Australian Government
Anti-Dumping Review Panel

ADRP REPORT NO. 35

Prepared or Preserved Tomatoes exported from Italy by Feger Di Gerardo Ferraiol S.P.A. and La Doria S.P.A.

November 2016

Review of a Decision of the Parliamentary Secretary to publish a Dumping Duty Notice in relation to Prepared or Preserved Tomatoes Exported from Italy by Feger Di Gerardo Ferraioli S.p.A. and La Doria S.p.A.

Table of Contents

Introduction

1. The following Applicants, pursuant to s.269ZZC of the *Customs Act 1901*(the Customs Act), sought review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary), to publish a Dumping Duty Notice pursuant to s.269TG(1) and (2) of the Customs Act in respect of Prepared or Preserved Tomatoes (PPTs) Exported from Italy by Feger Di Gerardo Ferraioli S.p.A. and La Doria S.p.A :

   a. Feger di Gerardo Ferraioli S.p.A (Feger);
   b. La Doria S.p.A (La Doria) and;
   c. the Government of the Italian Republic (Italy)

2. The then Acting Senior Member of the Anti-Dumping Review Panel (the Review Panel) directed in writing, pursuant to s.269ZYA of the Customs Act, that the Review Panel for the purpose of this review be constituted by me.

3. The applications for review of Feger, La Doria and Italy were accepted and notice of the proposed review as required by s.269ZZI of the Customs Act, was published on 13 April 2016.

Background

4. Anti-dumping measures applicable to prepared or preserved tomatoes exported from Italy were established following an anti-dumping investigation initiated on 10 July 2013 by the Anti-Dumping Commission (ADC). [1] As a result of the ADC's Investigation No. 217 (the previous investigation), and the recommendation of Commissioner of the ADC (the Commissioner), the then Parliamentary Secretary to the Minister for Industry decided to impose dumping duties on prepared or preserved tomatoes exported from Italy except by Feger and La Doria.[2]

5. During the previous investigation it was found that goods exported by Feger and La Doria had been dumped during the relevant investigation period (1 July 2012 to 30 June 2013), but that the dumping margins were less than 2%. Accordingly, on 20 March 2014, the Commissioner decided to terminate the investigation in so far as it related to Feger and La Doria in accordance with subsection 269TDA(1)(b)(ii). [3]

6. After accepting a request by certain parties to review the then Parliamentary Secretary to Minister for Industry's decision, the Review Panel recommended that the then Parliamentary Secretary to the Minister for Industry affirm his

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[1] Investigation No. 217.
[2] ADN No. 2014/32.
[3] ADN No. 2014/22.

decision. The then Parliamentary Secretary to the Minister for Industry decided on 21 October 2014 to affirm his decision to impose dumping duties on prepared or preserved tomatoes exported to Australia from Italy (except by Feger and La Doria). These measures are currently due to expire on 15 April 2019.

7. On 24 November 2014, SPC Ardmona Operations Limited (SPCA) lodged an application for the publication of a dumping duty notice in respect of prepared or preserved tomatoes (the goods) exported to Australia from Italy by Feger and La Doria. Following consideration of the application, the Commissioner decided not to reject the application and initiated the investigation. Public notification of the initiation of the investigation was made on 19 January 2015 in The Australian newspaper and in ADN No. 2015/05. In respect of the investigation, the Commission established an:

   - investigation period of 1 January 2014 to 31 December 2014 for the purpose of assessing dumping; and
   - injury analysis period beginning from 1 January 2010 for the purpose of determining whether material injury has been caused to the Australian industry.

8. The Statement of Essential Facts (SEF) was published on 4 September 2015 (SEF 276). On 4 September 2015 the Commissioner made a Preliminary Affirmative Decision (PAD) in relation to prepared and preserved tomatoes and securities were imposed as of 11 September 2015 against all exports of prepared or preserved tomatoes from Italy by Feger and La Doria.

9. The final report to the Parliamentary Secretary was made by the ADC in Anti-Dumping Commission Report No. 276 (REP 276). The ADC recommended to the Parliamentary Secretary that a Dumping Duty Notice be published in respect of prepared or preserved tomatoes exported from Italy by Feger and La Doria. The Parliamentary Secretary accepted the recommendations and a Dumping Duty Notice under subsections 269TG(1) and (2) of the Customs Act was published on 11 February 2016. [4]

The Review

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

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[4] See Anti-Dumping Notice No. 2016/13.

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

12. In undertaking the review, s.269ZZ of the Customs Act requires the Review Panel to determine a matter required to be determined by the Minister in like manner as if it was the Minister, having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.

13. An applicant is required to set out reasons for believing that the reviewable decision is not the correct or preferable decision, and failure to do so may result in rejection of the application. However, as it was stated in the ADRP Report No.15,[5] because an application is not rejected it does not follow that all grounds advanced in the application are to be viewed, or have been accepted as reasonable grounds for the reviewable decision not being the correct or preferable decision. It is also pointed out in the ADRP Report No.15 that the obligation on an applicant to set out the reasons is linked to the task the Review Panel has in determining whether the ultimate decision (the reviewable decision) was the correct or preferable one.

14. In making its recommendation the Review Panel must not have regard to any information other than the "relevant information" as defined in s.269ZZK(6) of the Customs Act, that is, information to which the ADC had regard or was required to have regard when making its findings and recommendations to the Minister. The Review Panel must only have regard to the relevant information and any conclusions based on the relevant information that are contained in the application for review and any submissions received under s.269ZZJ of the Customs Act.[6] In other words, the Review Panel does not undertake its own new investigation and is limited to the information that had been before the ADC.

15. In conducting this review I have had regard to the applications (including documents submitted with the applications) and to the submissions received pursuant to s.269ZZJ of the Customs Act insofar as they contained conclusions based on relevant information. I have also had regard to REP 276 and information relevant to the review which was referenced in REP 276. I have also had regard to the Statement of Essential Facts (SEF 276) and to documents referenced in SEF 276.

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[5] See ADRP Report No. 15 concerning Wind Towers exported from the People's Republic of China and the Republic of Korea, paragraph 16.
[6] See s.269ZZK(4) of the Act.

16. The time for submissions by interested parties under s.269ZZJ is within 30 days after the public notice. As the public notice was given on 13 April 2016 the time for submission expired on 13 May 2016. Submissions were received in this period from:

- Feger;
- La Doria;
- Italy;
- European Commission[7];
- SPCA;
- Orange & Green Pty Ltd (Orange & Green); and

Non-confidential versions of the submissions were made publicly available on the Review Panel's website. It should be noted that the ADC did not make a submission pursuant to s.269ZZJ.

17. After reviewing the applications, submissions and other material described above, on 14 June 2016, pursuant to s.269ZZL of the Customs Act, I required the ADC to reinvestigate various findings in REP 276 (Reinvestigation Request). I requested the ADC's reinvestigation in this regard by 23 August 2016. The ADC in a letter dated 18 August 2016, requested an extension of 30 days to 22 September 2016 to provide the Reinvestigation Report, which extension was granted by the Review Panel. The ADC in a letter dated 19 September 2016, requested a further extension of 14 days to 6 October 2016 to provide the Reinvestigation Report, which further extension was granted by the Review Panel. The request for reinvestigation and correspondence relating to the extensions were made publically available. A copy of the Reinvestigation Report, which was received on 6 October 2016 (the Reinvestigation Report), is attached as Annexure 1 to this report.

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[7] The European Commission (EC) noted in its submission that it was an interested party throughout the anti-dumping investigation subject of this review and also in the previous investigation involving all Italian exports of prepared or preserved tomatoes to Australia. The Review Panel is only allowed to have regard to submissions received under s.269ZZJ, with one of the categories entitled to make submissions being "interested parties in relation to the reviewable decision". The definition of "interested party" is in s. 269ZX and the question arises if the EC can be considered to be an "interested party" for the purpose of s.269ZZJ. The EC represents the European Union (of which Italy is a member) in trade negotiations, is a party to the WTO Anti-Dumping Agreement (ADA), has competence in respect of trade in agriculture and handles disputes under that agreement for its members, so it understandable that it could be regarded as an interested party with respect to anti-dumping investigations involving its members. It is possible that the EC comes within (d) of the definition of interested party. However, as the information and conclusions put by the EC in its submission were similar to those put by the applicants, particularly Italy, or were made in previous submissions to the ADC, it has not been necessary to resolve the issue of the EC's standing in this review.

Grounds of Review

Feger

18. Feger is an exporter of prepared or preserved tomatoes, which are the goods that are the subject of the reviewable decision application. Feger is an "interested party" in relation to a reviewable decision within the meaning of s.269ZX of the Customs Act. [8]

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

    a. The initiation of the investigation lacked legal basis under World Trade Organization (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 overestimated Feger's 'finance costs'.

La Doria

20. La Doria is also an exporter of prepared or preserved tomatoes. La Doria is therefore an "interested party" in relation to a reviewable decision within the meaning of s.269ZX. [9]

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

21. The grounds of review relied upon by La Doria that the Review Panel accepted as reasonable grounds for the reviewable decision are almost identical to the first four grounds ((a) to (d)) of review of Feger, set out above. [10]

Government of Italy

22. Italy is the government of the country of export of prepared or preserved tomatoes and is therefore an "interested party" in relation to a reviewable decision within the meaning of s.269ZX. [11]

23. The grounds of review relied upon by Italy that the Review Panel accepted as reasonable grounds for the reviewable decision are almost identical to all five grounds ((a) to (e)) of review of Feger, set out above. [12]

Consideration of Grounds of Review

Feger, La Doria and Italy

24. I will now deal with the grounds of review put forward by Feger, La Doria and Italy, indicating any differences between the three applicants, if at all, in respect of their grounds of review or arguments relating thereto.

The initiation of the investigation lacked legal basis under World Trade Organization (WTO) law

25. Feger, La Doria and Italy all submit that the initiation of anti-dumping investigation No. 276 lacks legal basis under WTO law. Therefore, they claim, the ADC should not have initiated the investigation against Feger and La Doria and, as a consequence, the Parliamentary Secretary should not have adopted the reviewable decision.

