



**TRADE MEASURES BRANCH**

CUSTOMS ACT 1901 - PART XVB

**CERTAIN OLIVE OIL  
FROM  
GREECE, ITALY AND SPAIN**

**TERMINATION OF THE INVESTIGATIONS INTO  
DUMPING AND SUBSIDY**

**REPORT No. 77**

24 May 2004

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## Abbreviations

ABS	Australian Bureau of Statistics
Act	<i>Customs Act 1901</i>
Aceites Borges	Aceites Borges Pont SA
ASCM	WTO Agreement on Subsidies and Countervailing Measures
Ballester	Juan Ballester Rosés, Sucesores SA
CEO	Chief Executive Officer of Customs
Cuetara	SOS Cuetara SA
Customs	Australian Customs Service
DDP	delivered duty paid
EC	European Commission
EU	European Union
FOB	free-on-board
GUC	goods under consideration
ICEX	Instituto de Comercio Exterior
Inglewood	Inglewood Olive Oil Producers Ltd
Injury period	1 July 1999 to 30 September 2003
Investigation period	1 October 2002 to 30 September 2003
IOOC	International Olive Oil Council
Minerva	Minerva Oli SpA
Minister	Minister for Justice and Customs
Moreno	Moreno SA
NGQ	national guaranteed quota
Panel	<i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i>
SAOC	South Australian Olive corporation
SEF	statement of essential facts
SG&A	selling general and administrative (expenses)
USP	unsuppressed selling price
Unilever	Unilever Bestfoods Italia s.r.l.
WTO	World Trade Organization

# 1 Summary

## 1.1 OVERVIEW

This report relates to the termination of an investigation into the alleged subsidisation of olive oil exported from Greece, Italy and Spain and the alleged dumping of olive oil from Italy and Spain. The Australian Customs Service (Customs) initiated the investigation following an application by Inglewood Olive Processors Ltd (Inglewood). The investigation into alleged subsidy of olive oil from Greece, Italy and Spain and alleged dumping of olive oil from Italy commenced on 12 November 2003. The investigation into alleged dumping of olive oil from Spain commenced on 17 November 2003.

Customs examined exports of olive oil during the period 1 October 2002 to 30 September 2003 (the investigation period) to determine whether dumping had occurred and/or countervailable (actionable) subsidy or subsidies were extant in respect of the goods under consideration (GUC). Customs examined data for the period 1 July 1999 to 30 September 2003 (the injury period) to determine the extent of any injury to the Australian industry.

Customs is required to place on the public record, within 110 days of initiation, a statement of the essential facts (SEF) on which it proposes to base its recommendations to the Minister for Justice and Customs (Minister). Interested parties are given 20 days to respond to issues raised in the statement. The SEF was due to be published on 1 March 2004.

The Minister granted Customs an extension until 11 April 2004 to place the SEF on the public record. The extension of time meant that the final report to the Minister was due no later than 25 May 2004. However, Customs recommends that the Chief Executive Officer of Customs (CEO) be satisfied that there are grounds to terminate the investigations into alleged dumping and subsidy from all countries before the final report is due. This document provides the reasons for Customs' recommendations.

## 1.2 FINDINGS

Customs is satisfied that:

- there is an Australian industry producing like goods to the GUC;
- in Greece, Italy and Spain, there was a subsidy, known as production aid, paid to olive growers in respect of olive oil;
- production aid is not a countervailable subsidy in respect of olive oil;
- in respect of Italy and Spain there was dumping of the GUC;
- the Australian industry has suffered injury as described in this report; and
- no causal link was established between injury to the Australian olive oil industry and goods sold at dumped prices.

### **1.3 TERMINATION OF THE INVESTIGATIONS**

Customs recommends that the CEO terminate the investigations in respect of olive oil from Greece, Italy and Spain under s. 269TDA of the *Customs Act 1901* (the Act).

## **2 Introduction**

### **2.1 PURPOSE OF INVESTIGATIONS**

Part XVB of the Act and the *Customs Tariff Anti-Dumping Act 1975* provide for anti-dumping and/or countervailing measures to be imposed where dumping and/or actionable subsidisation of an imported product caused, or threatens to cause, material injury to an Australian industry producing like goods. The applicant, Inglewood Olive Oil Processors Ltd (Inglewood) claimed that certain olive oil exported from Greece, Italy and Spain was causing it injury because of the existence of countervailable subsidy. Inglewood also claimed it was suffering injury because of the presence in the Australian market of GUC exported at dumped prices from Greece, Italy and Spain.

### **2.2 PROCEDURES**

In its consideration of matters relevant to the investigation, Customs had regard to

- its own resources;
- Australian Bureau of Statistics (ABS) data;
- submissions and data from the applicant, importers, exporters and the European Commission (EC);
- relevant legislation;
- World Trade Organization (WTO) jurisprudence; and
- other publicly available information.

In respect of dumping, Customs visited exporters that provided satisfactory responses to the exporter questionnaire. The questionnaires included a request for information in respect of subsidy.

A number of responses were also received from Greek exporters of olive oil in respect of subsidy but Customs did not visit any of these companies.

Customs maintained a public record in respect of the investigation. The public record includes non-confidential submissions by interested parties and the statement of essential facts. The public record also contains non-confidential versions of Customs' visit reports.

Interested parties have 30 days after the publication of the termination notice in which to ask the Trade Measures Review Officer to review the CEO's decision. The contact details are:

Trade Measures Review Officer  
Robert Garran Offices  
National Cct  
BARTON ACT 2601

Phone: +61-2-6250 6046  
Facsimile +61-2-6250 5914

## 2.3 BACKGROUND

On 13 October 2003 Inglewood lodged an application under s. 269TB(1) of the Act requesting that the Minister publish dumping and countervailing duty notices in respect of olive oil exported to Australia from Greece, Italy and Spain.

