Australian Government

Anti-Dumping Review Panel

ADRP REPORT No. 14

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PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY

Review of a decision of the Parliamentary Secretary to publish a dumping duty notice in relation to prepared or preserved tomatoes exported from Italy.

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Introduction

1. The following Applicants have applied, pursuant to section 269ZZC of the *Customs Act* (**the Act**), for review of a decision of the Parliamentary Secretary to the Minister for Industry (**the Parliamentary Secretary**) pursuant to s.269TG(1) and s.269TG(2) of the Act to publish a dumping duty notice in respect of prepared or preserved tomatoes imported from Italy:

   Associazione Nazionale Industriali Conserve Alimentari Vegetali (**ANICAV**);
   Conserve Italia Soc. Coop. Agr (**Conserve Italia**);
   Government of Italy;
   Attianese SpA (**Attianese**);
   Lodata Gennaro & C. S. p A. (**Lodato**); and
   Industria Meridionale Conserve Alimentari (**IMCA**)

2. The applications for review were accepted and notice of the proposed review as required by section 269ZZI of the Act was published on 30 May, 2014. The Senior Member of the Review Panel has directed in writing, pursuant to section 269ZYA, that the Review Panel for the purpose of this review be constituted by me.
3. Before commencing the review, I advised the Applicants that while I was a partner in the law firm, Baker & McKenzie, I had acted for Roger Simpson of Roger Simpson & Associates, (who represented Conserve Italia Soc. Coop. Agr, in this review) and his clients and that approximately 20 years ago I had acted for ANICAV[1]. None of the Applicants objected to my conducting the review.

Background

4. On 17 June, 2013, SPC Ardmona Operations Limited (**SPCA**) lodged an application under s 269TB of the Act, requesting that a dumping duty notice be published with respect to prepared or preserved tomatoes exported from Italy. This application was accepted and

[1] Letter to the Applicants dated 30 May 2014.

on 10 July, 2013 an investigation was initiated by the Commissioner of the Anti-Dumping Commission (**the ADC**). On 4 February, 2014 the ADC issued the Statement of Essential Facts (**SEF**) for the investigation.

5. The final report to the Parliamentary Secretary was made by the ADC on 21 March, 2014[2] (the **ADC Report**). The ADC recommended to the Parliamentary Secretary that dumping duty notices be published with respect to prepared or preserved tomatoes exported from Italy for all exporters, with the exception of La Doria S.p. A (**La Doria**) and Feger di Gerardo Ferraioli S.p. A. (**Feger**) The Parliamentary Secretary accepted this recommendation and dumping duty notices were published on 16 April, 2014.

Conduct of the Review

6. In accordance with s.269ZZK(1) of the Act, the Panel must recommend that the Minister (in this case, the Parliamentary Secretary) either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ requires the Panel to determine a matter required to be determined by the Minister in like manner as if it 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.
7. In carrying out its function the Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6)(a), i.e. information to which the ADC had, or was required to have, regard in reporting to the Minister. In addition to relevant information, the Panel is only to have regard to conclusions based on relevant information that are contained in the application for review and any submissions received under s.269ZZJ.
8. Some applications for review did contain information to which the Panel was not permitted by s269ZZK to have regard. This information is identified below in the section dealing with the consideration of the reasons put forward by the Applicants for the decision of the Parliamentary Secretary being not the correct or preferable decision.

[2] ADC Report 217

9. Unless otherwise indicated, in conducting this review, I have had regard to the applications (including documents submitted with the applications) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have also had regard to the ADC Report and information relevant to the review which was referenced in the ADC Report.

10. Upon accepting the applications for review of the Parliamentary Secretary's decision, the ADC was asked to provide comments on the grounds raised in the applications for review[3]. The response from the ADC was received on 24 June, 2014.[4] Both the request to the ADC and the response were made publicly available, except for the confidential attachments, before the time for submissions expired under s.269ZZJ. I have relied upon the ADC's response to assist me to identify information which was not relevant information as defined by s.269ZZK. I have also had regard to the response to the extent that the ADC has identified information to which it had regard in making its recommendation to the Parliamentary Secretary and which it considered responsive to the claims made by the Applicants.

11. In the course of the review, the Panel has requested further detail or clarification from the ADC of the calculations underpinning some of the findings in the ADC Report. This information was not made publicly available as it was confidential information.

12. The time for submissions by interested parties under s.269ZZJ is 30 days after the public notice. As the public notice was given on 30 May, 2014, the time for submissions expired on 30 June, 2014. Submissions were received from:

    John Bracic & Associates on behalf of Leo's Imports and Distributors Pty Ltd

    Roger Simpson & Associates on behalf of Conserve Italia

    The European Commission

    SPC Ardmona

    Giaguaro S.P.A.

13. S.269ZZJ describes those parties entitled to make submissions to the Panel in relation to a review. One of the categories entitled to make submissions is "interested parties in

[3] Letter from the Anti-Dumping Review Panel to the ADC dated 30 May 2014
[4] Letter and attachments from ADC dated 23 June 2014

relation to the reviewable decision". This picks up the definition of "interested party" in s269ZX. As the Panel is only allowed to have regard to submissions received under s269ZZJ, it follows that the Panel can only have regard to submissions from those parties described in s269ZZJ.

14. The European Commission noted in its submission that it had been considered as an interested party in the investigation by the ADC. This appears from the ADC Report to be the case[5], although it is not clear on what basis the ADC considered that the European Commission was an "interested party". The European Commission is a party to the Anti-Dumping Agreement[6] and handles disputes under that agreement for its members. It is understandable that it could be regarded as an interested party with respect to anti-dumping investigations involving its members.

15. The term "interested party" for the purpose of an anti-dumping investigation by the ADC is defined in s.269T of the Act. That definition is similar to the definition of an interested party for the purposes of s.269ZZJ[7]. It is possible that the European Commission comes within (b) or (f) of the definition of interested party. As the conclusions put by the European Commission in its submission were similar to those put by other parties, particularly the Government of Italy, it has not been necessary to resolve the issue of the European Commission's standing in this review.

16. Some of the submissions received by the Panel contained information, or conclusions based upon information, which was not "relevant information" within the meaning of s.269ZZK. Such information is identified in the section below dealing with the consideration of the grounds for review. I have not had regard to such information in conducting the review and making my recommendations to the Parliamentary Secretary.

17. After reviewing the applications, submissions and other material described above[8], pursuant to s.269ZZL of the Act, I required the ADC to re-investigate the finding in the ADC Report that dumping had caused material injury to the Australian Industry.[9] The

[5] ADC Report para 2.3, page 11
[6] WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
[7] S.269ZX definition of "interested party"
[8] Paras 8,9 and 10
[9] Letter to the ADC dated 18 July 2014

request was made publicly available and a copy of the non-confidential version of the response from the ADC is Annexure 1 to this report.[10]

18. The time specified for the reinvestigation report to be provided to the Panel under s.269ZZL(1)(b) was extended twice, with the final date for the report being 19 September 2014. The report was received by the Panel on 23 September, 2014. I do not believe the failure of the ADC to provide the report within the time specified as required by s.269ZZL(1)(b) has any consequence except to extend the time for this report. As s.269ZZK(3)(b)(ii) requires that the report of the Panel be made within 30 days of the day on which the ADC gives the Panel the re-investigation report, this report to the Parliamentary Secretary is due by 23 October, 2014.