26. This ground of review is almost identical for all three applicants and is made up of three separate sub-grounds or components:

    a. SPCA's complaint did not meet the standard of evidence necessary to trigger the initiation of an investigation pursuant to the WTO Agreement on Implementation of *Article VI of the General Agreement on Tariffs and Trade 1994* (ADA) and is contrary to Articles 5.2, 5.3 and 5.8;

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[10] Any differences in the grounds of review or arguments relating thereto will be addressed in the section entitled, "Consideration of Grounds of Review" below.
[11] See the definition of interested party in s.269ZX(f).
[12] Any differences in the grounds of review or arguments relating thereto will be addressed in the section entitled, "Consideration of Grounds of Review" below.

b. 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 negative determination; and

c. The scope of a fresh investigation must necessarily be country-wide.

27. This ground of review and its three components relate in effect to the decision of the Commissioner to initiate an anti-dumping investigation under Subdivision B of the Act. A preliminary issue arising is whether the Review Panel has the power to review such a decision. Section 269ZZA of the Customs Act sets out those Ministerial decisions that can be reviewed by the Review Panel and s.269ZZN sets out those decisions of the Commissioner that can be reviewed by the Review Panel. While a Commissioner's decision to **reject** an application for the imposition of dumping measures is reviewable, the decision of the Commissioner to initiate an investigation is not expressly mentioned in either section.

28. It could possibly be argued that the decision to initiate the investigation is a subsidiary decision made by the Commissioner, that underpins the operative and reviewable decision of the Parliamentary Secretary to eventually issue a dumping duty notice under s.269TG(1) and (2) of the Act. However, I do not think that such a wide interpretation of the Review Panel's powers is correct. As stated in ADRP No. 24, in a discussion of the Review Panel's powers:

> *" ..... the power to review, is to review the **operative decision**. It is not a power to "review" all or some of the calculations, assessments or subsidiary decisions made by or on behalf of the Commissioner that underpinned the operative decision if made by the Commissioner or as in this case informed, through a report, the decision-making of then Parliamentary Secretary."* (emphasis added)[13]

29. I therefore do not consider that it is a matter for the Review Panel to review the decision of the Commissioner to initiate the investigation, and this ground of review of all three applicants must fail.

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.

30. Feger, La Doria and Italy all submit that the upward cost adjustment to the cost of production of Feger and La Doria in order to reflect the alleged distortion of the raw tomatoes price in Italy, is ill founded and flawed. This in turn affected the dumping margins and individual duty rates determined by the reviewable decision.

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[13] See ADRP Report No. 24, paragraph 10.

31. This ground of review is almost identical for all three applicants. It will be considered under the two sub-headings used by all three applicants, although in the reverse order, for reasons which will become clear.

32. As background, s.269TAC(2)(c) of the Customs Act provides that where the normal value of goods exported to Australia cannot be ascertained under s.269TAC(1), the normal value of the goods may be constructed. [14] One of the key elements in the constructed normal value is the cost of production of the goods in the country of export, which is calculated in accordance with s.43 of the *Customs (International Obligations) Regulation 2015* (Regulation). Section 43(2) provides that if an exporter keeps records relating to like goods and the records are in accordance with generally accepted accounting principles in the country of export and *"reasonably reflect competitive market costs associated with the production or manufacture of like goods"*, the Minister must work out the costs using information set out in the records. In REP 276, the ADC found that the totality of direct income support payments made to growers of raw tomatoes in Italy significantly affected the prevailing market prices in Italy for raw tomatoes. Therefore, consistent with its usual policy and practice, the ADC was satisfied that the costs recorded by Feger and La Doria for raw tomatoes in their records do not reasonably reflect competitive market costs for the purposes of s.43(2) of the Regulation, and made an adjustment to the verified recorded costs to offset the direct income support payments in order to calculate what it considered to be the true cost of production.[15]

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

33. The applicants contend that the conclusion that the records of the two exporters 'do not reasonably reflect competitive market costs' is ill founded and the conditions for applying s.43(2) of the Regulation are not met in that:
    i. The ADC's conclusion that the prices for raw tomatoes in Italy are artificially low due to government influence is contradicted by the evidence collected during the investigation;
    ii. REP 276 provides no evidence or economic analysis demonstrating that in the absence of the SPS the market prices for raw tomatoes in Italy would be higher;
    iii. The cost adjustment is in contradiction with the ADC's conclusions on the 'particular market situation' in the Italian markets for PPT; and
    iv. The ADC's calculation of the amount of the alleged subsidy is ill-founded since the national ceiling for tomatoes no longer existed, and therefore impossible to calculate an amount of subsidy per kg of raw tomatoes produced in the investigation period, for the cost adjustment.

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[14] Also see s.269TAAD(4)(a) and (5) of the Customs Act.
[15] See Section 6.4.8 of REP 276, pages 30 – 31.

34. In the light of the applicants' claims and submissions, which appeared to have some merit, and which were not refuted by the ADC in REP 276 or by a s.269ZZJ submission, as well as some anomalies in the ADC's analysis, identified in the Reinvestigation Request, [16] I requested the Commissioner to reinvestigate the conclusion that the records of the two exporters 'do not reasonably reflect competitive market costs' for the purpose of s 43(2) of the Regulation and the calculation of the amount of the alleged subsidy for the purpose of calculating the cost adjustment.

35. The Commissioner states in the Reinvestigation Report that in order to address the matters that the Review Panel requested to be reinvestigated, he determined that it would be appropriate to provide interested parties with an opportunity to make submissions relating to the findings being reinvestigated. The Commissioner also sought additional relevant information and evidence from Feger, La Doria, the EC and SPCA.[17]

36. In the original investigation, the Commissioner was not satisfied that there was a situation in the market in Italy for PPT that would make sales of PPT in that market unsuitable for use in determining a price under s.269TAC(1).[18] It was still necessary for purpose of s.269TAC to determine if the domestic sales were sold in the "ordinary course of trade" (OCOT), and for that purpose to determine the cost of production of PPT in Italy for the exporters, with consideration to s.43(2) of the Regulation. This focusses on the issue as to whether the records of the exporter "reasonable reflect competitive costs" for the purpose of determining if the exporters' own information as set out in its records can be used.

37. In both *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* [2013] FCA 870 [19] and *Dalian Steelforce Hi-tech Co Ltd v Minister for Home Affairs* [2015] FCA 885,[20] Nicholas J held that it was 'open' to the Commissioner to conclude that the cost of an input did not reasonably reflect "competitive market costs" and not just actual costs.[21] These cases both related to the originally enacted regulation, that is, s.180(2)(b)(ii) of the *Customs Regulations 1926*, the predecessor provision of s.43(2) of the Regulation, Therefore, in accordance with Australian law, it is 'open' to the Commissioner to conclude that the cost of an input does not reasonably reflect "competitive market costs" (and not just actual costs) in the context of the market for raw tomatoes, for the purpose of s.43(2) of the Regulation.

38. The first step in this regard, was for the ADC to reinvestigate the value of the SPS payments and amounts received by the growers of tomatoes.

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[16] See Reinvestigation Request, pages 6 – 8.
[17] Non confidential versions of submissions are available on the ADC website, Investigation No. 360.
[18] See Section 6.3.3 of REP 276, page 25 and the Appendix to REP 276.
[19] See paragraph 91.
[20] See paragraph 41.
[21] This is discussed further under the second component of this ground of review.

39. The ADC considered that it had substantially better evidence obtained in the course of the reinvestigation, with both Feger and La Doria providing a significant amount of new information, as well as the EC. According to the Reinvestigation Report, this information and evidence, "*indicates that the value of SPS payments made to growers under the terms of the CAP varies according to the entitlements held*". According to the Reinvestigation Report, these entitlements are based on the land holding, and the payments are made regardless of crop or whether any part of the land remains fallow. The ADC quantified the value of the SPS payments received on a per hectare basis. Once the yield rate for tomato production in Italy in 2014 is factored into the volume of raw tomatoes actually purchased, the ADC found that the growers received approximately €0.014 / kg under the SPS during the investigation period, substantially less than the amount established in REP 276. The ADC was satisfied that its calculations in the reinvestigation, as a result of the additional information obtained and examined, are a more reasonable estimate of the amounts actually received by relevant growers of raw tomatoes under the SPS. [22]

40. The next step in the ADC's assessment was to consider whether, and to what extent, the amount of the SPS payments received influenced the prices paid by Feger and La Doria for raw tomatoes. In REP 276 the ADC found that the full value of the SPS payment amount to growers impacted prices for raw tomatoes, and therefore uplifted Feger's and La Doria's recorded raw tomato cost by this amount in order to reflect a competitive market cost in the dumping margin calculations. REP 276 noted that Feger and La Doria objected to the adjustment of the cost of production by the full amount of the subsidy paid to growers, and argued that only 73 per cent of the amount of the subsidy should have been applied, on the basis that this "flow on" amount was identified in the market situation assessment.

41. With regard to the applicants' claim relating to the comparatively high prices of tomatoes in Italy and the inability of the ADC to identify an alternative (and, higher) 'benchmark price' for raw tomatoes, the ADC noted that the prices paid in any market for raw tomatoes are a function of the different growing conditions, operating conditions and scale that may be prevalent. Accordingly, the ADC considered that without further evidence regarding the various economic factors, the comparison of prices in different markets is not sufficient to demonstrate that any given market is "competitive".[23]

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[22] For full discussion of the ADC's reinvestigation of this issue, see Chapter 4 of the Reinvestigation Report, pages 19 – 23.
[23] Section 5.4.1 of the Reinvestigation Report, page 26.

