VAN BAEL & BELLIS

Anti-Dumping Review Panel – Prepared or preserved tomatoes exported from Italy by Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A.

Submission by Feger di Gerardo Ferraioli S.p.A.

12 May 2016

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INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission ('ADC') initiated the antidumping investigation No. 276 on imports of prepared and preserved tomatoes (the 'product under investigation', or 'PPTs') exported from Italy by Feger di Gerardo Ferraioli S.p.A. ('Feger') and La Doria S.p.A. ('La Doria').

This investigation closely followed another investigation – i.e. investigation No. 217 on prepared or preserved tomatoes exported from Italy (the 'previous investigation') – targeting the same country and the same goods, which was initiated on 10 July 2013 and was terminated on 20 March 2014 with regard to Feger and La Doria with a finding that their dumping margins were *de minimis*.

On 18 January 2016, the ADC concluded the antidumping investigation No. 276 by adopting the Final Report No. 276 ('Final Report'), in which the ADC determined that dumped imports of PPTs exported from Italy by Feger and La Doria have caused material injury to the Australian industry producing the like goods ('SPCA') during the investigation period.

On 10 February 2016, based on the ADC's recommendations contained in the Final Report, the Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the 'Parliamentary Secretary') published the Anti-Dumping Notice No. 2016/13 imposing antidumping measures in relation to imports of PPTs exported from Italy by the two Italian exporters targeted by the investigation No. 276 (the 'reviewable decision'), i.e. Feger and La Doria (also, 'the two exporters').

On 10 March 2016, Feger lodged an application for review of the reviewable decision with the Anti-Dumping Review Panel ('ADRP), on the ground that it is not the correct or preferable decision within the meaning of section 269ZZE of the Customs Act 1901 (the 'Act').

As a consequence of, *inter alia*, that application, a review was initiated by the ADRP on 13 April 2016, following the publication of a Notice under section 269ZZI of the Act. According to the Notice, the ADRP is satisfied that the following grounds are reasonable grounds for the reviewable decision not being the correct or preferable decision:

(a) *The initiation of the investigation lacked legal basis under World Trade Organisation (WTO) law as the application for the investigation did not meet the standard of evidence, the investigation was initiated less than 12 months after the conclusion of another investigation, and the scope of the fresh investigation should have been country-wide*

(b) *The injury and causality assessment carried out by the ADC was flawed in relation to the period of injury assessment, the undercutting analysis, the conclusion reached on price suppression, consideration of all relevant economic factors and non-attribution analysis*

(c) *The adjustment to the cost for raw materials infringes WTO law and does not meet the conditions under section 43(2) of the Customs (International Obligations) Regulation 2015*

(d) *The ADC wrongly determined the magnitude of the cost adjustment and its impact on the dumping margin of Feger and La Doria, due to the calculation of the alleged subsidy per kg of raw tomatoes produced in Italy, the pass-through analysis and incorrect profit margin used when constructing normal value for Feger and La Doria*

(e) *The calculation of Feger's dumping margin was incorrect as the ADC unduly rejected downward domestic adjustments in relation to 'advertising', 'quality control' and 'administration costs' and the ADC over estimated Feger's 'finance costs'*

In accordance with its rights as an interested party under section 269ZZJ of the Act, Feger wishes to supplement its application for review by way of the additional comments contained in the present submission, concerning each of the above-listed grounds for review.

1. FIRST GROUND: THE INITIATION OF THE INVESTIGATION LACKS LEGAL BASIS UNDER WTO LAW

As a first ground for review, Feger submits that the initiation of investigation No. 276 by the ADC violates the WTO Anti-Dumping Agreement ('ADA') for the following reasons.

1.1 The complaint did not meet the standard of evidence necessary to trigger the initiation of the investigation

Article 5.2 of the ADA provides that the application requesting the initiation of an antidumping investigation must contain *'information on certain specific areas to the extent that it is 'reasonably available' to the applicant*'. The WTO case law has clarified that '*[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph*'.[1] According to Article 5.3 of the ADA, *the investigating authority has to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation*'.[2] If the evidence reasonably available to the complainant is not enough to meet the requirement of 'sufficiency', Article 5.8 of the ADA requires the investigating authority to immediately terminate the investigation.

[1] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.19.
[2] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.19.

Bearing the above in mind, Feger submits that the complaint filed by SPCA did not meet the standard of evidence required by Article 5.2 of the ADA and that, as a result, the ADC should have determined, in accordance with Article 5.3 of the ADA, that the evidence provided in the complaint was not sufficient to justify the initiation of investigation No. 276. It follows that the ADC should have immediately terminated the investigation, as provided for by Article 5.8 of the ADA.

1.1.1 The normal value calculation in the complaint was not supported by adequate *prima facie* evidence

As indicated in Consideration Report No. 276, SPCA's complaint determines the normal value of the two exporters on the basis of the following information:

- in 2013, SPCA's personnel visited retail outlets in Italy and obtained 56 observations of price; and
- in 2014, SPCA gathered 44 observations of prices from five online retailer websites.[3]

However, the above-listed information is clearly inadequate to meet the requirements of Articles 5.2 and could not justify the initiation of an investigation pursuant to Article 5.3 of the ADA. In particular, the approach followed by SPCA and upheld by the ADC is flawed insofar as:

- it focuses on domestic price information (both the 56 price observations obtained by visiting retail outlets in 2013 and the 44 observations from online retail websites in 2014) with no link whatsoever with the products manufactured by the two exporters. SPCA's attempt to assimilate the two exporters' price policy to that of the other Italian producers[4] is ill-founded. Suffice it to say that in investigation No. 217 the ADC had concluded that, contrary to the other Italian producers, the two exporters had not engaged in injurious dumping thereby recognising that their pricing policy was different from that of the other producers;
- the *prima facie* information relating to 2013 appears to be contradicted by the findings in the investigation No. 217 - in which the investigation period included the first semester of 2013 -, according to which the two exporters had not engaged in injurious dumping;
- the information relied upon by SPCA concerns retail prices. SPCA alleges that it worked out the ex-works prices by deducting from the retail price an amount calculated *'based on SPC Ardmona's knowledge of Europe's canned category's average retailer margin'*. Yet, the flaws of the methodology provided by SPCA,

[3] Consideration Report No. 276, p 21.

[4] In the complaint SPCA claims that *'[i]t is reasonable to assume that the prices paid for La Doria and Feger products would be close to the average retail price as they are significant players in the domestic market and product pricing in Italy is known to be very competitive'*.

and unwarrantedly upheld by the ADC, are flagrant. The adjustment was made on the basis of:

- unsubstantiated information. In fact, the adjustment is not supported by any documentary evidence but simply relies on the discretionary, *ex parte* assessment of SPCA; and

- inappropriate information. SPCA's claim relates to its alleged *'knowledge of Europe's canned category's average retailer margin'*. However, Feger fails to see how its normal value can be set on the basis of information relating to the European industry. SPCA, and consequently the ADC, clearly overlooked that the Italian industry and, more particularly Feger, has its own price and cost structure which in no way can be assimilated to that of an undefined category of 'European' producers.

1.1.2 The 'market situation' claim in the complaint was not supported by adequate *prima facie* evidence

In the framework of investigation No. 217, the ADC analysed whether the Italian exporters benefited, directly or indirectly, from government support having an impact on PPTs prices such as to require the use of a constructed normal value. The ADC found that *'any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processors in the form of lower prices'.*[5] Despite the ADC's findings in the previous investigation, SPCA's complaint alleges that in 2014 the prices for raw tomatoes in Italy were distorted due to the payments that tomato growers received under the Single Payment Scheme (the 'SPS') provided for by the Common Agriculture Policy ('CAP').

On this ground, SPCA requested the ADC to disregard the two exporters' domestic prices for PPTs and to construct instead their normal value. SPCA's 'market situation' claim relies upon the information provided in attachment B.4.2 to the complaint. The ADC considered that this information constituted *'new material that had not been considered in the previous investigation'*[6] and, on this basis, decided to re-assess the existence of a 'market situation'.

Feger respectfully submits that this decision is ill-founded. Indeed, attachment B.4.2 is nothing more than a paper providing an historical overview of the CAP. It contains no new information and has no relation whatsoever with the alleged distortion of raw tomatoes prices in the investigation period.

[5] Final Report 217, p. 34
[6] Consideration Report No. 276, p. 22.

It should be noted that attachment B.4.2 computes the amount of the alleged subsidy which, in SPCA's view, the Italian tomato growers would have illegally received. However, SPCA – and the ADC – overlooked that the question which should have been addressed in the context of a 'market situation' claim is not the extent of the alleged support, but whether or not such support did materially affect the domestic sales prices of the product under investigation.[7]

In light of the foregoing, it is submitted that the initiation of the investigation No. 276 is vitiated. In fact:

- the information relating to the 'market situation' claim contained in SPCA's complaint was already addressed and dismissed by the ADC in the framework of investigation No. 217;
- SPCA's complaint did not provide new information or evidence compared to that analysed in the investigation No. 217. SPCA limited itself to produce the legislative framework regarding the SPS, which is exactly the same as in the investigation period concerning the investigation No. 217;
- SPCA did not provide any *prima facie* evidence that the alleged subsidy to tomato growers actually produced an effect on the price of raw tomato and of PPTs in the investigation period.

