notes REP 349/354 simply disregarded the above claim without providing any solid ground for the rejection thereof, except for the timely completion of the investigation. Conserve Italia states that such a procedural ground is ill-founded and the ADC had sufficient time to complete the final report as the relevant claim was raised as soon as possible, that is, just 3 working-days after the disclosure of the dumping calculations by the ADC, which took place before the publication of the SEF 349/354. Further, Conserve Italia contends that the claim was reiterated in Conserve Italia's response to the SEF.

[87] See Section 1.1.1 of the Confidential application of review of Conserve Italia, page 5, for details of the particular brand and product model as well as the relevant calculation referred to.

151. I could find no reference to this particular issue in SEF 349/354 or in REP 349/354, or in Conserve Italia's submissions following SEF 349/354.[88] In its submission, the ADC stated with regard to Conserve Italia's first ground of review:

> *'The Commission considers that the sales were appropriately included in calculation of the normal value, based on the information provided by Conserve Italia. The Commission's treatment of the differing models produced by Conserve Italia is set out in Confidential Attachment 1.'*

152. In Confidential Attachment 1, the ADC referred to and quoted from an email provided to the ADC by Conserve Italia in response to the ADC's request for clarification on the nature of the particular 'brand' referred to, since [redacted]. The extract from the email stated that Conserve Italia [redacted].[89] The ADC stated that it therefore treated the particular sales as private label for the purposes of the model comparison when determining the normal value. Furthermore, the ADC stated that following the calculation of the dumping margin, it did not receive any submissions from Conserve Italia which argue that these products should not be included in the normal value of the private label sales.[90]

153. After reviewing Confidential Attachment 1, I requested clarification on the ADC's approach with regard to this first component of Conserve Italia's first ground of review, during the First Conference. The ADC confirmed the content of the email referred to in Confidential Attachment 1 to the ADC's submission, in which Conserve Italia clearly stated with regard to the relevant sales that, [redacted] Further the ADC confirmed that this

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[88] See Conserve Italia's confidential submission to the ADC dated 12 March 2017 (Document #058 of SEF 354).
[89] The full email was provided in the Confidential Appendix to Confidential Attachment 1 to the ADC's submission.
[90] See Confidential Attachment 1 to the ADC's submission.

issue was not raised subsequently by Conserve Italia. Since the ADC had no information which would allow it to determine whether the cost to make the particular brand was different to private label or premium brand (CIRIO) products, the ADC [redacted] treated it as a private label. [91]

154. It seems clear from the email referred to in Confidential Attachment 1 that Conserve Italia [redacted], which seems to be odds with its ground of review in this regard. I consider that the ADC's approach in this regard to be reasonable, and this component of Conserve Italia's first ground of review does not succeed.

Special recipe product sold to customer should be excluded from normal value

155. Conserve Italia submits that the products sold to a particular customer are produced on the basis of a special recipe and should therefore be excluded from the normal value calculation of the particular model. Conserve Italia claims that the product model sold to the particular customer is different from the models sold by Conserve Italia both on the domestic market and on the Australian market, because this customer requires Conserve Italia to manufacture the goods on the basis of a special recipe which is richer than the recipe used for producing other product models.

156. According to Conserve Italia, the richer recipe mainly stems from the increased "brix" level, as demonstrated by the specifications of the particular product code.[92] Conserve Italia explains that a higher brix level brings a better flavour to the product as a result of the thicker and richer outcome, which also affects the prices. Conserve Italia reveals that its domestic sales listing reveals a higher average unit ex-works price for the above-described richer recipe product.[93]

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[91] See First Conference Summary.
[92] Conserve Italia explains that in order to reach a higher degree of brix, some of the water naturally present in the tomato juice is evaporated and as a result, a more concentrated tomato juice is obtained, containing a greater amount of fresh tomatoes compared to other product models of the same weight.
[93] See Section 1.1.2 of the Confidential application of review of Conserve Italia, page 5, for details of the particular brand and product model as well as the relevant calculation referred to.

157. Conserve Italia therefore contends that it follows that, for the purpose of a fair comparison, the sales of richer recipe product code should be excluded from the normal value calculation of the particular model. In fact, according to Conserve Italia, the particular product exported to Australia was produced on the basis of a standard recipe, having a lower brix content and therefore a lower market value.

158. Conserve Italia further contends, in the alternative, that a physical adjustment should be applied to the normal value of the product code in order to re-establish an apple-to-apple comparison with the export price of the particular product exported to Australia. Conserve Italia submits that it has been clearly demonstrated that the higher quality of the product sold has a "*demonstrable effect on the selling price of the goods*", in accordance with the Dumping and Subsidy Manual (November 2015) ("Manual").

159. Conserve Italia contends that this claim appears to be in line with the ADC's practice, and provides the example that in the framework of the original anti-dumping investigation No. 217 concerning imports of PPTs from Italy, the ADC acknowledged at section 3.2.2 of Feger's Verification Report that the brix of the tomato juice determines the quality of the product, which was also confirmed in Section 5.2.2 of REP 217.

160. Conserve Italia notes that REP 349/354 simply disregarded the above claim without providing any solid ground for the rejection thereof, except for the timely completion of the investigation.

161. I could find no reference to this particular issue in SEF 349/354. In REP 349/354 the ADC refers to the fact that Conserve Italia claimed that some domestic sales should be excluded, due to being a "richer" recipe than that sold on the Australian market, or due to having a higher brix level. In this regard the ADC stated generally:

> *'The Commission has found all domestic and export sales in the sales listing provided by Conserve Italia in its exporter questionnaire response*

to be like goods. This is on the basis of the physical, functional, production and commercial likeness to the goods under consideration. This means that all models sold for export will have an AEP calculated, and will require a normal value to be derived.'[94]

While the ADC does state later on in the same section of REP 349/354 that it, *"considers that to resolve these differences between the data already verified and Conserve Italia's new claims will prevent the timely completion of this report*", this appears to be with reference to Conserve Italia's claims with regard to the adjustment claimed with regard to physical' differences for drained weight, referred to in its second ground of review, discussed below.

162. In its submission, the ADC stated with regard to Conserve Italia's first ground of review (both first and second components):

'The Commission considers that the sales were appropriately included in calculation of the normal value, based on the information provided by Conserve Italia. The Commission's treatment of the differing models produced by Conserve Italia is set out in Confidential Attachment 1.'

163. In Confidential attachment 1, the ADC stated that it was not provided with any information [redacted]. It also pointed out that there was an [redacted] with the private label products being [redacted] brix and the "richer recipe" product being [redacted] brix. As such the claims regarding the requirement to exclude these goods from the normal value calculation were not accepted by the ADC.

164. After reviewing Confidential Attachment 1, I decided to request clarification from the ADC during the First Conference. The ADC confirmed that the product was

[94] See Section 2.5.10 of REP 349 & 354, pages 19 - 20.

clearly a like product and that there was no basis for it to be excluded from the normal value. On the question of an adjustment for the richer content of the brix, the ADC confirmed that at the verification no evidence was provided to show that there was an actual difference in the cost of producing the richer product. This issue was only raised very late in the investigation, after the verification report had been completed. According to the ADC, to make the adjustments claimed would have required the ADC to go back and completely re-verify the data, because it meant that the data verified was incorrect, and the ADC simply didn't have time to do a re-verification of the costs. The only 'evidence' provided by Conserve Italia were the [redacted], however, it was pointed out that there was [redacted]. There was therefore no evidence to convince the ADC that the verification was incorrect, and that there was a difference in cost, justifying an adjustment.[95]

165. I reviewed all relevant documents including the [redacted] referred to by the ADC and consider that the analysis undertaken by the ADC was thorough and the approach adopted was reasonable. Therefore this component of Conserve Italia's first ground of review does not succeed.

Ground 2: The ADC wrongly dismissed claim for a physical adjustment

166. Conserve Italia submits that the ADC wrongly dismissed its claim for a physical adjustment in order to reflect the existing difference between the net drained weight of a particular branded product model sold in the domestic market and exported to Australia. Conserve Italia claims that it affects the price comparability between the particular product model sold in Italy and those sold in Australia.

167. Conserve Italia submits that the Manual allows adjustments for differences in physical characteristics (quality, chemical composition, structure or design) where the differences can be quantified to ensure fair comparison. Conserve

[95] See First Conference Summary.