42. After some general comments on the economic theory of the extent of the SPS' influence on tomato prices and reference to the LECA report[24] , which expressed the view that, "*any amount of the SPS which flowed from the growers to consumers was unlikely to be zero, and equally unlikely to be 100 per cent*",[25] the ADC proceeded to do a comprehensive economic analysis on the actual impact of SPS on prices paid by Feger and La Doria.[26]

43. The ADC concluded that the evidence does not support a finding that the SPS resulted in tomato prices which were lower than they otherwise would have been but for the SPS and that the SPS had no discernible impact on the prices actually paid by Feger and La Doria for raw tomatoes during the investigation period. It was stated in the Reinvestigation Report:

> *"The Commissioner has obtained no other evidence of any other influence over the raw tomatoes market being exerted by the Government of the Italian Republic or the European Union which would cause him to conclude that the prices paid for raw tomatoes are otherwise uncompetitive."*[27]

44. Accordingly, the Commissioner made a new finding in the Reinvestigation Report that the market for raw tomatoes operates on a competitive basis and that therefore the costs recorded by Feger and La Doria in their respective accounts are competitive market costs. Since their respective records are in accordance with generally accepted accounting principles in Italy, the Commissioner concluded that the cost of production for each exporter must be worked out using the information set out in those records, in accordance with s.43(2) of the Regulation. I agree with the analysis and reasoning of the ADC in the Reinvestigation Report, and am satisfied that the new conclusions reached by the Commissioner with regard to the application of s.43(2) are the correct and preferable decisions.

45. Based on the conclusion that the cost of production for each exporter now be calculated by using the information set out in the exporters' own records, the ADC recalculated the normal value and dumping margin of La Doria (without the cost adjustment used in REP 276) and calculated a dumping margin of -9%,[28] and therefore it concluded that the goods exported by La Doria were not dumped. I accept this new conclusion with regard to La Doria, as the correct and preferable decision.

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[24] Prior to the publication of SEF 276 the ADC engaged Law and Economics Consulting Associates (LECA) to analyse the (CAP) and SPS in relation to a market situation in Italy. There are numerous references to the LECA report in REP 276 , listed in the electronic public record as Document #040
[25] See Section 5.4.2 of the Reinvestigation Report, page 27.
[26] For the ADC's detailed analysis, see Chapter 5 of the Reinvestigation Report (pages 24 – 34 and Confidential Attachments 1, 2 and 3.
[27] See Section 5.1 of the Reinvestigation Report, page 24.
[28] See Confidential Attachment 6 to the Reinvestigation Report.

46. Similarly, the ADC recalculated the normal value and dumping margin of Feger without the cost adjustment used in REP 276. However, since Feger has additional grounds of review relating to various adjustments, its recalculated normal value and dumping margin will be considered below.

The cost adjustment infringes WTO law

47. The applicants contend that the decision to adjust upwards the cost of raw tomatoes as a component of the overall cost of production of Feger and La Doria infringes WTO law since:

i. Assessing the impact of the SPS in the framework of an antidumping rather than a countervailing investigation is contrary to WTO law. [29] The applicants also claim that the SPS is a fully WTO-compatible income support scheme which does not give rise to any market distortion and which, it is claimed, is a non-specific and fully decoupled income support;[30] and

ii. The 'cost adjustment' applied by the ADC in accordance with s.43(2) of the Regulation is not compliant with Article 2.2.1.1 of the ADA.

48. Firstly, In the light of the new finding by the ADC that the market for raw tomatoes operates on a competitive basis and that therefore the costs recorded by Feger and La Doria in their respective accounts are competitive market costs, with no cost adjustment made, I do not consider it necessary to make a finding relating to (i) above. I should, however, point out that similar claims were made by the applicants in Investigation No. 276, in regard to the ADC's assessment of "particular market situation" under s.269TAC(1) (read with s.269TAC(2)(a)(ii)). In addressing this claim, the ADC pointed out that in examining the effect of the SPS in this investigation it is not limited in terms of the factors it may examine when assessing whether there is a situation in the Italian market, such that sales of prepared or preserved tomatoes in that market, are unsuitable for use in determining normal values under subsection 269TAC(1).

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[29] Reference is made by the applicants to Article 32.1 of the *WTO Agreement on Subsidies and Countervailing Measures* ('SCMA') which stipulates that, "no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".

[30] The applicants contend that the SPS is a 'green-box' measure fully compliant with the requirements of Annex II to the WTO Agreement on Agriculture, which provides the rules for determining when a '[d]omestic support measures [has] no, or at most minimal, trade-distorting effects or effects on production'. According to the applicants the SPS is fully legal and, therefore, is deemed to have no trade distorting effects.

49. I agree with the ADC's analysis in this regard, and the application of this analysis to the ADC's assessment of whether the costs recorded by the exporter "*reasonably reflect competitive market costs*" associated with the production or manufacture of like goods, in accordance with s.43(2) of the Regulation. The considerations for determining whether the costs of the exporter *"reasonably reflect competitive market costs*" are specific to s.43(2) and distinctly different to investigations of subsidy programs for the purpose of recommending a countervailing duty notice under section 269TJ and in terms of the SCMA. As mentioned above, Under Australian law, it was open to the ADC to take into consideration whether and to what extent the SPS was impacting on the cost of raw tomatoes for the purpose of s.43(2), irrespective of whether SPS is a 'green-box' measure in accordance with WTO Agreement on Agriculture.

50. Secondly with regard to the WTO compliance of the cost adjustment, referred to in (ii) above, the applicants contend that 'cost adjustment' applied by the ADC in accordance with s.43(2) of the Regulation is not WTO compliant since Article 2.2.1.1 of the ADA requires the records of the exporting producers to 'reasonably reflect' the costs associated with the production and sale of the product under consideration and not the costs associated with the production of any input (the word 'reasonably' referring to the verb 'reflect', not to the noun 'costs'). Therefore it was contended that Article 2.2.1.1 does not require that the costs in the records of the exporting producer should be 'reasonable' or that they should reflect the actual costs of production of any input. In this regard, Orange & Green referred to a recent WTO Panel Report, *EU – Biodiesel*, [31] where it was held that the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.

51. In the light of the ADC's new finding with regard to the cost adjustment, I do not consider it necessary to address this issue directly or assess the impact *of EU - Biodiesel*. It is, however, clear that under Australian law the reference in s.43(2) to "reasonably reflect competitive market costs" requires an examination of the costs recorded by an exporter to assess both reasonableness and competitiveness. As noted in the Reinvestigation Report when the ADC confirmed its rejection of the applicants' contentions with regard to Article 2.2.1.1, noting that the expression used in s.43(2) is different to Article 2.2.1.1 of the ADA, which uses the words "*reasonably reflect the costs associated with the production and sale of the product under consideration."* According to REP 276:

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[31] *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R, (EU – Biodiesel) It should be noted that since the submission of Orange and Green, the Appellate Body has issued its report, confirming the Panel's decision with regard to Article 2.2.1.1. See WT/DS473/AB/R, paragraph 6.10.

> "*Australia's domestic legislation places an emphasis on the costs not only being "reasonable" but also "competitive" and the Commission's approach gives effect to the intent of the Government when it applies this section of the Regulation."* [32]

52. The ADC makes reference to Pilkington (Australia) Ltd v Minister of State for Justice and Customs [2002] FCAFC 423 (the Pilkington case)[33], which provides that WTO jurisprudence may assist in interpreting Australia's anti-dumping law only where a statute is ambiguous.

53. I agree with the approach of the ADC to give effect to Australia's domestic legislation as confirmed by the Australian courts in the *Pilkington* case.

The ADC wrongly determined the magnitude of the cost adjustment and its impact on the dumping margins of Feger and La Doria

54. The applicants contend that 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 values for Feger and La Doria.

55. As discussed above, ADC concluded in the Reinvestigation Report that the costs recorded by Feger and La Doria in their respective accounts are competitive marketing costs, and that the cost of production for each exporter be calculated using the information set out in their records, without any cost adjustment. Since I have accepted this conclusion, it is not necessary to address this particular ground of review generally nor to specifically address the three components of this ground of review, as presented by the applicants in their respective applications. It should be noted that in its analysis of the preceding ground of review, and in coming to the conclusion that the costs recorded by Feger and La Doria are 'competitive market costs' for the purpose of s.43(2) of the Regulation, the ADC in fact analysed in depth and recalculated the alleged subsidy per kg of raw tomatoes, as part of the process of reinvestigation, as well as addressing the issue of the pass-through analysis.[34]

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[32] Section 3.4.2 of the Reinvestigation Report.
[33] See paragraph 97.
[34] See Chapter 4 of the Reinvestigation Report, pages 19 – 23.

Other flaws affecting Feger's dumping margin calculation

56. Feger and Italy contend that 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 overestimated Feger's 'finance costs'. La Doria did not include this or similar claims as a ground of review in its application for review.

57. Italy addressed this ground of review in general terms in both its application for review and its submission in terms of s.269ZZJ, while Feger addressed this ground of review in detail, supported by confidential information. This ground of review will be considered under the three sub-headings used by Feger.

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

58. Feger and Italy submit that in REP 276, the ADC claimed that the allocation used by Feger would not 'reasonably represent' the expenses incurred for PPTs, however, in the previous Investigation No. 217, the same documentary evidence provided in the present investigation and the same allocation method was considered sufficient and adequate to warrant an identical claim. Feger and Italy submitted that the ADC provided no explanation of why an allocation by turnover would not 'reasonably represent' the expenses incurred for the product concerned, considering that the same allocation was used for other adjustments in respect of which the ADC did not raise any criticism. Feger and Italy claim that the ADC's refusal to grant the domestic adjustments under discussion is unjustified and contrary to Articles 2.2.1.1 and 2.4 of the ADA.

Adjustment for advertising expenses

59. Addressing the issue of advertising expenses separately and in greater detail in its s.269ZZJ submission, Feger referred to the Manual, which states that 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)[35].

60. Feger contends that in the present case, it was demonstrated that Feger reimburses the advertising cost incurred by certain domestic customers and claims that by unwarrantedly rejecting a "well-founded and substantiated claim" for an adjustment aimed at offsetting an imbalance between domestic and export

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[35] The Manual, page 74.

sales, would give rise to an unfair comparison, contrary to section 269TAC(8) of the Customs Act.

61. Feger referred to the ADC statement in Confidential Appendix 3 to REP 276 that:

[redacted][36]

62. Feger pointed out that as regards to the cases where [redacted] not only is the allocation method by turnover correct but it is also the only method that can be followed, and as regards the cases where [redacted] the allocation of such expenses on a turnover basis appears to be appropriate and reasonable. Feger also pointed out that the allocation method used for the 'advertising' adjustment is the same used for other adjustments which were granted by the ADC.

