Australian Government
Anti-Dumping Review Panel

APPLICATION FOR REVIEW OF A DECISION BY THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR A COUNTERVAILING DUTY NOTICE

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City
ACT 2601
P: +61 2 6275 5868
F: + 61 2 6275 6784
E: ADRP_support@customs.gov.au

INFORMATION FOR APPLICANTS

WHAT DECISIONS ARE REVIEWABLE BY THE ANTI-DUMPING REVIEW PANEL?

The role of the Anti-Dumping Review Panel (the ADRP) is to review certain decisions made by the Minister responsible for the Australian Customs and Border Protection Service (ACBPS), or by the Anti-Dumping Commissioner (the Commissioner).

The ADRP may review decisions made by the Commissioner:

- to reject an application for dumping or countervailing measures;
- to terminate an investigation into an application for dumping or countervailing measures;
- to reject or terminate examination of an application for duty assessment; and
- to recommend to the Minister the refund of an amount of interim duty less than the amount contended in an application for duty assessment, or waiver of an amount over the amount of interim duty paid.

The ADRP may review decisions made by the Minister, as follows:

Investigations:

- to publish a dumping duty notice;
- to publish a countervailing duty notice;
- not to publish a dumping duty notice;
- not to publish a countervailing duty notice;

Review inquiries, including decisions

- to alter or revoke a dumping duty notice following a review inquiry;
- to alter or revoke a countervailing duty notice following a review inquiry;
- not to alter a dumping duty notice following a review inquiry;
- not to alter a countervailing duty notice following a review inquiry;
- that the terms of an undertaking are to remain unaltered;
- that the terms of an undertaking are to be varied;
- that an investigation is to be resumed;
- that a person is to be released from the terms of an undertaking;

Continuation inquiries:

- to secure the continuation of dumping measures following a continuation inquiry;
- to secure the continuation of countervailing measures following a continuation inquiry;

- not to secure the continuation of dumping measures following a continuation inquiry;
- not to secure the continuation of countervailing measures following a continuation inquiry;

Anti-circumvention inquiries:

- to alter a dumping duty notice following an anti-circumvention inquiry;
- to alter a countervailing duty notice following an anti-circumvention inquiry;
- not to alter a dumping duty notice following an anti-circumvention inquiry; and
- not to alter a countervailing duty notice following an anti-circumvention inquiry.

Before making a recommendation to the Minister, the ADRP may require the Commissioner to:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the ADRP within a specified time period.

The ADRP only has the power to make **recommendations to** the Minister to affirm the reviewable decision or to revoke the reviewable decision and substitute with a new decision. The ADRP has no power to revoke the Minister's decision or substitute another decision for the Minister's decision.

WHICH APPLICATION FORM SHOULD BE USED?

It is essential that applications for review be lodged in accordance with the requirements of the *Customs Act 1901* (the Act). The ADRP does not have any discretion to accept an invalidly made application or an application that was lodged late.

Division 9 of Part XVB of the Act deals with reviews by the ADRP. Intending applicants should familiarise themselves with the relevant sections of the Act, and should also examine the explanatory brochure (available at www.adreviewpanel.gov.au).

There are separate application forms for each category of reviewable decision made by the Commissioner, and for decisions made by the Minister. It is important for intending applicants to ensure that they use the correct form.

This is the form to be used when applying for ADRP review of a decision of the Minister whether to publish a dumping duty notice or countervailing duty notice (or both). It is approved by the Commissioner pursuant to s 269ZY of the Act.

WHO MAY APPLY FOR REVIEW OF A MINISTERIAL DECISION?

Any interested party may lodge an application for review to the ADRP of a review of a ministerial decision. An "interested party" may be:

- if an application was made which led to the reviewable decision, the applicant;
- a person representing the industry, or a portion of the industry, which produces the goods which are the subject of the reviewable decision;
- a person directly concerned with the importation or exportation to Australia of the goods;
- a person directly concerned with the production or manufacture of the goods;
- a trade association, the majority of whose members are directly concerned with the production or manufacture, or the import or export of the goods to Australia; or
- the government of the country of origin or of export of the subject goods.

Intending applicants should refer to the definition of "interested party" in s 269ZX of the Act to establish whether they are eligible to apply.

WHEN MUST AN APPLICATION BE LODGED?

An application for a review must be received within 30 days after a public notice of the reviewable decision was first published in a national Australian newspaper (s 269ZZD).

The application is taken as being made on the date upon which it is received by the ADRP after it has been properly made in accordance with the instructions under 'Where and how should the application be made?' (below).

WHAT INFORMATION MUST AN APPLICATION CONTAIN?

An application should clearly and comprehensively set out the grounds on which the review is sought, and provide sufficient particulars to satisfy the ADRP that the Minister's decision should be reviewed. It is not sufficient simply to request that a decision be reviewed.

The application must contain a full description of the goods to which the application relates and a statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision (s 269ZZE).

If an application contains information which is confidential, or if publication of information contained in the application would adversely affect a person's business or commercial interest, the application will be rejected by the ADRP unless an appropriate summary statement has been prepared and accompanies the application.

If the applicant seeks to bring confidential information to the ADRP's attention (either in their application or subsequently), the applicant must prepare a summary statement which contains sufficient detail to allow the ADRP to reasonably understand the substance of the information, but the summary must not breach the confidentiality or adversely affect a person's business or commercial interest (s 269ZZY).

While both the confidential information and the summary statement must be provided to the ADRP, only the summary statement will be lodged on the public record maintained by the ADRP (s 269ZZX). The ADRP is obliged to maintain a public record for review of decisions made by the Minister, and for termination decisions of the Commissioner. The public record contains a copy of any application for review of a termination decision made to the ADRP, as well as any information given to the ADRP after an application has been made. Information contained in the public record is accessible to interested parties upon request.

Documents containing confidential information should be clearly marked “Confidential” and documents containing the summary statement of that confidential information should be clearly marked “Non-confidential public record version”, or similar.

The ADRP does not have any investigative function, and **must** take account only of information which was before the Minister when the Minister made the reviewable decision (s269ZZ). The ADRP will disregard any information in applications and submissions that was not available to the Minister.

HOW LONG WILL THE REVIEW TAKE?

The timeframes for a review by the ADRP will be dependent on whether the ADRP requests the Commissioner to reinvestigate specific findings or findings that formed the basis of the reviewable decision.

If reinvestigation is not required

Unless the ADRP requests the Commissioner to reinvestigate a specific finding or findings, the ADRP must make a report to the Minister:

- at least 30 days after the public notification of the review;
- but no later than 60 days after that notification.

In special circumstances the Minister may allow the Review Panel a longer period for completion of the review (s 269ZZK(3)).

If reinvestigation is required

If the ADRP requests the Commissioner to reinvestigate a specific findings or findings, the Commissioner must report the results of the reinvestigation to the ADRP within a specified period.