1.2 The investigation was initiated less than 12 months after the conclusion of another investigation targeting the same product and the same country which resulted in a no dumping finding for the two exporters

At the Doha Conference of 9 November 2001, with regard to the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Ministerial Conference established that '[…] *investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed*' (emphasis added).[8]

[7] See *Discussion Paper – Market Situation – s. 269 TAC(2)(a)(ii) – Guidance – Claims of Governement Influence*

[8] Decision of 14 November 2001 - Implementation-Related Issues and Concerns - WT/MIN01/17, 20 November 2001, para. 7.1.

According to WTO case law, a decision adopted by WTO Members may qualify as a *'subsequent agreement between the parties'* pursuant to Article 31(3)(a) of the Vienna Convention on the Law the Treaties provided that (i) the decision is subsequent to the relevant agreement and (ii) the terms of the decision express an agreement between the Members over the interpretation or application of a WTO law provision.[9] The Doha Ministerial Decision clearly meets both criteria. It follows that Articles 5.1 and 5.3 of the ADA must be interpreted in the light of the Doha Ministerial Decision.[10]

Bearing the above in mind, it should be concluded that the initiation of investigation No. 276 was in violation of Articles 5.2 and 5.3 of the ADA. In fact, despite the absence of changed circumstances, investigation No. 276 was initiated on 19 January 2015, i.e. less than 365 days after the termination of the previous investigation against La Doria and Feger concerning the same product and the same country, which occurred on 20 March 2014. In this respect, the following should be noted.

As already explained, in the framework of the previous investigation the ADC conducted a thorough assessment about the existence of a 'market situation' in the Italian market for PPTs and concluded that it did not occur. Nevertheless, the ADC decided to initiate investigation No. 276 on the ground that the information on the SPS provided in attachment B.4.2 to the complaint amounted to *'new material that had not been considered in the previous investigation'.*[11] In section 2.3.3 of the Final Report, the ADC mentions that *'SPCA application […] in comparison to the information that informed Anti-Dumping Commission Report Number 217 (REP 217) of the previous investigation, contained a considerable amount of new factual information'*.

As the ADPR can easily verifies, all the above is flawed. The information contained in attachment B.4.2 to the complaint does not provide any evidence indicating that *'circumstances have changed'* compared to the previous investigation, with respect to the SPS. As a matter of fact, both the complaint and its attachment B.4.2 indicate that the SPS applied in 2014 was the same scheme introduced in 2009 and analysed by the ADC in the previous investigation.[12]

In light of the above, it must be concluded that no evidence of changed circumstances was provided in the complaint with regard to the 'market situation' assessment. As a consequence, the ADC's decision to initiate a new investigation is ill-founded since it infringes Articles 5.2 and 5.3 of the ADA.

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9 Appellate Body Report, *US – Clove Cigarettes*, para. 262.

10 For the sake of completeness, it must be recalled that the Appellate Body in *US - Clove Cigarettes* reached the same conclusions with regard to another paragraph of the same Ministerial Decision (see paras. 241 - 275)

11 Consideration Report No. 276, p. 22.

12 As indicated in Regulation 1310/2013, quoted in non-confidential attachment B.4.2, *'Regulation (EU) No 1307/2013 of the European Parliament and of Council, which sets up new support schemes is to apply from 1 January 2015. Council Regulation (EC) No 73/2009 therefore continues to form the basis on which income support will be granted for farmers in calendar year 2014'.*

2. SECOND GROUND: THE INJURY AND CAUSALITY ASSESSMENT CARRIED OUT BY THE ADC IS FLAWED

Feger submits that the injury and causality assessment carried out by the ADC suffers serious methodological flaws and is inconsistent with WTO law, for the reasons illustrated below.

2.1 The ADC should have taken into account the findings of investigation No. 217 for the purpose of the injury assessment

The injury analysis period (1.01.2010 - 31.12.2014) of investigation No. 276 substantially overlaps with the injury analysis period of investigation No. 217 (1.01.2009 - 30.06.2013). Thus, three and half years of the injury analysis period in investigation No. 276 also fall in the injury analysis period of investigation No. 217.

As already discussed, in the previous investigation the ADC found that the dumping margins of the two exporters were *de minimis* and, therefore, concluded that:

- the exports from La Doria and Feger did not cause any injury to the Australian industry until 30.06.2013;[13] and
- the injury suffered by the Australian industry up to 30.06.2013 was caused by factors other than imports from the two exporters including, *inter alia*, the exports from other Italian producers.

It follows that the ADC should have reconciled its findings in investigation No. 276 with those reached in the previous investigation in which it had concluded that the injury suffered by the Australian industry until 30.06.2013 was caused by factors other than imports from the two exporters.

Bearing in mind the foregoing, the ADC's decision to re-investigate injury and causality relating to the three and half year period falling in the injury analysis periods of both investigation No. 217 and investigation No. 276:

- infringes the fundamental principle of law '*ne bis in idem'*. The conduct of the two exporters extensively analysed in the previous investigation was reassessed in investigation No. 276 to reach a diametrically diverging conclusion;

[13] The WTO case law has indeed clarified that *'the consideration of "dumped imports" for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than de minimis is established in the course of the investigation'*. Panel Report, *EC – Fasteners (China)*, para. 7.354.

- violates Article 3.1 of the ADA, which requires injury determinations to involve an objective examination of the volume of the dumped imports and their effects. The injury finding in investigation No. 276 conflicts with the injury findings reached in investigation No. 217, in which the ADC concluded that the imports of Feger and La Doria did not engage in injurious dumping until 30.06.2013.

Thus, the ADC incurred in a clear contradiction insofar it concluded in investigation 276 that that the two exporters engaged in injurious dumping while the same products, sold by the same producers in a largely overlapping period, were found not to have been sold at injuriously dumped prices in investigation No. 217. All this is illogical and contradictory.

2.2 The ADC's conclusions on injury are ill-founded

Feger submits that the ADC's conclusions according to which SPCA would have suffered injury in the form of (i) price undercutting, as well as (ii) price suppression and reduced profits and profitability, are unsubstantiated and ill-founded.

2.2.1 The ADC's undercutting analysis is vitiated by several flaws

According to section 8.5.2 of the Final Report, for the purpose of the undercutting analysis the ADC compared the price of PPTs from Italy at FIS ('free into store') terms with the price per Kg of comparative SPCA's products at delivered terms for the 2014 calendar year. Feger considers that such an analysis is flawed.

At the outset, it should be recalled that Article 3.1 of the ADA dictates that *'[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of […] the effect of the dumped imports on prices in the domestic market for like products'* (emphasis added).

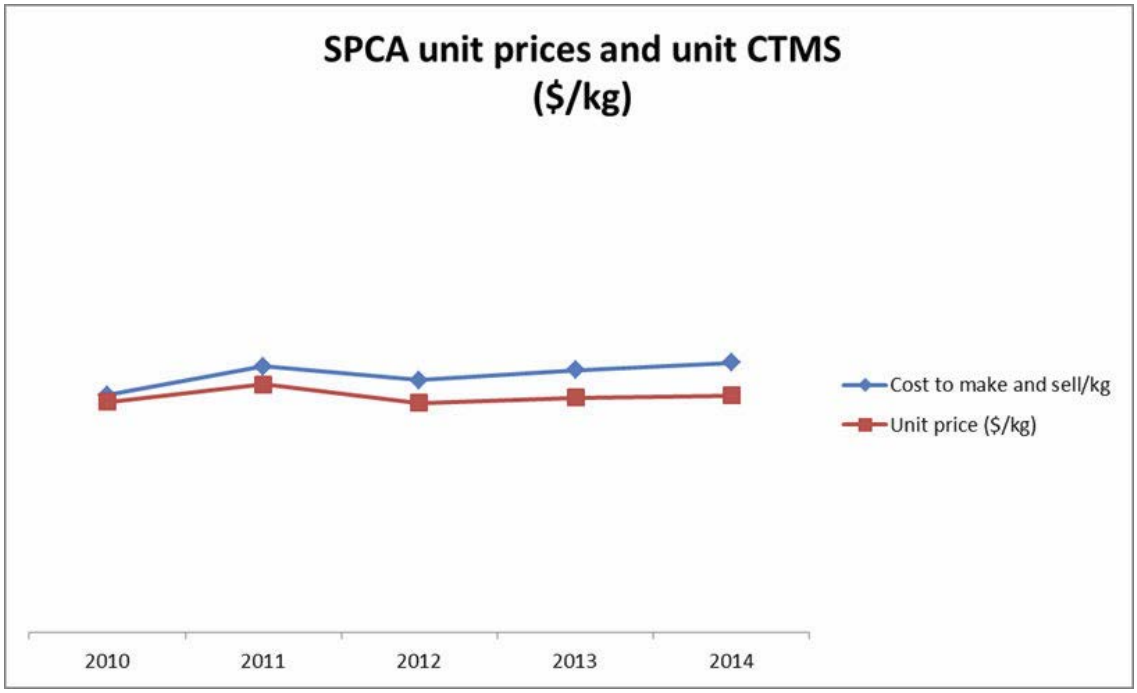
In stark contradiction with the above-quoted provision, the ADC carried out the assessment of the impact of the prices of the two exporters not on the basis of their prices, but on the basis of the FIS prices charged by unrelated importers, whose pricing policy is obviously in no way related with that of the two exporters.

The approach followed by the ADC is clearly illegal. The language of Article 3.1 of the ADA is unequivocal. It dictates that the prices to be used in the framework of the injury assessment are those of the exporting producers, and not those of their unrelated customers. Unrelated customers' prices depend on their marketing strategy, advertisement policy, distribution costs, efficiency, profits, etc., which have no relationship whatsoever with the prices of imports set by Feger.

