



**ANTI-DUMPING COMMISSION
REPORT TO THE ANTI-DUMPING REVIEW PANEL**

REINVESTIGATION REPORT No. 269

**REINVESTIGATION OF CERTAIN FINDINGS IN
REPORT NO. 217 REGARDING
PREPARED OR PRESERVED TOMATOES
EXPORTED TO AUSTRALIA FROM
ITALY**

22 September 2014

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1	ACRONYMS AND ABBREVIATIONS
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ABS	Australian Bureau of Statistics
ACBPS	Australian Customs and Border Protection Service
Act	<i>Customs Act 1901</i>
ADRP	Anti-Dumping Review Panel
Attianese	Attianese S.p.A.
Commission	Anti-Dumping Commission
Commissioner	Anti-Dumping Commissioner
Conserve Italia	Conserve Italia Soc. Coop Agr
Corex	Corex S.p.A.
De Clemente	De Clemente Conserve S.p.A
Feger	Feger di Gerardo Ferraioli S.p.A.
Fiamma	Fiamma Vesuviana Srl
Greci	Greci Industria Alimentare S.p.A.
IMCA	I.M.C.A. S.p.A
La Doria	La Doria S.p.A.
Lodato	Lodato Gennaro & C. S.p.A
Menu	Menu Srl
Mutti	Mutti S.p.A.
NIP	Non-injurious Price
Nolana	Nolana Conserve Srl
PAD	Preliminary Affirmative Determination
Parliamentary Secretary	Parliamentary Secretary to the Minister for Industry
Princes	Princes Industrie Alimentari SRL
Rispoli	Rispoli Luigi & C (S.R.L.)
SEF	Statement of Essential Facts
SPCA	SPC Ardmona Operations Ltd
Steriltom	Steriltom Srl
the goods	the goods the subject of the application (also referred to as the goods under consideration or GUC)
USP	Unsuppressed Selling Price
WTO	World Trade Organisation
WTO ADA	World Trade Organisation Anti-Dumping Agreement

2 SUMMARY OF FINDINGS

This report provides the results of the reinvestigation by the Commissioner of the Anti-Dumping Commission (the Commissioner) of certain findings in Anti-Dumping Commission Report No. 217 (REP 217), relating to the dumping of prepared or preserved tomatoes exported to Australia from Italy.

2.1 Findings

The Commissioner, in accordance with s. 269ZZL(3) of the *Customs Act 1901* (the Act)¹, **affirms** the finding that dumped prepared or preserved tomatoes exported to Australia from Italy during the investigation period caused material injury to the Australian industry producing like goods.

The evidence and material on which the findings are based, and the reasons for this decision, are set out in this report.

2.2 Summary of Reasons

The Anti-Dumping Commission (Commission) reinvestigated the finding that dumped prepared or preserved tomatoes exported from Italy had caused material injury to the Australian industry. As requested by the Anti-Dumping Review Panel (the ADRP), the Commission focused on material injury caused by dumping of exports by residual exporters² and uncooperative exporters.³ The Commission's reinvestigation found:

- a significant proportion of the goods exported by residual exporters were dumped (refer section 4.3 of this report);
- a significant proportion of the goods exported by uncooperative exporters were dumped (refer section 4.3 of this report);
- the export prices of both the residual and uncooperative exporters were undercutting Australian prices and the prices of undumped goods (refer section 4.4 of this report); and
- the injury caused by dumped exports from residual and uncooperative exporters, when considered in aggregate with injury caused by dumped exports from cooperating exporters, was material (refer section 4.4 of this report).

¹ A reference to a division, section or subsection in this report is a reference to a provision of the *Customs Act 1901*, unless otherwise specified.

² s. 269T refers: residual exporter means "an exporter of goods that are the subject of the investigation, review or inquiry, or an exporter of like goods, where: (d) the exporter's exports were not examined [...] and (e) the exporter was not an uncooperative exporter in relation to the investigation, review of inquiry."

³ s. 269T refers: uncooperative exporter means "an exporter of goods that are the subject of the investigation, review or inquiry, or an exporter of like goods, where: (d) the Commissioner was satisfied that the exporter did not give the Commissioner information the Commissioner considered to be relevant to the investigation, review or inquiry within a period the Commissioner considered to be reasonable; or (e) the Commissioner was satisfied that the exporter significantly impeded the investigation, review or inquiry."

3 BACKGROUND

3.1 Original Investigation

On 10 July 2013, the Commissioner initiated an investigation into the alleged dumping of prepared or preserved tomatoes exported to Australia from Italy. The investigation followed an application for the publication of a dumping duty notice that was lodged by SPC Ardmona Operations Ltd (“SPCA”), the sole Australian producer of prepared or preserved tomatoes.

REP 217 sets out the facts on which the Commissioner based his recommendations to the Parliamentary Secretary to the Minister for Industry (Parliamentary Secretary). The Parliamentary Secretary considered REP 217 and accepted the recommendations and reasons for the recommendations, including all material findings of fact and law on which the recommendations were based, and particulars of the evidence relied on to support the findings. The Parliamentary Secretary decided to issue a dumping duty notice in relation to prepared or preserved tomatoes exported to Australia from Italy by all exporters except La Doria S.p.A. (La Doria) and Feger di Gerardo Ferraioli S.p.A. (Feger).