Upon receipt of the Commissioner's reinvestigation report, the ADRP must make a report to the Minister within 30 days.

WHAT WILL BE THE OUTCOME OF THE REVIEW?

At the conclusion of a review, the ADRP must make a report to the Minister, recommending that the:

- Minister affirm the reviewable decision (s 269ZZK(1)(a)); or
- Minister revoke the reviewable decision and substitute a specified new decision (s 269ZZK(1)(b)).

After receiving the report from the ADRP the Minister must:

- affirm his/her original decision; or
- revoke his/her original decision and substitute a new decision.

The Minister has 30 days to make a decision after receiving the ADRP's report, unless there are special circumstances which prevent the decision being made within that period. The Minister must publish a notice if a longer period for making a decision is required (s 269ZZM).

WHERE AND HOW SHOULD THE APPLICATION BE MADE?

Applications must be EITHER:

- lodged with, or mailed by prepaid post to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  Australian Customs and Border Protection Service
  5 Constitution Avenue
  Canberra City ACT 2601
  AUSTRALIA

- OR emailed to:

  ADRP_support@customs.gov.au

- OR sent by facsimile to:

  Anti-Dumping Review Panel
  c/o Legal Services Branch
  +61 2 6275 6784

WHERE CAN FURTHER INFORMATION BE OBTAINED?

Further information about **reviews by the ADRP** can be obtained at the ADRP website (www.adreviewpanel.gov.au) or from:

Anti-Dumping Review Panel
c/o Legal Services Branch
Australian Customs and Border Protection Service
5 Constitution Avenue
Canberra City ACT 2601
AUSTRALIA

Telephone: +61 2 6275 5868
Facsimile: +61 2 6275 5784

Inquiries and requests for **general information about dumping matters** should be directed to:

Anti-Dumping Commission
Australian Customs and Border Protection Service
Customs House
5 Constitution Avenue
CANBERRA CITY ACT 2601

Telephone: 1300 884 159
Facsimile: 1300 882 506
Email: clientsupport@adcommission.gov.au

FALSE OR MISLEADING INFORMATION

It is an offence for a person to give the ADRP written information that the person knows to be false or misleading in a material particular (Penalty: 20 penalty units – this equates to $3400).

PRIVACY STATEMENT

The collection of this information is authorised under section 269ZZE of the *Customs Act 1901*. The information is collected to enable the ADRP to assess your application for the review of a decision to publish a dumping duty notice or countervailing duty notice.

APPLICATION FOR REVIEW OF

DECISION OF THE MINISTER WHETHER TO PUBLISH A DUMPING DUTY NOTICE OR COUNTERVAILING DUTY NOTICE

Under s 269ZZE of the *Customs Act 1901* (Cth), I hereby request that the Anti-Dumping Review Panel reviews a decision by the Minister responsible for Australian Customs and Border Protection Service:

to publish : ☑ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

OR

not to publish : ☐ a dumping duty notice(s), and/or

☐ a countervailing duty notice(s)

in respect of the goods which are the subject of this application.

I believe that the information contained in the application:

- provides reasonable grounds to warrant the reinvestigation of the finding or findings that formed the basis of the reviewable decision that are specified in the application;
- provides reasonable grounds for the decision not being the correct or preferable decision; and
- is complete and correct to the best of my knowledge and belief.

I have included the following information in an attachment to this application:

☑ Name, street and postal address, and form of business of the applicant (for example, company, partnership, sole trader).

☑ Name, title/position, telephone and facsimile numbers and e-mail address of a contact within the organisation.

☑ Name of consultant/adviser (if any) representing the applicant and a copy of the authorisation for the consultant/adviser.

☑ Full description of the imported goods to which the application relates.

☑ The tariff classification/statistical code of the imported goods.

☑ A copy of the reviewable decision.

☑ Date of notification of the reviewable decision and the method of the notification.

☑ A detailed statement setting out the applicant's reasons for believing that the reviewable decision is not the correct or preferable decision.

☑ [If the application contains material that is confidential or commercially sensitive] an additional non-confidential version, containing sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Signature:.....

Name: **Gabriele Coppo**

Position: **Consultant**

Applicant Company/Entity: **Lodato Gennaro & C S.p.A.**

Date: **15/05/2014**

ATTACHMENT TO THE APPLICATION FOR REVIEW OF THE DECISION OF THE MINISTER TO PUBLISH A DUMPING DUTY NOTICE IN RELATION TO PREPARED OR PRESERVED TOMATOES FROM ITALY

Applicant

Lodato Gennaro & C S.p.A.
Industria Conserve Alimentari
Via Sandro Pertini 11
84083 Castel San Giorgio (SA)
Italy

Contact person

Mr Francesco Senesi
Export Manager
Tel: +39 081 5161376
Email: francesco.senesi@annalisa.it

Consultant

Mr Fabrizio Di Gianni
Mr Gabriele Coppo
VAN BAEL & BELLIS
Avenue Louise 165
1050 Brussels, Belgium
Tel. + 32(0)2.647.73.50
Fax. + 32(0)2.640.64.99
Email: fdigianni@vbb.com; gcoppo@vbb.com
A copy of the PoA is attached (see Attachment 1)

Description of imported goods

The goods to which the application relates are:

tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume.

Tariff classification/statistical code of the imported goods

2002.10.00/60

The reviewable decision

A copy of the reviewable decision is attached (see Attachment 2)

Notification of the reviewable decision

Anti-Dumping Notice No. 2014/32 of 16 April 2014 (see Attachment 3)

GROUNDS WARRANTING THE REINVESTIGATION OF THE FINDINGS WHICH FORMED THE BASIS OF THE DECISION BY THE MINISTER

On 16 April 2014, the Parliamentary Secretary to the Minister for Industry published a dumping duty notice ("ADN") in relation to imports of preserved or prepared tomatoes from Italy ("the Minister's decision"). The Minister's decision is based on the conclusion reached by the Anti-Dumping Commission ("ADC") in the Final Report No 217 ("Final Report") that dumped imports of tomatoes from Italy have caused material injury to the Australian industry producing the like goods ("SPCA"). The present section sets out the reasons why the Minister's decision is not the correct or the preferable decision.

1. THE MINISTER'S DECISION WAS NOT CORRECT OR PREFERABLE INSOFAR AS IT DID NOT CONCLUDE THAT THE INJURY SUFFERED BY THE AUSTRALIAN INDUSTRY WAS CAUSED BY FACTORS OTHER THAN DUMPED IMPORTS

As a first ground it is submitted that the Minister's decision violated Article 3.5 WTO ADA, according to which the investigating authority must examine any known factors other than the dumped imports which at the same time are injuring the domestic industry and ensure that the injury caused by these other factors is not attributed to the dumped imports.

In the Applicant's view, the Minister's decision to publish an ADN was not correct or preferable since a correct, reasonable and objective examination of the nature and the extent of the injurious effects of other factors would have inevitably lead to the conclusion that the injury suffered by SPCA was only caused by factors other than the dumped imports.