Italia claims such quantification is clearly possible in the present case since the product sold in Italy and in Australia are affected by an objective difference in terms of net drained weight (indicating, in substance, the content of solid tomato in each can). According to Conserve Italia the evidence provided to the ADC during the investigation clearly shows that the product model sold in Italy has a [redacted] net drained weight than that of the product sold to Australia, and moreover, the different net drained weight is reflected in the selling prices. The domestic and export sales listings of Conserve Italia reveal that the unit normal value of the product model is [redacted] the unit export price of the same product (but with a lower drained weight, i.e. less tomato substance). According to Conserve Italia this clearly confirms that the physical difference in terms of net drained weight also has a *"demonstrable effect on the selling price of the goods*" in accordance with the Manual.[96]

168. Conserve Italia therefore claims that the normal value of the product model should be adjusted in order to reflect the existing physical difference between the goods sold on the domestic and Australian markets.

169. In this respect, Conserve Italia notes that REP 349/354 concluded that the normal value of the product model cannot be adjusted to reflect the higher net drained weight of the goods sold domestically (compared to the net drained weight of the goods exported to Australia) because, "*the cost to make for both models was identical, as they were from the same components*". Therefore, according to the ADC, "*the verified information demonstrated that the contents of the tins are identical, and thus cannot be different".*[97] Conserve Italia disputes this conclusion as "*clearly ill-founded*" contending that the higher net drained weight of the product sold domestically correspond to a higher tomato content in each can. Thus, Conserve Italia fails to understand how the ADC concludes that "*the contents of the tins are identical, and thus cannot be different".*

[96] See Section 2.1 of the Confidential application of review of Conserve Italia, pages 8 – 9, for details of Conserve Italia's claim as well as the particular product model and the relevant selling prices referred to.
[97] See REP 349/354, pages 19 – 20.

170. According to Conserve Italia, it should therefore be concluded that the different net drained weight is an objective difference which affects the price comparison. It points out that this was expressly acknowledged by the ADC in REP 217 [98] and it follows that, in the ADC's practice, the net drained weight is a relevant factor to be taken into account for the purpose of a fair comparison.[99]

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171. With reference to this ground of review, the ADC in its submission states:

> *'The Commission considers that the evidence provided by Conserve Italia demonstrates that no adjustment should be provided for the drained weight. The Commission's treatment of the drained weight of the products produced by Conserve Italia is set out in Confidential Attachment 1*.'[100]

172. In Confidential Attachment 1, the ADC referred to correspondence from Conserve Italia that [redacted] As such, the difference in cost for the minimum drained weight printed on the product specification was not able to be substantiated [redacted] and therefore the ADC did not apply an adjustment on this basis.

173. After reviewing Confidential Attachment 1, and various other documents relating to this claim, I decided to request clarification from the ADC during the First Conference. The ADC confirmed that Conserve Italia did not produce evidence to demonstrate that there was a difference in cost. According to the ADC the only difference was in respect of [redacted], which could not be substantiated by evidence of a difference in [redacted], based on the verification. I reviewed the relevant

[98] Conserve Italia is referring to REP 217, page 38.
[99] See Section 2.1 of the Public application of review of Conserve Italia, page 10.
[100] See ADC's submission, page 6.

work sheets which showed that [redacted].[101]

174. After reviewing all relevant documents, I consider that the analysis undertaken by the ADC and its approach to this claim of Conserve Italia to be reasonable. Therefore Conserve Italia's second ground of review does not succeed.

Ground 3: Failure to consider adjustment claims relating to value of the CIRIO trademark

175. Conserve Italia submits that in REP 349/354 the ADC did not consider its adjustment claim concerning the higher immaterial value of the CIRIO trademark in Italy compared to Australia.

176. In this respect Conserve Italia notes the following:

- In Italy, CIRIO is a premium brand with an extremely long history dating back to 1856, and the leader on the Italian market.
- In Australia, the position of the CIRIO brand is significantly different, being a young brand with a relatively small market share, and does not have the same reputation amongst the Australian consumers that it has amongst Italian consumers.
- In other words, the brand awareness of the CIRIO products in Italy is much higher than in Australia.

177. Therefore, according to Conserve Italia, the added-value of the CIRIO brand (that is to say, the "immaterial value" of the CIRIO trademark) is much higher in Italy than in Australia, and this affects, in turn, the selling price of CIRIO-brand products sold in Italy, compared to those sold in Australia.

[101] See First Conference Summary.

178. Conserve Italia contends that in order to calculate the different added-value (or immaterial value) of the CIRIO brand in Italy and Australia, reference is made to the information reported in Conserve Italia's questionnaire reply with regard to the selling prices of a particular model that is the only model to be sold in both Italy and Australia under (i) the CIRIO brand, and (ii) private labels. In carrying out such analysis, Conserve Italia states that it can be observed that:

- the normal value of the CIRIO-brand of the particular product model sold in Italy is higher than the normal value of the private-label of the particular product model sold in Italy, whereas
- the export price of the CIRIO-brand of the particular product model exported to Australia is higher, but to a lesser degree, than the export price of private-label of the particular model exported to Australia.

179. Conserve Italia argues that according to its calculations based on this methodology, this suggests that the prices of CIRIO-brand products in the two markets are driven by the different brand awareness among consumers. According to Conserve Italia, the different brand awareness has a "demonstrable effect on the selling price of the goods", as required by the Manual. As a result, Conserve Italia requested that a downward adjustment should be applied to the normal value of the CIRIO models in order to reflect the difference in terms of immaterial value of the CIRIO trademark in Italy and Australia.[102]

180. Conserve Italia, further contends that this is confirmed, inter alia, by the market research conducted by IRI (a leading market research firm) which was provided to the ADC during the investigation, and which demonstrates that the average unit sales price of certain CIRIO-brand product codes is the highest in the Italian market, being substantially higher than the market average.

[102] See detailed arguments of Conserve Italia, details of the product model and price comparisons carried out by it in this regard as well as Conserve Italia's calculations in Section 3.1 of Conserve Italia's confidential submission, pages 10 – 12 and Footnotes 5 and 7.

181. Finally, Conserve Italia notes that the ADC's practice confirms that a different level of brand awareness may justify an adjustment for the purpose of a fair comparison, in the framework of the Review No. 128 concerning the anti-dumping measures applicable to certain washing machines exported to Australia from Korea, where the ADC adjusted downwards the price of certain washing machines sold under a premium brand in order to reflect the differences in the brand awareness of different trademarks. In this respect, Conserve Italia refers to a clarifying statement by the ADC in REP 128:

> *'Customs generally requires that claims for adjustment for fair comparison are based on reasonable evidence that the factor has a price effect and that price effect can be reasonably quantified.'* [103]

182. Conserve Italia states that the ADC simply disregarded its claim without providing any solid ground for the rejection thereof.

183. I could find no reference to this particular issue in SEF 349/354 or a direct reference to this particular adjustment claimed, although there are reference to the CIRIO brand in the section of the report dealing with "Surrogate models for Conserve Italia"[104] discussed in regard to the first two grounds of review above.

184. In its submission, with regard to this third ground of review, the ADC stated:

> *'The adjustment proposed during the reviews by Conserve Italia was to decrease the normal value by an amount which would take into account this difference in brand premium between the domestic and export markets. However, no evidentiary basis was provided to the Commission to justify how this adjustment was arrived at, nor how it ought to be quantified. No evidence was provided that the CIRIO product is unable to*

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[103] See ACS Trade Measures Branch Report No. 128 Certain Washing Machines Exported by Daewoo Electronics Co. Ltd from the Republic Of Korea: Review of Anti-Dumping Measures (REP 128)The Washing Machine Review), page 10.
[104] Section 2.5.10 of REP 349 & 354, page 19 – 20.

be sold at a similar premium in Australian supermarkets relative to the private label products. The claim made in the application as to how to adjust for the brand value in the appeal was not presented to the Commission during the review. As a result, the Commission did not make the adjustment requested.'[105]

185. During the First Conference I sought clarification on the ADC's approach with regard to Conserve Italia's third ground of review, and in particular Conserve Italia's contention that the ADC failed to address this claim in REP 349/354. The ADC stated that it had never been provided with the calculations quantifying the claim that were in Conserve Italia's submissions to the Review Panel. It stated that while the market research provided to the ADC demonstrated the value of the CIRIO-brand in the Italian market, there was no similar evidence indicating the alleged lesser value of the CIRIO-brand in the Australian market. During the conference I also sought clarification on Conserve Italia's submission that the claim was "timely raised" on 14 February 2017, with reference to Confidential Annex IV to its submission and enquired if the ADC had responded to this claim. The ADC was unable to refer to any documentation on the record or in SEF or REP 349/354 which indicated that the claim had been considered and the reasons for its rejection provided. [106]

186. I therefore decided to request the ADC to reinvestigate its finding in regard to Conserve Italia's third ground of review. I requested that ADC in reinvestigating this finding to take into consideration the claim raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia, as set out in the third ground of review in its application for review. I pointed out that there is evidence that this claim was raised by Conserve Italia in an email to the ADC dated 14 February 2017 and that in its s.269ZZJ submission to the Review Panel the ADC recognised that such a claim was made by Conserve Italia, but stated that no evidentiary basis was provided to the ADC to justify how the adjustment was arrived at, nor how it ought to be quantified, and as a result the

[105] ADC's submission, page 6.
[106] See First Conference Summary.