63. Feger also drew attention to the fact that although these submissions were already contained in Feger's confidential comments on the SEF filed with the ADC on 22 September 2015, REP 276 (including Confidential Attachment 3 thereto) did not address Feger's arguments.

64. After taking into consideration all relevant documents and parties' applications and submissions to the Review Panel, as well as to the ADC in both Investigations No. 276 and No. 217, and since there appeared to be some merit in various contentions of Feger relating to the rejection of this adjustment, I requested the ADC to reinvestigate the advertising adjustment claim (together with the quality control adjustment claim), in particular with regard to:

- the fact that in Investigation No. 217, the same documentary evidence provided and the same allocation method was considered sufficient and adequate to warrant an identical claim; and
- why an allocation by turnover would not 'reasonably represent' the expenses incurred for the product concerned, considering that the same allocation was used for other adjustments in respect of which the ADC did not raise objections.

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[36] See Confidential Attachment 3 to REP 276.

65. With regard to the issue referred to in the first bullet point in the paragraph above, the ADC merely stated in the Reinvestigation Report that it considers that the evidence that Feger provided in relation to advertising costs in the context of REP 217 "*is specific and relevant only to that investigation and the particular period and circumstances relating to that investigation*",[37] without any real explanation as to the differences that led the ADC to taking a different decision in Investigation No. 276. The ADC did not either specifically address the issue that I raised in Reinvestigation Request, referred to in the second bullet point in the paragraph above, merely stating:

> "*The Commission notes that Feger did not provide any new evidence to support its claims for advertising and quality control adjustments to its normal value. The Commission has re-examined the material before it in the context of this reinvestigation and has determined that the data submitted by Feger does not constitute sufficient positive evidence to support such adjustments. The Commission notes that this view was consistently maintained in the verification report, the SEF and the Final Report; the reasoning set out in Confidential Attachment 3 to REP 276 (included here as Confidential Attachment 4) remains the Commission's position.*" [38]

The ADC therefore reaffirmed the finding made in REP 276 relating to the rejection of the advertising adjustment.

66. On 4 November 2016 a conference was held with the ADC, pursuant to s.269ZZHA of the Customs Act (the Conference), amongst other issues, to seek clarification on certain issues relating to this adjustment claim and to clarify some apparent anomalies in the documentation. The Conference involved confidential information relating to Feger.

67. After having regard to the Reinvestigation Report, the clarifications gleaned from the Conference and all other relevant information, I am not satisfied with the ADC's reasoning and explanation in regard to its rejection of this adjustment, particularly, in light of Feger's comprehensive submissions and evidence submitted in support of this ground of review. The ADC was unable to provide an adequate explanation to distinguish the circumstances of the claims in the two investigations, where the same documentary evidence was provided and the same allocation method was considered sufficient and adequate to warrant an identical claim in Investigation No. 217. The ADC was also unable to provide credible reasons why an allocation by turnover was not appropriate, considering that the same allocation was used for other adjustments in respect of which the ADC did not raise objections. I therefore consider that the decision of the ADC to

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[37] See Section 6.4 of the Reinvestigation Request, page 37.
[38] See Section 6.4 of the Reinvestigation Report, page 37.

reject the advertising adjustment, as reaffirmed in the Reinvestigation Report, is not the correct and preferable decision.

Adjustment for quality control expenses

68. Feger contends that the same arguments made in respect of the advertising expenses also apply to the quality control expenses (see above). In particular, the fact that an invoice paid by Feger may cover quality control expenses relating to PPTs as well as other product(s) should be irrelevant to decide about the claim for an adjustment. As with the advertising expenses, 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.

69. Feger addresses the issue of quality control expenses separately and in greater detail in its s.269ZZJ submission.[39] In particular, Feger's submission addresses various statements and concerns relating to this adjustment claim that the ADC articulated in Confidential Attachment 3 to Rep 276. Feger also provided detailed explanations and clarifications, in my view comprehensively and persuasively, of the three issues raised by the ADC in Confidential Attachment 3.[40]

70. Feger also drew attention to the fact that all the detailed observations and explanations referred to were contained in the confidential comments to the SEF that Feger filed with the ADC on 22 September 2015. However, Feger claimed that REP 276 completely overlooked such detailed explanations and comments, and claims that the ADC's decision not to grant the 'quality control' adjustment is manifestly groundless, and should therefore be revoked.

71. As mentioned with regard to advertisement expenses, after taking into consideration all relevant documents and parties' applications and submissions to the Review Panel, as well to the ADC in both Investigations No. 276 and No. 217, and since there appeared to be some merit in various contentions of Feger relating to the rejection of this adjustment, I requested the Commissioner to reinvestigate the quality control adjustment (together with the advertising expenses claim). The Reinvestigation Report addressed Feger's claim relating to the quality control expense together with the claim relating to advertising expenses, and the ADC reaffirmed the finding made in REP 276 relating to the rejection of the quality control adjustment.[41]

72. At the Conference, referred to above, I also sought clarification on certain issues relating to Feger's quality control claim. As in the case of the advertising expenses adjustment, having regard to the Reinvestigation Report, the clarifications gleaned from the Conference and all other relevant information, I

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[39] See Manual, page 58.
[40] See Section 5.1.2 of Feger's Submission (confidential version), pages 37 – 38, for Feger's clarifications and explanations.
[41] See Section 6.4 of the Reinvestigation Report, page 37.

was not satisfied with the ADC's reasoning and explanation in regard to its rejection of this adjustment, particularly, in light of Feger's comprehensive submissions and evidence submitted in support of this ground of review. The ADC was unable to provide an adequate explanation to differentiate the circumstances of the claims in the two investigations, where the same documentary evidence was provided and the same allocation method was considered sufficient and adequate to warrant an identical claim in Investigation No. 217. The ADC was also unable to provide credible reasons why an allocation by turnover was not appropriate, considering that the same allocation was used for other adjustments in respect of which the ADC did not raise objections. The ADC merely reconfirmed its view as set out in Confidential Attachment 3 to REP 276, and did not address the detailed explanations and clarifications of Feger in its submission to the Review Panel (and during the course of Investigation No. 276), in response to the issues raised by the ADC in Confidential Attachment 3.

73. I therefore consider that the decision of the ADC to reject the quality control adjustment, as reaffirmed in the Reinvestigation Report, is not the correct and preferable decision.

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

74. Feger contends that, as it extensively explained during the on-site visit and acknowledged in Feger's Verification Report, that the Italian market for PPTs is complex and competitive requiring extensive activities and expenses on the part of the sellers, while sales to Australia do not require the same efforts. The differences in markets were detailed in Feger's submission. [42]

75. As a result, Feger contends that it incurs considerably higher expenses to sell PPTs in Italy than in Australia, demonstrated by the fact that the number of sales staff dedicated to the domestic market is higher than the number of staff dedicated to the export markets. Feger states that in this respect, as explained to the ADC, a certain number of staff are dedicated to domestic sales, involved in direct selling activities which are not carried out with respect to export sales. [43] Feger contends that in order to reflect the overall higher costs incurred for domestic sales as compared to sales in Australia, the cost for these staff involved in direct selling activities in the Italian market should be deducted from the normal value in order to ensure a fair comparison. Feger explained that 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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[42] See Section 5.2 of Feger's submission.
[43] Feger lists these activities at Section 5.2 of its confidential submission, page 39.

76. The ADC decided not to grant the requested adjustment in Investigation No. 276 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'*",[44] which conclusion Feger rejects. Feger claims that the expenses relating to the staff 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) cannot be considered as 'general expenses' since they do not concern all Feger's sales, but only the sales made in the domestic market. Feger also points out that although it 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.

77. Feger therefore contends that a downward adjustment should be made to Feger's normal value to duly reflect the differences in the conditions and terms of sale between Feger's domestic and export sales.

78. Since I was requesting the ADC to reinvestigate the rejection of the adjustment claims with regard to 'advertising' and 'quality control' expenses, I requested the ADC to also reinvestigate the rejection of what Feger referred to as 'administration' costs during the investigation but claims relate to direct selling activities performed by Feger's staff dedicated to Italian customers, taking into consideration the arguments contained in Feger's Submission.

79. In the Reinvestigation Report, the ADC referred to the Manual which states that adjustments will not be made for differences in general sales and administration expenses, when those expenses relate more to the general cost of doing business and are spread across all sales of the company. The ADC considers that general expenses of this nature do not fall within the scope of the expression *"differences in conditions and terms of sale*". [45] The ADC stated that it had re-examined the arguments contained in Feger's submission to the original investigation and the extra information it provided prior to the publication of REP 276 regarding this claim for a downwards adjustment. While the ADC observed that Feger has incurred domestic administration costs, it noted that these costs are allocated across all products and not only to PPTs, which indicates that the costs are related to the general cost of doing business. The ADC considered that Feger has not provided sufficient positive evidence that demonstrates price comparability has been affected and noted that the information provided during the reinvestigation contains no additional evidence that the domestic prices or export prices were modified by way of these expenses. Having reinvestigated

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[44] Section 6.5.5 of REP 276, page 34.
[45] See Manual, page 60.

Feger's claims for a downwards adjustment to the normal value in respect of administration costs, the ADC reaffirmed the finding made in REP 276.[46]

80. I consider that the ADC's approach and analysis of this adjustment claim, both in respect of REP 276 and in the Reinvestigation Report, to be reasonable and not contrary to Australian legislation [47] or practice[48], or indeed, WTO jurisprudence relating to Article 2.4 of the ADA. The Appellate Body has stated:

> "*If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment. Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited.*"[49]

81. I therefore accept the finding of the ADC in REP 276 and reaffirmed in the Reinvestigation Report, to reject Feger's claim for a downward adjustment to normal value in respect of 'administration' costs.