1.1. The injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private labels products

At the outset, it is submitted that the Minister should have concluded that the injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets. Indeed, while acknowledging that the strategy of retailers to promote their own private labels products has contributed to the injury suffered by SPCA, the Final Report of the ADC seriously underestimates the impact of such strategies. In this respect, it is important to highlight the following characteristics of the Australian market:

- according to the information gathered by the ADC *"approximately 82% of all prepared or preserved tomato sales occur via the major supermarkets".*[1] The ADC also found that the three major Australian supermarkets (i.e. Coles, Woolworths and Aldi) exercise a strong buying power towards the tomatoes producers as a result of the size of their

[1] Final Report No. 217, page 20.

purchases and sales volumes in the downstream market, i.e. the retail sector.[2] Indeed, the vast majority of purchases of prepared or preserved tomatoes are concentrated in the hands of a few large retailers. The Australian retail market for prepared or preserved tomatoes amounts, therefore, to an *"oligopsony"*, i.e. a market dominated by a very small number of large purchasers which enjoy an extensive market power (which includes, e.g., setting the purchase prices, fostering the retail sales of specific brands in lieu of others, organising marketing campaigns, etc.);

- the prepared or preserved tomatoes sold in the Australian market can be grouped in two different categories:[3]

    a) **private labels**, i.e. brands created and owned by the retailers (supermarkets) with the goods being made under toll type arrangements. Private labels products are purchased by the retailers by means of a **tendering procedure**, in which the certified producers are invited to tender based on product specifications and volumes required by the retailer. It must be noted that the vast majority of the tomatoes imported from Italy are marketed under private labels; and

    b) proprietary (or branded) labels, i.e. brands created and owned by the tomatoes manufacturer (or distributor). Proprietary label products are purchased through normal **negotiations** between retailers and suppliers (or distributors). It must be noted that the vast majority of SPCA's products are branded label products.

As noted by the Productivity Commission in the framework of the Safeguard Inquiry into import of processed tomatoes, in the past *"private label products tended to be viewed as low cost and lower quality than branded products"*.[4] In recent years, however, supermarkets started to offer "premium" private label products regarded by consumers as substitutes for branded products. Therefore, due to the recent developments of the Australian market, the private label products are now in competition with SPCA's branded products.[5]

Therefore the striking feature of the present case is that the major supermarkets are not only the main channel of distribution of SPCA branded products (with their overall share of 82% of the prepared or preserved tomato retail market) but they are also the main, not to say the only, competitors of SPCA in the Australian market for branded preserved or prepared tomatoes.

---

2 Final Report No. 217, page 56.

3 Final Report No. 217, page 20.

4 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 12.

5 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 56.

The above clarified, it must be noted that the ADC acknowledged that the Australian supermarkets implemented a strategy to promote their private label products (and therefore, at the expense of SPCA's proprietary label products) in order to (i) offer a competitive alternative product to branded products; (ii) increase their profit margins; (iii) retain the loyalty of their customers by offering products which are not available in competitors' stores; and (iv) increase their purchasing power.[6]

In order to achieve these objectives, the major supermarkets decided to source their private labels products under tendering procedures, which are intended to achieve the best possible (lower) price for very large quantities. The concentration of large volume contracts amongst a few major supermarkets resulted in "*a strong and aggressive competition between suppliers to secure these supply contracts*".[7] The low purchasing prices obtained through the tenders allowed the retailers to implement a marketing strategy according to which "*private label products at the value end of the pricing spectrum are […] maintained at low levels".*[8]

As recognized by the Productivity Commission, the supermarkets' private label pricing strategies forced the suppliers of proprietary label products to cut their prices in order not to lose sales volumes. This reduced *"the ability of domestic producers to achieve premium prices for their products"*[9] and caused the injury suffered by SPCA.

In addition to the above, the ADC recognized that supermarkets boycotted SPCA's branded products in order to implement their private label strategies. In particular, the ADC found that *"the major supermarkets determine the shelf placement of all products within a range of goods. In doing so, retailers tend to provide the prime locations to the highest volume selling goods, often being their own private labels. Consequently SPCA's products have been moved to unfavourable locations on shelves within the prepared or preserved tomato range of goods which can exacerbate the lower sales performance".*[10] In this respect, it is worth to note that *"the strategy of shelf placement by the retailers is not related to their purchase of dumped imports from Italy"*[11]*.*

The foregoing leads to the conclusion that any injury that SPCA may have suffered is the direct consequence of the supermarkets' commercial strategies. The few players active in the retail market for prepared or preserved tomatoes, which hold a strong (quasi dominant) buying power, are in competition with

---

6 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 56.

7 Final Report No. 217, page 56.

8 Final Report No. 217, page 56.

9 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 56.

10 Final Report No. 217, page 60.

11 Final Report No. 217, page 60.

SPCA in the branded segment. The fact that they prefer to sell their own labelled tomatoes in lieu of those of SPCA constitutes a conduct which cannot be addressed with antidumping measures. The described situation, and any injury that it may have caused to SPCA, should be assessed and, if appropriate, addressed on the basis of other pieces of legislation such as, e.g., antitrust law.

Therefore, it is submitted that the Minister's decision was not correct or preferable insofar as it did not conclude that the injury suffered by the Australian industry was caused by the commercial strategies of the major supermarkets to promote their own private labels products.

1.2. The injury suffered by the Australian industry was also caused by additional factors other than dumped imports

In addition to the main factor outlined above (the commercial strategies of the major supermarkets to promote their private label products), the Applicant submits that the Minister's decision failed to take into due consideration the injury caused by other factors unrelated to dumped imports of tomatoes from Italy.

The appreciation of the AUD towards the EUR is definitely one of these factors. In the Final Report the ADC established that since 2007 the AUD/EUR exchange rate has started appreciating significantly.[12] In the period 2009-2013, the AUD appreciated by 37% and reached its peak in 2012, i.e. during the investigation period, when it appreciated by 42% against the EUR. Since the vast majority of prepared or preserved tomatoes exported from Italy were sold in EUR, the appreciation of the AUD had a significant impact on the economic situation of the Australian industry. In fact, the considerable appreciation of the AUD reduced the price of imported processed tomatoes relative to domestic products, making the domestic products less competitive on the Australian market. It is worth to note that the ADC itself considered that the appreciation of the AUD was a "*significant contributing factor to the injury suffered by the Australian industry by reducing the FOB value in Australian dollar terms thereby improving the competitiveness of the imported goods*". The same conclusion was reached by the Productivity Commission in the framework of the Safeguard Inquiry into import of processed tomatoes (see section 1.3 *infra*).