ADC did not make the adjustment. I pointed out that there appeared to be no indication in REP 349/354 (or in any other document on the record) that this claim was considered or the reasons for its rejection provided.

187. In reinvestigating this ground of review, the ADC found that no adjustment could be made under subsection 269TAC(8) to the normal value of product codes with the CIRIO trademark. The ADC was satisfied that Conserve Italia provided reasons in support of its claim for an adjustment to the normal value based on the different value of the CIRIO trademark in the Italian and Australian markets, however was not satisfied that Conserve Italia was able to quantify, during the conduct of the review, the magnitude of the adjustment sought, or provide a coherent and verifiable method for determining the adjustment.

188. In this regard the Commission noted that in both the email of 14 February 2017 and the submission of 12 March 2017, Conserve Italia relied upon the data provided by a market research firm to evidence the existence of a brand premium for the CIRIO brand in the Italian market, and the ADC accepted the veracity of this evidence. However, the ADC was of the view that Conserve Italia did not, however, demonstrate how this evidence could be applied for the purposes of determining the magnitude of the claimed adjustment, proposing instead that an adjustment be made arbitrarily from with the range of possibilities indicated by the research. The ADC further noted that at no time during the review of measures did Conserve Italia provide any corresponding information of the relative brand positioning of the CIRIO brand within the Australia market. As such, the ADC found that it did not have before it during the course of the review sufficient information to allow the claim that a brand differential existed between the Italian and Australian markets to be assessed.

189. The ADC noted that the approach proposed in the application for review represented a significant deviation from the approach proposed during the conduct of the review, and results in a claim for an adjustment for the brand differential which is significantly less than that claimed during the course of the review.

190. The ADC, however, as part of its reinvestigation, gave consideration to the additional information presented to the Review Panel by Conserve Italia in its application for review:

> *'In assessing Conserve Italia's request for this adjustment, the Commission does not consider that price differences an exporter can achieve between a domestic and export market is a factor warranting adjustment to ensure fair comparison between export prices and normal values. The Commission cannot be satisfied that the additional pricing premium Conserve Italia claims to enjoy in the Italian market is solely related to brand recognition. In an environment where dumping is occurring, as is the case in the Australian market for the goods, a lower price premium between goods sold into a domestic market and export market would be expected. The Commission considers that Conserve Italia's claim for an adjustment based on the different value of the CIRIO trademark between the domestic and Australia market is effectively a claim for an adjustment for dumping, therefore this claim is rejected.'*[107]

191. I agree with the ADC that the proposed method for calculation of a brand adjustment in Conserve Italia's application for review to the Review Panel was not provided to the ADC at any point during the conduct of the review. However, this does not prevent Conserve Italia from putting forward a new argument in its application for review, provided that it is based on information that was before the ADC during the course of the investigation and not on information which is not considered to be "*relevant"* information for the purposes of s.269ZZK(6) of the Act . Conserve Italia states in its submission that its claim for a downward adjustment to the normal value of CIRIO-brand products is based on verified information provided with the questionnaire response as well as documents issued by independent market research bodies. Furthermore, it claims that its questionnaire response provides the information for calculating the exact magnitude of the adjustment, by comparing the immaterial value of the CIRIO

[107] See Section 5.3 of the Reinvestigation Report, page 21.

trademark in Italy and Australia.[108] The ADC does not dispute that the information forming the basis of the claim was before the ADC during the investigation.

192. During the Third Conference, I requested clarification from the ADC on its reinvestigated finding:

i. Firstly, the ADC pointed out that REP (128 relating to Washing Machines), that Conserve Italia had relied upon as being an example of where the ADC previously accepted such an adjustment, related to proposed adjustments to the unsurpressed selling price (USP) and not to an adjustment to normal value.[109] The ADC stated that it was not aware of any instance in Australia where an adjustment to normal value had been granted for brand awareness; and

ii. Secondly, the ADC advised that it did not consider it as simple as saying the difference in spread between the CIRIO brand and the private label brand models in Italy and Australia respectively, is a meaningful way of establishing what the value differential of the brand ought to be. According to the ADC there needed to be some sort of correlation between the circumstances in one market versus the other to make the comparison. The ADC said that there was not enough information to precisely establish all the drivers of price in Italy and all the drivers of price in Australia, to be able to ascertain exactly what the brand value is doing to that price, since

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[108] See Conserve Italia's submission, page 12.

[109] I noted from REP 128 that the reference to an adjustment for brand awareness indeed related to the USP and not to normal value. Further the passage in REP 128 immediately following that quoted by Conserve Italia in its application for Review stated:

> *"In the present case, no evidence was put forward by either party to support the claim for adjustment or the appropriate amount for difference in brand awareness. However, Electrolux has agreed with Castel that there is a case for an adjustment due to a difference in brand awareness. While Electrolux disagrees with Castel on the amount of the adjustment, Customs recommends that an adjustment be made of the amount suggested by Electrolux. Without persuasive evidence that the amount of the adjustment should be higher, the amount of the adjustment should be limited to the amount proposed by Electrolux."*

I agree with the ADC that when the passage quoted by Conserve Italia is read in context, REP 128 is not supportive of Conserve Italia submission that the relevant passage is indicative of the ADC's practice of acceptance that a different level of brand awareness may justify an adjustment for the purpose of a fair comparison.

there is a lot more factors in play than just that brand power. Therefore trying to quantify the adjustment based purely on the spread, on one pair of models, is not considered by the ADC to be particularly strong, positive evidence to allow an adjustment of a type that has never been adjusted before. [110]

193. In response to a request for further clarification during the Third Conference, the ADC pointed out that in REP 349/354 Conserve Italia's calculations were based on [redacted] CIRIO models and [redacted] private label models, with its adjustment claim being based on the only product model common to both the CIRIO brand and the private label. The ADC pointed out that dumping margins were calculated for each model, and then a weighted average calculated for Conserve Italia's dumping margin, being 5.4%. Further the ADC pointed out that CIRIO branded model used for the purpose of calculating the adjustment claim had the [redacted] while [redacted] CIRIO branded models [redacted]. [111] This seemed to indicate that the [redacted] CIRIO models (not included in Conserve Italia's 'brand quantification' methodology) were [redacted] on the domestic market, raising questions about the methodology used by Conserve Italia to quantify the allegedly higher brand value on the Italian market. This seems to confirm the ADC's position that there are more factors in play than just that brand power, casting doubt on Conserve Italia's conclusion that the additional pricing premium that it claims to enjoy in the Italian market is attributed to brand recognition.

194. I therefore consider that the ADC's reinvestigated finding that it cannot be satisfied that the additional pricing premium Conserve Italia claims to enjoy in the Italian market is solely related to brand recognition, is reasonable. Conserve Italia's third ground of review is therefore rejected.

[110] See Third Conference Summary.
[111] See Third Conference Summary.

Mutti

195. I will now deal with the ground of review put forward by Mutti.

Ground 1: The ADC failed to correctly work out Mutti's Ascertained Export Price (AEP)

196. Mutti contends that the ADC failed to correctly work out its AEP insofar as the amounts of the deferred rebates that Mutti paid to certain Australian importers were not deducted from the FOB price paid by such importers.

197. In its application for review Mutti discusses the rules governing the determination of the AEP with reference to s.269TAB(1)(a), s.269TAB(1A) and s.269TAA(1A) of the Act. Mutti states that:

- according to s.269TAB(1)(a) the export price is *"the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation*";
- Section 269TAB(1A) clarifies that "[*f]or the purposes of paragraph (1)(a), the reference in that paragraph to the price paid or payable for goods is a reference to that price <u>after deducting any amount that is determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A)</u> in respect of that transaction*" (emphasis added by Mutti);
- the Manual states, "*Section 269TAA(1A) allows transactions affected by reimbursements that are a normal business practice to be treated as being at arms length, after having regard to any agreement or established trading practice. [...] A rebate may be considered part of price provided that the nature and manner of payment remain sufficiently connected with the sales transaction (e.g. volume rebate)*".