19. In conducting the review, I had regard to the report from the ADC on its re-investigation as required by the legislation. [11]

20. A number of applicants and interested parties requested that they be allowed to make further submissions in response to the re-investigation by the ADC. After considering the arguments put forward in support of this request, I came to the view that the legislation did not give the Panel a discretion to have regard to submissions other than those made pursuant to s269ZZJ of the Act. The parties were informed of this view[12] and the reasons for the view are set out in detail in Annexure 2 to this report.

Grounds for Review

ANICAV

21. ANICAV is not itself an exporter, but is an industry association representing about one hundred Italian tomato processors and is an interested party pursuant to s. 269ZX of the Act as a trade organisation, a majority of whose members are , or are likely to be, directly concerned with the production of prepared or preserved tomatoes or their export to Australia.

22. The reasons upon which ANICAV relies are set out in a submission annexed to the application[13] and can be summarised as:

[10] ADC Re-investigation Report No. 269 dated 22 September 2014
[11] See s269ZZK(4A)
[12] Letters to parties dated 26 August 2014
[13] Submssion by ANICAV dated 13 May 2014

a. The erroneous assessing of the volume of dumped imports by the "residual exporters";
b. The erroneous consideration of the effects of the un-dumped imports on the prices in the injury determination;
c. The lack of consideration of the factors other than dumped imports that caused injury; and
d. The injury determination carried out by the ADC is ill-founded in so far as it is based on a flawed like products definition.

Conserve Italia Soc. Coop. Agr

23. The reasons upon which Conserve Italia relies are set out in an attachment to its application and can be summarised as:
    a. in finding that dumped imports of tomatoes from Italy have caused material injury to SPCA, the ADC has not separated the impact of factors other than dumping on the price paid for like products produced and sold by SPCA; and
    b. any injury from dumped products was not material.

Government of Italy

24. The reasons upon which the Government of Italy relies are the same as those relied upon by ANICAV, which are listed above.

Attianese SpA

25. The reasons relied upon by Attianese are set out in an attachment to the application and can be summarised as:
    a. The injury suffered by the Australian industry was caused by factors other than dumped imports; and
    b. The ADC's determination of the volume of dumped imports for the purpose of the injury assessment is flawed.

Lodato Gennaro & C S. p A.

26. The reasons upon which Lodato relies are set out in an attachment to the application. With one exception they are effectively the same as those made by Attianese, both

companies using Van Bael & Bellis to act on their behalf. In addition to those reasons put forward by Attianese, Lodato also contends that the decision of the Parliamentary Secretary was not the correct or preferable decision because the calculation of the dumping margin applied to uncooperative exporters was flawed.

I.M.C.A. SpA

27. The application by IMCA was accompanied by a letter from Norton Rose Fulbright and a report from Ernst & Young.

28. On behalf of IMCA, the letter from Norton Rose Fulbright seeks review of a number of what it describes as "incorrect or not preferable decisions"[14] contained in the ADC Report. These are listed as:

    a. The ADC's decision to treat IMCA as an unco-operative exporter;
    b. The ADC's decision not to verify the data provided by IMCA (by way of a verification visit or 'desktop audit' or otherwise); and
    c. The ADC's assessment of IMCA's dumping margin to be 26.35% using the following methodology:
        i. export prices pursuant to section 269TAB(3) of the Act having regard to all relevant information, using the lowest export price from exporters found to have a dumping margin greater than 2%; and
        ii. determination of IMCA's normal values pursuant to section 269TAC(6) of the Act having regard to all relevant information, using the highest normal value from all cooperative exporters found to have a dumping margin greater than 2%.

29. The decision which the Panel is reviewing is the decision of the Parliamentary Secretary to publish a dumping duty notice with respect to tomatoes exported from Italy, including tomatoes exported by IMCA, not individual decisions made by the ADC in the course of its investigation or in the course of making its report to the Parliamentary

[14] Page 2, para 4.3 of letter from Norton Rose Fulbright dated 16 May 2014

Secretary. An applicant is required to provide reasonable grounds for the reviewable decision not being the correct or preferable decision.[15]

30. The application for review by IMCA has been treated by the Panel as one which seeks a review of the decision of the Parliamentary Secretary on the ground that it is not the correct or preferable decision for the reasons set out in the letter from Norton Rose Fulbright.

Consideration of Grounds

31. Given that the applications by ANICAV and the Government of Italy rely on similar reasons, these applications are considered together. This approach has also been taken with respect to the applications of Attianese and Lodato.

ANICAV/ Government of Italy

32. As a preliminary matter, I note that the applications contain information that it not relevant information, as that expression is defined by s.269ZZK(6) of the Act. This is the reference to the data from IRI Information Resources S.r.l. and The Nielsen Company S.r.l. regarding the Italian market. I have disregarded this information in conducting the review.

Volume of dumped imports by residual exports

33. ANICAV and the Government of Italy submit that the ADC was erroneous in its assessment of the volume of dumped imports by the "residual exporters". This is a reference to the exports by those exporters who were not selected by the ADC for the sampling exercise it undertook. The ADC considered that the number of exporters was too large to determine individual dumping margins for each of the exporters and consequently, as permitted by s.269TACAA of the Act, it undertook a sampling exercise by which it identified seven selected exporters, accounting for approximately 70% of the export volume to Australia.[16]

[15] S. 269ZZE (2)(b) and 269ZZG(1)(b).
[16] Para 7.3 of the ADC Report 217

34. The complaint made by the Applicants is that the ADC wrongly, and in contravention of the Anti-Dumping Agreement[17], treated the exports of the residual exporters as being dumped. When the exports of the residual exporters are excluded, it is contended that the actual percentage of exports that were found to have been dumped was only 26%. Consequently, the decision of the ADC to treat 56% of the exports as having been dumped, rather than 26% was unwarranted.

35. As part of their argument in this regard, the Applicants contend that common sense would suggest that the export prices of the producers exporting smaller volumes (i.e. the residual exporters), would not be lower than those of the market leaders.[18] They also contended it was unreasonable to claim that those exporters found dumping (representing a very small share of the Australian market) could be able to act as price leaders so as to influence the price level in the market. They also point to the dumping margin being only 4.24%.