The floods of 2011 is another important factor that caused injury to the Australian industry. As is well known, in recent years the tomato production in Australia has been subject to considerable fluctuations and, in 2011, its output was lower than 90,000 tons. The drop in production was caused by the bad weather conditions. Indeed, in the last 10 years, there has been a period of severe drought, followed by severe flooding. The reduction in the Australian production has caused imports to fill the gap to meet the local demand in the domestic market, which has remained constant. Moreover, as clarified by the Productivity Commission, sales of domestic private label products have not

[12] Final Report No. 217, page 64.

recovered to their pre-flood levels.[13] It is therefore clear that the floods caused significant injury to the domestic industry, and that the injury has persisted since Australian products have failed to regain market share even after production levels recovered in the following years. In this respect, it is worth noting that the Final report of the ADC completely departed from the findings of the APC, according to which floods caused significant injury to the domestic industry, without providing any explanation for this contradiction.

In light of the foregoing it is submitted that the Minister's decision was not correct or preferable insofar as it did not conclude that additional factors other than dumped imports such as the appreciation of the AUD and the floods of 2011, together with the commercial strategies of the major supermarkets to promote their private label products, were the only cause of the injury suffered by the Australian industry.

1.3. The Minister's decision is in stark contradiction with the findings of the Productivity Commission

The Applicant further submits that the Minister's decision was not correct or preferable since it is in stark contradiction with the conclusions reached by the Productivity Commission in the safeguard investigation conducted with regard to the same product and period.

At the outset, it must be stressed that although the differences between anti-dumping investigations and safeguards investigations and the different tests applied in the two types of investigations ("material injury" vs "serious injury") are well known, such differences do not relate to the causality test (and, in particular, the so-called "negative test") to be carried out by the investigating authority. Indeed, in both safeguards and anti-dumping proceedings, the investigating authority is under an obligation to establish whether the injury derives from factors other than the imports of the product concerned.

After having duly examined the contribution to the injury suffered by SPCA of any known factor other than the imports, the Productivity Commission concluded that "*the injury to the domestic tomato processing industry coincides with, and has been caused by, a combination of long-term industry and market trends as well as recent acute events*".[14] The Productivity Commission stated that:

> *"a number of specific developments have combined to cause injury to the domestic industry. First, the retail unit value of SPC Ardmona branded products […] which contributed to a loss of market share. This was exacerbated by the floods in 2011, which caused lower production and a loss of market share for domestic private label*

---

13 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 53.

14 Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 48.

products supplied by SPC Ardmona. The ready availability of imported products — assisted by the concurrent appreciation of the Australian dollar — made it possible for supermarkets to increase their use of imports for private label brands and to choose to pass reductions in import prices on to consumers, or to increase their margins. At the same time, exports of processed tomato products decreased, probably as a result of the appreciation of the Australia dollar". [15]

On the basis of the above considerations, the Productivity Commission reached the conclusion that "*any injury [suffered by SPCA] would not be attributable to increased imports, but rather to choices made by supermarkets about branded and private label products and by consumers*".[16] In addition, it was concluded that *'[t]he import price of [the Italian imports], expressed in Euros, has not changed significantly over the past five years […]. This, along with the fact that there was no surge in import volumes, shows that the reduction in the supermarket retail price of processed tomato products was not caused by a significant change in the world market price for processed tomato products"* (emphasis added). Therefore the Productivity Commission concluded that neither the volume of imports from Italy nor the price (expressed in Euros) of these imports caused the injury suffered by the Australian industry.

Bearing the above in mind, it is hard to understand how – in an investigation regarding the same goods and the same period – the ADC could reach a conclusion on the causality link completely opposite to that reached by the Productivity Commission. The findings of the ADC are even more inexplicable if one considers that the "other factors" (private label strategies, flood, appreciation of AUD) on which the Productivity Commission based its findings are exactly the same as those taken into account by the ADC in the Final Report. As a matter of fact the ADC did not substantiate with adequate evidence why it departed from the Productivity Commission's findings, limiting itself to (wrongly) state that Productivity Commission's findings are "*generally consistent with the findings outlined in SEF 217*".[17]

In the light of the foregoing, the ADC's conclusion that SPCA suffered material injury and that there was a causal link between the injury and dumped imports from Italy and the Minister's decision to publish a ADN are vitiated since they flagrantly contradict the findings of the Productivity Commission in the safeguard inquiry regarding the same imports of the same product.

---

[15] Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 62.

[16] Inquiry Report No. 68, 12 December 2013 of the Productivity Commission, issued in the framework of the Safeguard Inquiry into import of Processed Tomato Products, page 58. In this respect, see also paragraphs 1.1 of the present submission.

[17] Final Report No. 217, page 55.

1.4. The injury caused by dumped imports – if any – was not material

Finally, it is submitted that the Minister's decision was not correct or preferable since it did not conclude that the injury caused by dumped imports – if any – was not material. In this respect it must be noted that in its injury analysis, the ADC identified several factors which contributed in causing the injury suffered by the Australian industry, including:

- unfavourable placement of SPCA's products on the retail shelf;[18]
- undumped imports;[19]
- consumer preferences for region specific products;[20]
- private label strategies of the major supermarkets;[21]
- appreciation of the Australian dollar.[22]

Despite all the above factors, the ADC concluded that the dumped imports have contributed to the Australian industry suffering material injury. The ADC further explained that the *"dumped imports need not be the sole or even the principal cause of injury. What must be established is that the injury that can be attributed to dumping is material"*.[23] However, while it is undisputed that dumping may not be the sole cause of injury, it is also true that the concurrence of many different factors causing injury to the domestic industry may be sufficient to break the causality link between dumped imports and the materiality of injury caused by such imports. Otherwise, the so called "negative test" (i.e. the test to determine whether factors other than dumped imports caused the injury suffered by the domestic industry) would be just useless.

Therefore, in order not to render the "negative causality test" meaningless, the ADC should have assessed whether or not, in the absence of dumped imports, the domestic industry would have experienced any material injury (due to factors other than dumped imports). However, the ADC did not establish - nor attempted to establish - this. On the contrary, the ADC recognized that in the absence of any dumped sales SPCA would still have experienced material injury caused by other factors. As a matter of fact, the ADC acknowledged that "*[i]t is likely the accumulation of the long term competitive pressures has culminated in the difficult commercial situation SPC Ardmona currently faces. Given the Australian industry performance has been eroded over a number of*

---

[18] Final Report No. 217, page 60.

[19] Final Report No. 217, page 60.

[20] Final Report No. 217, page 60.

[21] Final Report No. 217, page 65.

[22] Final Report No. 217, page 64.

[23] Final Report No. 217, page 55.

years for various reasons, and it is such, that <u>any adverse market condition that causes injury could be considered to be material</u>" (emphasis added).[24]

Moreover, the ADC's undemonstrated assumption that in the absence of dumped imports *"the higher import prices would have translated into higher retail shelf prices given the strong correlation between the wholesale prices and retail prices"*[25] not only is it <u>contradictory</u> (in so far as it completely ignores the above-discussed pressure exercised by the supermarkets as competitors in the branded tomato segment) but it is also <u>insufficient</u> to prove that, in the absence of dumped imports from Italy, the Australian industry would not have suffered any material injury.