Dumping duties were subsequently imposed in relation to prepared or preserved tomatoes from Italy in accordance with the Commissioner’s recommendations on 16 April 2014 (Anti-Dumping Notice No. 2014/32 refers). The dumping duty imposed is an amount worked out in accordance with the combination of fixed and variable duty method, with the fixed component of duty (in this case, equivalent to the dumping margin) detailed in the table below. An additional amount of variable duty may be incurred if the actual export price per unit of the goods is below the (confidential) ascertained export price per unit.

Manufacturer / Exporter	Visited	Dumping Margin
Selected Exporters		
De Clemente Conserve S.p.A. (De Clemente)	Yes	3.25%
Conserve Italia Soc. Coop Agri (Conserve Italia)	Yes	4.54%
I.M.C.A. S.p.A. (IMCA)	No	26.35%
Lodato Gennaro & C. S.p.A. (Lodato)	No	26.35%
Residual Exporters		
Attianese S.p.A. (Attianese)	No	4.24%
Fiamma Vesuviana Srl (Fiamma)	No	4.24%
Greci Industria Alimentare S.p.A. (Greci)	No	4.24%
Menu Srl (Menu)	No	4.24%
Mutti S.p.A. (Mutti)	No	4.24%
Nolana Conserve Srl (Nolana)	No	4.24%
Princes Industrie Alimentari SRL (Princes)	No	4.24%
Rispoli Luigi & C (S.R.L.) (Rispoli)	No	4.24%
Steriltom Srl (Steriltom)	No	4.24%
Uncooperative exporters (All others)	No	26.35%

3.2 Legislative Framework for a Review

Division 9 of Part XVB of the Act sets out procedures for review by the ADRP of certain decisions made by the Minister⁴ or the Commissioner.

Interested parties can apply to the ADRP to review certain decisions in relation to dumping and countervailing matters. If an application for review is not rejected, the ADRP must make a report to the Minister on the application either:⁵

- recommending that the Minister affirm the reviewable decision; or
- recommending that the Minister revoke the reviewable decision and substitute a specified new decision.

If the ADRP has not rejected an application for review, before making a recommendation under s. 269ZZK(1), the ADRP may, by written notice, require the Commissioner to:⁶

- 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 the specified period.

3.3 Review by the Anti-Dumping Review Panel

Applications to the ADRP seeking a review of the Parliamentary Secretary's decision were due by 16 May 2014.⁷ Six applications were received and accepted, and the ADRP announced its intention to conduct a review of the Parliamentary Secretary's decision on 30 May 2014.

On 18 July 2014, the ADRP, in the course of its review, wrote to the Commissioner pursuant to s. 269ZZL and requested that the Commissioner reinvestigate "the finding that dumped prepared or preserved tomatoes exported from Italy had caused material injury to the Australian industry producing like goods."

The ADRP clarified that the request for re-investigation "does not cover the finding that there was material injury suffered by the Australian [industry] or the findings with respect to the dumping of exports by the selected exporters who were cooperating exporters."

The ADRP advised the Commissioner of the following reasons for requesting the reinvestigation:

1. In determining whether dumped goods caused material injury, it cannot be simply assumed that residual or non-examined exporters were dumping or dumping at the dumping margins determined under subsections 269TAB (3) and 269TAC(6). In making use of any dumping margins determined under subsections 269TAB(3) and 269TAC(6) for the purpose of the investigation, it is necessary to consider whether the material relied upon to determine such dumping margins, or other available material, supports a conclusion that those exporters were dumping and dumping at those or similar margins.

⁴ The Minister for Industry has delegated his decision-making authority to the Parliamentary Secretary – as a result, all references to "the Minister" should be interpreted as also referring to the Parliamentary Secretary.

⁵ s. 269ZZK(1)

⁶ s. 269ZZL(1)

⁷ Details available on <http://www.adreviewpanel.gov.au/site/TomatoesPreparedorPreservedExportedfromItaly.asp>.

2. In investigating whether or not material injury has been caused by dumping, assumptions can be drawn as reasonable inferences from available material, including any material relied upon to determine dumping margins for residual or uncooperative exporters. Any assumptions made need to be tested to ensure they are appropriate and credible.
3. The finding that material injury was being caused by dumping in Final Report No. 217 relied, at least in part, from the comparison of declared import values for residual exporters with the weighted average normal value for all cooperating exporters.⁸ It is not clear, however, that there was any testing of the assumption that such a normal value is a valid one to use for the residual exporters. The suitability of using that normal value could be affected by, for example, any differences in the products being exported.
4. Similarly, the finding also relied upon a comparison of export prices⁹ and it is not clear whether an analysis was conducted to ensure that any such comparison was valid and not affected by any factors such as differences in the products being exported.
5. In using the results derived from the methodology described at paragraphs 8.4.1 and 8.4.2 of Final Report No. 217, there is reliance on the average dumping margins or average prices, but there does not appear to have been consideration given to material indicating that individual exporters may not be dumping or the declared import values for individual exporters were not undercutting undumped prices.
6. Finally, while there was reliance on material other than simply the margins determined for the non-examined exporters under subsections 269TAB(3) and s. 269TAC(6), there also appears to have been reliance on such margins as if those margins were evidence of the actual size of dumping margins.¹⁰

The reinvestigation was originally due to be completed by 18 August 2014, but two extensions of time were sought from and were granted by the ADRP. The revised due date for the Commissioner to report to the ADRP is 19 September 2014.