The ADC's decision to conduct the undercutting analysis not by reference to the 'price of imports' but on the basis of the 'retail prices' is seriously vitiated.

2.2.2 The ADC's conclusions on price suppression and reduce profits and profitability are unsubstantiated

According to the ADC, the data in Graph 4 presented in section 7.5 of the Final Report (reproduced below) indicate that *'SPCA has suffered price suppression in the period of 2010 to 2014. During that period the price suppression suffered by SPCA has ensured negative profit margins that have almost doubled during the period of 2010 to 2014'*.[14] However, such conclusion is unsubstantiated and ill-founded, for the following reasons.



First, the information on PPT's unit price and cost submitted by SPCA and relied upon by the ADC, which was summarised in Graph 4, cannot be considered sufficiently reliable. Indeed, this information was not verified by the ADC, even though it was in stark contradiction with the figures contained in Coca-Cola Amatil's Annual Report of 2014, as repeatedly pointed out by La Doria and Feger throughout the investigation. In this respect, the fact that Coca-Cola Amatil's Annual Report *'is not specific to the goods under consideration'* (as claimed in section 7.4 of the Final Report) rather than justifying the ADC's approach, strengthens the conclusion that a verification of SPCA's cost and price data on PPTs would have been appropriate since such data were not available in public documents.

Second, the ADC failed to take into account that, as demonstrated by the figures provided in the complaint, SPCA's domestic prices for PPTs increased over the investigation period and, in particular, from 2012 to 2014 (see chart below, from SPCA's complaint)

[14] Final Report No. 276, p. 52 (section 8.5.3).

*Index of **price** variations (model, type, grade of goods)*

Period	2010	2011	2012	2013	2014HY
Index	100	108	100	102	104

In light of the above, the ADC's conclusion that SPCA suffered injury in term of price suppression is highly questionable since it does not take into account two extremely important elements, namely:

(i) The fact that SPCA's unit CTMS increased more than SPCA's unit domestic prices for PPTs (which, as noted above, also increased) over the investigation period; and

(ii) the fact that SPCA's unit CTMS increased over the investigation period despite the fact that, in the same period, also SPCA's sales volumes significantly increased, as acknowledged by the Final Report. In fact, an increase of sales volumes should normally lead to a reduction, and not to an increase of the unit CTMS.The ADC's failure to assess the above-mentioned key factors clearly demonstrates that the injury assessment carried out by the Final Report is incomplete and inadequate to support the ADC's conclusions on injury.

Third, it must be recalled that Article 3.2 of the ADA requires the investigating authorities to consider *'whether the effect of [the] imports is […] to […] prevent price increases, which otherwise would have occurred, to a significant degree'*. In order to conclude that the domestic injury is suffering injury, it is therefore requested that the price suppression should be significant. However, the ADC did not even attempt to demonstrate that the alleged price suppression suffered by SPCA, if any, was significant.

In light of the foregoing, Feger submits that the findings on price suppression contained in the Final Report are unsubstantiated and ill-founded. Moreover, the same conclusion holds true in respect of the ADC's findings regarding SPCA's reduced profits and profitability. As made clear in section 7.7 of the Final Report, indeed, such conclusions were *'derived only from SPCA's sales and cost data of like goods'*, i.e. from the price suppression analysis.

2.3 The ADC failed to evaluate all relevant economic factors

Article 3.4 of the ADA contains a non-exhaustive list of economic factors that investigating authorities must take into account in order to determine to what extent the poor performance of the domestic industry is attributable to dumped imports. The WTO case law has consistently held that at least *'each of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned'* (emphasis added).[15]

It follows that the ADC was bound to duly analyze all the factors listed in Article 3.4 of the ADA, namely *'actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments'*. However:

- the Final Report does not contain a single word on factors such as (i) productivity (ii) return on investments, (iii) actual and potential negative effects on cash flow, (iv) employment, (v) wages, (vi) growth, which were completely ignored by the ADC. This, alone, amounts to a blatant violation of Article 3.4 of the ADA; and

- the Final Report does not contain a meaningful analysis of factors such as (i) output, (ii) utilization of capacity, (iii) magnitude of the margin of dumping (iv) inventories, (v) ability to raise capital or investments, in respect of which the ADC merely provides unsubstantiated assertions.

Therefore, the Final Report blatantly violates Article 3.4 of the ADA, insofar as it did not properly analyze all the factors listed therein.

2.4 The ADC's non-attribution analysis is ill-founded.

Article 3.5 of the ADA requires the investigating authority to '*examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*' (non-attribution analysis). In this respect, the ADC failed to conduct a proper and meaningful analysis of the actual impact of a number of factors, in respect of which the Final Report reaches unsubstantiated conclusions.

Had the ADC carried out a correct and objective non-attribution analysis, the conclusion would have been that any injury allegedly suffered by SPCA was caused by a combination of factors other than the imports of allegedly dumped PPTs produced by La Doria and Feger. All such factors are discussed below.

[15] Panel Report, *EC — Bed Linen*, paras. 6.154–6.159.

2.4.1 Strategy of the Australian retailers

As acknowledged by the ADC, the Australian retail market is dominated by a very small number of large purchasers which enjoy an extensive market power.[16] Approximately 82% of all PPT sales occur via the major supermarkets, especially Coles, Woolworths, and Aldi,[17] which exercise a strong buying power vis-à-vis PPTs producers.

Retailers tend to favour their own private labels, at the expense of SPCA's proprietary labels. This allows the retailers to offer a competitive alternative product to branded products, increase their profit margin and purchasing power and retain the loyalty of their customers by offering products which are not available in competitors' store. In addition, retailers tend to diversify their source of supply in order to ensure the constant supply of PPTs.[18]This entails several negative consequences for SPCA, amongst which: (i) downward pressure on prices; (ii) placing of SPCA's products in unfavourable locations on shelves, which results in lower sales performance; (iii) important decline in profitability.

The Australian retailers' policy undoubtedly represents one of the main causes, if not the main, of any injury allegedly suffered by SPCA. This is confirmed by many independent sources:

- the Productivity Commission noted that '*developments in supermarket private label strategies could cause injury to the domestic industry without any increase in imports*. […] *It is likely that any supermarket strategy that leads to consumers switching from SPC Ardmona's branded products to domestically sourced private label products would reduce SPC Ardmona's margins and its profitability. Any such injury would not be attributable to increased imports, but rather to choices made by supermarkets about branded and private label products, and by consumers*'(emphasis added);[19]

- in the framework of investigation No. 217, the ADC found that '*factors other than dumping, including* […] *the retail strategies of the major supermarkets have played a contributing role to the injury experienced by SPCA during the investigation period*'.[20] It also added 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. The Commission considers that the strategy of shelf placement by the retailers is*

16 SEF No. 217, p. 56.
17 SEF No. 217, p. 20.
18 It is recalled that Australian growers of tomatoes are mostly located in northern Victoria and Southern New South Wales, which exposes them to period of low production due to bad weather. This was for example the case in 2011.
19 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, pp.57-58.
20 SEF No. 217, p. 55.

not related to their purchase of dumped imports from Italy. As a result, lost sales due to the unfavourable placement of SPCA's products on the retail shelf cannot be attributed to dumped imports';[21]

- SPCA itself recently acknowledged that: *'[t]here's been in recent years a dramatic shift of value from food suppliers to retailers and consumers. So, a report that was issued by Morgan Stanley in October last year suggests that Australian food suppliers to the grocery industry declined in profitability by close to 40% over a five year period, while retailers grew their profits by 30% in the same period. These Morgan Stanley findings were supported by a report published by the AFGC in May 2014 which also concluded that profitability in the Australian food processing sector had declined collectively by 30% since 2010'* (emphasis added).[22]

While acknowledging *'the significant buying power that is concentrated among the major supermarkets'*, section 8.8.2 of the Final Report merely notes that *'no evidence […] suggests that the negotiation of prices by the major supermarkets has any greater effect on any particular supplier […]'*.[23] However, this statement is contradicted by the previous findings of the Productivity Commission and of the ADC itself, according to which supermarkets tend to favour their own private labels at the expense of the proprietary labels of SPCA.

In light of the foregoing, the ADC's conclusion that, despite the downward pressure on prices exerted by the supermarkets, the allegedly dumped prices of Feger and La Doria are the main cause of the injury suffered by SPCA appears to be ill-founded.[24] On the contrary, the available evidence points to the conclusion that the Australian supermarket strategy constitutes one of the main causes, if not the main, of any injury allegedly suffered by SPCA.

2.4.2 Appreciation of the Australian dollar

The appreciation of the AUD largely contributed to the alleged injury suffered by SPCA. This has been acknowledged by SPCA itself which declared:

- '*the stronger Australian dollar has materially impacted SPCA's competitiveness against cheap imported brands and private label categories in the domestic market*.';[25]

- '*the stronger Australian dollar continues to impact SPCA's competitiveness against cheap imported brands and retailer private label categories in Australia*

21 SEF No. 217, p. 60.
22 See **Annex 3** to Feger's comments on the SEF.
23 Final Report No. 276, p. 54 (section 8.8.2).
24 SEF No. 217, p. 42.
25 Coca-Cola Amatil, Annual Report 2010, p.2.

and its earnings from international operations with export sales declining by over 20% over the last 12 months;'[26]

- '*the ongoing impact of the high Australian dollar on the competitiveness of SPC Ardmona has led to a write-down of assets and goodwill in the business which was recognised as a significant item in the accounts*' (emphasis added).[27]

Moreover, in recent statements Reg Weine, SPCA Managing Director, argued that the adoption of antidumping duties, '*coupled with a depreciating Australian dollar'* will close the gap between SPCA's prices and the prices charged by Feger and La Doria.[28] In other words, SPCA itself made clear that the imposition of antidumping measures against Feger and La Doria would not be sufficient to offset the injury suffered by the Australian industry because, as a matter of fact, such injury was caused to a large extent by the appreciation of the AUD. The Final Report failed to take any position with regard to this statement by SPCA, despite the fact that it was brought to the ADC's attention in the comments that the two exporters filed with respect of the SEF.