In connection with the above, it must be further noted that the ADC's calculation of the *"magnitude of the price increases"* in the absence of dumping (i.e. 9%, which – according to the ADC – would correspond to the weighted average dumping margin determined for selected exporters) is totally flawed since:

- the weighted average dumping margin calculation is based on the FOB unit export prices, while the price undercutting was measured at FIS level. Since FIS prices are higher than FOB prices, the *"magnitude of the price increases"* is certainly lower than 9%;

- in determining the effect of dumping on the FIS price of imports, the ADC overlooked the fact that 44% of these imports were found to be undumped;

- the ADC's calculation included the dumping margin established for non-cooperating exporters (since the weighted average of the dumping margins of cooperating exporters is certainly lower than 9%). This means that the *"magnitude of the price increases"* was not determined on the basis of positive evidence;

- the ADC's assumption that a 9% increase of the retail shelf price of imports from Italy would directly translates into a 9% increase of the retail shelf price of SPCA's products is undemonstrated.

In light of the foregoing, it is submitted that the ADC failed to duly distinguish and separate the injurious effect of factors other than dumped imports on the price paid for like goods produced and sold in Australia by SPCA and wrongly applied the so-called "negative test" in the causality assessment.

Finally, as regards the ADC's statement that *"[d]isentangling the effects that a range of factors have had on an industry is a very challenging task and the [ADC] is unaware of any investigating authority that undertakes to measure the amounts of injury attributable to dumped imports and other known factors"* it is worth recalling that, according to the WTO Appellate Body:

---

[24] Final Report No. 217, page 66.

[25] Final Report No. 217, page 66.

> *"[…]it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors".* [26]

Therefore, although it is not requested to "*measure the amounts of injury attributable to dumped imports and other known factors",* the ADC should have demonstrated that factors other than imports of dumped goods, considered in isolation, were unable to cause the injury suffered by SPCA.

In light of the above, it must be concluded that the Minister's decision was not correct or preferable insofar as it did not correctly assess the materiality of the (alleged) injury caused by dumped imports. A correct, reasonable and objective examination of the nature and the extent of the injurious effects of factors other than dumped imports would have inevitably lead to the conclusion that the injury suffered by SPCA was only caused by such factors.

2. THE MINISTER'S DECISION WAS NOT CORRECT OR PREFERABLE INSOFAR AS THE ADC'S DETERMINATION OF THE VOLUME OF DUMPED IMPORTS FOR THE PURPOSE OF THE INJURY ASSESSMENT IS FLAWED

As a second ground, it is submitted that the Minister's decision was not correct or preferable since the ADC's determination of the volume of dumped imports for the purpose of injury assessment was vitiated insofar as the imports from the residual exporters were erroneously treated as dumped.

In dealing with this issue in the Final Report, the ADC first noted 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*".[27] The ADC then stated that in the case at issue it considered that "*the dumping margin determined for residual exporters is relevant to the material injury assessment being undertaken*".[28]

However, the above approach amounts to a tautological reasoning: with a view to deciding whether the imports of the residual exporters have to be considered as dumped the ADC assumes that they were dumped !

---

[26] WTO Appellate Body Report, *US – Hot-Rolled Steel*, paragraph 228.

[27] Final Report No. 217, page 52.

[28] Final Report No. 217, page 52.

The ADC then referred to the Appellate Body report in *EC - Bed linen*.[29] As is well known, in that case, the Appellate Body found that *"Article 9.4 [of the WTO ADA] does not provide justification for considering all imports from non-examined producers as dumped for purposes of Article 3"*[30] and that, therefore, additional positive evidence is required to treat the imports from unexamined producers as dumped for the purpose of the injury assessment. In this respect, the ADC clarified that, in order to conclude that imports from the residual exporters were dumped, the statistical data of declared imports value for good exported by each residual exporter during the investigation period were examined.

In the ADC's view, such statistical data would reveal that the average dumping margin for the residual exporters would be approximately 14%. This margin was obtained by comparing the average export price (it is unclear how this was computed and no information was provided by the ADC - see *infra*) of the nine residual exporters extracted from the customs database with the weighted average normal value for all cooperating exporters (it is unclear how this was computed and no information was provided by the ADC - see *infra*).[31]

However, the methodology followed by the ADC is unreasonable and flawed as the following grounds demonstrate:

- in calculating the average dumping margin for the residual exporters the ADC used a normal value (i.e. the weighted average normal value of the cooperating exporters) which has no relationship with such exporters. Such a comparison is misleading and, as such, totally meaningless. The Italian market is characterized by the presence of a multitude of producers with considerably different prices, costs, marketing strategy, sales channels, consumers perception, labelling, etc. (as demonstrated, for instance, by the market survey regarding peeled tomatoes attached under **Annex 1**). To compare the normal value of producer "X" with the export price of producer "Y" can only lead to a meaningless results;

- furthermore, it would appear that in its calculation the ADC did not carry out a fair comparison. In fact, it would appear that it did not take into account the physical differences between the five general model categories of goods exported to Australia (i.e. diced/chopped, crushed, whole peeled, and value added).[32] In fact, the ADC calculated a weighted average normal value by (apparently) including all the model categories sold by the cooperating exporters irrespective of whether all such model categories have been exported by the residual exporters. In this respect,

---

29 European Communities – Anti-dumping duties on imports of cotton-type bed linen from India (WT/DS141/AB/RW).

30 European Communities – Anti-dumping duties on imports of cotton-type bed linen from India (WT/DS141/AB/RW), paras. 124-127. Emphasis added.

31 Final Report No. 217, page 53.

32 Final Report No. 217, page 14 and 38.

it is important to note that since there are significant differences in terms of cost and price among the above-mentioned model categories, the ADC should have calculated a weighted average normal value by model category. Moreover, it would appear that the other factors relating to the fair comparison exercise (such as, e.g., private label versus branded labels, packaging, labelling, types of cans and lids, etc.) may have been neglected by the unreasonable approach followed by the ADC. Thus, without prejudice to what stated above regarding the unreliable and unreasonable nature of the methodology used by the ADC, the latter should have taken into account all the differences which affect price comparability in order to ensure a fair comparison;

- the above is based on the Applicant's limited understanding of the methodology followed by the ADC. In fact, despite the request submitted on 6 May 2014 (see **Annex 2**), the ADC has failed to provide any explanation whatsoever to clarify the methodology used to calculate the 14% average dumping margin. It is strongly claimed that the failure to provide the Applicant with clear information about the essential facts and considerations underlying the adoption of antidumping measures undermine its rights of defense and, as such, irremediably flaws the decision.