198. Mutti concludes that s.269TAA(1A) provides that, if it is possible to establish a sufficient connection between, on the one hand, the export sales transactions and, on the other hand, deferred rebates made in accordance with the normal business practice, the consequence is that, first, the export transactions should be considered at arm's length despite the existence of compensatory

arrangements between the exporter and the importer and, second, the rebates under discussion should be considered as part of the selling price paid by the importer. Mutti states that this means, in turn, that such deferred rebates should be deducted from the FOB selling price paid by the importer when working out the export price.

199. In this respect, Mutti notes that it grants deferred rebates/discounts to two Australian customers. According to Mutti these discounts/rebates (which it states were reported in an aggregated form in the "Australian sales" listing") take different forms, including: target rebates, shelf price discounts and lump sum rebates.

200. Mutti contends that the nature and characteristics of the rebates/discounts clearly shows that these rebates are "sufficiently connected" with the sales of the goods under consideration in the Australian market. Moreover, Mutti claims that the rebates/discounts under discussion have been verified by the ADC and taken into account for the purpose of calculating Mutti's dumping margin. According to Mutti this clearly demonstrates that these discounts/rebates are *"sufficiently connected with the sales transaction"* and therefore must be *"considered part of price*" as provided by the Manual. Therefore Mutti contends that they should have been deducted from the FOB price paid by Mutti's Australian customers when working out Mutti's AEP, and by failing to do so, the ADC has unduly inflated Mutti's AEP.

201. I could find no reference to this issue in SEF 349/354 or REP 349/354. In its submission the ADC stated with reference to this ground of review:

> *'As part of the verification process, the Commission provided Mutti with certain calculations for the purpose of establishing the dumping margin. Mutti had opportunities to review and comment on these calculations, but did not identify the substantive matter in respect of the AEP which has been subsequently raised in its application to the ADRP.*

In any event, the Commission did take account of Mutti's deferred rebates in the dumping margin calculation by making an adjustment to the normal value. As outlined in section 6.1 of the Mutti verification report, the Commission made a downward adjustment to the normal value to reflect the particular off-invoice discounts for each sale, and then an upward adjustment to reflect the weighted average discount provided to the export sales. This allowed for a direct comparison between the ascertained normal value and the free on board export price.

The Commission's view is that the calculation has already taken into account the deferred rebates. However, if the ADRP comes to a different conclusion and considers that the AEP ought to be corrected, the Commission notes that there will need to be consequential adjustments to the normal value.' [112]

202. I sought clarification from the ADC on this claim during the First Conference. The ADC advised that a claim by an exporter for the reduction of the AEP was unusual, as it could result in an increased dumping margin. While the ADC was unable to legally refute Mutti's claim in regard to the AEP, it pointed out that the ADC cannot lower the AEP without considering what happens to the dumping margin. The ADC reiterated what it stated in its submission, that Mutti had not made any claim regarding the AEP during the investigation and that the adjustments were taken into account in the verification report, which Mutti had reviewed, as well as in the dumping margin calculations, which Mutti had reviewed without raising any further issues. The ADC confirmed that the dumping margin calculation had already taken into account the various discounts and deferred rebates referred to.[113]

203. It is clear that Mutti did not raise this specific claim relating to its AEP during the course of this investigation. However, I do not consider that Mutti is prevented from making the claim in its application for review, since it is based on legal

[112] See ADC's submission, page 7.
[113] See First Conference Summary.

argument and does not rely on any new information that was not before the ADC during the investigation, nor does it rely on any information that could be considered not to be "*relevant information*" for the purposes of s.269ZZK of the Act.

204. On reviewing the legislative provisions referred to by Mutti in its application for review, I cannot criticise Mutti's interpretation of the statutory provisions or its legal argument. In addition I note that in *Nordland Papier AG v Anti-Dumping Authority [1999] FCA 10 (Nordland)* Lehane J supported the argument of Nordland Papier AG (the applicant in the case) that a reference to "price" paid is taken to mean, "*the ultimate, or nett, monetary obligation incurred by the buyer as consideration for the purchase of the goods*".[114] His Honour quoted with approval Saxville J in *Colgate Palmolive Pty Ltd v Commissioner of Taxation (1998) 98 ATC 4748 (Colgate Palmolive)*":

> *'Sackville J, after considering the earlier cases at some length, held that the "price … for which the goods were sold" was to be ascertained taking account of a number of rebates and allowances, particularly a volume rebate apparently similar to the rebate allowed by Nordland in its domestic sales.' [115]*

205. However, I also agree with the ADC that the AEP cannot be adjusted without a simultaneous adjustment to the normal value and dumping margin, since the various adjustments referred to by Mutti had been taken into account in the dumping margin calculations in REP 349/354.

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[114] In Nordland the reference to "price paid" was in relation to definition of "normal value" in s.269TAC(1) (as opposed to "export price" in the current review). Nordland Papier AG was challenging the Anti-Dumping Authority's finding that its sales could not be used for the purpose of ascertaining "normal value" because its domestic sales were not "arms length transactions"; that was so, in turn, because the sales were made under arrangements which included the payment of volume rebates by Nordland to buyers of its product.
[115] See *Nordland* at paragraphs [21] and [23]. It should be noted that this case related to an earlier version of the Customs Act, prior to the insertion of s.269TAA(1A), s.269TAC(1A) (with regard to normal value) and s.269TAB(1A) (with regard to export price).

206. Therefore, I adjusted Mutti's AEP downwards, based on Mutti's calculation in its application for review,[116] and simultaneously adjusted Mutti's ANV downwards by the same amount. While this resulted in same specific dumping duty amount, when calculated as a percentage it amounted to an increased duty percentage.

207. During the Second Conference, I obtained confirmation from the ADC on the correctness of the adjusted AEP as well as a resulting adjusted ANV and dumping margin percentage. The ADC pointed out that an effect of using the net export price was a potential inaccuracy relating to the credit terms adjustment. Following the Conference the ADC provided an updated file for Mutti which also updated the credit terms adjustment to account for the impact of using the net export price. The total impact on the dumping margin is that it increases from 3.2 to 3.9 per cent.[117]

208. As this would result in a higher fixed duty percentage (calculated on a lower AEP) as well as a lower variable duty, during the Second Conference I also requested clarification from the ADC of the potential fiscal effects of any adjustment to the AEP, based on the historic exports of Mutti since the publication of ADN 2017/47, to determine if a decision based on Mutti's claim would be materially different to the reviewable decision. The ADC provided a calculation based on a comparison of the interim dumping duty ("IDD") collected since ADN 2017/47 and the IDD that would have been collected with a revised AEP and dumping margin, with the difference being almost AU$[redacted] less, which I consider to be material.[118]

209. Accordingly, I consider that the reviewable decision, with regard to Mutti's AEP, ANV and dumping margin is not the correct or preferable decision, and I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision in accordance with Confidential Schedule A.

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[116] See paragraph 11 of Mutti's confidential application for review, page 9.
[117] See Second Conference Summary.
[118] See Second Conference Summary.

LSI

210. I will now deal with the grounds of review put forward by LSI

Ground 1: The ADC's methodology to ascertain LSI's variable factors is flawed

211. LSI contends that the methodology followed by the ADC to ascertain LSI's variable factors in Review 354 is flawed and that the correct methodology was that the one used in the framework of Review 351. LSI submits that the reviewable decision is not correct since it disregards the information collected and verified in the framework of Review 351.

212. This ground of review will be considered under the two sub-headings used by LSI in its application for review.

Methodology used to calculate LSI's normal value is flawed

213. This main component of this subground of review is LSI's contention that the ADC erred in concluding that its domestic sales of unlabelled (bright) cans were not suitable for the normal value calculation, and that the correct methodology should have been the one used in the framework of Review 351, being the actual domestic sales of unlabelled (bright) cans made by LSI in the investigation period, duly adjusted to reflect the labelling and packaging costs (LSI's main contention).