Finally, it should be recalled that in Final Report No. 217 the ADC itself concluded that *'the appreciation of the AUD is 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'.*[29] Thus, it is hard to understand how the Final Report No. 276 may have reached the opposite conclusion - namely that *'the material injury that the Australian industry has suffered […] is not attributable to the effects of the changes in the exchange rate in the investigation period'* - considering that the injury analysis period of investigation No. 276 and that of investigation No. 217 overlap by three and half year.

The above is yet another example of the arbitrary conduct taken by the ADC in investigation No. 276. The appreciation of the AUD was found by the ADC to be a factor contributing to injury in investigation No. 217 while, only a few months later, the ADC reached the opposite conclusion in investigation No. 276.

In light of the foregoing it is submitted that the ADC has manifestly erred in concluding that the injury suffered by SPCA, if any, is not due to, *inter alia*, the appreciation of the AUD.[30]

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26 Coca-Cola Amatil, Annual Report 2011, p.2.

27 Coca-Cola Amatil, Annual Report 2012, p.1.

28 '*If you look at the average price today, the retail price of a can of tinned tomatoes ranges anywhere on average from 80 cents through to 1 dollar 40 cents a tin. So at 7.5% coupled with a depreciating Australian dollar you have to think that there's going to be a 10-15 cent differential in the price going forward from where we've been in the past, and that will substantially close the gap between the prices between our wonderful brand of tomatoes, Ardmona, and the competition which is a good thing*', see www.abc.net.au/news/2015-09-07/reg-weine-spc-dumped-italian-tomatoes/6754350

29 SEF No. 217, p. 64.

30 The ADC's finding at section 8.8.3 of the Final Report that *"during the investigation period "the AUD/EUR exchange rate has experienced noticeable change"*, with a peak in 2012 followed by a depreciation trend and a new appreciation trend in 2014, cannot put into question the above conclusion. It seems normal that, in a very long period such as the injury period, exchange rates

2.4.3 SPCA's lack of investments

Albeit an investigating authority is not under the obligation to conduct an extensive research concerning any *possible* factor that may have a negative impact on the domestic industry pursuant to Article 3.5 of the ADA, it has to conduct a meaningful analysis with regard to those factors that are *known* to it. According to the WTO case law, *''known' factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation'.*[31]

In the present case, it is emphasised that section 8.8 of the Final Report (dealing with the non-attribution analysis) does not contain a single word on the arguments and evidence provided by the two exporters concerning SPCA's lack of investment. Therefore, it must be concluded that the ADC failed to take into account a factor which was brought to its attention during the investigation, in violation of Article 3.5 of the ADA.

This conclusion is not put into question by the fact that SPCA's lack of investments was briefly touched upon in section 7.8.7 of the Final Report (dealing with 'other factors' affecting the economic condition of the Australian industry). As a matter of fact, this section of the Final Report does not contain any analysis of the economic impact of SPCA's lack of investment. Rather, the ADC merely noted that *'SPCA provided values of its capital investment across the injury analysis period'* and that this information showed '*a reduction in capital investment from a company-wide perspective'.* Despite this finding, the ADC further noted that *'SPCA could not provide evidence concerning what components were specific to production of the like goods'.* The Final Report thus concluded that the ADC *'cannot determine the degree to which SPCA's investments in infrastructure or lack thereof contributed to the injury suffered*.[32] The above statements are astonishing, and show that the conclusions contained in the Final Report are not accurate and reliable. In particular:

- the ADC's statement that *'SPCA could not provide evidence concerning what components were specific to production of the like goods'* is groundless. The fact that SPCA *did not* provide the information at stake does not mean that it *could not* provide it;

- the ADC's statement that it could not *'determine the degree to which SPCA's investments in infrastructure or lack thereof contributed to the injury suffered'* is equally hard to believe. Feger fails to understand why the ADC did not request SPCA to provide data on investment specific to the production of PPTs and did not verify such data.

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may be subject to fluctuations. The fact that the ADC fails to mention is that, for the major part of the injury analysis period, the AUD/EUR exchange rate was at very high levels.

31 Panel Report, *Thailand – H-Beams*, para. 7.273

32 SEF No. 276, p. 36.

The concerns about the ADC's conclusions are *a fortiori* justified since the lack of investment in the PPTs sector was repeatedly acknowledged by SPCA itself.[33] Moreover, publicly available information confirms that SPCA failed to invest in its tomato processing facilities in the last years, and decided to remedy this situation only recently thanks, *inter alia,* to a very generous grant of 22 mio AUD by the Victorian Government.[34]

It is therefore clear that the injury suffered by SPCA, if any, was due to a serious lack in investment which was only recently remedied through the granting of subsidies by the Australian Government.

In light of the foregoing it is submitted that the ADC (i) violated Article 3.5 by not taking into account an injury factor brought to its attention by the interested parties, (ii) manifestly erred in concluding that the lack of investment did not constitute a significant factor of injury for SPCA.

2.4.4 Other factors overlooked by the ADC

In addition to the above, it is submitted that the following factors were overlooked or simply touched upon in the Final Report:

- **Drop of SPCA's exports.**[35] This factor of injury was acknowledged by both SPCA (see section 2.4.2 above) and the Productivity Commission, which considered that '*exports of Australian processed tomatoes have decreased significantly over the past five years* […]. *This has likely caused injury to SPC Ardmona through decreased production volumes, sales, revenues and profits*.'[36]

- **Exports from the Italian producers already facing antidumping duties.** According to the Final Report, exports of PPTs from the Italian producers already subject to antidumping duties undercut the domestic prices for PPTs in each months of the investigation period.[37] This reveals that the imports which are already subject to antidumping duties keep causing injury to SPCA. The ADC's conclusion that *'while these imports continue to compete with SPCA on price, it is the dumped goods from Feger and La Doria which are the lowest priced goods in the market'*[38] – apart from being based on a undercutting analysis which is vitiated by a number of flaws (see section 2.2.1 above) – does

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33 In a recent statement, SPCA declared that '*[r]einventing the business would enable us to continue our Australian employment, and the value that we generate in Victoria's 'Golden Valley', but it would also require serious investment to modernise the plant and equipment in the ageing Shepparton facilities'.* See **Annex 3** to Feger's comments on the SEF.

34 'SPC Mooroopna plant concludes operation', 19 August 2015, www.sheepadviser.com

35 The ADC's statement in the Final Report that *'the proportion of SPCA's total sales of like goods that are exported is at a level that is insignificant'* does not exclude – but, rather, confirms – that SPCA's exports dropped in the course of the period 2010-2014.

36 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, p.13. The same authority stated that Australian exports of PPTs decreased by 45% between 2008-2009 and 2010-2011 (see Inquiry Report No. 68, p.60).

37 Final Report No. 276, p. 52 (section 8.5.2).

38 Final Report No. 276, p. 53 (section 8.8.1).

not justify the ADC's failure to properly identify and separately assess the impact of the injury caused by different source of imports, in order to make sure that injury caused by factors other than imports from La Doria and Feger is not attributed to them.

- **High costs in the Australian food processing industry.** The Final Report fails to address the argument raised by La Doria and Feger in the reply to the SEF regarding the widely documented high costs faced by the Australian food industry, acknowledged by independent sources such as the Australian Food and Grocery Council[39] as well as SPCA itself, which stated that *'analysis from KPMG recently concluded that out of 10 developed countries that they looked at, Australia's food processing sector has the highest costs of doing business. Australia was among the most expensive countries for labour, facility costs, transportation and energy'* (emphasis added).[40] The high processing costs clearly represent a main cause of any injury allegedly suffered by SPCA, as demonstrated by the circumstances analysed in section 2.2.2 above, i.e. that:

    - despite SPCA's increase of unit domestic prices for PPTs over the investigation period, SPCA's unit CTMS increased even more than prices; and

    - SPCA's unit CTMS increased over the investigation period despite the fact that, in the same period, also SPCA's sales volumes significantly increased (which should normally lead to a reduction, and not to an increase, of the unit CTMS).

3. THIRD GROUND: THE ADJUSTMENT TO THE COST FOR RAW TOMATOES IS ILL-FOUNDED

The costs of production of La Doria and Feger were adjusted upwards in order to reflect the alleged distortion of the raw tomatoes prices in Italy which, according to the ADC, was due to the SPS that Italian tomato growers receive under the CAP. The adjustment to the two exporters' cost of production (the 'cost adjustment'), which was applied on the basis of section 43(2) of the *Customs (International Obligations) Regulation* (the 'Regulation'), affected Feger's dumping margin computed by the ADC and Feger's individual duty rate determined by the reviewable decision.

Feger submits that the cost adjustment, which rests on a wrong understanding of the CAP and lacks adequate evidentiary support, infringes WTO law.