3.4 Approach to Reinvestigation

In conducting a reinvestigation, the Commissioner may only have regard to relevant information and any conclusions based on relevant information. Relevant information, as defined by s. 269ZZK(6), is information from the original investigation and comprises the application for the publication of a dumping duty notice, submissions to the original investigation, Statement of Essential Facts No. 217 (SEF 217), submissions to SEF 217, REP 217 and any other matters the Commissioner had regard to in the course of the investigation.

The Commission has examined the documents from the original investigation (relevant information) for the purposes of conducting the reinvestigation. Consideration has also been given to the findings of facts, law and policy arising in the original investigation.

⁸ REP 217, para 8.4.1, page 53.

⁹ *ibid* para 8.4.2, page 53.

¹⁰ *ibid* para 8.9.1 and Confidential Attachment 9 to Attachment A to the letter from the Commission dated 23 June 2014.

4 REINVESTIGATION

4.1 Key Aspects of the Original Investigation

4.1.1 The Goods

Chapter 3 of REP 217 deals with the definition of the goods:

“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.”¹¹

The goods excluded from this definition are pastes, purees, sauces, pasta sauces, juices and sundried tomatoes.

4.1.2 Sampling

The Commission published a sampling report on the electronic public record to explain its approach to this aspect of its original investigation.¹² Summarised briefly, 106 potential exporters from Italy were identified using the Australian Customs and Border Protection (ACBPS) import database and invited to participate in the investigation by completing Part 1 of the Exporter Questionnaire.

Following consideration of responses to Part 1, the Commission considered that the number of exporters that provided information was too large to determine individual dumping margins for all exporters expressing a willingness to cooperate. Therefore, the Commission elected to use a sample group of seven selected exporters¹³ for the purpose of conducting the investigation; these seven were invited to respond to Part 2 of the Exporter Questionnaire. The selected exporters, which collectively represented approximately 70 per cent of the total import volume of the goods, were Conserve Italia, Corex S.p.A. (Corex), De Clemente, IMCA, Feger, La Doria and Lodato.

This sample and the categorisation of exporters was further refined during the course of the original investigation. As a result:

- four exporters (Conserve Italia, De Clemente, Feger, and La Doria) were considered to have cooperated with the investigation, were examined and their relevant information was verified;
- nine exporters (Attianese, Fiamma, Greci, Menu, Mutti, Nolana, Princes, Rispoli and Steriltom) cooperated with the investigation but were not individually examined as a result of the sampling exercise, and were therefore deemed to be residual exporters;
- Corex was found to not be an exporter; and
- all remaining exporters, including IMCA and Lodato, were considered to be uncooperative exporters.

¹¹ REP 217, para 3.3.

¹² Sampling Report, document #18: <http://www.adcommission.gov.au/cases/documents/018-OtherReport-ExporterSamplingReport.pdf>

¹³ s. 269T refers: selected exporter means, in relation to a dumping duty notice, “an exporter of goods the subject of the application or like goods whose exportations were investigated for the purpose of deciding whether or not to publish that notice.”

The four cooperating exporters represented 54.4 per cent of the total volume of the goods exported during the investigation period. The nine residual exporters represented 10.6 per cent of the volume of the goods exported, whilst the uncooperative exporters represented the remaining 35.0 per cent.¹⁴

4.1.3 Dumping Margin Determinations

In its sampling report, the Commission notified all interested parties how the dumping margins would be determined for each category of exporters. The Commission explained:¹⁵

- for each selected exporter, it will determine individual export prices, normal values and dumping margins using relevant information supplied in the exporter questionnaire. Where a selected exporter refuses to provide requested information required by the exporter questionnaire, the Commission will determine individual export prices, normal values and dumping margins using all relevant information;
- for residual exporters, export prices and normal values will be calculated using the weighted average of export prices and normal values for like goods of cooperative exporters from Italy. In calculating the weighted average export price and normal value, the Commission will not include any export price or normal value from a cooperative exporter that was found to not be dumping or where the dumping margin, when expressed as a percentage of the export price or weighted average of export prices used to establish that dumping margin, is less than 2 per cent; and
- for uncooperative exporters, the Commission will establish export prices and normal values under s. 269TAB(3) and s. 269TAC(6) respectively, having regard to all relevant information.

Consistent with the approach foreshadowed in the sampling report, the Commission calculated dumping margins in REP 217 as follows:

- for **selected exporters** that cooperated (Conserve Italia, De Clemente, Feger and La Doria) - individual dumping margins that were based on those exporters' verified information;
- for **residual exporters** (Attianese, Fiamma, Greci, Menu, Mutti, Nolana, Princes, Rispoli and Steriltom) - a single dumping margin based on certain weighted average export prices and weighted average normal values from selected exporters that cooperated; and
- for **uncooperative exporters** (Lodato, IMCA and all others) – a single dumping margin, based on export prices that were established pursuant to s. 269TAB(3) having regard to all relevant information and normal values that were established pursuant to s. 269TAC(6) having regard to all relevant information.

¹⁴ These figures were not included in REP 217, but were made available to the ADRP in the confidential attachments associated with correspondence between the Commission and the ADRP prior to the reinvestigation. These figures have been reviewed and updated as a result of the reinvestigation.

¹⁵ Sampling Report, Electronic Public Record - Document #18, Section 5.