214. LSI further contends the following, assuming that the ADC's conclusion concerning the suitability of domestic sales of bright cans for use in calculating a domestic sale price is correct (which it denies):

    i) Section 269TAC(1) enables the ADC to use sales by other exporters in order to establish LSI's normal value but not the normal value of other exporters, (meaning that the relevant other exporters' sales should undergo an OCOT test carried out on the basis of LSI's cost to make and sell, but not to use directly the normal value determined for other

exporters), [119] therefore s.269TAC(1) would have required the ADC to use the CTMS of LSI in order to determine the normal value on the basis of sales made by other sellers in Italy;

ii) According to Section 8.2 of the Manual, *"if it is not known whether the exporter has made any domestic sales, other sellers' information is not applicable for the purposes of s.269TAC(1).*" Therefore according to LSI, having concluded that it was uncertain (i.e. "not known") whether the bright cans sold by LSI in Italy would be entered into home consumption, the ADC cannot use other seller's information (nor the weighted average normal value of other exporters) in order to establish the normal value of the products sold by LSI;[120]and

iii) The ADC did not provide LSI with any information relating to other seller's sales and consequently prevented LSI from defending its interests as prescribed by section 8.2 of the Manual, which states that *'[w]here an other seller's prices are being considered for normal values, the Commission will, subject to confidentiality, seek to provide the exporter with information about the other seller's sales so that the exporter in question might defend its interests. Generally, this will involve identifying that other seller, providing information on the type of products being sold on the domestic market, and the other seller's domestic distribution methods for level of trade comparisons.'*

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[119] In its submission, LSI refers to Section 8.3 of the Manual which it contends confirms the above reading of s.269TAC(1) as it expressly provides that:

> *"in considering whether other seller's sales are suitable, the Commission will compare the other seller's prices to the CTMS of the exporter in question. The purpose is to ensure that the other seller's domestic sales prices, which are being considered for normal value purposes for the exporter in question, are not unprofitable and unrecoverable given the cost structure of the exporter in question. The other seller's prices should not be less than the CTMS of the exporter"* (emphasis added by LSI).

[120] In its submission LSI submits that this conclusion is confirmed by ADC's practice with reference to the review of antidumping measures applicable to certain pineapples exported from Thailand, where domestic sales made by the exporting producer Natural Fruit were not considered to be true domestic sales as the like goods were sold to domestic trading companies who in turn exported the goods. As a result, the ADC determined a constructed normal value for Natural Fruit and did not resort to the sales of other sellers. (LSI refers to SEF 196, pages 18 -19, in this regard.)

These three further contentions of LSI will be referred to as the 'alternative contentions' and only become relevant if LSI's main contention relating to the sale of unlabelled (bright) cans fails.

215. I now turn to consider LSI's main contention that the ADC erred in concluding that its domestic sales of unlabelled (bright) cans were not suitable for the normal value calculation, and that the correct methodology should have been the one used in the framework of Review 351. LSI contends that considering that its weighted average normal value had been already ascertained in the framework of Review 351 (which concerned the same investigation period of Review 354), the ADC should have simply applied the conclusions already reached in Review 351. However, the ADC refused to do so, on the ground that it now considered that, *'LSI's domestic sales of bright cans are not suitable for use in calculating a domestic sale price as it is uncertain whether these will be entered into home consumption. This is because the unlabelled goods can be either exported or sold domestically, and the manufacturer does not have control over (or potentially awareness of) the end destination for the goods'.*[121] LSI submits that the above-described methodology is flawed and not compliant with the WTO Anti-Dumping Agreement ("the ADA").

216. At the outset, LSI notes that the ADC never raised a similar ground in Review 351 nor in the original investigation (Investigation 217), and that the reason underlying the change in the ADC's approach in this respect remains unclear. Moreover, LSI claims that the idea that labelled cans are necessarily entered into home consumption, while unlabelled goods may be either sold domestically or exported is ill-founded, and the fact that the cans are labelled does not provide conclusive evidence that they will be entered for home consumption.[122] LSI submits that the relevant criterion to decide whether or not a sales transaction should be considered "for home consumption" is the producer's awareness when

[121] This is a reference to a statement in REP 349/354, page 29.
[122] In this regard, LSI points out that labels are often standardised and may be easily removed and replaced by other labels, if necessary.

fixing the price and from LSI's perspective, the bright cans sold to domestic customers are destined to domestic consumption.[123]

217. LSI elaborates on this claim in its submission to the Review Panel in terms of s.269ZZJ of the Act (the LSI submission) and refers to the following international authority in support of its claim:

- WTO Panel finding in *EC - Salmon (Norway)*[124] which confirmed that the key element for determining whether the domestic transactions are suitable for the calculation of the normal value is the awareness of the producer as to whether the goods will be exported:

  '[...] Article 2.1 makes clear that it is only sales that are "destined for consumption in the exporting country" that may qualify as domestic sales. Thus, <u>where a producer sells</u> to an unrelated exporter (or a trader) <u>knowing that the product will be exported</u>, that sale cannot, in our view, qualify as a sale intended for domestic consumption.'[125] (LSI's emphasis)

- The International Trade Administration in its Notice of Final Determination of Sales at Less Than Fair Value within the framework of the anti-dumping investigation conducted by the United States concerning the imports of stainless steel sheet and strip in coils from Taiwan, noted that the '*sales may be excluded from the home market database only if a respondent knew or had reason to know that merchandise was not sold for home consumption.'*[126]

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[123] See Section 2.1 of LSI's application for review, pages 6 – 7.
[124] *European Communities - Anti-Dumping Measure on Farmed Salmon from Norway (WT/DS337/R)* (EC - Salmon (Norway).
[125] *EC - Salmon (Norway)*, footnote 339.
[126] Cited in LSI's submission as International Trade Administration [A-580-831] 64 FR 30598, March 31, 1999.

- The EC in imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of polyethylene terephthalate film originating in India and the Republic of Korea, examined the "structure" of domestic sales in order to determine whether such goods were destined for domestic consumption. As a result, the EC excluded such sales since it was evident from the way that such sales are structured in Korea that they were made for export. [127]

218. LSI therefore concludes that the approach followed by the ADC is at odds with the legal standard established under WTO law, in that while the ADC considers that a mere uncertainty concerning the actual final destination of the goods is sufficient to exclude these goods from the normal value calculation, the WTO case law considers that a domestic sale transaction can be excluded from the normal value calculation only when it is certain that the exporting producer is aware that the goods are not destined for consumption in the exporting country.

219. According to LSI, therefore, unless the producer under discussion is aware - for a particular reason (such as contractual arrangements, etc.) - of the final destination of the goods, any sales transaction to an unrelated customer established in the exporting country should be considered "*for home consumptio*n". LSI notes that it did not know nor had a reason to know whether or not the bright cans sold on the domestic market would be finally exported to a third country. Therefore, from LSI's perspective, the bright cans sold to domestic customers are destined to domestic consumption, and LSI's normal value should have been calculated on the basis of its sales in the ordinary course of trade, that is, should correspond to the normal value calculated in the framework of Review 351.

220. Since the ADC did not address this issue further in its submission (other than by referring back to Section 3.3.6 of REP 349/354), I requested further clarification during the First Conference, with respect to its change in approach in

[127] Council Regulation (EC) No 1676/2001 of 13 August 2001.

methodology from REP 351 regarding normal value. The ADC stated that in Investigation 351, the best information available for normal value was LSI's domestic sales of unlabelled cans, despite limitations relating to this data. However, in Investigation No. 354 the ADC had access to verified information of other exporters' sales, which it considered was better information. Further, it was stated that the ADC was of the view that sales of unlabelled tins are not readily comparable and it is not easily determinable as to whether they will be entered into home consumption. I sought clarification on the extent of '*knowledge*' of whether the cans would be exported. The ADC stated that its view is that the burden is essentially on the exporter to satisfy the Commissioner, which is difficult when selling unlabelled tins, as the destination is unclear and will depend on what label is attached by the purchaser. With LSI, the ADC could not be satisfied that the tins entered the domestic market. The ADC stated that the primary reason for its decision to use other exporters' information was because the ADC could not be satisfied that the tins were to be entered into the domestic market but there was also doubt as to whether the costs were being accurately captured, because of the specific circumstances relating to the manufacture of the tins.[128]

221. Since I consider LSI arguments to be fairly persuasive in regard to its main contention and since I was concerned at some of the clarifications of the ADC during the First Conference, I requested the ADC to reinvestigate the finding that LSI sales in the domestic market of bright cans (unlabelled) were unsuitable for use in calculating a domestic sale price as it is uncertain whether these will be entered into home consumption.

222. In the reinvestigation request I made the following observations:

- The reasoning of the ADC in REP 349/354 appeared to presume that a mere uncertainty concerning the final destination of the goods is sufficient

[128] See First Conference Summary.

to exclude these goods from the normal value calculation, which I did not consider could be read into s.269TAC(1) of the Act.