In light of all of the above grounds, it is submitted that the ADC did not provide any additional "objective evidence" that exports from the residual exporters were dumped. It follows that such exports should have been regarded as non-dumped for the purpose of the injury analysis. This conclusion is also supported by the following evidence and considerations:

- in *EC - Bed linen*, the fact that producers accounting for 47% of total imports attributable to examined producers were found to be dumping was considered not a sufficient basis to justify treating imports from unexamined exporters as dumped for the purpose of the injury analysis. It is submitted that the above conclusion applies *a fortiori* in the present case in which only 37% (compared to 47% in the Bed Linen case) of the total exports attributable to examined producers (i.e. 26% out of 70%) were found to be dumped by the ADC, while 63% of the total exports attributable to examined producers (i.e. 44% out of 70%) were found to be undumped;

- the weighted average dumping margin established with respect to the (minor) part of Italian exports which were found to be dumped is extremely low (i.e. 4.24%);

- bearing in mind that the two producers with the largest sales volumes (accounting for 44% of total imports from Italy and 63% of examined imports from Italy) were found not be dumping, common sense suggests that the export prices of producers exporting smaller volumes (i.e. the

residual unexamined cooperating exporters) were not lower than those of the market leaders.

In light of the foregoing, the ADC's decision to consider all imports from the residual exporters as dumped for the purpose of the injury assessment is unwarranted. No evidence whatsoever supports the conclusion that imports made by the unexamined producers were dumped. Therefore, the Minister's decision was not correct or preferable since it relied upon a wrong determination of the volume of dumped imports for the purpose of injury assessment.

3. THE MINISTER'S DECISION WAS NOT CORRECT OR PREFERABLE AS THE CALCULATION OF THE DUMPING MARGIN APPLIED TO UNCOOPERATIVE EXPORTES IS FLAWED

As a third ground, it is submitted that the ADC's determination of the dumping margin applied to uncooperative exporters such as the Applicant is flawed since it does not take into account the physical differences of the products which affect price comparability.

3.1 The ADC failed to provide a meaningful disclosure of the methodology followed to calculate the dumping margin applied to uncooperative exporters

As explained in the SEF and in the Final Report, the dumping margin of 26.35% applied to uncooperative exporters[33] was calculated as follows:

"For uncooperative exporters, the Commission established export prices pursuant to s.269TAB(3) of the Act having regard to all relevant information by reference to export prices determined with verified information of cooperating exporters over the investigation period. The Commission used the lowest export price from cooperative selected exporters found to have a dumping margin greater than 2%.

Normal values were established pursuant to s.269TAC(6) of the Act having regard to all relevant information. The Commission used the highest normal value from cooperative selected exporters found to have a dumping margin greater than 2%"[34]

---

[33] In this respect it should be noted that pursuant to Paragraph 6 of Annex II to the WTO ADA *"[I]f evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation"*. However, after having informed the Applicant - on 2 October 2013 - that it would have been treated as an uncooperative exporter, **the ADC failed to set a deadline for the Applicant to comment on its decision to use best information available**, thus violating the provisions of the WTO ADA. See correspondence attached as **Annex 3**.

[34] Final Report No. 217, page 49.

On 13 February 2014, following the publication of the SEF, clarifications regarding the methodology used to calculate the dumping margin for uncooperative exporters were requested to the ADC (see **Annex 4**). On 17 February 2014, the ADC provided the following reply (see **Annex 5**):

"The dumping margin calculated for uncooperative exporters was based on the lowest weighted average export price over the investigation period and the highest weighted average normal value over the investigation period from cooperative exporters found to have a dumping margin greater than 2%.

For uncooperative exporters the weighted average export price used was; 0.564 eur

For uncooperative exporters the weighted average normal value used was; 0.713 eur

Dumping margin = (0.713 -0.564) / 0.564 = 26.35%"

After the publication of the Final Report, the ADC was requested to provide additional clarifications regarding the methodological steps followed to compute the anti-dumping duty for uncooperative exporters. In particular, it was not clear whether the dumping margin applied to uncooperative exporters had been calculated by taking into due account the differences of the products (such as the five general model categories of goods, i.e. diced/chopped, crushed, whole peeled, and value added) which affect price comparability. Despite the numerous requests, however, the ADC failed to clarify this point. Therefore, the ADC prevented the Applicant to have a full and meaningful understanding of the methodology followed to calculate its dumping margin, allowing it to fully defend its interests, as requested by WTO law (see correspondence with the ADC's services attached under **Annex 6** and the email sent to the AD Commissioner attached under **Annex 2**).

It is claimed that the ADC's conduct has deprived the applicant of essential information necessary to have a sufficiently clear understanding of the calculation of its dumping margin. This omission and its consequences on the limitation of the rights of defense of the applicant can only be remedied by acknowledging that the ADC's Final Report – and therefore the Minister's decision based on such Report - is vitiated.

3.2 The Minister's decision was not correct or preferable insofar as the calculation of the dumping margin applied to uncooperative exporters is flawed

In the absence of the requested clarifications by the ADC (see above), the present submission is based on the assumption that the dumping margin applied to uncooperative exporters was calculated in accordance with the following methodological steps:

- for each cooperative exporter found to have a dumping margin greater than 2% (i.e. De Clemente and Conserve Italia) the ADC calculated a single weighted average normal value (including all OCOT sales of all model categories of products sold in the domestic market) and a single weighted average export price (including all export sales of all model categories of products sold in the export market);

- the highest between the weighted average normal value of the two cooperative exporters found to have a dumping margin greater than 2% was compared with the lowest between the weighted average export price of the two cooperative exporters found to have a dumping margin greater than 2%;

- the resulting margin amounts to 26.35%.

On the basis of the above assumption, it is submitted that the methodology followed by the ADC to calculate the dumping margin applied to uncooperative exporters does not ensure a fair comparison.

First, it would appear that the ADC did not take into account the differences between the five general model categories of goods exported to Australia (i.e. diced/chopped, crushed, whole peeled, and value added).[35] As a matter of fact, it would appear that the ADC calculated a single weighted average normal value (for each cooperating exporter found to have a dumping margin greater than 2%) which includes all sales of all the model categories sold in the domestic market, irrespective of whether the same or different model categories were exported to the Australian market. However, as it is well known by the ADC, there are significant differences in terms cost and price among the above-mentioned model categories. Therefore, the ADC should have calculated a per-category weighted average normal value and a per-category weighted average export price. On the contrary, it would appear that in calculating the dumping margin applied to uncooperative exporters the ADC departed from the general methodology for calculating dumping margins illustrated at section 7.5 of the Final Report, according to which:

"[i]n instances where there are numerous and various types of export sales to Australia, the Commission will seek to establish model categories. These model categories will then be used to identify whether relevant domestic sales of comparable like goods exist and to identify a subset of corresponding normal values to ensure that like is being compared with like. These are commonly referred to as model export prices and model normal values.