Specifically, the Commission used the lowest export price from selected cooperative exporters found to have a dumping margin greater than 2 per cent and it used the highest normal value from selected cooperative exporters found to have a dumping margin greater than 2 per cent.

4.1.4 Material Injury Caused By Dumping

In REP 217, the Commission found that SPCA suffered material injury and there is a causal link between the material injury experienced by the Australian industry and dumped imports from Italy.

In determining the volume of dumped imports relevant for assessing material injury, the Commission considered it was reasonable to include the import volumes from residual exporters. This was based on the following findings:¹⁶

“The Commission examined and had regard to statistical data of declared import values for goods exported by each individual residual exporter during the investigation period. The information reveals that imports from all of the residual exporters were dumped by margins exceeding 2 per cent. The average dumping margin for the residual exporters was approximately 14 per cent when compared to the verified weighted average normal value for all cooperating exporters.”

In determining the effect of dumped imports on prices, the Commission found:¹⁷

“...that Figure 1 of SEF 217 clearly shows that retail shelf prices for all Italian imports undercut corresponding prices of Australian industry’s products, irrespective of whether imports were dumped or undumped. A further examination and comparison of import prices shows that dumped prices from selected exporters undercut the lowest undumped prices by up to 18 per cent. The Commission also compared the declared export prices of residual exporters derived from the commercial import database to undumped prices and found that these prices were approximately 10 per cent below the lowest undumped prices.”

4.2 Observations Regarding the ADRP’s Request

The ADRP requested that the finding that dumped prepared or preserved tomatoes exported from Italy had caused material injury to the Australian industry producing like goods be reinvestigated. The ADRP clarified that this request does not cover the finding that there was material injury suffered by the Australian industry or the findings with respect to the dumping of exports by the selected exporters who were cooperating exporters.

The Commission understands this is essentially a request to reinvestigate the injury caused by dumping with respect to goods exported by the residual exporters and the uncooperative exporters. The ADRP states that, in determining whether dumped goods caused material injury, it cannot be simply assumed that residual or non-examined exporters were dumping or dumping at the margins determined under subsections 269TAB(3) and 269TAC(6).

¹⁶ REP 217, section 8.4.1

¹⁷ REP 217, section 8.4.2

The Commission makes the following observations.

4.2.1 Approach to sampling

As provided for under s. 269TACAA, where there are a large number of exporters identified in relation to an investigation, review or inquiry the Commission may examine a selected number of those exporters if it is not practicable to examine every exporter and the use of a sample would ensure that it is able to complete its investigation in a timely manner. If the Commission proceeds on this basis, it potentially results in three categories of exporters, being:

- those which were selected in the sample and their exports were investigated (selected exporters);
- those which cooperated with the investigation but their exports were not examined (residual exporters); and
- those which either did not give relevant information to the investigation within a reasonable timeframe or impeded the investigation (uncooperative exporters).

Having identified an appropriate sample with which to undertake the investigation, the usual practice is to seek no further information from the residual and uncooperative exporters. That practice was followed in the original investigation, as only the selected exporters were asked to provide detailed information.

4.2.2 Available information

The Commission observes that as a result of using a sample to conduct the investigation, the reinvestigation has had to rely on other sources of information regarding the residual and uncooperative exporters for the purpose of assessing dumping volumes and injury.

One source of relevant information is the importers, comprising their response to the Importer Questionnaire and whatever other relevant information is obtained in the course of the visit and verification process. Although this data can have the advantage of having been verified, not all importers will be approached for this purpose in every investigation.¹⁸ For those importers that are verified, the verification process gathers information which may have limited application to the analysis of the residual and uncooperative exporters.

A second source of data is the ACBPS import database. Although this data has the advantage of being a single data set which ostensibly captures all export information, the reliability of the data is less certain in some instances: as has been noted elsewhere in this report, a proportion of the data relevant to this investigation is imprecise (for example, some “exporters” in the database have been subsequently identified as traders in the course of the original investigation). Further, the Commission cannot know, for example, whether the transactions in the ACBPS import database occurred at arm’s length, whether rebates were paid subsequent to the transaction, or whether there are other reasons which make it inappropriate to rely on that data for the purpose of calculating an accurate export price.

¹⁸ For example, SEF 217 notes that 82% of sales occur via the major supermarkets, being Coles, Woolworths, Aldi and Metcash (covering IGA etc.); of the eight importers selected, only six cooperated with the verification process, which accounted for approximately “60% to 70%” of exported volume during the investigation period.

Noting the potential limitations in both sources of information, the Commission has elected to use the ACBPS import database as its primary source for the purpose of the reinvestigation, observing (see analysis in section 4.3, below) that a homogenous data set was able to be generated with a moderate degree of confidence. However, the Commission notes that future investigations may find that taking a similar approach to examining residual and uncooperative exporters' exports may not be appropriate or useful, depending on the reliability of the information available and the nature of the products being investigated. In addition, although this report includes specific figures derived from reasonable calculations of the data so identified, the Commission is unable to express absolute confidence in these results because they rely on unverified information.