39 'Canned : the decline of the production line', 17 June 2013, www.sproutmagazine.com

40 See **Annex 3** to Feger's comments on the SEF.

3.1 The 'cost adjustment' infringes WTO law

The upwards adjustment applied to the cost of raw tomatoes as a component of the overall cost of production of La Doria and Feger infringes WTO law for the reasons below.

3.1.1 Assessing the impact of the SPS in an antidumping investigation rather than in a countervailing investigation is contrary to WTO law

Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures ('ASCM') stipulates that '*no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1944, as interpreted by this Agreement*'. Moreover, Article 10 of the ASCM provides that *'[c]ountervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture'* (in this respect, see also section 3.1.2 below). It follows that the ADC was not entitled to analyse the alleged impact of the SPS in the framework of an antidumping investigation.

As it clearly appears from its wording, Article 32.1 of the ASCM covers any possible action taken by any Member against any type of alleged subsidy. Therefore, Article 32.1 of the ASCM does not draw any distinction on the basis of the purpose of the analysis carried out by the investigating authority, as the ADC seems to suggest in section 2.3.2 of the Final Report, where it is explained that the analysis of the effects of the SPS *'was done for the purpose of determining normal value in the context of considering whether to recommend the publication of a dumping duty notice under section 269TG of the Act. These considerations are distinctly different to investigations of subsidy programs for the purpose of recommending a countervailing duty notice under section 269TJ'*. Irrespective of the purpose pursued by the ADC, the ASCM provides that *'no specific action against a subsidy of another Member can be taken'* except in the framework of a countervailing investigation.

In light of the foregoing, it is crystal clear that the alleged impact of the SPS granted to Italian tomato growers under the CAP could not be analysed by the ADC in the framework of an antidumping investigation. The fact that the ADC's analysis concerned subsidies having an alleged impact on the costs of an input (i.e. upstream product) is irrelevant. The wording of the SCMA indicates that the alleged impact of the SPS can only be addressed in the framework of a countervailing investigation.

3.1.2 The SPS is a fully WTO-compatible income support scheme which does not give rise to any market distortion

As repeatedly explained throughout the investigation, the SPS is a 'green-box' measure fully compliant with the requirements of the WTO Agreement on Agriculture ('AA'). Annex II to the AA provides that *'[i]ncome support measures shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed*

shall conform to the following basic criteria […]'. The AA then describes the different types of measures. With regard to the *decoupled income support*, the AA provides that:

> *'(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.*
>
> *(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.*
>
> *(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.*
>
> *(d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.*
>
> *(e) No production shall be required in order to receive such payments'* (emphasis added).

As repeatedly explained throughout the investigation – without any objection being raised by the ADC - the payments granted to tomato growers under the SPS during the investigation period are fully compliant with the above-described conditions and, therefore, must be deemed to '*have no, or at most minimal, trade-distorting effects'.*

This conclusion is further confirmed by the fact that the SPS is a non-specific and fully decoupled income support. Indeed under the SPS all farmers – whether or not tomato growers – receive a payment based on the hectares of land and the entitlement they own. These payments are *decoupled from production*. This means that all the farmers eligible for the SPS are granted a payment, *irrespective of what they produce, and of their volume of production*. [41] Therefore, the SPS cannot be considered to produce trade distorting effects. Since all farmers receive the payments irrespective of whether, what and how much they produce, the decision to grow tomatoes is a profit-driven decision.

In light of the foregoing, it must be concluded that the SPS is fully compliant with the AA and, therefore, does not have trade distorting effects.

[41] Pursuant to the SPS, farmers are entitled to receive every year a direct payment on the basis of (1) the hectares of land owned and (2) the entitlements held by each farmer in that particular year. An entitlement is a conditional right to receive the payment pursuant to the SPS which is (i) not attached to the land, (ii) is allocated to a person and is the property of that person and (iii) can be traded. The value of each entitlement is calculated on the basis of the amount of payments received during a reference period (2004-2006), by dividing this amount by the number of hectares which qualified for the support in the reference period.

3.2 The conditions for applying section 43(2) of the Regulation are not met

Even though the comments in section 3.1 above prove the illegality of the ADC's cost adjustment, for the sake of completeness arguments and evidence are provided to highlight the errors in which the ADC incurred in applying section 43(2) of the Regulation.

3.2.1 The conclusion that the records of the two exporters *'do not reasonably reflect competitive market costs'* is manifestly ill-founded

Feger submits that the ADC's conclusion that prices for raw tomatoes in Italy are artificially low due to government influence is ill-founded and clearly contradicted by the evidence collected throughout the investigation. In particular:

- at section 6.4.6 of the Final Report, the ADC acknowledges that, since 2011, the Italian market for raw tomatoes was characterised by a *'decline in tomato production and high price'.* The ADC further acknowledges that prices for raw tomatoes in Italy are *'comparatively high'*. As a matter of fact, the information submitted by the two exporters – which was never contradicted by SPCA or by the ADC – shows that the prices for raw tomatoes in Italy are the highest in the world. Therefore, it is hard to understand how the ADC could conclude that the prices for raw tomatoes in Italy, i.e. the highest price in the world, do not *'reasonably reflect competitive market costs'* and, as such, should trigger an increase of the raw tomatoes cost incurred by La Doria and Feger;

- the Final Report itself acknowledges that, due to the high market prices in Italy, the ADC was unable to identify an alternative (and, obviously, higher) *'benchmark price for the raw material input'* (i.e. raw tomatoes) to be used for the purpose of the dumping calculation;

- in connection with the above, it should be further noted that the Italian prices for raw tomatoes are also higher than the prices for raw tomatoes in other EU countries, where growers equally receive the payments administered under the CAP;

- the Final Report concludes that no *'particular market situation'* exists in the Italian market for PPTs. In other words, the Final Report itself recognizes that the market prices for PPTs in Italy are not distorted. Once again, the ADC proves to be able to say everything and its contrary. On the one hand, the ADC claims that market prices for raw tomatoes are distorted even though, on the other hand, it concluded that the Italian market prices for PPTs, whose cost of production consists to a large extent of the cost of raw tomatoes, are not distorted.

Finally, and most importantly, the Final Report does not provide any evidence or meaningful economic analysis (including a pass-through analysis, see section 4.2

below) – other than mere speculations and allegations – demonstrating that in the absence of the SPS the market prices for raw tomatoes in Italy would be higher.

In light of the above, it should be concluded that the ADC's conclusions regarding the need to apply the cost adjustment are contradictory and unsubstantiated. It follows that the conditions for applying section 43(2) of the Regulation are not warranted.

3.2.2 The cost adjustment is in stark contradiction with the ADC's conclusions on the 'particular market situation' in the Italian markets for PPTs

In the course of the investigation, the ADC requested an independent expert to evaluate whether the alleged subsidy granted to raw tomato growers affected the domestic PPTs prices so as to make them unsuitable for use in the dumping margin calculation. Based on the opinion rendered by the expert, the ADC concluded that such an impact was *'insignificant'* and that, therefore, there was no *'particular market situation'* in the Italian market for PPTs.

However, the Final Report concludes that an upward adjustment of the cost for raw tomatoes (as a component of Feger's overall cost) was appropriate. Such conclusion flagrantly conflicts with the conclusion that no *'particular market situation'* exists in the Italian market for PPTs. In fact, the cost adjustment triggers *inter alia* a modification – *rectius*, an increase – of the normal value calculated on the basis of the domestic PPTs prices, even though the ADC itself had acknowledged that all these prices were suitable for the purpose of the dumping margin calculation in the context of the 'market situation' assessment..

3.2.3 The ADC's calculation of the amount of the alleged subsidy is intrinsically ill-founded

The Final Report calculates the amount of the alleged subsidy per kg of raw tomatoes in the investigation period by dividing the (obsolete) national ceiling for coupled payments, which was in force until 2011, by the total volume of raw tomatoes produced in Italy in 2014:

$$\text{amount per kg (€)} = \frac{\text{Total grower payments for tomatoes in 2014}}{\text{Total production volume in 2014}} = \frac{\text{€ 183,970,000}}{\text{4,911,000,000 kg}} = \text{€0.037 per kg}$$

In this respect, the Final Report maintains that *'a national ceiling was fixed by the Italian Government under the SPS for 2014, and within that national ceiling was an allocation of €183,970,000 for direct income support payments to be made to growers of raw tomatoes'.* However, this is irremediably wrong. Suffice it to recall the submission of the European Commission dated 21 December 2015, which has been given no shrift by the ADC, which explained that the Decree of the Italian Minister of Agriculture of October 2013 relied upon by the Final Report refers to a completely different matter (i.e. the valuation method of the entitlements from the National Reserve and not yet assigned to any hectare). This confirms that, as was repeatedly explained

throughout the investigation (and, apparently, not understood by the ADC), in 2014 the national ceiling for tomatoes relied upon by the Final Report (i.e. € 183,970,000) did no longer exist, since it was abolished in 2011.

From the foregoing, it emerges that it is **impossible** to calculate an amount of subsidy per kg of raw tomatoes produced in Italy in the investigation period (i.e. the amount of the cost adjustment).