The ADC overestimated Feger's 'finance costs'

82. In its application for review, Italy summarised the claim of Feger and Italy that the ADC added to Feger's cost to make and sell (CTMS) an amount for the so-called 'finance costs' borne by Feger, calculated on the basis of Feger's financial statement. This amount represents the negative interests that Feger pays to banks for borrowing money. However, it was claimed that it was documented that during the investigation period such money (triggering the negative interests at stake) was also used for extraordinary expenses not related to the production and sale of PPTs. Thus, the 'finance costs' to be included in Feger's CTMS should correspond to the interests paid with respect to the cash borrowed by Feger to finance its sales of PPTs only. As a result, it was claimed that the ADC overestimated the 'finance cost' to be included in Feger's CTMS for PPTs.

83. Feger contends that the ADC's calculation 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, which Feger claims is not correct. Feger points out that there is an amount in the financial statement that corresponds to the negative interests that Feger pays to the banks for borrowing money. In this respect, it notes that Feger is a small, family company with a non-sophisticated accounting system and limited access to credit lines, and as a matter of fact, Feger uses the money obtained from the same credit lines (triggering the negative interests under discussion) to finance

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[46] See Section 6.5 of the Reinvestigation Report, page 38.
[47] The sub-sections dealing with adjustments are s.269TAC(8) and 269TAC(9) of the Customs Act.
[48] See Chapter 14 of the Manual dealing with "Due Allowance".
[49] European Communities – *Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (EC - Fasteners (China)), para 488.

all its operations, including extraordinary operations not related with the production and sales of PPTs. In this respect Feger submitted evidence, in the course of Investigation No. 276, demonstrating that in the year 2014 (i.e., the investigation period) the credit lines at stake financed certain financial expenses (examples were provided) that 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, which reflect the trade credit terms relating to each sale of PPTs.[50]

84. On this basis, Feger calculated the 'finance cost' attributable to the product under investigation, which Feger considered to be appropriate and reasonable for the calculation of the 'finance cost' specifically relating to PPTs. Feger therefore disagreed 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*" and 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 a lesser percentage amount.

85. Since I was requesting the ADC to reinvestigate the rejection of the adjustment claims with regard to 'advertising' and 'quality control' expenses, I also requested the ADC to also reinvestigate Italy and Feger's claim that the ADC overestimated Feger's so-called 'finance costs'.

86. In the Reinvestigation Report, the ADC stated that the onsite verification of Feger's data confirmed that its records are in accordance with the generally accepted accounting principles in Italy and that those records reasonably reflect the administrative, general and selling costs associated with its sale of the like goods. As a result, and in accordance with section 44 of the Regulation, it used the amount recorded in Feger's financial records to calculate an amount of finance expense for normal value purposes in REP 276. Further, the ADC stated that the reinvestigation considered Feger's claim that the amount recorded in its 2014 income statement includes interest expenses in relation to borrowings for extraordinary expenses not related to the production and sale of PPT. It was stated:

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[50] See Section 5.3 of Feger's submission, pages 40 – 41.

"The Commission is satisfied that although the evidence indicates that certain cash outflows may have occurred during 2014, the evidence fails to indicate what the extraordinary expenses were or link the cash outflows in 2014 to the "extraordinary expenses". Further, Feger has not provided any positive evidence to the Commission to support the validity of the claim that the finance cost that should be attributed to PPT is equal to the credit cost incurred only on domestic sales of like goods." [51]

87. The ADC therefore reaffirms its finding made in REP 276 relating to Feger's claims for a downwards adjustment to the normal value in respect of finance costs. I consider that the ADC's approach and analysis of Italy and Feger's challenge of the rejection of Feger's claim for a downward adjustment to normal value in respect of finance costs, both in respect of REP 276 and in the Reinvestigation Report, to be reasonable and not contrary to Australian legislation or practice. I therefore accept the finding of the ADC in REP 276 and reaffirmed in the Reinvestigation Report, to reject Feger's claim for a downward adjustment to normal value in respect of 'finance costs'.

Consequential Impact on Feger's Dumping Margin Calculations

88. As mentioned above, based on the conclusion that the cost of production for each exporter now be calculated by using the information set out in the exporters' own records, the ADC recalculated the normal values and dumping margins of the two exporters (without the cost adjustment used in REP 276). This led to the new conclusion that the goods exported by La Doria were not dumped, which I accepted as the correct and preferable decision. As also mentioned, the ADC recalculated the normal value and dumping margin of Feger without the cost adjustment used in REP 276. However, since Feger had additional grounds of review relating to various adjustments, its recalculated normal value and dumping margin would be considered once the conclusions had been reached on these adjustments.

89. In summary, with regard to the Feger and Italy's ground of review, entitled 'Other Flaws Affecting Feger's Dumping Margin', I have found that the ADC's decisions in the Reinvestigation Report:

- to reject Feger's claim for a downward adjustment to normal value for advertising expenses, **is not** the correct or preferable decision;
- to reject Feger's claim for a downward adjustment to normal value for quality control, **is not** the correct or preferable decision;
- to reject Feger's claim for a downward adjustment to normal value for administrative costs, **is** the correct or preferable decision;

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[51] See Section 6.6 of the Reinvestigation Report, page 39.

- to reject Feger's claim for a downward adjustment to normal value for 'finance costs', **is** the correct or preferable decision;

90. Based on the ADC's findings in the reinvestigation, it recalculated Feger's normal value with no uplift made to the recorded cost of raw tomatoes, and no downward adjustments to normal value based on the various claims by Feger. The revised dumping margin for Feger was calculated to be 5.6%. [52]

91. In the Reinvestigation Request I particularly requested that if after the reinvestigation the ADC reaffirmed its findings in REP 276 that the downward adjustments to normal value claimed by Feger should be rejected, the ADC should provide the Review Panel with the calculations, as if the adjustments had been accepted, since the Review Panel may require this information to calculate normal value and the dumping margins for Feger in the event that it does not accept the ADC's reinvestigated finding as the correct or preferable decision, and is required to substitute its own specified decision. The ADC acknowledged the request in the Reinvestigation Report and provided the Review Panel with an "inputs" worksheet for each dumping margin calculation. From this, the amount of accepted adjustment can be selected and the consequential impact on the dumping margin can be calculated. At the Conference with the ADC referred to above, I requested clarification on the workings of the "inputs" worksheet for Feger's dumping margin calculation and requested the ADC to recalculate the normal value and dumping margin of Feger, based on the acceptance of the adjustments for advertising and quality control, in accordance with the decision of the Review Panel. The recalculated dumping margin of Feger was calculated to be 4.8%, in accordance with the Revised Confidential Attachment 5 to the Reinvestigation Report.

The injury and causality assessment carried out by the ADC is flawed

92. Feger, La Doria and Italy all submit that the injury and causality assessment undertaken by the ADC suffers serious methodological flaws and is inconsistent with the WTO law requirements. This in turn, resulted in vitiated conclusions based on which the Parliamentary Secretary adopted the reviewable decision.

93. This ground of review is almost identical for all three applicants. It will be considered under the three sub-headings used by all three applicants.

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[52] The dumping margin calculations for Feger were included in Confidential Attachment 5 to the Reinvestigation Report.

The injury assessment should not have covered the period before 1 July 2013

94. The applicants point out that the injury analysis period (1.01.2010 - 31.12.2014) of Investigation No. 276 substantially overlaps with the injury analysis period of the previous investigation No. 217 (1.01.2009 - 30.06.2013), in which it was determined that the dumping margins of both Feger and La Doria was *de minimis* and their exports did not therefore cause any injury to the Australian industry. The applicants contend that the ADC should have limited the injury analysis period of the new investigation between 1.07.2013 and 31.12.2014, and therefore, according to the applicants the ADC's decision to re-investigate the injury and causality with regard to the period before 30.06.2013 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.

95. In their respective submissions pursuant to s.269ZZJ of the Customs Act, the applicants refer to WTO case law which they contend 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 ADA 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.[53]

96. Thus, the applicants claim that the ADC's conclusion in Investigation 276 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 is illogical and contradictory. According to the applicants it follows that - since in the previous investigation the two exporters have been found not to export at dumped prices - it would be illegal for the ADC to consider that the injury (if any) suffered by the Australian industry before 1 July 2013 was caused by the imports of the PPTs manufactured by Feger and La Doria. It remains that the only relevant period for the purpose of the injury analysis is the period between 1 July 2013 and 31 December 2014 (i.e. the end of the investigation period) and since the Commission has carried out the injury assessment based on the period 2010-2014, it follows that the injury determinations are irremediably flawed.

97. In addressing this issue in REP 276, the ADC states:

> *"In response to the SEF, Feger and La Doria submit that the injury analysis period cannot encompass any period of time prior to 1 July 2013 due to a*

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[53] The applicants refer to Panel Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R (EC – Fasteners (China)), paragraph 7.354. In their Comments on SEF 276 (See Document #063 of the Public File) Feger and La Doria also refer *European Communities – Anti-Dumping Measure on Farmed Salmon From Norway*, WT/DS337/R, paragraph 7.625.

finding of de minimis dumping margins for Feger and La Doria in Inv 217. [footnotes omitted]

As discussed at section 2.2.1 of this report, the Commission is satisfied that the current investigation is a new investigation encompassing a different investigation period. Moreover, there is nothing in the legislation which requires the Commission to limit its injury analysis to a period where dumping has occurred or where significant dumping margins have been found to exist. In fact, subsection 269T(2AD) implicitly allows the Parliamentary Secretary to examine periods before the investigation period for the purpose of determining whether material injury has been caused to the Australian industry. [footnoted omitted]" [54]

98. While the ADC is correct in its statement that s.269T(2AD) of the Customs Act specifically does not exclude the Parliamentary Secretary from examining periods before the investigation period for the purpose of determining whether material injury has been caused to an Australian industry, at the same time s.269T(2AD), does not appear to contradict or detract from the principle established in the WTO jurisprudence referred to by the applicants, that when there is a finding of de minimis dumping margins by a particular producer or exporter, then imports attributable to such producer or exporter may not be treated as "dumped" imports for the purposes of the injury determination. Therefore, it would seem that while the ADC may "examine" what I refer to as the 'de minimis period' in its injury analysis, it may not treat the imports of Feger and La Doria as dumped for this period, for purposes of making the injury determination. Any injury suffered by SPCA relating to this period should not form part of the ADC's consideration of a positive finding of a particular injury factor. I therefore requested the ADC to reinvestigate its injury determination without attributing any injury suffered by SPCA in the de minimis period, to Feger and La Doria.[55]

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[54] See Section 7.3 of REP 276, pages 40 – 41. Section 269T(2AD), which is referred to in the extract from REP 276 provides:

"*The fact that an investigation period is specified to start at a particular time does not imply that the Minister may not examine periods before that time for the purpose of determining whether material injury has been caused to an Australian industry or to an industry of a third country.*"

[55] See reference to Finding 1a in the Reinvestigation Request, pages 2 – 3.