4.2.3 Treatment of residual exporters

In the case of residual exporters, the Commission recognises that s. 269TACAB(3) provides for an outcome that will generally mean a residual exporter dumping margin greater than 2 per cent is determined for the purpose of the dumping duty notice.¹⁹ This is because the export price and normal value determined for residual exporters are based on those of the cooperative exporters, and in doing so they must not include export prices or normal values that resulted in no dumping, or those that result in a dumping margin less than 2 per cent.²⁰

In these circumstances, the Commission recognises the dumping margin determined for residual exporters may not reflect the actual dumping margin for the exporters involved. As stated in REP 217, it does not appear 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. Nonetheless the Commission has, for the purposes of this reinvestigation, undertaken an objective examination of the positive evidence to determine whether, and in what volume, the residual exporters were in fact dumping, and to assess the materiality of injury caused by any dumping. While the evidence emerging from the examination of selected cooperative exporters will form part of that positive evidence, the Commission has also been able to take account of other information for the ADRP's requirement to assess dumping margins and volumes of dumped goods for the purposes of assessing injury caused by dumping.

4.2.4 Treatment of uncooperative exporters

In the case of the uncooperative exporters, they are designated as such because the Commissioner has been unable to obtain information which he considers relevant in a reasonable timeframe, or he was satisfied that the exporter significantly impeded the investigation. In such cases the Commission often has limited information upon which to assess the essential elements of export price and normal value that can be applied confidently to determine a dumping margin for the uncooperative exporters, either individually or as a group. This includes limited information to enable the Commission to ensure proper model matching and period matching in comparing those variable factors.

¹⁹ Mathematically, this assumes that at least one or more of the selected cooperating exporters was dumping.

²⁰ s. 269TACAB(3)

The Commission considers it is therefore reasonable to use verified information from selected exporters that cooperated with the investigation as “relevant information” for the purposes of establishing an export price under s. 269TAB(3) and a normal value under s. 269TAC(6). In doing so, the Commission may, as a matter of policy consistent with WTO jurisprudence, use the lowest weighted average export price for any exporter and the highest weighted average normal value for any exporter. This is considered reasonable because an uncooperative exporter has not provided the Commission any means to make assessments about product mix, pricing behaviours and increments, costs and any other adjustments that might be required to ensure a fair comparison for the purpose of conducting an objective investigation based on positive evidence. That is, the exporter has not provided the Commission with access to sufficient information that would demonstrate its export price is higher than the lowest weighted average for selected exporters, or that its normal value is lower than the highest weighted average for selected exporters.

Inevitably, as a result of an exporter being found to be uncooperative, the Commission has no reliable information on which to calculate the actual volume of dumped goods or an actual dumping margin for that category of exporter. A comparison of export prices determined under s. 269TAB(3) and normal values determined under s. 269TAC(6) is, in the Commission’s view, a reasonable assessment of dumping in the circumstances.

4.2.5 Other observations

The Commission considers that its views on the appropriate means to establish whether and in what volume goods were dumped by residual exporters and uncooperative exporters are supported by relevant WTO jurisprudence, which is set out in **Non-Confidential Appendix 1**. The Commission is also concerned that the approach it has taken in this reinvestigation may create uncertainty in relation to its practice of applying a sampling strategy where a large number of exporters make determining rates for individual exporters impracticable. The Commission also has reservations with respect to the data that would be relied upon (in relation to unexamined exporters) to draw consistent and defensible conclusions using this approach.

Notwithstanding the legal and practical concerns outlined above, the Commission has, for the purposes of assessing injury caused by dumping as requested in this reinvestigation, reassessed the level and volume of dumping found in relation to goods exported by residual exporters and uncooperative exporters. Furthermore the Commission has reassessed whether dumping caused material injury. These elements are addressed in the following sections of this report.

4.3 Reinvestigation – Dumping margins and volume of dumped goods

The Commission notes the ADRP’s concerns regarding the comparison of the weighted average export prices for residual exporters and weighted average normal values of all cooperating exporters. The ADRP suggests that this approach may not be appropriate if, for example, there are differences in the products being exported. The implication is that export prices for residual exporters may be unfairly compared to a product mix which is irrelevant, resulting in an inequitable calculation of dumping margin.

4.3.1 General Practice

When calculating the normal value the Commission seeks to match those models of the goods which are sold on the domestic market to those models of the goods which are exported to Australia. Appropriate adjustments can then be made to ensure the domestic prices for the goods provide for fair comparison with export prices. Once identified, however, these models are not usually intended to be used for a comparison with any other exporter. As a result, the models selected may vary considerably.

4.3.2 Reinvestigation

Regarding the four cooperating exporters, **Confidential Table 1** identifies the models that were used to calculate normal values for each exporter. These models are broadly able to be categorised by the product type of the goods (such as diced, peeled, crushed etc.) and by the container size (either 400g or 800g cans).

The Commission reviewed the ACPBS import database to determine whether any of the models in **Confidential Table 1** could be matched (and to what degree) to the descriptions in the database for the goods exported by the residual and uncooperative exporters. The Commission particularly sought to identify the product type and container size in the export data in order to generate a data set which had a high level of alignment with the models used to calculate normal values for the four cooperating exporters.

The Commission found that in many cases the goods description in the ACPBS import database was imprecise and unable to be categorised.²¹ Further, the Commission applied a strict interpretation when the goods description was clear but did not align with the models used to calculate normal values.²² In some cases, the Commission was also able to use verified data arising from importer visits to identify the goods in some transactions with a high degree of confidence, even if the goods description in the ACPBS import database was ambiguous.²³

Using this methodology, the Commission was able to identify 22.8 per cent (by volume) of the total goods exported by the residual exporters which were comparable to a model in **Confidential Table 1**. Similarly, the Commission was able to identify 35.6 per cent (by volume) of the total goods exported by all of the uncooperative exporters²⁴ which were comparable to a model in **Confidential Table 1**.