4. FOURTH GROUND: THE ADC WRONGLY DETERMINED THE MAGNITUDE OF THE COST ADJUSTMENT AND ITS IMPACT ON THE DUMPING MARGIN OF FEGER

Even though it has been demonstrated above that the 'cost adjustment' is unlawful, for the sake of completeness it is submitted that, in any case, the Final Report wrongly determined the magnitude of the cost adjustment and its impact on Feger's dumping margin. Indeed, even assuming that adjusting the cost of production would be lawful, *quod non*, the ADC: (i) wrongly determined the magnitude of alleged subsidy per kg of raw tomatoes produced in Italy in the investigation period; (ii) failed to properly investigate the actual impact of the alleged subsidy granted to tomato growers on the prices for raw tomatoes in Italy; and (iii) failed to draw the correct consequences from the application of the cost adjustment with respect to Feger's normal value calculation.

4.1 The ADC wrongly determined the alleged subsidy per kg of raw tomatoes produced in Italy in the investigation period

Feger submits that the ADC's calculation of the alleged subsidy per kg or raw tomatoes is contradicted by the evidence collected throughout the investigation.

4.1.1 The ADC's subsidy calculation is in stark contradiction with the 'market situation' analysis contained in the Appendix to the Final Report

At the outset, it must be noted that the ADC's calculation of the alleged subsidy per kg of raw tomatoes illustrated in section 3.2.3 above is in stark contradiction with the ADC's findings contained in the *'market situation'* assessment in the Appendix to the Final Report.

In section 6.4.9 of the Final Report, the ADC calculated the amount of the alleged subsidy per kg of raw tomatoes produced in Italy in 2014 to be taken into account for the purpose of the 'cost adjustment' pursuant to Section 43(2) of the Regulation. This amount was determined to be **€ 0.037/kg**.

In section 8.2 of the Appendix to the Final Report, the ADC illustrated the content of two papers from Rickard and Summer (one provided by SPCA, the other one found by the ADC itself), in which it was explained that *'[t]he CAP set up in 2001 stipulated domestic support paid to tomato growers of €34.5/tonne'* and that *'the CAP payment fell by half to €17.25/ton between 2008 and 2011'*. The data provided by Rickard and

Summer were relied upon by the ADC for the purpose of the 'market situation' assessment. In this context, the ADC acknowledged that:

- in the year 2001 (when the payments to tomato growers were still coupled to production) the subsidy amounted to **€ 0.0345/kg**;
- in the year 2011, following a reduction by 50% of the CAP payments, the subsidy amounted to **€ 0.01725/kg**.

Despite the above findings, in section 6.4.9 the Final Report the ADC calculated an amount of subsidy per kg of raw tomatoes with regard to the year 2014 (€ 0.037/kg) which not only is higher than the amount of the 'reduced' subsidy per kg of raw tomatoes calculated by Rickard and Summer report with regard to the year 2011 (€ 0.01725/kg), but which is even higher than the amount of subsidy per kg of raw tomatoes calculated by Rickard and Summer as regards the year 2001, when the payments were still coupled (€ 0.0345/kg).

This is clearly contradictory and shows that the ADC's calculation of the amount of the alleged subsidy per kg of raw tomatoes produced in Italy in 2014 to be taken into account for the purpose of the 'cost adjustment' is manifestly overestimated and wrong.

4.1.2 The ADC's subsidy calculation is contradicted by the actual data collected from Feger's suppliers

The ADC's calculation of the average payment received by tomato growers (i.e. € 0.037/kg or € 2,700/ha) is further contradicted by the sample certificates issued by AGEA (the Government Agency in charge of paying the SPS), which were provided to the ADC in the course of the investigation. These certificates clearly demonstrate that the average payments received by Feger's raw tomatoes suppliers in the year 2014 were significantly lower than € 2,700/ha.

In this respect, section 6.4.5 of the Final Report explains that the certificates under discussion were rejected by the ADC on the ground that:

- they *'pertain to a select group of growers who collectively account for 0.5% of the total volume of raw tomatoes produced in Italy during the investigation period'*,
- they are *'copies that are difficult to read and decipher'*, and
- they *'do not contain any official Italian Government stamp, which makes their verification difficult'*.

With respect to the above, the ADRP's attention is drawn to the fact that Feger cannot be required to provide copy of the certificates pertaining to *'the payments made to all growers of raw tomatoes under the SPS during the investigation period'*, as suggested by the ADC. This request is clearly unreasonable, in view of the extremely high number

of Italian tomato growers and the impossibility for Feger to identify them one by one in a short timeframe. Moreover, it must be pointed out that the payments received by Feger's suppliers are the only ones to be taken into account for the purpose of establishing Feger's normal value. Generally speaking, any information relating to the payments received by tomato growers which are not suppliers of La Doria and Feger should be considered irrelevant for the purpose of investigation No. 276.

As regards the fact that the certificates do not contain any official stamp, it is submitted that these are not valid grounds to reject the evidence provided by Feger. The certificates under discussion are issued by AGEA and have therefore to be considered official documents, even though they do not contain any official stamp. [42] Moreover, they constitute publicly available information.[43]

Concerning the low quality of the pdf files submitted in the course of the investigation, Feger regrets that this matter was not pointed out by the ADC at the time of the submission. For sake of good order, Feger is pleased to resubmit herewith the certificates relating to all its suppliers, in a clearer format (see **Annex 1 [confidential]**).

Based on the attached certificates, it results that the ADC's subsidy calculation (i.e. about € 2,700/ha) is far from reality, since the average value of the SPS certificates held by Feger's suppliers amounts to about € **[confidential cost information]**. In light of the foregoing, it must be concluded that the ADC clearly overestimated the payments granted to growers under the SPS.

4.2 The ADC failed to carry out a pass-through analysis in order to establish the actual impact of the alleged subsidy on the prices for raw tomatoes

In applying the cost adjustment the ADC just assumed that 100% of the SPS had flown on the final price for raw tomatoes. However, the absence of a pass-through analysis is contradictory and violates WTO law.

4.2.1 The absence of pass-through analysis for the purpose of calculating the 'cost adjustment' is contradictory

In the context of the 'market situation' analysis the ADC concluded that '*in a realistic scenario'* only *'73% of the 32% subsidy would flow into the cost of raw tomatoes for prepared or preserved tomato production*'.[44] However, for the purpose of adjusting Feger's CTMS on the basis of section 43(2) of the Regulation, the ADC increased the cost of the raw tomatoes by an amount equal to the full value of the CAP payments.[45] In other words, the ADC considered that 100% of the subsidy flows on the price for raw tomatoes paid by La Doria and Feger.

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42 As a matter of fact, also the documents issued by the ADC, such as the Final Report, do not contain any 'official stamp'.

43 The certificates under discussion are publicly available at the following official link www.sian.it/titoli/titoli/consultazione/start.do?op=0&referer=http%3A%2F%2Fwww.sian.it%2Fportale-sian%2Fsottosezione.jsp%3Fpid%3D6

44 Final Report No. 276, p. 77. See also footnote 135.

45 See SEF No. 276, p. 26.

With regard to the above, the ADC explained in section 6.4.10 of the Final Report that *'[a] flow on analysis for the purposes of an assessment of market situation and the adjustment of the cost of production while conducting the OCOT test are separate and distinct processes',* since '*a significant component of the OCOT test is to establish competitive market costs. This process is in direct contrast with an attempt via economic modelling to establish the potential flow on to downstream purchasers from a payment made to upstream producers'.*

However, this is contradictory. In this respect, it must be recalled that for the purpose of the 'market situation' assessment, the methodology followed by the ADC consisted of two steps:

(i) first, to determine the level of flow-on of the alleged subsidy into the price at which raw tomatoes are sold in the market, which obviously correspond to the costs borne by PPTs processors for the purchase of the raw material input, and

(ii) second, to determine the level of flow-on of the increased raw material cost into the domestic selling prices for PPTs.

Therefore, insofar as the ADC expressly acknowledged that the flow-on analysis is necessary to determine the level of the undistorted selling price for raw tomatoes in the absence of the SPS for the purpose of the 'market situation assessment' (see step (i) described above), it must be concluded that the same analysis is necessary for determining the 'competitive market costs' of La Doria and Feger when applying section 43(2) of the Regulation.

Indeed, the hypothetical 'competitive market costs' which La Doria and Feger should have borne in the absence of the SPS (determined pursuant to section 43(2) of the Regulation) correspond to the undistorted prices at which raw tomatoes would have been sold in the Italian market in the absence of the SPS (which the ADC determined in the context of the 'market situation' assessment).

It follows that the ADC's conclusion that 100% of the alleged subsidy had flown on the final price for raw tomatoes is clearly ill-founded.

4.2.2 The ADC's finding is contrary to Article VI:3 of the GATT 1994 and Article 10 of the SCMA

Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement prevent any investigating authority from assuming that a subsidy granted to producers of an 'upstream' input automatically benefits unrelated producers of the downstream product, especially if there is evidence on the record of arm's-length transactions between the two'. In this respect, a pass-through analysis is required.[46]

[46] Appellate Body Report, *US — Softwood Lumber IV*, paras. 156–157.

Although the above case law concerns the interpretation of the ASCM and not of the ADA (for obvious reasons, in light of the provisions of Article 32.1 of the ASCM discussed in section 3.1.1 above), the relevant principles are fully applicable in the present case, which indeed involves the assessment of the impact of an alleged subsidy (even though in the framework of an antidumping investigation).

It follows that the ADC should have carried out a carry out any pass-through analysis in order to demonstrate what part of the SPS was reflected in the price for raw tomatoes paid by Feger and La Doria. On the contrary, in applying the cost adjustment, the ADC just assumed that 100% of the SPS had flown on the final price for raw tomatoes. This is manifestly contrary to Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement.