99. In the Reinvestigation Report relating to this issue, the ADC does not dispute the principle established by WTO jurisprudence, referred to by the applicants, and states that the dumping of PPT which occurred during the investigation period for REP 276 (calendar year 2014) can only be considered to be a cause of injury to the Australian industry if that injury was experienced during the same period. The ADC states in the Reinvestigation Report that, "*Whilst REP 276 did examine the period from 2010, this examination was to provide context for what has occurred to SPCA's injury indicators over that time*". The ADC acknowledges that REP 276, *"could have been clearer on this point*", but confirms that, "*the findings with regard to price suppression, profit and profitability relate solely to the movement in those indicators between the immediately prior period (that is, 2013) and the period in which dumping was found to have occurred (that is, 2014)*", and that *it "did not make a finding that either Feger or La Doria's exports of the goods were dumped by reference to any period other than the investigation period for REP 276.*" [56]

100. The concerns I had with REP 276 relating to this sub-ground of review of the applications were therefore clarified in the Reinvestigation Report and I am satisfied that the injury findings relate solely to the movement of the various indicators between the 'de minimis period' (that is before July 2013) and the period in which dumping was found to have occurred (that is, 2014). I was also satisfied that in making its finding on this issue in the reinvestigation, the ADC took into account that only Feger's exports were dumped during the investigation period.[57]

The ADC's undercutting analysis is vitiated by several flaws

101. The applicants contend that the ADC's undercutting analysis is vitiated by several flaws in that:

- the analysis was based on sales and cost data of importers. However the ADA requires the injury analysis to be based on the prices of dumped imports, and not on the re-sale price of such imports;
- FIS prices are not a suitable benchmark for the undercutting analysis, since they are affected by factors (e.g., the importer's profit, the effects of the exchange rate) upon which the two exporters have no control;
- the ADC used data 'ascertained from verified importers data from the previous dumping investigation'. It is unclear why the ADC had to use data not relating to the investigation period.

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[56] See Section 7.4 of the Reinvestigation Report, pages 41 – 42.
[57] See reference made to this in the last sentence of Section 7.4 of the Reinvestigation Report, page 42.

102. I do not consider that there is a basis for the applicants' contentions in the first two bullet points. The ADC's price cutting analysis would appear to be in accordance with the Australian legislation and practice relating to the price undercutting analysis. Section 269TAE(1)(e) provides for the Minister to have regard to, amongst other, the difference between the price that has been or is likely to be paid for the goods produced and manufactured in the Australian industry and sold in Australia and "*the price that has been or is likely to be paid for goods of that kind exported to Australia from the country of export* ***and sold in Australia***" (emphasis added), without reference to any specific level of trade. One of the alternatives specifically provided for in the Manual, is that when examining prices the ADC "may" take into account, "*the difference between the price paid or payable for the goods produced in Australia and the landed duty paid into store cost of the imported goods at the same level of trade.*" [58] In addition, it would appear that WTO jurisprudence does not support the applicant's submissions. [59]

103. With regard to the third bullet point of the applicants' contentions, that the ADC inappropriately used data 'ascertained from verified importers data from the previous dumping investigation', I examined Confidential Attachment 9 to REP 276, which was referenced in the ADC's discussion on price undercutting in REP 276. [60] It was clear to me from the ADC's general notes to Confidential Attachment 9 that the price undercutting analysis focused on "*data that covers transactions made during the investigation period*" and that the analysis compared the price of the imported goods with the sales price of the locally produced goods, ensuring that the transactions are made under the same conditions. The import prices used in the analysis were from *"transactions made during the investigation period*". However, since the analysis was based on the free into store (FIS) price, the ADC "*constructed"* the price to the DDP level using the *"best data available*". The author of the spreadsheets containing the undercutting analysis, stated in the general notes, "*So as to express the best available import prices as "delivered", I have "constructed" to the DDP level the best available data to me (using either the importer questionnaire responses, previously verified data from Inv. 217 or the ACBPS import data) and then made adjustments for the importation costs.*" The ADC stated in REP 276 that:

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[58] See Section 43 of the Manual, page 16.
[59] In *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (Egypt — Steel Rebar), Turkey had argued that, to satisfy the requirements of Article 3.2, a price undercutting analysis must be made on a delivered-to-the customer basis, as, in its view, it is only at that level that any such undercutting can influence customers' purchasing decisions. The Panel did not find on the basis of the plain text of Article 3.2 any requirement that the price undercutting analysis must be conducted in any particular way, that is, at any particular level of trade. (see paras. 7.70 and 7.73.)
[60] See Section 8.5.2 of REP 276, page 51.

> *"Where available, the Commission used amounts for shipping and importation costs, into-store costs and the gross margins for importers for 2014. Otherwise, the Commission used such data ascertained from verified importers' data from Inv 217."*

It is clear to me that it was only in respect of the 'construction' to the DDP level that the ADC used data from verified importers' data from Investigation No. 217, and only then in cases where importers did not submit questionnaire responses in Investigation No. 276. It was equally clear to me that the FOB import prices used were from transactions during the investigation period of Investigation No 276. I am satisfied that the approach adopted by the ADC in this regard is reasonable.

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

104. The applicants contend that the ADC's conclusions on price suppression and profitability are unsubstantiated. In particular, it is claimed that the ADC failed to explain its conclusions in the light of the increase of SPCA's unit CTMS over the investigation period despite the fact that, in the same period, SPCA's sales volumes significantly increased (as acknowledged by REP 276) and its domestic prices for PPTs increased. According to the applicants an increase of sales volumes should normally lead to a reduction, and not to an increase of the unit CTMS.

105. Reference was made to Article 3.1 of the ADA which provides that a determination of injury shall be based *on "positive evidence and involves an objective examination of.....the effect of the dumped imports on prices in the domestic market for like products ....."*. The Applicants claim that the ADC failed to give any explanation based on 'positive evidence' as to why the increase in CTMS was caused by the alleged dumped imports. The applicants contend that the ADC's failure to assess the above-mentioned key factors clearly demonstrates that the injury assessment in REP 276 is incomplete and inadequate to support the ADC's conclusions on injury. The applicants contend, moreover that the ADC failed to demonstrate that the price suppression allegedly suffered by SPCA was 'significant' as required by Article 3.2 of the ADA. The applicants also claim that the finding on reduced profit and profitability is unsubstantiated and ill-founded for the same reasons since it is made clear in REP 276 that such conclusions were, *"derived only from SPCA's sales and cost data of like goods*",[61] that is, from the price suppression analysis.

106. In the light of the applicants' submissions, I requested the ADC to reinvestigate its finding in this regard, with a particular emphasis on providing an analysis and explanation of the increased CTMS, notwithstanding the substantial increase in

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[61] See Section 7.7 of REP 276, page 45.

sales volume, and an explanation, as to why any injury in this regard is caused by the alleged dumped imports.

107. As mentioned above, it was stated in the Reinvestigation Report that in order to address the matters that I asked to be reinvestigated, the ADC determined that it would be appropriate to provide interested parties with an opportunity to make submissions relating to the findings being reinvestigated. The ADC also sought additional relevant information from various parties, including SPCA. The ADC stated that it received a submission from SPCA on this aspect of the reinvestigation and met with SPCA in order to clarify its understanding of the data.

108. The new more detailed analysis showed that SPCA's cost of production increased since 2012 whilst its SG&A costs reduced. The overall effect caused a year on year increase in the CTMS since 2012. In contrast, the increase in revenue was marginal, and revenue increased at a lesser rate than the CTMS.

109. The ADC's assessment is that the increase in production costs appears to have been driven largely by an increase in overheads since 2012 and an increase in raw material costs in 2014. SPCA explained that it uses its finished goods inventory to balance supply and demand from year to year and to offset any crop failure or yield issues and for this reason, there is not a direct correlation between manufacturing costs and sales volume in a given year. The ADC noted that the accounting approach used by SPCA could distort the injury picture if there were substantial movements in certain cost components from year to year, and was satisfied that the documents submitted explained the apparent contradiction between SPCA's increased CTMS at the same time as sales volume increased in 2014. As a result of the further analysis and examination, the ADC was "*satisfied that the analysis faithfully presents the economic condition of the Australian industry*" and endorsed the comment made at section 8.7.7 of SEF 276 (highlighted in the Reinvestigation Request), that: "*SPCA has stated that a decline in its sales volumes caused by imported products has resulted in higher costs to make and sell because of reduced economies of scale which in turn leads to poor fixed costs recovery and eroded profits and profitability*."

110. The ADC also observed that the increase in the CTMS was not a form of injury identified in REP 276, and nor was it alleged that the increased CTMS was caused by the dumped goods. The ADC considered that the increased divergence between the CTMS and the unit prices obtained by SPCA is, however, an indicator of price suppression (that is, that SPCA was unable to increase its prices in order to recover increases in its costs).The ADC therefore concluded that in addition to finding that price suppression occurred during the injury period, detailed analysis shows that price suppression also occurred during the investigation period, in which there were no instances where selling price exceeded the CTMS. The ADC found that the increasing gap between the CTMS and prices during the investigation period has had a direct impact on the deteriorating profit and profitability performance of SPCA and the increased

sales volume during the investigation period did not provide SPCA with the sort of relief that would normally be expected.[62]

111. It appears that in the reinvestigation the ADC undertook a more comprehensive examination and analysis of SPCA's CTMS data, as contained in Confidential Attachments 7, 8 and 9, than in REP 276. The analysis and conclusions relating to price suppression and profitability in the reinvestigation did not suffer from the same flaws as that of the original investigation, and I consider that the ADC's findings in the reinvestigation of these injury factors is not unreasonable.