²¹ For example, an import declaration for “Whole, Peeled or Diced Tomatoes < 1.14L” provides no indication as to the product type, whether it is canned or in jars, nor the container size.

²² For example, goods described as being “Diced Organic 400g” are clearly capable of identification, but do not match any of the models listed in **Confidential Table 1** and were therefore excluded from the data set.

²³ For example, a transaction was considered sufficiently clear to include in the data set if:

- the response to the importer questionnaire indicated there were two 400g models sold during the investigation period; and
- the ACPBS data indicated that across multiple transactions there were only two types of products imported; and
- either the description of the goods in the importer’s data or the description of the goods in the ACPBS import database aligned with a model identified in **Confidential Table 1**.

²⁴ Note that the data set for the uncooperative exporters *excludes* exports from known traders as there is a risk of double counting. The excluded traders are identified in **Confidential Table 6**.

The data set revealed that there were six models used for normal values for the cooperating exporters which were able to be matched to the goods exported by residual and uncooperative exporters. **Confidential Table 2** shows these models, and the volume and value of each of these models for the four cooperating exporters that were used to establish normal value. This data generates weighted average normal values for each model, shown in **Confidential Table 3**.

4.3.3 Findings

The ACBPS import data for all residual and uncooperative exporters was then reviewed to identify potential matches with these six models. Where models could be matched, a dumping margin was calculated by comparing the weighted average export price and corresponding weighted average normal value in the investigation period.

Confidential Table 4 shows the dumping margin generated where there was a matching model for residual exporters. **Confidential Table 5** shows the dumping margin generated where there was a matching model for uncooperative exporters.

The results for **residual exporters** show that at least four models were being dumped by the residual exporters during the investigation period, and by significant margins. The volume of dumped identifiable and comparable goods represents 96.4 per cent of all residual exporters' identifiable and comparable goods exported in the investigation period. The results for **uncooperative exporters** show that at least three models were being dumped by the uncooperative exporters during the investigation period, and by significant margins. The volume of dumped identifiable and comparable goods represents 79.0 per cent of all uncooperative exporters' identifiable and comparable goods exported in the investigation period.²⁵

The weighted average dumping margin for residual exporters was 8.3 per cent. This result is effectively a revised calculation of the dumping margin of 14 per cent discussed in REP 217.²⁶

The weighted average dumping margin for uncooperative exporters was 11.4 per cent. However, for the reasons outlined in 4.2 above, the Commission does not consider this assessment is the correct and preferable approach for assessing dumping margins for uncooperative exporters or for assessing injury caused by that dumping.

The Commission notes that, having undertaken this analysis and demonstrated that dumping is occurring at levels above *de minimis*, the Commission is obliged to use the approaches outlined in s. 269TACAB to establish final dumping margins for the residual and uncooperative exporters.

²⁵ For selected exporters, the Commission calculated one exporter-specific dumping margin in relation to all the goods the selected exporter exported in the investigation period. While these calculations were underpinned by relevant model matching and period matching, there is no distinction between models or periods in the overall exporter dumping margin. In terms of the volume of dumped exports, the effect is that 100% of each selected exporter's exports in the investigation period are considered either dumped or not dumped. The Commission is unable to take a similar approach for the residual and uncooperative exporters because of the absence of more detailed information. To determine the volume of dumped goods exported by residual and uncooperative exporters, the Commission has excluded those exports which are identifiable and comparable to one of the six models but where the weighted average export price was greater than the weighted average corresponding normal value (and therefore not dumped). These proportions of dumped goods are less than 100% because they *exclude* exports of any undumped models.

²⁶ REP 217, section 8.4.1

4.4 Reinvestigation – Material Injury

Article 3.1 of the Anti-Dumping Agreement (ADA) requires that a determination of injury be based on positive evidence and involve an objective examination of the consequent impact on the domestic industry. Article 3.4 of the ADA provides a non-exhaustive list of factors that *must* as a minimum be taken into account when assessing whether the domestic industry has experienced material injury. These provisions are reflected in s. 269TAE. As noted above, s. 269TAE(1)(aa) requires the Minister to have regard to the size of the dumping margin as a factor in assessing material injury.

4.4.1 Reinvestigation

The original investigation found that all residual exporters were dumping²⁷, and (as has been usual practice) presumed that all uncooperative exporters were dumping. This resulted in the finding that “approximately 56 per cent of all goods exported from Italy” were dumped.²⁸

Noting the above findings in 4.3.3 that a significant proportion of identifiable and comparable goods were dumped and at significant margins, the Commission considers it reasonable to assume that at least some proportion of the remaining exported goods were also dumped. The Commission acknowledges that some of the goods of the residual and uncooperative exporters which were not identifiable or not comparable may not have been dumped, or may have been dumped in smaller or larger proportions than those goods which were identifiable and comparable. The Commission considers that to identify a total volume of dumped goods during the investigation period it is reasonable for it to rely on its findings with regard to the selected exporters, and to extrapolate the reinvestigation findings with regard to the residual and uncooperative exporters.

Confidential Table 7 shows the volumes of dumped goods for selected cooperating exporters which have been verified, as well as those volumes of dumped goods from residual and uncooperative exporters which have been calculated using the methodology described in 4.3.3 above.