4.3 The ADC used a wrong profit margin for the purpose of constructing the normal value of Feger pursuant to section 269TAC(2)(c)

Finally, it is submitted that the ADC erred in determining the profit margin to be used for the purpose of constructing the normal value of Feger pursuant to section 269TAC(2)(c).

In this respect, it must be noted that the ADC carried out the 'ordinary course of trade' ('OCOT') test for establishing the normal value of the models sold in the domestic market (pursuant to section 269TAC(1)) on the basis of Feger's 'adjusted' cost (i.e. the 'increased' CTMS resulting from the costs in Feger's records plus the additional amount calculated by the ADC as to reflect the alleged impact of the SPS). However, the ADC did not use the resulting domestic profit margin of **[confidential profit information]** (i.e. the profit margin calculated on the basis of the adjusted CTMS) for the purpose of constructing the normal value of the models not sold in the domestic market.

In order to calculate the normal values pursuant to section 269TAC(2)(c), the ADC used the domestic profit margin of **[confidential profit information]** resulting from the actual costs in Feger's records (the 'non-increased' CTMS, i.e. the CTMS net of the additional amount calculated by the ADC as to reflect the alleged impact of the SPS). This higher profit margin was then applied to the 'adjusted' (and higher) CTMS, in order to construct the normal values pursuant to section 269TAC(2)(c).[47]

It follows that the ADC carried out the OCOT test twice:

- first, the OCOT test was carried out on the basis of the 'adjusted' CTMS, for the purpose of establishing the normal value of the models sold in the domestic market;

[47] The ADC therefore used the higher CTMS (i.e. the 'adjusted' CTMS) and the higher profit margin (i.e. the profit margin resulting from the 'non-adjusted' CTMS), with the deliberate aim of obtaining the highest possible normal values.

- second, the OCOT was carried out on the basis of the 'non-adjusted' CTMS (as recorded in the exporting producer's records), in order to determine the profit margin ratio (i.e. the profit margin expressed in percentage) to be used for the purpose of constructing the normal value of the models not sold in the domestic market.

Feger submits that the approach followed by the ADC is ill-founded and contrary to Article 2.2.2 of the ADA, according to which *'the amounts […] for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'* (emphasis added). This provision is mirrored by Section 45 of the Regulation, according to which the Minister must work out the amount for profits *'by using data relating to the production and sale of the like goods by the exporter or producer of the goods in the ordinary course of trade'* (emphasis added).

The language of the above provisions clearly requires that the CTMS used for carrying out the OCOT test (for the purpose of establishing which domestic transactions are to be taken into account for determining the normal values pursuant to section 269TAC(1)) must also be used for calculating the domestic profit margin for constructing the normal values pursuant to section 269TAC(2)(c). The ADA does not allow the investigating authorities to carry out multiple OCOT tests on the basis of different CTMSs.

A different conclusion would entitle the investigating authorities to carry out the OCOT test an indefinite number of times on the basis of different costs, and then to pick up the preferred result on the basis of the purpose they intend to reach. This is clearly contrary to the logic and purpose of the ADA.[48]

In any event, even assuming that the ADC would be allowed to carry out multiple OCOT tests for the purpose of the dumping calculation, *quod non*, it should be noted that ADC's approach would be still ill-founded in so far as the ADC used the 'increased' CTMS as a basis for the normal value calculation, and then applied to such 'increased' CTMS a profit margin (calculated on the basis of the 'non-increased' CTMS) expressed in percentage.

[48] This conclusion is not put into questions by the explanation provided in section 6.5.3 of the Final Report, where the ADC quoted Australian case-law according to which *'the value constructed under s 269TAC(2)(c) is to provide a price that would have emerged from the operation of s 269TAC(1) had there been goods sold in the ordinary course of trade for home consumption in arms length transactions'*. If the purpose of section 269TAC(2)(c) is to construct a price as much as possible in line with the price that *'would have emerged from the operation of s 269TAC(1) had there been goods sold in the ordinary course of trade for home consumption in arms length transactions'*, in the first place the ADC should not have used an 'adjusted' CTMS. Once such an 'adjusted' cost is used, the profit margin which allows to obtain a normal value as much as possible in line with the price that *'would have emerged from the operation of s 269TAC(1) had there been goods sold in the ordinary course of trade for home consumption in arms length transactions'* is the profit margin resulting from the OCOT test carried out on the basis of such an 'adjusted' cost. It follows that the ADC's arguments illustrated in Section 6.5.3 of the Final Report confirm, rather than contradicting, the well-founded of Feger's claim.

In doing so, the ADC artificially boosted the normal value of the models not sold (or sold in insufficient quantities) in the domestic market, constructed in accordance with section 269TAC(2)(c). Indeed, by applying a profit margin expressed percentage to an 'increased' basis (i.e. the 'increased' CTMS) the ADC *de facto* used a profit which, in absolute terms, is remarkably higher than the 'actual' profit earned by Feger with regard to the domestic sales of the product under investigation, as recorded in Feger's records.

In other words, the ADC's approach results in a scenario where the profit per kg used for constructing the normal values pursuant to section 269TAC(2)(c) is significantly higher than the actual profit per kg earned by Feger with regard to the domestic sales of the product under investigation. This is clearly contrary to the ADC's statement in section 6.5.3 of the Final Report, according to which *'when determining an amount of profit the Commission is attempting to determine an actual amount of profit that the exporter has generated from its domestic sales based on the exporter's own data'* (emphasis added).

Based on the foregoing, it must be concluded that the ADC's approach violates Article 2.2.2 of the ADA, according to which *'the amounts […] for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'* (emphasis added). In fact, the profit used by the ADC for the purpose of constructing the normal values in accordance with section 269TAC(2)(c) is not representative of the actual profit (e.g. the profit per kg of PPTs sold in the domestic market) earned by Feger.

Moreover, the ADC's approach is contrary to Article 2.2 of the ADA, because the profit used by the ADC for the purpose of constructing the normal value of Feger's models not sold on the domestic market (pursuant to section 269TAC(2)(c)) is significantly higher than the actual profits earned by Feger for each kg of PPTs sold in the domestic market and, therefore is not 'reasonable'.

5. FIFTH GROUND: OTHER FLAWS AFFECT FEGER'S DUMPING MARGIN CALCULATION

Other than the above-discussed cost adjustment, it is submitted that additional flaws affect Feger's dumping calculation, producing a negative impact on Feger's individual duty rate determined in the reviewable decision.

5.1 The ADC unduly rejected the downward domestic adjustments claimed by Feger with regard to 'advertising' and 'quality control' expenses

In the questionnaire reply, Feger requested a downward domestic adjustment for 'advertising' and 'quality control' expenses undertaken by certain domestic customers. This claim was rejected since, as explained in Confidential Attachment 3 to the Final Report: [49] **[quote from confidential attachment]**

However, the above conclusion is ill-founded. First of all, it must be noted that during the on-site verification Feger provided the visit team with comprehensive information and evidence regarding – *inter alia* – the 'advertising' and 'quality control' adjustments. Moreover, Feger expressed its availability to provide any additional evidence which the ADC would appreciate receiving. Had the ADC been dissatisfied with the evidence submitted in connection with the 'advertising' and 'quality control' adjustments (even though, as explained below, the evidence submitted meets the evidentiary threshold), it should have informed Feger and granted it the opportunity to provide additional information during the verification visit.

Second, it must be stressed that in the previous investigation No. 217 - which concerned the same product manufactured by the same exporting producer - the ADC concluded that the same documentary evidence provided in investigation No. 276 was sufficient and adequate to warrant an identical claim for 'advertising' and 'quality control' adjustments in respect of advertisement and quality testing expenses incurred by Feger with regard to domestic sales.[50] It is hard to understand why an adjustment which was warranted only two years ago has, all at once, been held to be unsubstantiated in presence of the same, identical, evidence.

Third, it must be pointed out that the methodology followed by Feger to allocate the 'advertising' and 'quality control' expenses between PPTs and other products (i.e. allocation by turnover) does not differ at all from the allocation methodology used for other adjustments such as 'year-end rebates' or 'commissions' in respect of which the ADC did not raise any criticism. This *'à la carte'* approach, according to which the same allocation method is accepted in relation to certain adjustments while it is rejected when applied to advertising and quality control expenses, is manifestly flawed.

In light of the foregoing, Feger firmly claims that the ADC's decision not to grant domestic 'advertising' and 'quality control' adjustments to Feger is ill-founded. In this respect, further elements are provided in sections 5.1.1 and 5.1.2 below.

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49 See **Annex 2** to the present submission **[confidential]**.

50 See Feger's Verification Report in investigation No. 217, page 37, an excerpt of which is provided under **Annex 3** hereto.

5.1.1 Adjustment for adverting expenses

According to the Dumping and Subsidy Manual, *'advertising expenses often relate more to the general cost of business and generally are not grounds for adjustment. However, […] where the connection to the sale is established and evidence is suitable, adjustment may be allowed in certain circumstances, such as where:*

- *the exporter pays advertising costs on behalf of its customer;*
- *the exporter reimburses the importer for advertising costs; or*
- *advertising and sales promotion expenses are exclusive to the goods in question'* (emphasis added).

In the present case, it was demonstrated that Feger reimburses the advertising cost incurred by certain domestic customers. **[confidential commercial information]**.

It follows that the ADC unwarrantedly rejected a well-founded and substantiated claim for an adjustment aimed at offsetting an imbalance between domestic and export sales. Such a difference must be corrected through an adjustment. If not, this situation would give rise to an unfair comparison, contrary to section 269TAC(8) of the Act.