- It appeared to me, as LSI suggested, that the emphasis should be on whether there is some knowledge or presumed knowledge that the goods may actually be exported, that is, "*if like goods are not so sold by the exporter*"(emphasis added). Only if there is such an indication, should the ADC look to like goods so sold, "*by other sellers of like goods*", to determine normal value. This would appear to align with the WTO case law and the practice of other WTO members referred in the LSI submission as well as the ADC's own past practice.
- There is no indication in REP 349/354 that it was evident or that there was any knowledge (or reason to believe) by LSI that the products sold were to be exported. In REP 351 the ADC did not appear to question whether similar sales by LSI entered into home consumption.
- The ADC indicated in both SEF and REP 349/354 that the approach taken in REP 351 was based on "*the best information available at the time*", implying that better information became available in Reviews 349/354 (in the form of verified normal values of other exporters), which the ADC then chose to use. I pointed out that s.269TAC(1), however, does not allow for such a choice of better information. It only provides for the normal value to be determined by other sellers of like goods, *"if there are no sales of like goods sold in the ordinary course of trade for home consumption in the country of export*" (emphasis added) by the exporter.

223. After conducting a comprehensive reinvestigation of LSI's main contention, the ADC came to a different conclusion to that found in REP 348/354 and considered that LSI's sales of bright cans ought to have been considered to have been entered for home consumption for the purposes of s.269TAC(1). A summary of the ADC's reasoning is set out below:

    - The Panel's comments in *EC – Salmon (Norway)* indicate that a key determinant is the knowledge of the producer as to whether the goods will be subsequently exported.

- This is supported by the findings of the International Trade Remedies Branch in REP 196 where a finding that domestic sales were not entered for home consumption in the country of export was predicated upon the knowledge of the exporter that the goods would be subsequently sold into an export market.[129] This appears consistent with Article 2.1 of the ADA and the interpretation espoused by the Panel in *EC – Salmon (Norway).*
- The ADC found this approach to be in contrast to that adopted in REP 349/354, where all sales of bright cans were removed from domestic sales on the basis that the ADC was uncertain whether the goods, being unlabelled and therefore able to be sold either domestically or exported, would be entered into home consumption in the country of export.
- According to the ADC this approach implies that domestic sales can only be considered where the ADC has certainty that the goods will be consumed in the country of export. This shift in approach is, in the ADC's view, not consistent with the intent of s.269TAC(1).
- Furthermore, the ADC notes that the exporter questionnaire sent to LSI for the purposes of REP 351 did not contain any specific requests for information about the exporters' sales of bright cans. There appears to be no evidence that the verification activities undertaken included reasonable inquiries to establish the exporter's knowledge as to whether those bright cans would subsequently be sold into an export market.
- The ADC's reinvestigation found that during the conduct of the review the ADC did not take sufficient steps to justify the exclusion of all bright cans from domestic sales for all exporters on the grounds that those bright cans were not entered for home consumption in Italy. [130]

224. In the reinvestigation, based on this finding, the ADC further determined that LSI's domestic sales were in the OCOT having regard to s.269TAAD of the Act.

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[129] Report No. 196, Review of Anti-Dumping Measures –Food Service and Industrial Pineapple Exported from Thailand. The issue was considered on an exporter by exporter basis and verification activities were undertaken to evidence that the exporter's knowledge as to the subsequent exportation of the goods sold into the domestic market was sound, and only those sales thus identified as having been subsequently exported were removed from the relevant exporter's domestic sales listing.
[130] See Section 6.3 of the Reinvestigation Report, pages 25 – 26.

As a result of this analysis, the ADC is satisfied that LSI's domestic sales are suitable for the purposes of calculating a normal value under subsection 269TAC(1). Based on the ADC's considered reinvestigation of this aspect of LSI's sub-ground of review, I consider that the ADC's reinvestigated finding of LSI's main contention is the correct and preferable decision.

225. Noting the circumstances of LSI's production and sales, the ADC in the reinvestigation report, however, considered it necessary to make a range of adjustments under s.269TAC(8)(b) of the Act to account for the differences between the goods sold domestically and the goods that would be exported:

- an upward adjustment for the additional production costs incurred by LSI to manufacture bright cans to an ex-works point, using the verified cost data relied upon in REP 351;
- an upward adjustment for the pricing differential between bright cans and labelled cans sold into the domestic market which the ADC's analysis indicated significantly exceeded the actual cost associated with labelling a bright can; and
- an upward adjustment for the costs associated with transferring the goods from an ex-works point to an FOB point, calculated as the weighted average FOB costs of the verified exporters having a normal value calculated under subsection s.269TAC(1) of the Act. [131]

226. The ADC recommended, having reinvestigated this ground, that LSI's ascertained normal value be amended, in accordance with the ADC's reinvestigated calculation of LSI's ascertained normal value at Confidential Attachment 2 to the Reinvestigation Report.

227. After studying the Reinvestigation Report and Confidential Attachment 2 to the Reinvestigation Report, I requested some clarifications relating to the

[131] See Section 6.3 of the Reinvestigation Report, page 27, for details of the ADC's analysis in regard to adjustments to normal value.

s.269TAC(8)(b) adjustments, particularly any differences with REP 351.[132] I was satisfied with the clarifications and explanations of the adjustments, provided by the ADC and considered the calculation of LSI's ascertained normal value as contained in Confidential Attachment 2 to be the correct and preferable decision.[133]

228. Accordingly, I consider that the reviewable decision, with regard to LSI's ascertained normal value is not the correct or preferable decision, and I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision in accordance with Schedule A.

229. Since LSI's main contention that that its domestic sales of unlabelled (bright) cans in the investigation period should have been found to be suitable for the normal value calculation, duly adjusted, was successful, I do not consider it necessary to address LSI's three alternative contentions (referred to above) any further.

Methodology used to calculate LSI's ascertained export price (AEP) is flawed

230. In REP 349/354 the ADC found that since LSI did not export PPTs to Australia during the review period, it calculated the AEP under s.269TAB(3) by having regard to all relevant information, therefore *"calculating the weighted average of the AEP from the five verified exporters of the goods whose export prices were determined under subsection 269TAB(1)."*[134]

231. LSI contends that according to the ADC's consolidated practice, when there are no export sales from a particular exporter during the investigation period, the AEP is set at the same level of the weighted average normal value for that exporter. [135] LSI points out that in the case under discussion, the ADC calculation of LSI's ascertained export price on the basis of the export prices of other exporters is unwarranted and that there is no reason for the ADC to deviate from

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[132] See Second Conference Summary.
[133] I noted that the new ascertained normal value is lower than that contained in REP 349/354, and higher than that contained in REP 351.
[134] See Section 3.3.6 of REP 349/354, page 29.
[135] LSI refers to REP 351 and REP 250 in this regard.

its consolidated practice. LSI submits that the ADC should establish LSI's export price at the same level of LSI's weighted average normal value, in line with its well-established practice. LSI contends that the correct methodology was the one used in Review 351.

232. In its submission the ADC states that the AEP is required to be calculated with regard to "*any relevant information*" under s.269TAB(3) where the preceding subsections are unable to be used (which will occur in any instance where there are no relevant export sales). The ADC states further that in REP 351, the only relevant information available was the ascertained normal value. In REP 349/354, there was significantly more reliable information, namely verified export prices comprising 93 per cent by volume of the exports under review.

233. I sought clarification from the ADC during the First Conference on its change in methodology from REP 351 with regard to the determination of the AEP. The ADC stated that since there were no exports to Australia during the review period (as is the case with many accelerated reviews where there is no relevant information available) the AEP was simply fixed at the normal value in REP 351. However, in Investigation No. 354, there was better information available, being the verified data of the other cooperating exporters.[136]

234. Since I was concerned about an inadvertent effect that this methodology might have had due to the fact that LSI had a negative dumping margin and that the form of duties imposed was the combination method, I requested the ADC to reinvestigate the determination of the AEP, also taking into consideration other relevant information, including:

- That LSI's has a negative dumping margin and therefore its AEP is greater than its ANV;
- The form of the duties is the combination method, with a fixed and variable component. Circumstances may arise where the actual export

[136] See Summary of First Conference.

price is below the AEP but still higher that the ANV (since the AEP is set higher than the ANV), effectively triggering the variable duty and resulting in a dumping duty being imposed on exports that are not in fact dumped, as they are higher than the normal value; and

- Previous practice of the ADC in reviews where there were no exports during the review period and the AEP was set at the same level as the normal value, so that a dumping duty would only be incurred where the actual export price was below this, that is, when dumping occurs (REP 351 and REP 250).

235. In reinvestigating this finding I also requested the ADC to take into consideration: Article VI:2 of the GATT and Article 9.3 of the Anti-Dumping Agreement; Section 8(2) and s.8(6) of the *Customs Tariff (Anti-Dumping) Act 1975* ("The Dumping Duty Act").