36. The arguments put by the Applicants on this issue were addressed in the ADC Report when dealing with the submissions made in response to the SEF[19]. The ADC noted that submissions on this issue referred to the decision of the WTO Appellate Body in *EC-Bed Linen* DS141[20]. In that case, the Appellate Body of the World Trade Organisation (**WTO**) reversed the finding of the WTO Panel that an investigating authority is entitled to consider the total volume of imports from non-examined exporters as being dumped for the purpose of an injury analysis, as long as a dumping margin had been established for any of the examined exporters. Contrary to the Panel, the Appellate Body found that Article 9.4 of the Anti-Dumping Agreement (which deals with the determination of dumping margins for non-examined exporters) did not provide justification for considering all imports from non-examined exporters as dumped for the purpose of the determination of injury. Relevantly the Appellate Body stated:

[17] WTO Agreement on the Implementation of Article VI of the General Agreement on Tariff and Trade 1994
[18] ANICAV submission page 3
[19] Para 8.4 of the ADC Report 217
[20] European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (WT/DS141/AB/R)

> "Article 9.4 provides no guidance for determining the volume of dumped imports from producers that *were not* individually examined on the basis of 'positive evidence' and an 'objective examination' under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel."[21]

37. The Appellate Body concluded that the EC's approach of considering all imports from non-examined exporters as dumped, because a number of exporters in the sample were found to have been dumping, was inconsistent with the obligation under Article 3 of the Anti-Dumping Agreement to conduct an objective assessment of the evidence. In this respect, the Appellate Body stated:

> "The examination was not 'objective' because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to limit the examination to some, but not all, producers — as they are entitled to do under Article 6.10 — all imports from all non-examined producers will necessarily always be included in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the 'all others' duty rate on imports from non-examined producers, regardless of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to non-examined producers are simply presumed, in all circumstances, to be dumped, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it 'more likely [that the investigating authorities] will determine that the domestic industry is injured', and, therefore, it cannot be 'objective'. Moreover, such an approach tends to favour methodologies where small numbers of producers are examined individually. This is because the smaller the number of individually-examined producers, the larger the amount of imports attributable to non-examined producers, and, therefore, the larger the amount of imports presumed to be dumped. Given that the Anti-Dumping Agreement generally requires examination of all producers, and only exceptionally permits examination of only some of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement. For these reasons, we conclude that the European Communities' determination that *all* imports attributable to non-examined producers were dumped — even though the evidence from *examined* producers showed that producers accounting for 53 per cent of imports attributed to examined producers were *not* dumping — did not lead to a result that was *unbiased, even-handed*, and *fair*. Therefore, the European Communities did not satisfy the requirements

[21] Para 126

of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is '*objective*'."[22]

38. In response to the submissions based on these findings in *EC-Bed Linen*, the first point made by the ADC is that the Australian legislation "specifically provides for the Minister to have regard to the size of the dumping margin as a relevant factor in assessing whether dumping caused material injury"[23]. This is a reference to s.269TAE(1)(aa) of the Act which, in effect, provides that in determining whether material injury has been caused by exports of goods the Minister may have regard to "the size of the dumping margins, worked out in respect of goods of that kind that have been exported to Australia and dumped". The ADC goes on to conclude that in the present case the dumping margin determined for residual exporters was relevant to the material injury assessment being undertaken.

39. In investigating whether material injury has been caused to an Australian industry by dumping, the size of the dumping margin for goods that have been found to have been exported to Australia and dumped is relevant. S.269TAE(1)(aa) has nothing to say about whether or not exports of non-examined or residual exporters can be treated as dumped for the purpose of an injury assessment because exports of some of the examined exporters were dumped. Given that the dumping margins for the residual exporters were determined by a methodology that predetermined that dumping margins would be found, to treat the exports of the residual exporters as dumped only on that basis and to have regard to such dumping margins determined for them as if they were actual margins, would be to act contrary to the requirement in Article 3 of the Anti-Dumping Agreement to make a determination of injury on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination" of the volume of dumped imports and the effect of dumped imports on prices.

40. It is of course Part XVB of the Act which governs this and other anti-dumping investigations. The Anti-Dumping Agreement and decisions of the WTO Appellate Body are not directly binding. However, the provisions of Part XVB are intended to implement

[22] Paras 132-133
[23] Page 52 of ADC Report 217

Australia's obligations under the Anti-Dumping Agreement and other relevant WTO agreements. Thus, the provisions of Part XVB are to be interpreted, as far as the language permits, in accordance with Australia's obligations under those international agreements.[24] There does not appear to be anything in the language of s.269TAE or Part XVB generally which would require a different approach to the determination of material injury in this respect from that set out by the Appellate Body in *EC-Bed Linen*. Indeed, the terms of s.269TAE (2AA) which provides that a determination of whether material injury to an Australia industry has been or is being caused "must be based on facts and not merely on allegations, conjecture or remote possibilities" would seem to require an approach not dissimilar to that required by *EC-Bed Linen*. I note also that the Ministerial Direction on Material Injury[25] requires that "identification of material injury be based on facts and not on assertions unsupported by facts". The Ministerial Direction also refers to the demonstration of injury being consistent with Australia's obligations under the relevant WTO agreements.

41. For these reasons, the comment in the ADC Report that it is not necessary under Australia's legislation to separately establish that the volume of imports from residual exporters were dumped for the purposes of assessing material injury[26]cannot be accepted without some qualification. It is likely that in many investigations using the sampling method it will not be necessary to separately consider the effect of the imports by residual or non-examined exporters when assessing material injury. The sample may be sufficiently large and/or representative and/or the results of the investigation so conclusive that it is possible to draw conclusions or make extrapolations from the investigation with respect to the imports from the residual or non-examined exporters. However, if it is necessary to consider those imports, then the imports cannot be treated as dumped simply on the basis of a dumping margin determined using a methodology which assumes the imports are dumped.

[24] Pilkington (Australia) Ltd v Minister for Justice & Customs (2002) 127 FCR 92; Minister of State for Home Affairs v Siam Polyethylene Co. Ltd [2010] FCAFC 86, paras 34-35; G M Holden v Commissioner of the Anti-Dumping Commission [2014] FCA 708, paras 7-12.
[25] Ministerial Direction on Material Injury 2012 issued by Jason Clare, Minister for Home Affairs on 27 April 2012.
[26] Page 52 of Report 217

42. Notwithstanding the comment in the ADC Report, it appears that the ADC did consider whether there was evidence that the imports from the residual exporters were being dumped rather than simply assuming that they were. After referring to passages from the Appellate Body Report which give examples of what might constitute "positive evidence" for the determination of the volume of dumped imports attributable to non-examined producers, the ADC Report states that the ADC had regard to other sources of information in making the determination of material injury.

43. The other information used by the ADC to establish the volume of dumped imports attributable to residual exporters was the statistical data of declared import values for the goods exported by individual residual exporters during the investigation period. According to the ADC Report, this information revealed that imports from "all of the residual exporters were dumped by margins exceeding 2%" and the "average dumping margin for the residual exporters was approximately 14% when compared to the verified weighted average normal value for all cooperating exporters"[27].