This is a critical step in the determination of dumping as the Commission's practice is to apply the ordinary course of trade tests and sufficiency of sales tests to each model category."[36]

---

35 Final Report No. 217, page 14.

36 Final Report No. 217, page 37.

In light of the foregoing it must be concluded that the ADC erred in calculating the dumping margin applied to uncooperative exporters in so far as it did not follow its own policy guidelines and methodology for the dumping calculation, and therefore did not ensure an apple to apple comparison of the exported goods with the like product.

Second, it is not clear whether the weighted average normal value and the weighted average export price used by the ADC to calculate the dumping margin of 26.35% applied to uncooperative exporters were duly adjusted to reflect all the differences between products sold in Italy and Australia, such as, e.g., differences in:

- quality (organic or not; PDO-certified or not);
- drained weight (60%, 65%, 70%, etc.);
- type of can (coated or non-coated);
- type of lid (easy-on or standard);
- external packaging (simple tray, double tray, box, etc.);
- etc.

The Applicant respectfully ask the ADPR to examine the file of the investigation as to ensure that the export price and the normal value used to compute the Applicant's dumping margin were duly adjusted to take into account any difference affecting the price comparability.

Third, it must be further highlighted that the ADC disposed of reliable information (e.g. Customs database) about the products exported by the Applicant during the investigation period (i.e. a mix of mid-range private label products, proprietary label products such as Annalisa and organic private label products such as Macro). Therefore, it is inexplicable why the ADC did not rely on such information and, instead, used the weighted average export price of another producer which may be entirely based on low-priced generic private label products.

In light of the foregoing, it is submitted that the 26.35% margin applied to uncooperative exporters is unwarranted since, in calculating this margin, the ADC did not ensure an apple to apple comparison of the exported goods with the like product. The Applicant therefore requests that the ADRP reinvestigate the finding and substitute it with a new finding which involves determining a dumping margin for the Applicant on an apple to apple basis, based on a fair comparison between normal value and export price of each model category, and applying the due adjustments to take into account any difference in quality, drained weight, type of can, type of lid, packaging, etc.

4. CONCLUSIONS

The above comments demonstrate that the Minister's decision was not preferable, correct and reasonable in several fundamental aspects. The Applicant respectfully requests the Review Panel to examine the file of the investigation, to take the necessary measures to reinvestigate the finding and to substitute it with a new finding which corrects all the above-described serious flaws.

Annalisa

Mr. Fabrizio Di Gianni
Mr. Gabriele Coppo
Mr. Aldo Scalini
Van Bael & Bellis
Avenue Louise 165
1050 Brussels

Castel San Giorgio, 8 May 2014

Dear Sirs,

We authorize Van Bael & Bellis to act on our behalf in seeking a review by the Anti-Dumping Review Panel of the decision of the Parliamentary Secretary to the Minister for Industry to impose antidumping measures on prepared or preserved tomatoes from Italy. You have fll authority to appoint a co-counsel.

Yours sincerely,

Gennaro Lodato

LODATO GENNARO & C S.p.A
Industria Conserve Alimentari
Via S[illegible] Pellini, 11
84083 Castel San Giorgio (SA)
Partita IVA 0 [illegible] 7 0 6 5 1

Lodato Gennaro & C S.p.A.
Industria Conserve Alimentari
84083 Castel San Giorgio (SA)
C.F. + P.iva 00180870651
Cap. Soc. Euro 2.654.148,75 i.v.
C.C.I.A.A. n. 127968 Reg. Imp. (SA) n. 151/93 - Pos. Mecc. SA 00453

T +39 081 5161376
F +39 081 5161381
lodato@annalisa.it
www.annalisa.it

Australian Government
Anti-Dumping Commission

ANTI-DUMPING NOTICE NO. 2014/32

Prepared or Preserved Tomatoes

Exported from Italy

Findings in Relation to a dumping investigation

***Customs Act 1901* – Part XVB**

I, Dale Seymour, Commissioner of the Anti-Dumping Commission have completed the investigation, which commenced on 10 July 2013, into the alleged dumping of prepared or preserved tomatoes ("the goods"), exported to Australia from Italy.

The goods are currently classified to tariff subheadings 2002.10.00 statistical code 60 in Schedule 3 of the *Customs Tariff Act 1995*.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2013/59. This ADN is available at the Anti-Dumping Commission website www.adcommission.gov.au. Findings and recommendations were reported to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) in Anti-*Dumping Commission Report No. 217* (REP 217), in which it outlines the investigations carried out by the Commission and recommends the publication of a dumping duty notice in respect of the goods. The Parliamentary Secretary has considered REP 217 and has accepted the recommendations and reasons for the recommendations, including all material findings of fact or law on which the recommendations were based, and particulars of the evidence relied on to support the findings.

Notice of the Parliamentary Secretary's decision was published in *The Australian* newspaper and the *Commonwealth of Australia Gazette* on 16 April 2014.

On 20 March 2014, I terminated the dumping investigation into the goods exported by La Doria SpA and Feger di Gerardo Ferraioli from Italy. *Termination Report No. 217* sets out the reasons for these terminations. This report is available on the Commission's website.

In REP 217, it was found that:

- prepared or preserved tomatoes exported from Italy to Australia were dumped with margins ranging from 3.25% to 26.35%;
- the dumped exports caused material injury to the Australian industry producing like goods; and
- continued dumping may cause further material injury to the Australian industry.

The duty that has been determined is an amount worked out in accordance with the combination of fixed and variable duty method, as detailed in the table below.

Particulars of the dumping margins established for each of the exporters and the effective rates of duty are set out in the following table.

Exporter / Italy	Dumping Margin	Effective rate interim dumping duty	Duty Method
De Clemente Conserve S.p.A.	3.25%	3.25%	*combination of fixed and variable duty method*
Attianese S.p.A.	4.24%	4.24%	
Fiamma Vesuviana Srl	4.24%	4.24%	
Greci Industria Alimentare S.p.A.	4.24%	4.24%	
Menu Srl	4.24%	4.24%	
Mutti S.p.A.	4.24%	4.24%	
Nolana Conserve Srl	4.24%	4.24%	
Princes Industrie Alimentari SRL	4.24%	4.24%	
Rispoli Luigi & C (S.R.L.)	4.24%	4.24%	
Steriltom Srl	4.24%	4.24%	
Conserve Italia Soc. Coop Agr	4.54%	4.54%	
I.M.C.A. S.p.A.	26.35%	26.35%	
Lodato Gennaro & C. S.p.A.	26.35%	26.35%	
Uncooperative exporters (All other)	26.35%	26.35%	

NB: Pursuant to section 12 of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act), conversion of securities to interim duty will not exceed the level of security taken. The rate of conversion for securities will be required per the notices published on 1 November 2013 and 4 February 2014.

Where the non-injurious price (NIP) is the operative measure the lesser duty rule has taken effect to reduce the duties to a level sufficient to remove the injury caused by dumping and subsidisation.