236. In reinvestigating this finding the ADC stated that it was satisfied that in the current circumstances, where LSI has not exported goods during the review period, the most relevant and reliable information available for the determination of an export price under subsection 269TAB(3) is the verified information obtained in relation to the export sales of other exporters. The ADC pointed out that during the review the ADC obtained verified information relating to 93 per cent of exports by volume to Australia from Italy, which allowed the ADC to not only understand export pricing, but to develop a detailed understanding of the composition of the Australia market for the goods exported from Italy in terms of product characteristic such as the size of the cans, whether the cans contained whole or chopped tomatoes, whether the tinned tomatoes were organic, or whether the cans also contained herbs or other additives. It stated:

> *'From a commercial perspective, the Commission is of the view that an exporter who has not previously exported the goods into the Australia market will foremost, to be competitive, need to make decisions about the types of product demanded by the Australian market, and from that basis, decisions about the pricing of those products. The Commission is further of the view that factors such as product type and pricing will differ across*

markets, including between domestic markets and export markets. The Commission notes that setting an ascertained export price based on an exporter's normal value as determined under subsection 269TAC(1) fundamentally involves setting the export price to reflect the product composition as it relates to the domestic market. The Commission does not accept that information about an exporter's sales into a domestic market represents the most relevant and reliable information for determining an ascertained export price under subsection 269TAB(3) where comprehensive, verified information about the Australian market is available.

The Commission accepts that within other contexts, such as an accelerated review the best available information to allow an ascertained export price to be determined pursuant to subsection 269TAB(3) may be the exporter's ascertained normal value. The Commission notes that this was in fact the case in relation to both REP 351 and REP 250.'[137]

237. The ADC concluded that in the current circumstances, and for the reasons detailed in the Reinvestigation Report, it affirms the reasoning applied in determining an AEP for LSI pursuant to s.269TAB(3), having regard to all relevant information, specifically the weighted average of the ascertained export prices of the five verified exporters whose export prices were determined under subsection 269TAB(1).[138]

238. While the ADC did not refer to the possible consequential effect of this methodology that I had referred to in the Reinvestigation Request, the ADC confirmed during the Second Conference that if the reinvestigated finding of LSI's AEP determination was accepted, as appropriate, the ADC would separately recommend to the Minister a change in the form of duties for LSI in accordance with the Guidelines on the Application of Forms of Dumping Duty (November

[137] See Section 7.3 of the Reinvestigation Report, pages 30 – 31.
[138] See Section 7.3 of the Reinvestigation Report, pages 30 – 31.

2013), as was acknowledged in the Commissioner's covering letter to the Reinvestigation Report.[139]

239. Having regard to the ADC's additional analysis in the Reinvestigation Report, I consider that its conclusion is reasonable in the circumstances and in accordance with s.269TAB(3) of the Act. I therefore accept the ADC's reinvestigated finding in regard to LSI's AEP and recommend that the reviewable decision be affirmed.

Ground 2: The investigation should be terminated since the dumping margin is negative

240. LSI contends that the reviewable decision is not correct since it results in collection of duties in excess of the dumping margin. In this respect, it claims that the measures should be terminated vis-à-vis LSI.

241. LSI makes the following points in regard to this claim in its application for review:

i) According to Article VI.2 of the GATT, antidumping duties can be imposed only on "*dumped products*". Moreover, Article 2.1 of the ADA sets forth that "*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 destined for consumption in the exporting country*." Therefore, antidumping duties cannot be imposed on goods whose export price is higher than their normal value. It follows that if, as a result of an interim review, an investigation authority determines that the dumping margin of a particular exporter is negative, the antidumping duty targeting that exporter should be immediately terminated, irrespective of the form it may take (i.e. ad valorem duty, floor price or combination of the two measures); and

[139] See Second Conference Summary.

ii) In the case at hand, in light of the fact that LSI's dumping margin is established as negative in REP 349/354, no antidumping measure (including the floor price applicable to LSI's imports pursuant to the so-called "combination method") should be imposed vis-à-vis LSI.

242. In its submission to the Review Panel, the ADC stated that this issue is addressed at sections 2.5.4 to 2.5.6 of REP 349/354 (in respect of other interested parties) and that it considered that the explanation in section 2.5.5 of REP 349/354 to be sufficient to deal with the matters raised by LSI. In REP 349/354 the ADC had referred to the EC's submission based on WTO jurisprudence[140] than when an investigation determines that there is no dumping margin (or a de minimis margin) for an exporter, the investigation insofar as it applies to that exporter should be terminated. In the particular decision, the Appellate Body had noted that the ADA requires that exporters who were found during an investigation not to have engaged in dumping be excluded from the anti-dumping measure and requires the investigation to be terminated in respect of those exporters. Those same exporters must also be excluded from administrative and changed circumstances reviews. The ADC pointed out, however, that this aspect of the Appellate Body's finding did not appear to be relevant to these reviews of measures because the ADC is not considering any exporters who, during the original investigation (Investigation 217), were found to be not dumping or that had de minimis dumping margins. Investigation 217 was terminated insofar as it related to two exporters, Feger and La Doria, and the Commissioner has not included Feger and La Doria in these reviews of measures. Accordingly, the ADC is of the view that these reviews of measures can be distinguished.[141] I agree with this reasoning of the ADC.

243. In addition, the ADC referred to the EC's submission that, under Article 5.8 of the ADA, any exporters found to have a negative or de minimis margin should have

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[140] The ADC stated that it understood that the WTO reference in the EC's submission relates to the decision of the WTO Appellate Body, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/AB/R).
[141] See Section 2.5.5 of REP 349/354, page 16.

the investigation terminated against them, and be excluded from any subsequent review. It was pointed out that Princes Industrie Aimentar S.r.L. had made a similar argument, with additional reference to Article 11(2) of the ADA, which relates to when an interim review has found "*that the antidumping (sic) duty is no longer warranted*", and that Conserve Italia also made a similar submission. The ADC noted in this regard that a dumping duty notice may be revoked in certain circumstances, including in its application to a particular exporter. It stated further:

> '*However, subsection 269ZDA(1A) prevents the Commissioner from making a revocation recommendation to the Parliamentary Secretary unless, among other matters, a revocation review notice has been published in relation to the review of measures. No revocation review notice was published in relation to these reviews of measures because the Commissioner did not receive an application under section 269ZCA to extend the review of measures to include revocation. As no application was made to extend the review of measures to include revocation, the Commissioner is not obliged to consider whether the anti-dumping measures are no longer warranted. Accordingly, subsection 269ZDA(1A) prevents the Commissioner from recommending to the Parliamentary Secretary that the measures be revoked as a result of these reviews of measures.*'[142]

244. In addition, I also noted that s.269ZBD(1AA) of the Act, in dealing with the powers of the Minister in relation to a review of anti-dumping measures, states the Minister "*must not*" make a revocation declaration in relation to anti-dumping measures unless a revocation review notice has been published in relation to the relevant review of measures. It was clear that no such revocation review notice was published in respect of measures imposed on LSI.

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[142] See Section 2.5.6 of REP 349/354, page 17/

245. I therefore consider that LSI's ground of review that the investigation should be terminated since the dumping margin is negative, must fail.

Rejected Grounds of Review

246. It should be noted that LSI's application for review contained two further grounds of review that were rejected by the Review Panel prior to the initiation of the review in a letter to LSI dated 11 July 2017 (the LSI rejection notice) being:

i) LSI should have been excluded from the scope of Review No. 354 on the ground that a review of measures in relation to its exports, that is, Review No. 351, was still ongoing at the time of initiation of ADC Review No. 354, contrary to s 269ZA(2) of the *Customs Act 1901* and World Trade Organisation ("WTO") case law; and

ii) The reviewable decision is not correct since it results in collection of duties in excess of the dumping margin and should be modified so that any "floor price" applicable to LSI's imports should be set at the level of the ascertained normal value and not at the level of LSI's ascertained export price.[143]

247. While it is not usual to refer to rejected grounds of review in Review Panel reports, I shall discuss each ground briefly since LSI challenged the rejections in its s.269ZZJ submission to the Review Panel.

LSI should have been excluded from the scope of ADC Review No. 354

248. The reason for the rejection of this ground of review as set out in the LSI rejection notice is as follows:

[143] It should be noted that this is the second component of what is referred to as the "Third Ground of Review" in LSI's application for review. The rejection did not apply to the first component of LSI's "Third Ground" of review, which is that the reviewable decision is not correct since LSI's dumping margin was established as negative and therefore the investigation should be terminated and no Anti-Dumping measure should be imposed.