44. While it reasonable to use the data of the declared import values, it is necessary to consider the methodology by which the ADC determined whether the imports of the residual exporters had been dumped and the dumping margins, using this data. From the ADC Report and confidential information provided[28] to the Panel, it appears that the methodology was that the ADC used the weighted average export prices for the imports by the residual exporters. These prices were based on the declared weighted export price per entry which was data extracted from the Australia Customs commercial database. The weighted average export prices were then compared with the weighted average normal value of all selected exporters.

45. The validity of the methodology used by the ADC depends on the assumption that the exports of the selected exporters are properly comparable to those of the residual exporters and that there were no differences in the products or circumstances of sale that may have affected the comparison.

[27] Page 53 of Report 217
[28] See para 9 above

46. There is nothing wrong with a methodology which uses assumptions as long as those assumptions are tested or have some basis in fact. In *Mexico — Anti-Dumping Duties on Rice*[29], the Appellate Body observed that assumptions by an investigating authority should be based on positive evidence:

> "An investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on 'positive evidence'. Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified."[30]

47. It is also arguable that an injury analysis which is based on assumptions which are not based on reasonable inferences from established facts would not comply with s.269TAE(2AA). There does not appear however to have been any analysis of the data used by the ADC to determine whether or not the weighted average normal value of the selected exporters was comparable and hence suitable to be used to determine whether there had been dumping, and the margin of such dumping, with the exports by the residual exporters.
48. It needs to be recognised that there is a limit on the ability of the ADC to investigate the exports of the residual exporters. However, the data which has been used does raise the issue of whether or not the assumption made by the ADC was valid. The export prices of the residual exporters do vary considerably and there is no indication in the ADC Report that the reasons for this significant variation was considered. It does raise the issue of the suitability of the use of the weighted average normal value of the selected exporters for this exercise, at least without consideration of the comparability of the products or transactions.
49. Another issue which arose from the exercise performed by the ADC with respect to the imports from the residual exporters, was the use of the results. While the exercise did result in an average dumping margin of approximately 14%, there was a considerable variation in the dumping margins, and in one case there was apparently a negative dumping margin. The impact of this does not appear to have been considered by the ADC or at least it is not reflected in the injury analysis described in the ADC Report.

[29] Mexico-Definitive Anti-Dumping Measures on Beef and Rice, Complaint with respect to Rice WT/DS295/R
[30] Ibid para204

50. The volume of dumped imports was found by the ADC to be approximately 56% of the goods exported from Italy[31.] This finding was however based in part on the analysis of the imports from the residual exporters. Given the concerns I had with this analysis, as described above, and that the finding of the volume of dumped imports is an integral part of the injury analysis, I required the ADC to reinvestigate the finding in the ADC Report that dumping had caused material injury to the Australian Industry[32].

The Re-investigation Report

51. The re-investigation found, with respect to the volume of dumped goods, that a significant proportion of the exports by the non-examined exporters (the residual and uncooperative exporters) were dumped. The methodology used to reach this finding can be briefly summarised as follows:

    a. The ADC identified the models used to calculate the normal value for each of the examined exporters.
    b. The commercial database maintained by Australian Customs was then examined to determine whether any of those models could be matched with the description in the database of the goods imported from the non-examined exporters.
    c. In some cases the ADC used information from importer visits to identify the goods where the database information was ambiguous.
    d. The ADC identified six models of goods that were used for the normal values for the examined exporters which were comparable with imports from the non-examined exporters.
    e. Where it found a comparable product imported from a non-examined exporter, the ADC then compared the weighted average export price of those goods with the corresponding weighted average normal value of the exports by the selected exporters to determine a dumping margin.[33]

52. When the results from the above exercise were extrapolated across all of the imports from the non-examined exporters and dumped imports from selected exporters included, the ADC concluded that, in the absence of more reliable information, 47.7 % was a reasonable estimate of the volume of dumped goods during the investigation period[34].

53. As noted above there are limitations on the ability of the ADC to investigate imports from non-examined exporters and the ADC had some concerns regarding the reliability of some of the data used. Nonetheless, the methodology used by the ADC in the re-

[31] Paras 7.13 and 8.6.1 of Report 217
[32] Letter to the ADC dated 18 July 2014
[33] Sections 4.3.2 and 4.3.2, pages 14 and 15 of the ADC Re-investigation Report No. 269
[34] Section 4.4.1 and confidential tables 7 and 8 of ADC Re-investigation Report No. 269

investigation addressed the concerns I expressed above with regard to that used in the original investigation. Steps were taken to ensure as far as possible that only comparable products and transactions were used.

Effect of Un-dumped Goods on Prices

54. The Applicants contend that there was an erroneous consideration of the effects of un-dumped imports on prices in the injury determination. They argue that an injury analysis should be based on prices of dumped goods only. Contrary to this, the assessment by the ADC of the magnitude of undercutting was on the basis of the shelf/retail prices of the goods marketed by Coles and Woolworths which, the Applicants submit, were also supplied by companies not found to have engaged in dumping.

55. The Applicants also contend that the assessment was flawed because it was carried out on the basis of the unproved assumption that a correlation would exist between wholesale prices and retail prices. In response to this latter criticism, I note that the ADC showed the correlation with a graph demonstrating the relationship between the FOB price and the retail price of Italian imports[35]. The ADC provided the Panel with further material on which the graph was based. I am satisfied that there was a reasonable basis for the conclusion by the ADC with respect to the correlation between the wholesale and retail prices.

56. The criticism of the assessment of the magnitude of the undercutting being on the basis of shelf/retail prices of the goods marketed can also be answered by the reference to the material analysed by the ADC which included wholesale prices and not just retail prices. The ADC provided the panel with confidential material upon which it relied for its finding with respect to the undercutting of SPCA's products by Italian imports.[36] That material does demonstrate convincingly that the Italian imports substantially undercut the prices of the SPC products. Such undercutting included substantial undercutting by the imports from those selected exporters shown to have been dumping. It is therefore a reasonable conclusion that the shelf prices of SPC's prices were undercut by Italian dumped imports[37].

57. In addressing the criticism that the un-dumped imports were incorrectly included in the undercutting analysis, the ADC points to material which shows that dumped prices from selected exporters undercut the lowest un-dumped prices by up to 18%[38]. The confidential material on which this calculation was based was provided to the Panel.

[35] Figure 4 page 54 of Report 217.
[36] Confidential pricing information supplied by importers and obtained from Australian Customs database and AZTEC point of sale prices.
[37] Page 58 of Report 217
[38] Para 8.4.2 page 53 of Report 217

The comparison was made between the average export price for one of the selected exporters found not to have been dumping and the average export price for the exports from one of the selected exporters found to have been dumping whose products were most comparable. The undercutting was in fact approximately 21%, an error having been made in the ADC Report in this respect.