Confidential Table 8 extrapolates these findings, assuming that all other residual exports were dumped in the same proportion as the identifiable and comparable exports of the residual exporters (96.4%), and assuming that all other uncooperative exports were dumped in the same proportion as the identifiable and comparable exports of the residual exporters (79.0%). In the absence of more reliable information, the Commission considers that **47.7 per cent** is a reasonable estimate of the volume of all dumped goods during the investigation period. This approach effectively revises the finding in REP 217 that “approximately 56 per cent of all goods exported from Italy” were dumped.

4.4.2 Undercutting

In addition, the Commission has sought to identify whether prices have been undercut by dumped imports. For the purpose of identifying an undumped export price, the Commission has identified the lowest ascertained export price for the selected exporter

²⁷ As noted in this report in section 4.1.4, REP 217 indicated that residual exporters were dumping (on a weighted average basis) at margins of 14%.

²⁸ REP 217, para 7.13 (page 50).

which had the lowest identified dumping margin (which was *de minimis*).²⁹ The models used to generate a normal value for this particular selected exporter were then compared to the export prices of the residual and uncooperative exporters.

Confidential Table 9 shows the outcome of these calculations, which suggests that where there was a matching identifiable and comparable model, the declared export prices for residual and uncooperative exporters undercut these prices by between 8.5 and 10.9 per cent. Whilst this result is not conclusive, it does strongly support the conclusion that a significant proportion of the unexamined exports were also undercutting prices.

4.4.3 Findings

Noting its reservations concerning the reliability of the data used to undertake this analysis, the Commission finds that:

- the reinvestigation has established a reduced volume of dumped goods overall when compared to the volume relied upon in REP 217. However, the revised volume of dumped goods is still significant;
- the dumping margin for residual exporters has been assessed at a lower rate in this reinvestigation than was found to be the case in REP 217. Nonetheless, the dumping margin established in the reinvestigation is still significant; and
- the revised dumping margin for uncooperative exporters, calculated only for the purposes of satisfying the ADRP request, is less than that relied upon in REP 217. Even if that dumping margin were preferred, it should also be regarded as significant.

The dumping margins are of sufficient magnitude as to provide significant price advantage for the imported goods when competing for sales in Australia – a competitive advantage enabled by dumping. 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 undumped goods in the market. Accordingly, the Commission reinvestigation affirms the REP 217 finding that dumping of prepared or preserved tomatoes from Italy caused material injury to the Australian industry producing like goods.

It is important to recognise that the reinvestigation does not consider any of its findings require an amendment to the levels of the duties imposed as a result of REP 217. Despite the revised assessment of dumping margins and volume of dumped goods for residual exporters for the purpose of assessing injury, as required by the ADRP, this does not affect the outcome for those exporters. That is, the variable factors relevant to the calculation of duty payable (export price³⁰, normal value³¹ and non-injurious price³²) were properly determined and implemented as a result of REP 217.

In relation to non-cooperating exporters, the Commission considers that the approach taken in REP 217 to establishing the variable factors for these exporters was correct and preferable.

²⁹ As noted in this report in section 4.1.4, REP 217 indicated that all prices undercut the domestic price for the Australian industry.

³⁰ s. 269TACAB(2)(c) for residual exporters and s. 269TAB(3) for uncooperative exporters.

³¹ s. 269TACAB(2)(d) for residual exporters and s. 269TAC(6) for uncooperative exporters.

³² s. 269TACA.

5 APPENDICES

PUBLIC RECORD

<u>Title</u>	<u>Description</u>
Non-confidential Appendix 1	Establishing dumping margins and volume of dumped goods for residual and uncooperative exporters

IN CONFIDENCE

<u>Title</u>	<u>Description</u>
Confidential Table 1	Models used to calculate normal value for cooperative exporters
Confidential Table 2	Volumes and values for models of the four cooperating exporters that were used to establish normal value and which can be matched with residual / uncooperative exporter models
Confidential Table 3	Weighted average normal values calculated using the aggregate of data from the four cooperative exporters
Confidential Table 4	Residual exporters dumping margin calculation
Confidential Table 5	Uncooperative exporters dumping margin calculation
Confidential Table 6	Traders excluded from uncooperative exporters data set
Confidential Table 7	Dumped volumes by exporter category and in aggregate
Confidential Table 8	Dumped volumes (extrapolating for all other exports from residual and uncooperative exporters)
Confidential Table 9	Comparison of prices between selected exporter and residual / uncooperative exporters to identify undercutting

Establishing dumping margins and volume of dumped goods for residual and uncooperative exporters

WTO Jurisprudence

The treatment of non-examined exporters has been discussed at some length in two key decisions of the WTO, being *European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*³³ (also known as *EC – Bed Linen*) and *European Communities – Definitive Anti-Dumping Measures On Certain Iron Or Steel Fasteners From China*³⁴ (known as *EC – Fasteners*). These cases are of particular relevance in terms of the treatment of residual exporters.

The Appellate Body in *EC – Bed Linen* reiterates the need to determine the volume of dumped imports of non-examined producers on the basis of positive evidence and an objective examination.³⁵ The Appellate Body rejected the approach of the European Communities, which assumed that all residual exports were dumped because some exports of the examined producers were also dumped:

“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*.”³⁶

³³ WT/DS141/AB/RW, 8 April 2003.

³⁴ WT/DS397/R, 3 December 2010.