Measures apply to goods that are exported to Australia after publication of the Parliamentary Secretary's notice.

The actual duty liability may be higher than the effective rate of duty due to a number of factors. Affected parties should contact the Commission on 1300 884 159 or +61 2 6275 6066 (outside Australia) or at clientsupport@adcommission.gov.au for further information regarding the actual duty liability calculation in their particular circumstance.

Any dumping securities that have been taken on and from 1 November 2013 will be converted to interim dumping duty.[1] Importers will be contacted by the national Temporary Imports Securities Section detailing the required conversion action for each security taken.

To preserve confidentiality, the export price, normal value and non-injurious price applicable to the goods will not be published. Bona fide importers of the goods can obtain details of the rates from clientsupport@adcommission.gov.au.

Clarification about how measures securities are applied to 'goods on the water' is available in ACDN 2012/34, available at the Commission website.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel in accordance with the requirements in Division 9 of Part XVB of the Act within 30 days of the publication of the Parliamentary Secretary's notice.

REP 217 and *Termination Report No.217* have been placed on the Commission's public record, which may be examined at the Commission office by contacting the Case Manager on the details provided below. Alternatively, the public record is available at www.adcommission.gov.au.

Enquiries about this notice may be directed to the case manager on telephone number 02 62744948, fax number 1300 882 506 or +61 2 6275 6888 (outside Australia) or operations1@adcommission.gov.au.

Dale Seymour
Commissioner
Anti-Dumping Commission

16 April 2014

[1] Within the time limitations of section 45 of the *Customs Act 1901*.

Australian Government

Anti-Dumping Commission

Customs Act 1901 – Part XVB

PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY

Findings in Relation to a Dumping Investigation

Public notice under subsections 269TG(1) and (2) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission (the Commissioner) has completed the investigation into the alleged dumping of prepared or preserved tomatoes (the goods), exported to Australia from Italy.

The goods are classified to tariff subheading 2002.10.00 (statistical code 60) in Schedule 3 of the *Customs Tariff Act 1995*.

A full description of the goods is available in Anti-Dumping Notice (ADN) No. 2013/59. This ADN is available on the internet at **www.adcommission.gov.au**

The Commissioner reported the findings and recommendations to the Parliamentary Secretary to the Minister for Industry (the Parliamentary Secretary) in *Anti-Dumping Commission Report No. 217 (REP 217)*, in which it outlines the investigations carried out by the Commissioner and recommends the publication of a dumping duty notice in respect of the goods. The Parliamentary Secretary has considered REP 217 and has accepted the Commissioner's recommendations and reasons for the recommendations, including all material findings of fact or law on which the Commissioner's recommendations were based, and particulars of the evidence relied on to support the findings.

I accepted the Commissioner's recommendation to impose a retrospective notice in relation to the goods.

On 20 March 2014, the Commissioner terminated the dumping investigation into the goods exported from Italy by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. Termination Report No. 217 sets out the reasons for these terminations. This report is available at **www.adcommission.gov.au**

Particulars of the method used to compare export prices and normal values and the dumping margins established are set out in the following table:

Exporter	Dumping Margin	Method to establish dumping margin
Attianese S.p.A.	4.24%	*Weighted average export prices were compared with weighted average corresponding normal values over the investigation period in terms of ss.269TACB(2)(a) of the Customs Act 1901.*
Conserve Italia Soc. Coop Agr	4.54%	
De Clemente Conserve S.p.A.	3.25%	
Fiamma Vesuviana Srl	4.24%	
Greci Industria Alimentare S.p.A.	4.24%	
I.M.C.A. S.p.A.	26.35%	
Lodato Gennaro & C. S.p.A	26.35%	
Menu Srl	4.24%	
Mutti S.p.A	4.24%	
Nolana Conserve Srl	4.24%	
Princes Industrie Alimentari SRL	4.24%	
Rispoli Luigi & C (S.R.L.)	4.24%	
Steriltom Srl	4.24%	
Uncooperative exporters	26.35%	

NB: Pursuant to section 12 of the Customs Tariff (Anti-Dumping) Act 1975 (the Dumping Duty Act), conversion of securities to interim duty will not exceed the level of security taken. The rate of conversion for securities will be required per the notices published on 1 November 2013 and 4 February 2014.

I, ROBERT CHARLES BALDWIN, Parliamentary Secretary to the Minister for Industry, have considered, and accepted, the recommendations of the Commissioner, the reasons for the recommendations, the material findings of fact on which the recommendations are based and the evidence relied on to support those findings in REP 217.

I am satisfied, as to the goods that have been exported to Australia, that the amount of the export price of the goods is less than the normal value of those goods and because of that, material injury to the Australian industry producing like goods might have been caused if the security had not been taken. Therefore under subsection 269TG(1) of the *Customs Act 1901* (the Act), I **DECLARE** that section 8 of the Dumping Duty Act applies to:

(i) the goods; and

(ii) like goods that were exported to Australia after 1 November 2013 (when the Commissioner made a Preliminary Affirmative Determination under section 269TD of the Act that there appeared to be sufficient grounds for the publication of a dumping duty notice) but before the publication of this notice.

I am also satisfied that the amount of the export price of like goods that have already been exported to Australia is less than the amount of the normal value of those goods, and the amount of the export price of like goods that may be exported to Australia in the future may be less than the normal value of the goods and because of that, material injury to the Australian industry producing like goods has been caused or is being caused. Therefore under subsection 269TG(2) of the Act, I **DECLARE** that section 8 of the Dumping Duty Act applies to like goods that are exported to Australia after the date of publication of this notice.

This declaration applies in relation to all exporters of the goods and like goods from Italy excluding those exported by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A..

The considerations relevant to my determination of material injury to the Australian industry caused by dumping are the size of the dumping margins, the effect of dumped imports on prices in the Australian market in the form of price undercutting and the consequent impact on the Australian industry including price depression, price suppression and reduced profits and profitability.

In making my determination, I have considered whether any injury to the Australian industry is being caused or threatened by a factor other than the exportation of dumped goods, and have not attributed injury caused by other factors to the exportation of those dumped goods.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel, in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

Particulars of the export prices, non-injurious prices, and normal values of the goods (as ascertained in the confidential tables to this notice) will not be published in this notice as they may reveal confidential information.

Clarification about how measures securities are applied to 'goods on the water' is available in ACDN 2012/34, available at **www.adcommission.gov.au**.

REP 217 and other documents included in the public record may be examined at the Anti-Dumping Commission office by contacting the case manager on the details provided below. Alternatively, the public record is available at **www.adcommission.gov.au**.

Enquiries about this notice may be directed to the case manager on telephone number 02 62744948, fax number 1300 882 506 or +61 2 6275 6888 (outside Australia) or **operations1@adcommission.gov.au**

Dated this 14th day of April 2014

ROBERT CHARLES BALDWIN
Parliamentary Secretary to the Minister for Industry