'*This ground relates in effect to the decision of the Commissioner to initiate a review of anti-dumping measures in respect of LSI under Division 5 of the Customs Act 1901. Section 269ZZA of the Customs Act 1901 sets out those Ministerial decisions that can be reviewed by the Review Panel and s 269ZZN sets out those decisions of the Commissioner that can be reviewed by the Review Panel. While a Commissioner's decision to reject an application for the imposition of dumping measures is reviewable, the decision of the Commissioner to initiate an investigation or review is not expressly mentioned in either section. Therefore, and in accordance with previous decisions of the Review Panel, the Review Panel does not have the power to review the decision, since it is not a reviewable decision pursuant to s 269ZZA or s 269ZZN of the Customs Act.*

It should in any event be mentioned that s 269ZA(4)(b) of the Customs Act provides that the making of a declaration under s 269ZG(3), which is made following an accelerated review, is not treated as a review of the dumping duty notice for the purpose of determining whether s 269ZA(2) permits any person other than the applicant for the accelerated review to apply for a review of the notice.'

249. LSI submits that the Review Panel misinterpreted this ground of review and consequently rejected it by stating that the Review Panel was not in a position to review the decision insofar as it relates to the decision of the ADC to initiate an investigation or review concerning the imports of PPTs from LSI.

250. Firstly, in this respect, LSI noted that in its application for review it did not challenge the decision of the ADC to initiate a review vis-a-vis LSI but, rather, the decision of the Minister to confirm the inclusion of LSI within the framework of Review 354 and, therefore, to amend LSI's variable factors pursuant to Section 269ZDB(1)(iii) of the *Customs Act 1901*. However, in its application for review LSI submits, *"that the ADC wrongly disregarded the outcome of Review 351 and extended Review 354 to exports of PPTs to Australia by LSI. The Minister, in*

*turn, accepted the ADC's recommendations drawn up on the basis of such inaccurate extension, thereby creating an unfair result for LSI." (*emphasis added*)* It seemed clear to me that LSI was challenging its inclusion within the framework of Review 354, which is in effect a challenge of the decision of the ADC to include LSI in its initiation of the review. The Minister did not "*confirm the inclusion of LSI within the framework of Review 354" as* suggested by LSI, but rather accepted the ADC's recommendations (that is, its findings) relating to Review 354. It should be recalled, as discussed in the introductory section of this report on the nature of the "The Review", that the obligation on an applicant to set out the reasons for the application for review is linked to the task the Review Panel has in determining whether the 'ultimate decision' (the reviewable decision) was the correct and preferable one.[144] The inclusion of LSI in Review 354 cannot be said be "*ultimate decision*" or the reviewable decision.

251. Secondly, LSI considers that the decision of the Minister to amend LSl's variable factors as a result of Review 354 violates the fundamental principle of fair and equal treatment, as enshrined in the ADA and WTO case law. LSI does not consider the outcome of the discretion used by the ADC in the present case to be even-handed decision since it confirmed the inclusion of LSI in Review 354, notwithstanding that LSI was also subject to Review 351, whereas ARIA was excluded from the scope of Review 354 on the ground that Review 349 had already been initiated. At the outset it should be noted that the denial of procedural fairness simpliciter does not arise for consideration in a review.[145] In any event Review 351 was an accelerated review under Division 6 of the Act while Reviews 349 and 354 are reviews of anti-dumping measures conducted under Division 5 of the Act. It was particularly mentioned in the LSI rejection notice that s.269ZA(4)(b) of the Act provides that the making of a declaration under s 269ZG(3) (which is made following an accelerated review), is not treated as a review of the dumping duty notice for the purpose of determining whether s

[144] See paragraph 19 above.
[145] See conclusion of Mortimer J *in GM Holden Limited v Commissioner of the Anti-Dumping Commission* [2014] FCA 708, discussed by the Review Panel in ADRP Report No.16, Quenched and Tempered Steel Plate (2015).

269ZA(2) permits any person other than the applicant for the accelerated review to apply for a review of the notice. These provisions therefore permitted SPCA to apply for a review of measures relating to LSI pursuant to Chapter 5 of the Act, notwithstanding that an accelerated review had been initiated.[146] It should also be noted that since Reviews 349 and 354, being both reviews of antidumping measures under Chapter 5 of the Act, examined the same goods exported to Australia during the same time period, the ADC established a single electronic record for both reviews and issued a single report being REP 349/354.

252. On the basis of the above I consider that LSI's ground of review was properly rejected.

The reviewable decision results in collection of duties in excess of the dumping margin

253. The reason for the rejection of this ground of review as set out in the LSI rejection notice is as follows:

> *'This ground would appear to be a challenge of the calculation of the fixed and variable rate of duty under s 5(2) and (3) of the Customs Tariff (Anti-Dumping) Regulation 2013 ("the Tariff Regulation"), pursuant to section 8(5) of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act), for the interim dumping duty payable in accordance with the combination duty method. The decision of the Assistant Minister in this regard is made pursuant to s 8(5) and of the Dumping Duty Act and not under s 269ZDB(1) of the Customs Act 1901. Therefore, and in accordance with previous decisions of the Review Panel, the Review Panel does not have the power to review the decision, since it is not a reviewable decision pursuant to s 269ZZA(1) of the Customs Act 1901.'*

254. LSI submits that the Review Panel misinterpreted and therefore incorrectly dismissed this ground of review, stating that LSI does not challenge the form of

[146] This was noted by the ADC in REP 354, page 17.

the duty but rather, the ADC's determination of LSI's variable factors, and in particular the determination of LSI's AEP. I consider that the ground of review as stated in the application of review appears to be based on the calculation and future collection of duties resulting from the particular form of duties, in respect of which the Review Panel does not have the power of review, as stated in the LSI rejection notice.

255. However, it should be noted (with regard to LSI's statement that it is not challenging the form of duty but rather the determination of the AEP) that challenging the determination of the AEP is a reviewable decision under s.269ZZA(1) and is already the subject of consideration in this review (above) under the heading, "*Ground 1: The ADC's methodology to ascertain LSI's variable factors is flawed*" and in particular under the sub-heading, "*Methodology used to calculate LSI's ascertained export price (AEP) is flawed."* Further, in requesting the ADC to reinvestigate the determination of the AEP, I requested the ADC to take into consideration other relevant information, including that LSI had a negative dumping margin and therefore its AEP was greater than its ANV. Therefore, it would appear that even though this ground of review remains rejected, the underlying concerns of LSI will have been taken into consideration by LSI's challenge of the methodology used to calculate LSI's ascertained export price (AEP).

256. LSI also refers to Article VI.2 of the GATT and Article 2.1 of the ADA in support of its contention that if, as a result of an interim review, an investigation authority determines that the dumping margin of a particular exporter is negative, the anti-dumping duty targeting that exporter should be immediately terminated, irrespective of the form of the duty. It should be point out that it was made clear in the notice to LSI that the rejection was only in respect of the second component of what is referred to as the "*Third Ground of Review"* in LSI's application for review. The rejection did not apply to the first component of LSI's "*Third Ground*" of review, which is that the reviewable decision is not correct since LSI's dumping margin was established as negative and therefore the investigation should be terminated and no anti-dumping measure should be

imposed. This first component of the third ground of review was included in the public notice and is considered above under the heading, "*Ground 2: The investigation should be terminated since the dumping margin is negative*".

Recommendations / Conclusion

257. For the reasons set out above, pursuant to s.269ZZK(1) of the Act:

i. I consider that the reviewable decision in respect of Mutti was not the correct and preferable decision, in that:

The AEP should have been adjusted downwards by deducting the amounts of the deferred rebates that Mutti paid to certain Australian importers, with a resulting downwards adjustment to the ANV and increase in the dumping margin from 3.2 per cent to 3.9 per cent.

Accordingly I recommend that the Parliamentary Secretary revoke the decision and substitute for the Reviewable Decision a decision declaring that the dumping duty notice applicable to Mutti's goods be taken effect as if the relevant variable factors had been fixed in accordance with Confidential Schedule A.

ii. I consider that the reviewable decisions in respect of LSI was not the correct and preferable decision, in that:

LSI's domestic sales should have been considered suitable for the purposes of calculating a normal value under subsection 269TAC(1) of the Act adjusted in accordance with s.269TAC(8)(b), resulting in a lower adjusted normal value.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted, I recommend that the Parliamentary Secretary revoke the decision and substitute for the Reviewable Decision a decision declaring that the dumping duty notice

applicable to LSI's goods be taken effect as if the relevant variable factor had been fixed in accordance with Confidential Schedule A.

iii. I consider that all other reviewable decisions relating to REP 349/354 that are being challenged in this review to be the correct and preferable decisions and accordingly I recommend that they be affirmed.

Leora Blumberg
Panel Member
Anti-Dumping Review Panel
10 January 2018

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