58. There is a difficulty with the use of the percentage by which the dumped prices from the selected exporter undercut the prices of the selected exporter found not to have been dumped. The dumping margin was very small compared to the undercutting percentage. Hence, if the export prices for the imports from the selected exporter found to have been dumping were increased to a level where there was no dumping margin, they would still have been undercutting the non-dumped prices by a substantial amount.

59. Another calculation relied upon by the ADC in response to the criticism of its undercutting analysis is that based on the declared export prices of the residual exporters derived from the commercial import database. A comparison of these prices with the un-dumped prices found that the prices from the residual exporters undercut the lowest un-dumped prices by approximately 10%. This exercise assumes of course that the imports from the residual exporters were dumped. It suffers therefore from the same issues as those discussed above with regard to the finding with respect to the volume of un-dumped goods.

60. The Panel was provided with the calculations on which the 10% figure was based. A further difficulty which I found with this calculation was that it was based on an average of the margins between the imports from the residual exporters and the un-dumped imports. It does not take into account that those margins varied considerable and, in one case, the imports from a residual exporter appear to be substantially above the un-dumped prices. This could at least indicate that the imports may not have been comparable.

61. The above difficulties I had with the analysis by the ADC were a further reason for requiring the ADC to re-investigate the finding as to material injury being caused by dumped imports.

The Re-investigation Report

62. Having found the percentage of dumped goods during the investigation period to be 47.7%, the ADC sought to identify whether or not prices had been undercut by dumped imports. The exercise undertaken to do this, involved identifying an un-dumped export price. To do this, the ADC identified the lowest export price for the selected exporter which had the lowest identified dumping margin. The models for this particular selected exporter were then compared to the export prices of the residual and uncooperative exporters.

63. According to the re-investigation report, the above exercise showed that the declared export prices for residual and uncooperative exporters undercut the prices of the selected exporter by between 8.5% and 10.9%.[39] There was an error with this calculation in that it was based on the normal value for these models. When the export prices are compared, the undercutting was between 10.4% and 10.6%.

64. Not a great deal can be taken from this exercise as it does not show the extent to which the undercutting was done by dumped goods. Whereas the revised volume of dumped goods was significant, there was also a larger volume of un-dumped goods. What can be drawn from it, and the conclusion regarding the volume of dumped goods, is that there was a significant volume of dumped goods imported from the residual and uncooperative exporters and a significant undercutting by the residual and uncooperative exporters of the lowest price for the un-dumped goods. It is then perhaps reasonable to conclude that a proportion of the dumped goods were undercutting the lowest un-dumped price.

65. In its report following the re-investigation, the ADC concluded that the dumping margins were of sufficient magnitude as to provide significant price advantage for the imported goods when competing for sales in Australia, which advantage was gained by dumping. Further, the ADC concludes that the "volume of dumped goods exported to Australia in the investigation period was sufficient to have influenced prevailing prices in the Australian market, including prices of the Australian products and those of un-dumped goods in the market".[40]The findings of the re-investigation are not affected by the concerns I had with the original findings in the ADC Report on this issue.

Factors other than dumped imports caused injury

66. The Applicants point to other factors which were found to have contributed to the injury experienced by SPCA and contend that there was not sufficient evidence to demonstrate that the injury was caused by the dumped imports rather than the other factors.

67. The other factors alleged to have contributed to the injury suffered by SPCA are:
    a. The appreciation of the Australian dollar
    b. The private label strategies of the supermarkets
    c. Extreme weather events
    d. The decrease of SPCA's export sales.

68. The Applicants submit that if the ADC had correctly and objectively applied Article 3.5 of the Anti-Dumping Agreement, it would have led to the conclusion that the vast majority of the injury suffered by the Australian industry was caused by factors other than dumped imports. Article 3.5 of the Anti-Dumping Agreement relevantly states that:

[39] Section 4.4.2 page 17 and Confidential Table 9 of ADC Re-investigation Report no. 269
[40] Section 4.4.3, page 17 of ADC Re-investigation Report No. 269

> "The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

69. The requirement that injury caused by factors other than dumping not be attributed to the dumped imports was considered by the WTO Appellate Body in the *US-Hot-Rolled Steel* case[41]. In that case it was stated:

> "The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.
>
> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.[42] "

70. Two principles can be taken from the above. The ADC must separate the injurious effects of other factors from the injurious effects of the dumped imports so as to determine that the dumped imports are causing material injury. What method or approach the ADC chooses to use to undertake this task is a matter for it.

[41] United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan WT/DS184/B/R
[42] US- Hot -Rolled Steel paras 223-224

71. The need to examine any other factors which may be causing injury to the domestic industry is reflected in s.269TAE(2A) of the Act which requires that the Minister "must consider whether any injury to an industry…is being caused or threatened by a factor other than the exportation of those goods…and any such injury must not be attributed to the exportation of those goods".

72. The ADC acknowledged the obligation under Article 3.5 of the Anti-Dumping Agreement[43] and it did examine other factors which were possible causes of injury[44]. These possible causes included those listed by the Applicants. I can find no problem with the analysis of the ADC in this respect, except for one issue.

73. The issue is that the analysis treats the size of the dumping margin of the non-examined exporters to be a relevant factor pursuant to s.269TAE(1)(aa).[45] For the reasons given above[46], I do not agree that such dumping margins are necessarily relevant to the issue of causation of injury. They are not actual dumping margins and their relevance will depend on the material on which they are based. In the case of the uncooperative exporters, the dumping margins were based on the highest normal value and the lowest export price of the selected exporters found to have a dumping margin greater than 2%. They are to a degree punitive in nature. While this may be acceptable for the purpose of imposing dumping duties on the uncooperative exporters, the dumping margins determined in this way cannot be treated as evidence that there are actually goods being dumped at those margins.

74. This issue affected the analysis by the ADC in that the analysis relied on the weighted average dumping margin of approximately 9% in determining that the injury caused by dumped products was material. The difficulty I had with the calculation of this margin is that it appeared to include values which were derived from the margins determined under s.269TAB(3) and s.269TAC(6) and hence, given the methodology used in this case by the ADC, not actual dumping margins.

[43] Para 8.4.4 of Report 217
[44] Para 8.8 of Report 217
[45] Section 8.9.1 of Report 217
[46] Paragraphs 36 to 38

75. The concern I had with this analysis by the ADC was another reason why I asked the ADC to re-investigate its finding that the dumped imports were causing material injury to the Australian industry. As noted above, the ADC has re-investigated the finding of material injury being caused by dumped goods and affirmed the original finding. The re-investigation analysis does not have the same issue which I found with the analysis in the original investigation.

A flawed like products definition

76. The Applicants contend that the Italian products are not like products to the Australian products. They argue there is considerable difference with the physical characteristics, with the Italian tomatoes being "long tomatoes" and also "San Marzano" tomatoes. The latter are said to come from plants that must be produced and transformed only in a particular and defined area of the south of Italy.