112. With regard to the applicants' contention that the ADC failed to demonstrate that the price suppression allegedly suffered by SPCA was 'significant' as required by Article 3.2 of the ADA, I note that the Panel in *Thailand – H-Beams* did not consider that the absence of an explicit "finding" by the Thai authorities that the increase in dumped imports was "significant" is inconsistent with the requirements of the first sentence of Article 3.2:

> *"We note that the text of Article 3.2 requires that the investigating authorities 'consider whether there has been a significant increase in dumped imports'. The Concise Oxford Dictionary defines 'consider' as, inter alia: 'contemplate mentally, especially in order to reach a conclusion'; 'give attention to'; and 'reckon with; take into account'. We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'. While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports is 'significant', and to give a reasoned explanation of that characterization, we believe that the word 'significant' does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms."* [63]

113. The ADC did in fact characterise the price suppression as "*significant*" [64] although it did not give a reasoned explanation of this characterisation in REP 276 nor in Confidential Attachment 6. In the light of the WTO jurisprudence this would, appear to be sufficient to meet the requirements of Article 3.2 to *"consider whether there had been a significant price undercutting"*.

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[62] For a more detailed analysis, see Section 7.5 of the Reinvestigation Report and Confidential Attachments 7, 8 and 9.
[63] *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/R (Thailand – H-Beans), para 7.161.
[64] See wording, "most significant increase" in text under Section 7.6 of REP 276, page 44.

The ADC failed to evaluate all relevant economic factors

114. The applicants contend that the ADC failed to evaluate all relevant economic factors having a bearing on the state of the industry, which must be analysed pursuant to Article 3.4 of the ADA in order to determine to what extent the weak performance of the domestic industry has to be attributed to dumped imports. The applicants contend that the ADC failed to properly take into account some of these factors, such as: actual and potential decline in output; magnitude of the margin of dumping; actual and potential negative effects on cash flow; inventories; employment; wages; growth; and ability to raise capital or investments. The applicants contend that certain factors were not directly addressed and with regard to a number of the factors, the ADC provided unsubstantiated assertions without a meaningful analysis.

115. The applicants refer to WTO case law that 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' [65]. The applicants contend, therefore, that the ADC was bound to analyse all the factors listed in Article 3.4 of the ADA [66] and that REP 276 blatantly violates Article 3.4 of the ADA, insofar as it did not properly analyse all the factors listed therein.

116. In light of the claim by the Applicants in this regard, I requested the ADC to also reinvestigate its finding with regard to the impact of the dumped imports on the domestic industry and the required 'evaluation of all relevant economic factors'. I requested the ADC, in conducting the reinvestigation, to take cognisance of the relevant statement in the Manual. [67]

117. In the Reinvestigation Report, the ADC stated that it evaluated the relevant economic factors in the course of the reinvestigation, having received further information and updated data from SPCA. In particular, the ADC provided further analysis and assessment in respect of assets, domestic sales revenue, inventories, capacity and capacity utlisation, pointing out in some instances that SPCA's accounts did not provide the relevant data with specific reference to the production of PPT, with the result that the ADC was unable to assess whether

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[65] Panel Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/R, (EC – Bed Linen), paragraph 7.8.7.

[66] That is, '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'.

[67] On page 17 of the Manual, it is stated:

> *"The Commission conducts its investigations in accordance with the WTO requirement which makes it mandatory to evaluate all of the factors listed in Article 3.4 of the ADA [footnote omitted]. Section 269TAE(3) reflects that Article. In examining these factors the Commission will decide what weight ought to be given to any particular factor, based upon the case circumstances. Some factors may be significant while others may not – the Commission will explain its conclusions in this respect."*

injury has been experienced with respect to the particular injury factor, in respect of the manufacture of PPT. [68] Further, the ADC stated that while *"the known to be operating economic indicators"* have seen slight improvement during the injury analysis, the ADC does not consider that improvements in relation to particular economic factors, of itself, preclude a finding that the Australian industry has suffered material injury in respect of other factors, which, according to the ADC is consistent with the Ministerial Direction on Material Injury (dated 27 April 2012).[69]

118. The ADC pointed out that although SPCA's overall financial position may have seen some slight improvement, the analysis is focused on injury experienced by SPCA concerning only PPT. The ADC specifically pointed out that due to SPCA's accounting practices, data relevant to all of the factors listed in s.269TAE(3) is not available at a level which enables the Commission to assess the factors specifically with regard to only PPT.[70]

119. I consider that in the reinvestigation, the ADC undertook a more comprehensive examination and analysis of a number of the injury factors, than in REP 276, having received further information and updated data from SPCA in the course of the reinvestigation. While the ADC still did not explicitly address certain factors listed in s.269TAE(3), it was explained that due to SPCA's accounting practices, data relevant to all of the factors listed in s.269TAE(3) was not available at a level which enabled the ADC to assess the factors specifically with regard to only PPT. In the circumstances I consider this to be a reasonable explanation as to why those particular factors are not significant in the injury analysis, in the particular circumstances of the case. I therefore consider that the ADC's findings in the reinvestigation of the evaluation of all relevant economic factors are not unreasonable, and the applicants' claim in this regard fails.

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[68] For details of the ADC's analysis and assessment, see Section 7.6 of the Reinvestigation Report, pages 42 – 45. It should also be noted while the factor 'ability to raise capital and investment' was one of the factors in respect of which the ADC was unable to assess in respect of PPT in REP 276, it did request further specific information from SPCA on investment in relation to PPTs, in the reinvestigation of the ground of review relating to the ADC's non attribution analysis, and analysed this factor in the context of applicants' claim relating to SPCA's lack of investments. See Section 7.7.1 of the Reinvestigation Report, page 46 – 47.

[69] The Ministerial Direction on Material Injury states that:

> *"... [a] material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance".*

[70] See "Additional observations" in Section 7.6.5 of the Reinvestigation Report, page 45.

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

120. The applicants contend that the ADC's "*non-attribution analysis*" is ill-founded[71] and that the ADC failed to conduct a proper and meaningful economic analysis to assess the actual impact of a number of factors, in respect of which REP 276 reached unsubstantiated conclusions. These specific factors referred to by the applicants in their submissions are :

- The appreciation of the AUD;
- The drop of SPCA's exports;
- Exports from Italian producers already facing anti-dumping duties;
- SPCA's lack of investments;
- High costs in the Australian food processing industry;
- The strategy of the retailers. [72]

121. The ADC addressed these possible causes of injury in REP 276, [73] that were brought to its attention:

i. Exchange Rates:

In response to claims that the appreciation of the Australian dollar (AUD) caused a loss of competitiveness to the Australian industry, the ADC did a comprehensive analysis of the AUD/ EUR exchange rate over the period and its likely effect on Australian purchasers of PPTs. It noted that although the AUD steadily appreciated against the EUR until mid-2012, prior to a relatively steeper depreciating trend returning to original levels, which, in isolation, would likely have the effect of imports becoming less attractive to Australian purchasers. It referred to EC's assessment noting the significant depreciation since spring 2013, which caused a considerable price increase of Italian imports, and its statement that, "*Therefore, the exchange rate cannot be considered a cause of injury anymore*".[74] Based on an analysis of the available evidence and an examination of the entire injury analysis period, the ADC considered that the material injury that the Australian industry suffered, was not attributable to the effects of the changes in the exchange rate in the investigation period. I consider that the ADC's analysis and conclusion of this factor as a possible cause of injury, to be comprehensive and reasonable. [75]

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[71] 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'. This is known as the "non-attribution analysis".
[72] See Section 2.4.4 of applicants' submissions for details.
[73] See Section 8.8 of REP 276, pages 53 – 55.
[74] See EC Submission to the ADC, Document #014 of EPR 276 .
[75] See Section 8.8.2 of REP 276, pages 54 – 55, as well as Confidential Attachment 13 to REP 276.

ii. SPCA's Export Sales:

The ADC noted the claims of Feger and La Doria that the injury has been caused by a drop in SPCA's exports, based on a safeguards inquiry report by the Productivity Commission in 2013 that depicted a downward trend in SPCA's exports over a period of ten years to July 2013. Firstly, the ADC noted that a safeguards inquiry is not concerned with dumping nor material injury and is intended to deal with different circumstances by applying different principles. The ADC then analysed SPCA's sales data for the injury analysis period relevant to the investigation and identified changes in export volumes across the period. The ADC observed that the proportion of SPCA's total sales of like goods that are exported is at a level that is insignificant and accordingly, does not consider that minor changes in SPCA's export volumes to have caused material injury. I consider that the ADC's analysis and conclusion of this factor as a possible cause of injury, to be comprehensive and reasonable.

iii. Competition from Italian producers already facing anti-dumping duties

While the ADC acknowledged that these imports may have contributed to the price suppression and reduced profits and profitability experienced by SPCA, it recognises that the volume of these imports decreased in 2014 at a time when SPCA experienced the greatest degree of price suppression and reduced profits and profitability. Further the ADC considered that while these imports continue to compete with SPCA on price, it is the dumped goods from Feger (and La Doria)[76] which are the lowest priced goods in the market. The ADC referred to Ministerial Direction on Material Injury, which states that *'... [a] material injury assessment involves a range of factors that are considered together; no one or several of these factors can necessarily give decisive guidance'*. The Ministerial Direction also directs that dumping need not be the sole cause of injury to the industry. The ADC was satisfied that the significant shift in volumes to Feger (and La Doria) placed downward pressure on prices, evidenced by the price suppression suffered by SPCA from the dumped goods during the investigation period. I consider that the ADC's analysis and conclusion of this factor as a possible cause of injury, to be reasonable.

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[76] It should be noted that at the time of REP 276, La Doria had been found to have been dumping. As a result of the ADC's reinvestigation, La Doria's imports have been found to have not been dumped. The ADC subsequently provided a consequential impact on injury and causation analysis, see below.

iv. *SPCA's Lack of Investment:*

I noted that Report 276 does not appear to address this issue in its non-attribution analysis in Section 8.8 although it was brought to the ADC's attention during the investigation. While briefly touched upon in Section 7.8.7 of REP 276, there appeared to be no analysis of the economic impact of SPCA's lack of investment and its contribution to injury suffered. I therefore requested the ADC to reinvestigate this factor, as part of its non-attribution analysis.