³⁵ *EC – Bed Linen*, para. 124.

³⁶ *EC - Bed Linen*, para.132-133.

The Appellate Body, however, recognises that there is no specific methodology which is stipulated for an investigating authority to determine the volume of dumped imports in these circumstances:

“Turning to that part of Article 6 referred to by India, we note that Article 6.10 deals specifically with the determination of *margins* of dumping. Clearly, it does *not stipulate* that investigating authorities must follow a specific *methodology* when determining the *volume* of dumped imports under paragraphs 1 and 2 of Article 3. However, this does not mean that *evidence* emerging from the determination of margins of dumping for *individual* producers or exporters pursuant to Article 6.10 is irrelevant for the determination of the volume of dumped imports in paragraphs 1 and 2 of Article 3. To the contrary, such evidence may well form part of the "positive evidence" on which an "objective examination" of the volume of dumped imports for purposes of determining injury may be based. Indeed, in cases where the examination has been limited to a select number of producers under the authority of the second sentence of Article 6.10, it is difficult to conceive of a determination based on "positive evidence" and an "objective examination" that is made other than through some form of *extrapolation* of the evidence. This could be done, for example, by extrapolating from the import volumes attributed to *examined* producers found to be dumping to the import volumes attributed to *non-examined* producers. We recall that we considered that evidence on *dumping* margins of more than *de minimis* for *examined* producers is relevant as "positive evidence" in this investigation for determining which import volumes may be attributed to *non-examined* producers that are *dumping*.”³⁷

The Appellate Body also notes that a consequence of investigating only a sample of exporters is that some producers may be liable to pay a duty where no dumping is actually occurring:

“In such cases, as an *exception* to the rule in Article 9.3, Article 9.4 permits the imposition of a certain maximum amount of anti-dumping duties on imports attributable to producers that were *not* examined individually, irrespective of whether those producers would have been found to be dumping had they been examined individually. It is likely, therefore, that this "all others" duty rate will be imposed on imports attributable at least to some producers that, in reality, might *not* be dumping.”³⁸

In doing so, an investigating authority would need to ensure that a determination of injury is based on the volume and effect of imports that *are* dumped to the exclusion of the volume and effect of imports that are *not* dumped.³⁹

Separately, the Review Panel in *EC – Fasteners* observed:

“The purpose of sampling foreign producers/exporters in an anti-dumping investigation is to allow an investigating authority to extrapolate from the sample to draw conclusions about dumping for all non-sampled/unexamined foreign producers/ exporters on the basis of a detailed examination of fewer than all of them. Article 9.4 of the AD Agreement makes clear that, if the sample for the dumping determination is selected consistently with the AD Agreement [...] then the investigating authority may treat the findings of dumping made with respect to that sample of companies as establishing the existence of dumping by all non-sampled/unexamined companies for purposes of the imposition of anti-dumping duties.

³⁷ *EC – Bed Linen*, para. 137.

³⁸ *EC – Bed Linen*, para. 125.

³⁹ *EC – Bed Linen*, para. 111.

“In our view, a similar result should follow with respect to the treatment of imports as dumped for purposes of the injury determination. That is, if the sample for the dumping determination is selected consistently with the [Anti-Dumping] Agreement [...] then the investigating authority may treat the findings of dumping made with respect to that sample of companies as evidence that imports from the non-sampled/ unexamined companies are dumped. To do otherwise would limit the utility of Article 6.10 of the AD Agreement, as it would require the investigating authority to gather and consider information for non-sampled/ unexamined producers in order to be able to make individual judgments as to whether the imports from non-sampled/ unexamined producers are dumped, despite the decision to proceed on the basis of a sample.

“In our view, an investigating authority is not required to consider facts concerning the individual operations of non-sampled/unexamined producers *per se* and decide the extent to which findings for the sampled producers may be relied upon in drawing conclusions concerning whether imports attributable to non-sampled/unexamined producers are dumped. To us, it seems inconsistent and illogical to accept that conclusions about dumping for sampled producers can be the basis for the imposition of anti-dumping duties on non-sampled/unexamined producers, but not to accept that those same conclusions about dumping may serve as evidence that imports attributable to non-sampled/ unexamined producers are dumped in the same investigation.”⁴⁰

Further, the Panel in *EC – Fasteners* made the following comments regarding the use of “different and additional evidence” to evaluate whether imports from unexamined producers are dumped for the purpose of injury analysis:

“We note that, like the panel in *EC – Salmon (Norway)*, we are troubled by the notion that an investigating authority may consider “different and additional evidence” to evaluate whether imports from non-sampled/unexamined producers are dumped for purposes of injury analysis, given that Article 2.1 of the AD Agreement makes clear that “a product is to be considered as being dumped” only if the export price is less than the normal value, and establishes detailed rules for that calculation. We too consider it unclear “how such “other evidence” can provide a legally sound basis for a conclusion that imports attributable to unexamined producers are dumped” and consider that “the fact that imports from unexamined producers are, under the AD Agreement, recognized as dumped for purposes of the imposition of anti-dumping duties, and that those duties may be collected in amounts limited by calculations made pursuant to Article 2 of the AD Agreement, does establish a legally sound basis for the treatment of those imports as dumped for purposes of the injury analysis.”⁴¹

⁴⁰ *EC – Fasteners*, para.7.363-7.365.

⁴¹ *EC – Fasteners*, para.7.370.

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