77. Under Australian law like goods are "goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration"[47].

78. The issue of whether or not the imported products were like goods to the Australian products was dealt with by the ADC at Section 3 of the ADC Report. The arguments put forward by the Applicants were addressed at section 3.6[48]. The ADC sets out its analysis of the products physical likeness, commercial likeness, functional likeness and production likeness. I am unable to see any problem with this analysis. It supports the finding made by the ADC that the imported goods are like goods to the Australian product. While not identical, the Australian products have characteristics closely resembling those of the imported products.

Conserve Italia Soc. Coop Agr

Effect of factors other than dumping

[47] S.269T of the Customs Act
[48] Page 15 of Report 217

79. The Applicant, Conserve Italia, contends that the conclusion by the ADC that dumped imports of tomatoes from Italy caused material injury to SPCA was contrary to the provisions of s.269TAE(2A) of the Act and Article 3.5 of the Anti-Dumping Agreement because the ADC has attributed injury to SPCA caused by factors other than dumped imports of tomatoes from Italy.

80. The Applicant contends that the ADC failed to distinguish and separate the injurious effect of factors other than dumping on the price paid for like goods produced and sold in Australia by SPCA. This is necessary, it is argued, to enable its assessment of the materiality of the injurious effect of dumping on this price.

81. The ADC did identify factors other than dumping which parties had argued were the possible cause of the injury suffered by the Australian industry. These factors are listed at section 8.8 of the Report and at section 8.10 the ADC concluded that it had identified and isolated factors other than dumping that may have contributed to the injurious effects being experienced by SPCA. Nevertheless, the ADC found that the dumped goods from Italy had caused material injury to the Australian industry.

82. As stated above, I had a concern with the analysis of the ADC in this respect[49]. This concern was partly responsible for the request to the ADC to reinvestigate the finding that the dumped goods had caused material injury to the Australian industry. The results of the re-investigation are discussed above.[50] Accordingly, I will only address those aspects of the submission by the Applicant which are not dealt with in the above paragraphs dealing with similar submissions by ANICAV and the Government of Italy.

83. The Applicant contends that it is the comparison at the wholesale level which is essential in determining the effect of the dumped imports on the price of like goods produced and sold by the Australian industry. I have found above that there is a reasonable basis for the conclusion of the ADC with respect to the price undercutting analysis and the use in the analysis of the retail prices of the respective products.[51]

84. With respect to the price undercutting analysis, the Applicant also contends that the ADC did not take into account that “the vast majority of imports from Italy are private

[49] Paras 73 to 74
[50] Paras 62 to 65 and para 75.
[51] Para 55

label products and the vast majority of SPCA's products are proprietary label products"[52]. The Applicant does not reference any material or finding in the ADC Report in support of this statement.

85. At section 5.2.1 of the ADC Report and following, the ADC refers to the products in the Australian market as including private label products and proprietary label products. Figure 1[53] shows that there are both imported proprietary label products and local proprietary label products. The private label products are not identified as either local or imported.

86. The ADC found that sales volumes for SPCA's goods, proprietary Italian labels and premium private labels notably increased in response to price discounting. It also found for these products that sales volumes are highly responsive to price increases.[54] The pricing at the generic or value end of the market was however static and volumes moved more in line with seasonal trends[55].

87. While it seems that the generic or value end of the market was supplied by Italian products, it was at the proprietary and premium private label end of the market that the price competition was found. It was also here that the ADC found injury being caused by the discounting of imported proprietary products.[56] This finding, to the extent it attributes the injury to dumping was of course the subject of the reinvestigation which reaffirmed the finding following a different analysis.

88. The Applicant refers to the following factors as having been identified by the ADC as having influenced the relativity of the price of imports from Italy:

    a. Un-dumped imports
    b. Appreciation of the Australian dollar
    c. Supermarket private label strategies.

The Applicant contends that in not taking these factors into account in its price undercutting analysis the ADC attributed the effect of these factors to dumping,

[52] Page 5 of the Application by Conserve Italia Soc. Coop. Agr
[53] Page 23 of Report 217
[54] Pages 23 and 24 of Report 217 and Figure 2
[55] Page 24 of Report 217
[56] Page 60 of Report 217

contrary to the provisions of s.269TAE (2A) of the Act and Article 3.5 of the Anti-Dumping Agreement.

89. The effect of un-dumped imports on the price analysis was considered by the ADC at sections 8.4.2 and 8.8.1 of the ADC Report. The appreciation of the Australian dollar was considered at section 8.8.3 and the private label strategies of the supermarkets were also considered in section 8 of the ADC Report, particularly at sections 8.5 and 8.8.6. The ADC did have regard to the possibility that these factors could be the cause of injury to the Australian industry. The approach with regard to analysing the impact of un-dumped goods was flawed and hence the finding of causation was the subject of the re-investigation. I did not find that there was an issue with the analysis of the impact of the other factors.

Materiality of any injury

90. The Applicant also took issue with the finding by the ADC that in the absence of dumping, the retail shelf price of imports from Italy would have been 9% higher during the investigation period, which would have translated into a higher retail price for SPCA's products, a higher price paid by retailers to SPCA for its products and a 9% increase in SPCA's profitability. The Applicant contends that this finding, which is vital to the ADC's conclusion that injury caused by the dumped imports is material, is not based on positive evidence or objective analysis.

91. There are four reasons given for the Applicant's attack on the ADC's finding. These can be summarised as:

    a. The 9% ad valorem weighted average dumping margin used by the ADC is based on FOB unit export prices and does not translate into a 9% increase in retail shelf prices, such prices being significantly higher than the FOB export prices.
    b. The finding did not take into account that 44% of the imports from Italy were un-dumped.
    c. The 9% margin was not based on positive evidence, the evidence showing that the margin for the selected exporters was about 1%.

d. It cannot be assumed that an increase of 9% to the retail price of Italian imports directly translates into a 9% increase to the retail shelf price of SPCA products, as retailer sales and marketing strategies influence this translation.

92. Much of the argument made by the Applicant is based on criticism of the use by the ADC of the 9% margin. I was concerned at the way in which the 9% margin appeared to have been calculated and this was one of the reasons for the request made to the ADC to re-investigate the finding that dumping had caused material injury. So, to the extent that the Applicant criticises the calculation of the 9% margin, and its use, on the basis that it used values which were not based on evidence, I agree with the Applicant's submission.

93. With respect to the Applicant's argument regarding the volume of the imports from Italy being dumped, this was another finding of the ADC with which I had some concern and was also the reason for the re-investigation request.

94. With regard to the Applicant's argument that it cannot be assumed that an increase in the retail price of Italian imports will translate into the same increase in SPCA's retail prices, I am not convinced that this was what the ADC assumed. What the ADC says in the Report is that "the higher import prices would have translated into retail shelf prices given the strong correlation between the wholesale prices and retail prices"[57]. As noted above there is evidence to support the correlation between import prices and retail prices. The increase in the retail prices would decrease the price undercutting of SPCA's product by the imported products but it was not found that this would translate directly into the same price increase for SPCA's products.