In the Reinvestigation Report, the ADC referred to REP 276 which noted that SPCA's accounts did not provide investment data specifically related to the production of PPT and therefore the ADC was unable to observe or make any injury assessments in relation to capital investment that was particular to PPT. As part of the reinvestigation the ADC requested further information from SPCA regarding capital investment and made certain observations regarding the new information provided by SPCA during the reinvestigation.

It noted that while SPCA has been open about its need to invest in its tomato processing line, investment has been constrained due to its participation in the PPT market being uncertain due to the impact of dumped imports. Confronted with the decline in its profitability, SPCA made a decision to invest in what it termed "stay in business" repairs and maintenance from 2011 to 2014, allowing time to conduct a risk based procurement process given the market conditions it faced, and given that the purchase of a new tomato processing plant is a significant capital investment that requires careful consideration and time. The ADC was satisfied that any decision to invest is guided by a range of considerations, including prevailing market conditions, and that the presence of dumped goods in the market may discourage investment. The ADC was satisfied that while a lack of investment may have the potential to cause injury, this is not the case as SPCA committed large amounts of capital to the viability of its PPT business during the investigation period and injury period, and further, the market conditions created by the dumped imports presented significant risk to SPCA's return on investment.

I am satisfied that the concerns that I had with this sub-ground of review in REP 276 has been addressed by the ADC in the reinvestigation. I consider that in its reinvestigation, the ADC's analysis and conclusion of this factor as a possible cause of injury, is reasonable.

v. *High costs in the Australian food processing industry*:

I noted that REP 276 failed to address the argument raised by La Doria and Feger in Investigation 276 regarding evidence submitted on the high costs faced by the Australian food industry. I therefore requested the ADC to reinvestigate this factor, as part of its non-attribution analysis.

In the Reinvestigation Report, the ADC addressed the applicants' claim that the high costs faced by SPCA caused the injury and not the dumped goods, with particular reference to submissions made by Feger and La Doria in the course of the reinvestigation.[77] The ADC points out that the two sources cited by Feger and La Doria to support this claim cover a range of general topics about the whole food processing industry, the influence of Coles and Woolworths on the food industry, buyer behaviour and competition from imports in a range of agricultural product categories and make no specific reference to PPTs. The ADC considers that changing market conditions can affect a wide range of a manufacturer's costs in many ways, some of which may have the potential to cause injury. The ADC pointed out that SCPA's CTMS has fluctuated over the investigation period for a number of reasons, and to suggest that it is a function of Australia's food processing sector having the highest cost of doing business is simplistic. Whilst the ADC considered that the cost of doing business in Australia clearly contributes to SPCA's CTMS, it did not consider that this has caused material injury.[78]

I am satisfied that the concerns that I had with this sub-ground of review in REP 276 has been addressed by the ADC in the reinvestigation. I consider that in its reinvestigation, the ADC's analysis and conclusion of this factor as a possible cause of injury is reasonable.

vi. *Strategy of the Australian Retailers, with particular regard to private labels:*

While the ADC addressed the issue of 'Supermarkets' under Section 8.8 of REP 276, it only addressed the issue of the significant buying power of the major supermarkets. The ADC did not, however, address the issue of supermarkets favouring their own private labels, raised by Feger and La Doria in the course of the Investigation No. 276 and acknowledged by the ADC in REP 217 as contributing to SPCA suffering injury. I therefore requested the ADC to reinvestigate this factor, as part of its non-attribution analysis.

In the Reinvestigation Report, the ADC addressed the applicants' claim that the Australian supermarkets' strategy of favouring their own private labels, at the expense of SPCA's proprietary labels, is one of the main causes, if not the main cause, of any injury allegedly suffered by SPCA. Feger and La Doria cited comments made in REP 217 and the Productivity Commission's 2013 safeguards inquiry report into the Australian tomato processing industry in support of their claim.

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[77] See Documents #004 and 005 of EPR 360.
[78] See Section 7.7.2 of the Reinvestigation Report, page 47.

The ADC acknowledged that in REP 276 it did not make any direct reference to the supermarkets favouring private labels over proprietary labels and also stated that it had not obtained any new evidence as part of the reinvestigation regarding these claims. The ADC therefore reconsidered the evidence collected for the purpose of the Investigation No. 276, and reiterates its position in REP 276 that the Productivity Commission's inquiry related only to safeguards, which is distinct from an anti-dumping investigation, with entirely different considerations and entirely different tests being applied. REP 276 found that the chief considerations of the major supermarkets in its negotiation with suppliers is to obtain a secure and consistent supply of the goods at the lowest possible price, with this conclusion supported by the significant shift in market share towards Feger and La Doria after interim dumping duties were imposed on all other Italian exporters. The ADC considered that any strategy by the supermarkets to favour their private labels over proprietary labels will firstly place further downward pressure on prices, and secondly result in some suppliers seeking to secure contracts at prices less than the normal value. The ADC concluded that the strategy of the supermarkets to favour their private labels has contributed to the injury experienced by SPCA. However, the strategy places further downward pressure on prices and results in dumped goods having a competitive price advantage, which allows the replacement of SPCA PPT with imported PPT.[79]

I am satisfied that the concerns that I had with this sub-ground of review in REP 276 has been addressed by the ADC in the reinvestigation. I consider that in its reinvestigation, the ADC's analysis and conclusion of this factor as a possible cause of injury is reasonable.

Consequential Impacts on Injury and Causation Analysis

122. Based on the findings outlined above the ADC, in its reinvestigation, found that the goods exported by La Doria were not dumped. Accordingly, the ADC was mindful not to attribute injury caused by dumping to the exports from La Doria. However, the ADC found that the goods exported by Feger were dumped and therefore needed to assess whether the dumped goods caused the injury experienced by SPCA during the investigation period, and whether that injury was material.

123. As a first step the ADC examined the characteristics of the market relevant to SPCA and injury / causation. The ADC confirmed that SPCA competes with the prices offered by the Italian exporters, including the dumped prices of Feger, and notes that these dumped prices were amongst the lowest available in the market during the investigation period. The ADC's analysis of the market indicated that

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[79] See Section 7.7.3 of the Reinvestigation Report, pages 48 – 49, for the ADC's analysis.

the market shares held by Feger and La Doria increased after the imposition of anti-dumping measures following REP 217.

124. The ADC accepted, based on an analysis of the evidence, that price is the key basis for competition between SPCA's own products and the imported goods and that the data demonstrates a very close correlation between retail volumes and price. Consumers appear to be quick to change their purchasing behaviour on the basis of price, and less so by reference to other factors. The ADC also accepted that the retailers are very sensitive to movements in the wholesale price, and use the prices of competing exporters as a basis for seeking better terms from SPCA.[80]

125. Secondly, the ADC examined the competition between SPCA and Feger, and found that:

- For sales to common customers, the data demonstrated that Feger's prices undercut SPCA's prices;
- Noting the correlation between price and retail volume, the ADC considers that the dumping margin conferred a price advantage on Feger's goods, that was significant;
- If Feger's goods had not been dumped, competitively priced PPT from other suppliers (including both La Doria and SPCA) would have been more attractive to Feger's customers
- Whilst SPCA's prices are undercut by a number of participants in the market (including the un-dumped goods supplied by La Doria), the degree of that undercutting is significant because of the correlation between price and sales volume;
- La Doria, Feger and SPCA were all beneficiaries of the switches in the market that occurred following REP 217;
- Had Feger's goods not been dumped, there would also have been a switch away from Feger during the investigation period;
- Whilst the data suggests that La Doria would gain the largest share of Feger's sales in those circumstances, the ADC is satisfied that SPCA would also gain a significant share;
- Increases in price at the retail level would be likely to lead to improved sales volumes for other products, including those of SPCA;
- Although difficult to quantify precisely, SPCA experienced a lost sales opportunity due to the presence of the dumped goods in the market and that lost volume represents a significant material disadvantage to SPCA;
- The presence of dumped goods in the market results in an unfair price advantage, which distorts SPCA's production planning process;
- A decline in production volume in any given year can have longer term consequences on SPCA's CTMS, capacity utilisation and therefore profit and profitability;

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[80] For details of the ADC's examination, see Section 7.8.1 of the Reinvestigation Report and its Confidential Attachments 9, 10, 11 and 12.

- The presence of dumped goods in the market exacerbates the injury experienced from what would otherwise be normal fluctuations in supply and demand; as a result, Feger's dumped goods have impacted on demand for SPCA's products, which has led to the decline in SPCA's production volume and therefore the increased CTMS and SPCA's inability to raise its prices in response, impacting on SPCA's profit and profitability as a result. [81]

126. From the ADC analysis, it is reasonable to conclude that the dumped goods (of Feger) caused injury experienced by SPCA during the investigation period, and that the dumping was material.

Recommendations / Conclusion

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

i. I consider that the reviewable decision in respect of La Doria was not the correct and preferable decision, in that the finding that the recorded costs of raw tomatoes was not a 'competitive market cost' was incorrect, resulting in an error in the calculation of normal values for La Doria.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision that uses La Doria's own data for calculating the normal value in accordance with s.43(2) of the Regulation, resulting in no dumping for La Doria;

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

a. The finding that the recorded costs of raw tomatoes was not a 'competitive market cost' was incorrect, resulting in an error in the calculation of normal values for Feger;

b. The downward adjustment claims for advertising expenses and quality control expenses should not have been rejected, resulting in an error in the calculation of normal values for Feger.

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[81] For details of the ADC's analysis, see Section 7.8.2 of the Reinvestigation Report and its Confidential Attachments 9 and 10.

Accordingly and having had regard to the report of the Commissioner pursuant to s.269ZZL(2), which I have accepted in part, I recommend that the Parliamentary Secretary revoke the decision and substitute a new decision that firstly, uses Feger's own data for calculating the normal value in accordance with s.43(2) of the Regulation, and, secondly, does not reject Feger's downward adjustments claims for advertising expenses and quality control expenses, resulting in a new dumping margin of 4.8% for Feger.

Leora Blumberg
ADRP Member
7 November 2016