The above conclusion cannot be put into question by the ADC's finding that **[quote from confidential attachment]**.[51] As a matter of fact, frequently happens that certain expenses relate to various products. The fact that **[confidential commercial information]** is irrelevant to decide about the claim for an adjustment.

As extensively explained to the ADC, **[confidential commercial information]**. This is the reason why not all the advertising expenses incurred by Feger, but only a certain part of such expenses was allocated to the product under investigation. The allocation was made on a turnover basis which constitutes a very reasonable and sound method.

According to the ADC, however, **[quote from confidential attachment]**.[52]

Feger fails to understand why the ADC considered that the proposed allocation of the advertising expenses on a turnover basis would not be 'convincing' and would not 'reasonably represent' the expenses specifically incurred for PPTs. In this respect, it must be noted that: [53]

- as regards the cases where **[commercial in confidence arrangement]**, not only is the allocation method by turnover correct but it is also the only method that can be followed;

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51 Confidential Attachment 3 to Final Report No. 276.

52 Confidential Attachment 3 to Final Report No. 276.

53 For sake of clarity, it must be noted that the advertising expenses are negotiated and agreed between Feger and its customers as follows: **[commercial in confidence arrangement]**.

- as regards the cases where **[commercial in confidence arrangement]**, the allocation of such expenses on a turnover basis appears to be appropriate and reasonable. In this respect, it must be recalled that the allocation method used for the 'advertising' adjustment is the same used for other adjustments which were granted by the ADC (see section 5.1 above). Feger fails to understand how the ADC may claim that **[quote from confidential attachment]**. [54]

Finally, the ADRP's attention is drawn to the fact that although the above comments were already contained in Feger's confidential comments on the SEF filed with the ADC on 22 September 2015, neither the Final Report nor Confidential Attachment 3 to the Final Report contain a single word to address Feger's arguments. As a matter of fact, the ADC itself expressly confirmed **[confidential correspondence]** This clearly demonstrates that the ADC simply ignored Feger's detailed comments filed on 22 September 2015, thus blatantly violating Feger's right of defence.

In light of the foregoing, Feger firmly claims that the ADC's decision not to grant the 'advertising' adjustment is manifestly groundless, and should therefore be revoked.

5.1.2 Adjustment for quality control expenses

According to the Dumping and Subsidy Manual, adjustments are not to be granted where there are *'differences in general sales and administration expenses that relate more to the general cost of doing business and are spread across all sales of the company (or expenses such as research and development as these too are spread across all sales of the firm)'.* In this respect, the ADC explained that the 'quality control' adjustment was not warranted since **[quote from confidential attachment]**.[55]

The above statement rests on a manifestly flawed understanding of the facts. The quality control expenses claimed by Feger as an adjustment were not incurred for all Feger products. They only cover the expenses **[commercial in confidence arrangement].** This clarified, the arguments illustrated in section 5.1.1 above also apply here. In particular, the fact that an invoice paid by Feger may cover quality control expenses relating to PPTs as well as other product(s) is irrelevant to decide about the claim for an adjustment. Moreover, Feger fails to understand why the proposed allocation by turnover would not be 'convincing' and would not 'reasonably represent' the expenses specifically incurred for PPTs.

In addition to the above, Confidential Attachment 3 to the Final Report further claims that **[quote from confidential attachment]**.

In this respect, the following should be noted: **[observations on confidential attachment]**.

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54 Confidential Attachment 3 to Final Report No. 276.
55 Confidential Attachment 3 to Final Report No. 276.

Finally, Confidential Attachment 3 to the Final Report alleges that **[quote from confidential attachment]**[56]

With regard to the above, it is submitted that **[observations on confidential attachment]**.

Once again, the ADRP's attention is drawn to the fact that all the above detailed observations and explanations were contained in the confidential comments to the SEF that Feger filed with the ADC on 22 September 2015. However, the Final Report completely overlooked such detailed explanations and comments. This clearly demonstrates that the ADC simply ignored Feger's confidential submission of 22 September 2015, thus blatantly violating Feger's right of defence.

In light of the foregoing, Feger firmly claims that the ADC's decision not to grant the 'quality control' adjustment is manifestly groundless, and should therefore be revoked.

5.2 The ADC unduly rejected a downward domestic adjustment to reflect the different 'administration costs' borne by Feger with regard to domestic and export sales

As extensively explained during the on-site visit and acknowledged in Feger's Verification Report, the Italian market for PPTs is a very complex and competitive market requiring extensive activities and expenses on the part of the sellers. By contrast, sales to Australia do not require the same efforts. In fact **[confidential market information]**

As a result, Feger incurs considerably higher expenses to sell PPTs in Italy than in Australia. This is demonstrated by the fact that the number of sales staff dedicated to the domestic market **[number of staff persons]** is higher than the number of staff dedicated to the export markets **[number of staff persons]**. [57] Such difference reflects the fact that the staff dedicated to the Italian market is involved in additional activities compared to the staff dealing with export markets. In this respect, it was further explained to the ADC that **[number of staff persons]** dedicated to domestic sales is involved in direct selling activities which are not carried out with respect to export sales. Such activities include **[confidential information concerning Feger's business organisation]**

In order to reflect the overall higher costs incurred for domestic sales as compared to sales in Australia, Feger claimed that the cost for **[number of staff persons]** involved in direct selling activities in the Italian market should be deducted from the normal value in order to ensure a fair comparison. In fact, the cost of such activities is incurred by Feger with regard to domestic sales, while in Australia the same cost is incurred by Feger's customers.

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56 Confidential Attachment 3 to the Final Report refers here to the evidence provided by Feger in its confidential submission filed on 13 August 2015.

57 See Confidential Exhibit 26 to Feger's Verification Report

The Final Report did not object to the fact that Feger incurred the expenses under discussion. However, the ADC decided not to grant the requested adjustment on the ground that *'general expenses of this nature do not fall within the scope of the term 'differences in conditions and terms of sale'*. [58] Feger firmly rejects such conclusion. The expenses relating to **[number of staff persons]** specifically involved in direct selling activities with regard to Italian customers (as detailed, *inter alia,* in Feger's confidential submission lodged with the ADC on 22 September 2015[59]) cannot be considered as *'general expenses'* since they do not concern all Feger's sales, but only the sales made in the domestic market. In this respect, it is worth to point out that although Feger named the claimed adjustment 'administration costs', the underlying expenses do not concern Feger's 'administration' but, as explained, relate to direct selling activities performed by Feger's staff dedicated to Italian customers.

In light of the foregoing, it is submitted that a downward adjustment should be made to Feger's normal value (by deducting the domestic extra cost incurred by Feger) in order to duly reflect the differences in the conditions and terms of sale between Feger's domestic and export sales.

5.3 The ADC overestimated Feger's 'finance costs'

The ADC added to Feger's CTMS an amount to reflect the financing expenses incurred by Feger, calculated on the basis of Feger's financial statement. The so-called 'finance cost' was determined to amount to **[confidential cost information]**, on the basis of the following calculation:[60]

[confidential cost information]

The ADC's calculation illustrated above relies on the assumption that all the financial expenses recorded in Feger's financial statement relate to Feger's operative costs concerning, *inter alia*, the product under investigation. However, this is not correct.

The amount of **[confidential cost information]** corresponds to the negative interests that Feger pays to the banks for borrowing money. In this respect, it must be noted that Feger is a small, family company with a non-sophisticated accounting system and limited access to credit lines. As a matter of fact, Feger uses the money obtained from the same credit lines (triggering the negative interests under discussion) to finance all its operations, including extraordinary operations not related with the production and sales of PPTs.

In this respect Feger submitted evidence demonstrating that in the year 2014 (i.e., the investigation period) the credit lines at stake financed, by way of example **[confidential information concerning Feger's business organisation]**.

58 Final report No. 276, p. 34 (section 6.5.5).
59 See in particular Annex 3 to Feger's confidential submission of 22 September 2015.
60 Based on the figures contained in Exhibit 14 to Feger's Verification Report.

It goes without saying that financial expenses such as those indicated above have no relationship whatsoever with the operation of the PPTs business and, as such, should not be reflected in Feger's CTMS of PPTs.

Given the high difficulty in identifying which specific expenses generated the negative interests under discussion, Feger claimed that the only share of 'finance costs' which should be attributed to the product under investigation – and therefore included in the CTMS of PPTs – is the cash borrowed by Feger to finance its sales of PPTs. This amount corresponds, in substance, to the so-called 'credit cost' calculated in the domestic and export sales spreadsheets, [61] which reflect the trade credit terms relating to each sale of PPTs.

It follows that the 'finance cost' attributable to the product under investigation should account for **[confidential cost information]**, in accordance with the calculation below:

[confidential cost information]

Feger considers the above calculation to be appropriate and reasonable for the calculation of the 'finance cost' specifically relating to PPTs. As a matter of fact, an equivalent methodology was used by Feger and accepted by the ADC **[confidential cost information]**. Feger therefore firmly disagrees with the ADC's conclusion that the proposed methodology would not *'substantiate the net amount of finance expense recorded, particular to prepared and preserved tomatoes in 2014'*.

Based on the foregoing, Feger submits that the 'finance cost' to be included in the CTMS of Feger's PPTs (thus, with the exclusion of costs not related to the product under investigation) should account for **[confidential cost information]**. It follows that Feger's CTMS should be corrected accordingly. This would at its own turn impact Feger's dumping margin calculation.

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[61] **[confidential – cost information]**