95. The Applicant also claims that the ADC did not separate out certain factors found by the Productivity Commission to have caused serious injury to SPCA and found that in the absence of dumping, SPCA would not have suffered material injury from the combined effect of the other factors found by the Productivity Commission to have caused serious injury.

[57] Page 66 of Report 217

96. I am not convinced that the findings of the Productivity Commission are relevant to the exercise which must be conducted by the ADC in an investigation under Part XVB of the Act. There are obvious differences in what is being examined and the test for the imposition of safeguard measures as opposed to anti-dumping measures is different. It is also not correct that the anti-dumping legislation requires that the ADC find that, in the absence of dumping, material injury would not have been suffered by the Australian industry. While the injury caused by dumping must be material it does not need to be the sole cause of the injury and there can be other contributing factors[58].

97. The Act does require that consideration be given to whether any factors other than dumping are contributing to the injury suffered by the Australian industry and that any such injury not be attributed to the exportation of the dumped goods.[59]I have already dealt with the exercise undertaken by the ADC to comply with this requirement.

Attianese/ Lodato Gennaro

98. Given the similarity of the reasons put forward by these Applicants as to why the decision of the Parliamentary Secretary was not the correct or preferable decision, I will consider their applications together.

Factors other than dumping

99. The Applicants contend that a correct, reasonable and objective examination of the nature and extent of the injurious effects of factors other than dumping would lead to the conclusion that the injury suffered by SPCA was caused by factors other than dumping. They put forward a number of reasons in support of this, namely:

    a. That the injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private label products.
    b. The injury suffered by the Australian industry was also caused by additional factors such as the appreciation of the Australian dollar towards the Euro and the floods of 2011.

[58] Ministerial Direction on Material Injury 2012
[59] S.269TAE(2A)

c. The Minister's decision is in stark contrast to the findings of the Productivity Commission.

d. Any injury caused by dumping was not material.

100. In making their arguments with regard to the commercial strategies of the supermarkets, the Applicants refer to the "vast majority" of SPCA's products being branded label products whereas the "vast majority" of the imported tomatoes from Italy are marketed under private labels. The Applicants did not reference any material to support the assertion. In any event, the point is dealt with above in the consideration of a similar point made by Conserve Italia[60].

101. The Applicants also made a number of assertions regarding the findings of the ADC in the ADC Report which were not supported by references to the ADC Report, namely that "the ADC acknowledged that the Australian supermarkets implemented a strategy to promote their private label products "[61] and that "they prefer to sell their own labelled tomatoes in lieu of "SPCA's products[62]. I have been unable to find any references in the ADC Report or to other material before the ADC to support these assertions.

102. However, the ADC did confirm that private label products were placed in the preferred locations in the supermarkets' shelving plans whilst SPCA's products were in unfavourable locations[63]. The reason for this was found to be that the private label products sold in higher volumes and that the supermarkets tended to provide the prime locations to the goods that sell in the highest volumes[64].

103. The ADC also found that for SPCA's goods, proprietary Italian labels and the premium private labels, sales volumes notably increased in response to price discounting and that there was a strong correlation between price reductions and increased sales volumes[65].

[60] Paras 75-77
[61] Page 14 of the Application
[62] Page 15 of the Application
[63] Page 22 of Report 217
[64] Page 60 of Report 217
[65] Page 23 of Report 217

There was evidence that the Italian imported products (both private label and proprietary label) were undercutting SPCA's products[66].

104. Given these findings, I cannot agree that the Minister should have concluded that the injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private label products. There is evidence to support the conclusion that the price undercutting by the imported products enabled the lower retail prices which in turn led to higher volumes of sales for the imported product and better shelf placement, with corresponding lower sales for SPCA's products and loss of shelf space (which exacerbated the loss of sales). Whether or not the dumped products were responsible for the price undercutting is another issue, which is dealt with elsewhere in my report.

105. The analysis by the ADC of the affect which factors such as the appreciation of the Australian dollar and the floods of 2011 had on the injury suffered by SPCA is considered above[67]. The point made by the Applicants with respect to the Productivity Commission is also dealt with above in considering the application by Conserve Italia.[68]

106. With respect to the Applicants criticism of the ADC's finding with respect to the materiality of the injury caused to SPCA by the dumped exports, I have also dealt with this above. I agree with the criticism in so far as deals with the calculation of the 9% weighted average dumping margin and its use. The finding with respect to material injury being caused by dumping was the subject of the re-investigation by the ADC and the ADC confirmed its finding in the original investigation. As noted above[69], the analysis made in the re-investigation took into account the concerns I had with the original investigation and the calculation of the 9% margin.

Volume of Dumped imports

107. The Applicants contend that the ADC's determination of the volume of dumped imports for the purpose of the injury assessment was vitiated insofar as the imports from the residual exporters were erroneously treated as dumped. For the reasons I give above

[66] Figure 1 in Report 217
[67] Paras 67 to 72
[68] Paras 95 and 96
[69] Para 75

when dealing with the application by ANICAV and the Government of Italy, I agree that the original analysis by the ADC of the volume of dumped goods was flawed. This was one of the reasons for the request I made to the ADC to re-investigate the finding that dumping was causing material injury to the Australian industry.

108. The methodology which the ADC used in the re-investigation did not suffer from the same flaws as that of the original investigation. In particular, steps were taken to use comparable transactions when applying the normal value of the examined exporters to the export prices of imports from unexamined exporters which addressed one of the principal criticisms made by the Applicants.

109. Given the methodology used in the reinvestigation, I cannot agree with the argument put by the Applicants that there is no evidence to support the conclusion that imports by the unexamined producers were dumped.

Uncooperative exporter dumping margin

110. In addition to the reasons put forward by Attianese, Lodato also relied on a further reason, namely that the calculation of the dumping margin applied to uncooperative exporters was flawed. In essence, the complaint by the Applicant is that the methodology followed by the ADC to calculate the dumping margin applied to the uncooperative exporters did not ensure a fair comparison. The application by Lodato was supported in this respect by submissions made by J. Bracic & Associates on behalf of Leo's Imports & Distributors.

111. The dumping margin for the uncooperative exporters was 26.35%. This margin results from the normal value and export price ascertained at the time the Parliamentary Secretary made the decision to publish the dumping duty notice. The Parliamentary Secretary ascertained the normal value and export price for the uncooperative exporters based on a recommendation in the ADC Report. That recommendation was in turn made by the ADC pursuant to s.269TAC(6) and s.269TAB(3) respectively.

112. The normal value was derived from the highest weighted average normal value of the two selected exporters found to have a dumping margin greater than 2% and the export price was derived from the lowest weighted average export price of the same selected

exporters. The criticism made by the Applicant is that the methodology did not take into account differences in the models exported to Australia. Nor did the ADC make adjustments to take into account any difference affecting the price comparability.

113. It is important to note that the decision being reviewed by the Panel is the decision of the Parliamentary Secretary to publish a dumping notice under s.269TG (1) and (2) of the Act with respect to prepared or preserved tomatoes exported from Italy[70]. Decisions made by the ADC in the course of making a report to the Parliamentary Secretary are not in themselves reviewable decisions. The Panel will only consider criticism made of these decisions by the ADC to the extent that such criticisms affect the decision of the Parliamentary Secretary to publish a dumping notice so as to make that decision not the correct or preferable decision.

114. The original finding of the ADC that dumped imports of prepared or preserved tomatoes from Italy had caused material injury to the Australian industry was I consider flawed to the extent that it treated as an actual dumping margin, the margin for uncooperative exporters resulting from the normal value and export price determined under s.269TAC(6) and s.269TAB(3). This was one of the reasons for the request to the ADC to re-investigate its finding. As the re-investigation by the ADC did not rely on the dumping margin for the uncooperative exporters resulting from the determination under s.269TAC(6) and s.269TAB(3), it is not affected by any criticism made of that determination.

115. Insofar as the Applicant seeks a review of the methodology used by the ADC to determine the dumping margin for uncooperative exporters, I have some doubt that the ADC's decision to recommend a dumping margin for the purpose of levying duty is in itself a reviewable decision.

116. The recommendation by the ADC was accepted by the Parliamentary Secretary at the time the decision was made to publish the dumping duty notice and details of the dumping margin for uncooperative exporters are included in the dumping duty notice under s.269TG(3). Arguably it is a separate decision to that made under s.269TG(1) and

[70] S.269ZZA(1)(a)

(2) to issue a dumping duty notice and hence the ascertainment of the normal value and export price for the uncooperative exporters is not part of the reviewable decision.

117. However, if the ascertainment of the margin for the uncooperative exporters is part of the reviewable decision, I do not consider that there is any reason put forward by the Applicant to make the decision of the Parliamentary Secretary not the correct or preferred decision in this respect.

118. The Anti-dumping Agreement notes that non-cooperation by a party can lead to "a result which is less favourable to that party than if the party did cooperate"[71]. This approach is reflected in recent amendments to Part XVB of the Act dealing with the treatment of uncooperative exporters[72]. The exports of the uncooperative exporters are not examined as part of the investigation and the Minister is authorised by the legislation to ascertain the normal value and export price on the basis of all relevant information[73]. There is a wide discretion and there is no obligation to make the analysis as to the comparability of the normal value and export prices for which the Applicant contends. That this may lead to a more unfavourable result for the exporter is a consequence of being found to be uncooperative.

IMCA

119. IMCA was treated by the ADC as an uncooperative exporter and consequently the dumping margin for the purpose of the dumping duty imposed on its exports was 26.35%. The application by IMCA seeks review of the decision to treat IMCA as an uncooperative exporter, the decision not to verify the data provided by IMCA and the assessment of IMCA's dumping margin to be 26.35%.

120. As noted above with respect to the application by Lodato, the decision which is being reviewed by the Panel is the decisions of the Parliamentary Secretary made under s.269TG(1) and s.269TG(2) to publish a dumping duty notice with respect to exports of prepared or preserved tomatoes from Italy. The decisions which IMCA seeks to have reviewed can only be considered by the Panel to the extent that they affect the overall

[71] Annex II to the Agreement on the Implementation of Article VI of the GATT 1994, para 7.
[72] Explanatory Memorandum to Custos Amendment (Anti-dumping Improvements) Bill (No. 3) 2012, paras 19 and 20.
[73] S269TACAB (1), s269TAB(3) and s.269TAC(6)

conclusion by the ADC to recommend to the Parliamentary Secretary that a dumping duty notice issue and the decision by the Parliamentary Secretary to accept that recommendation.

121. The decision made by the ADC to treat IMCA as an uncooperative exporter was made on the basis that IMCA had not provided a complete Exporter Questionnaire Response (**EQR**) by the required time, despite a number of extensions of time being given to IMCA. While IMCA had provided an EQR on 27 September, 2013 after an initial extension, it was notified by the ADC that the EQR was deficient in a number of ways and given until 17 October, 2013 to remedy the deficiencies. Although IMCA provided an amended EQR on 15 October, 2013, the ADC found it was still deficient and on 17 October, 2013 notified IMCA that it must be treated as an uncooperative exporter.

122. The definition of "uncooperative exporter" includes an exporter of goods which the ADC is satisfied did not give the ADC information the ADC considered to be relevant to the investigation within a period the ADC considered to be reasonable.[74] There was a basis for the conclusion reached by the ADC. The consequence for IMCA that followed from the finding that it was an uncooperative exporter was that it was subject to the rate of duty determined for uncooperative exporters.

123. The treatment of IMCA as an uncooperative exporter had the effect that it reduced the effectiveness of the sampling exercise. The seven exporters initially selected to be examined for the investigation represented approximately 70% of the export volume to Australia[75]. However, this percentage included Corex which was subsequently found to be a trader and not an exporter. It also included Lodato which was also subsequently found to be uncooperative.

124. The weighting which any of IMCA's exports would have had if they had been examined as part of the investigation would have been relatively small[76]. Consequently, even if the decision to treat IMCA as an uncooperative exporter was in itself not the preferable decision, it would not impugn the reviewable decision. This conclusion also applies to the decision not to verify the data provided by IMCA.

[74] S269T
[75] Section 7.3, page 36 of Report 217
[76] Confidential Attachment 9

125. With regard to the criticism made by IMCA of the assessment of the dumping margin of 26.35 %, this margin applied to it because it was treated as an uncooperative exporter. I have already dealt with the criticism of the methodology used by the ADC to determine the margin for uncooperative exporters when considering the application by Lodato.

Recommendations/Conclusion

126. Most of the applications for review criticised the finding that dumped exports had caused material injury to the Australian industry. I found that some of the criticism was merited and requested the ADC to re-investigate that finding. The re-investigation made changes to the methodology used by the ADC to accommodate my reasons for requesting the re-investigation.

127. The result of the re-investigation was that the ADC confirmed the finding that dumped exports had caused material injury to the Australian industry, on the basis of slightly different facts. For the reasons given above in this report, I did not consider that the other criticisms made of the ADC Report meant that the decision of the Parliamentary Secretary, on which it was based, was not the correct or preferable decision.

128. Pursuant to s.269ZZK(1) of the Act, I recommend that the Parliamentary Secretary affirm the decisions made pursuant to s.269TG(1) and s.269TG(2) of the Act to publish a dumping duty notice with respect to prepared or preserved tomatoes exported from Italy.

Joan Fitzhenry

Member of the Anti-Dumping Review Panel

17 October, 2014