The application alleged that injury was being caused to the Australian olive oil industry by allegedly subsidised and dumped olive oil. The applicant claimed that it was suffering injury due to:

- price undercutting;
- price depression;
- price suppression;
- negative profit and profitability;
- negative return on investment; and
- reduced ability to raise capital.

On 7 November 2004, prior to initiation, Customs formally consulted with representatives of the governments of Greece, Italy and Spain, and representatives of the EC to clarify matters raised in the application in respect of production aid and other forms of subsidy that may or may not apply to the GUC.

Customs initiated investigations, except for dumping from Greece, into the alleged dumping and countervailing based on prima facie evidence contained in the application, from its consultation with the EC, from information obtained from the Customs' commercial data base and from publicly available information. Notifications of the investigations were published in *The Australian* on 12 and 17 November 2003 and Australian Customs Dumping Notices 2003/45 and 2003/47.

After Ministerial consent was granted for an extension, Customs notified interested parties that the SEF would be placed on the public record by 11 April 2004. (In effect, this date for placement on the public record was 13 April 2004 as 11 April was a Sunday and 12 April 2004 was a public holiday.)

On 8 April 2004 the applicant provided Customs with a legal opinion by a Senior Counsel relating to what Inglewood understood were the central issues in respect of subsidy and conference of benefit. This opinion arrived too late to be considered as part of the SEF. The legal opinion did not alter Customs views from those expressed in the SEF.

Interested parties were given until 3 May 2004 to respond to the SEF. Customs received responses from the applicant (which included an economist's opinion in respect of subsidy); the olive oil exporter associations of Greece, Italy and Spain; the EC; and the Australian Olive Oil Association.

### **3 Goods under consideration**

The applicant described the GUC as extra virgin and blended olive oil in package sizes of 250 ml, 500 ml, 1 litre, 2 litre, 3 litre and 4 litre containers. The goods were for retail sale.

In further defining the goods under consideration, the applicant provided descriptions, as provided by the International Olive Oil Council (IOOC), of various types of olive oil. These descriptions were accepted in the European Union (EU) and other parts of the world as definitive and are as follows:

#### **Virgin olive oils**

*Oils obtained from the fruit of the olive tree solely by mechanical or other physical means under conditions that do not lead to alteration in the oil, which have not undergone any treatment other than washing, decantation, centrifugation or filtration, to the exclusion of oils obtained using solvents or using adjuvants having a chemical or biochemical action, or by re-esterification process and any mixture with oils of other kinds.*

##### Extra virgin olive oil

*Virgin olive oil having a maximum free acidity, in terms of oleic acid, of 0.8 g per 100 g, the other characteristics of which comply with those laid down for this category.*

##### Virgin olive oil

*Virgin olive oil having a maximum free acidity, in terms of oleic acid of 2 g per 100 g, the other characteristics of which comply with those laid down for this category.*

##### Refined olive oil

*Olive oil obtained by refining virgin olive oil, having a free acidity content expressed as oleic acid, of not more than 0.3 g per 100 g, and the other characteristics of which comply with those laid down for this category.*

##### Olive oil

*Composed of refined olive oils and virgin olive oils (pure and light olive oil including extra light)<sup>1</sup>.*

*Olive oil obtained by blending refined olive oil and virgin olive oil other than lampante oil, having a free acidity content expressed as oleic acid, of not more than 1 g per 100 g, and the other characteristics of which comply with those laid down for this category.*

Virgin olive oil and olive oil are the goods the subject of the application. Refined olive oil is the major component of olive oils as defined above.

Lampante oil and pomace oil are not the GUC. These were described in the application as:

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<sup>1</sup> Description in brackets added by applicant.

**Lampante olive oil**

*Virgin olive oil having a free acidity, in terms of oleic acid, of more than 2 g per 100 g, and/or the other characteristics of which comply with those laid down for this category.*

**Olive-pomace oil**

*This is another oil derived from the olive that keeps its initial chemical structure. It is made of the oil extracted from olive pomace using solvents, which is then refined and blended with virgin olive oil. In no case may the degree of acidity exceed 1%.*

Customs accepted the descriptions of the GUC as provided by the applicant and initiated investigations in respect of extra virgin and blended olive oil in containers sizes from 250 mls to four litres. Bulk oil was specifically excluded by the applicant.

During the course of the investigation, both the applicant and the EC submitted that, in response to case issues, bulk olive oil should have been included in the GUC. The EC further noted that Customs couldn't consider olive oil, regardless of packaging, for consideration of pass through of benefit and packaged olive oil only for dumping, injury and causality. Customs agrees with this view. Customs could not include bulk olive oil in its considerations of the GUC without IOPL withdrawing the application by which this investigation was initiated.

Since 1 July 2002, the GUC have been classified under subheading 1509.10.00, statistical code 10 and 1509.90.00 statistical code 30 of the *Customs Tariff Act 1995*. Before that date, the goods under consideration were classified to 1509.90.00 statistical codes 16 and 17. The rate of duty is free.

## **4 Australian industry**

### **4.1 LIKE GOODS**

#### **4.1.1 Background**

In the initiation report, and subsequent documents, Customs agreed that Australian produced extra virgin olive oil had characteristics that were identical to, or closely resembling, those of imported extra virgin olive oil. Customs has not altered this view.

However, Customs did not conclude at initiation that Australian produced extra virgin olive oil was a like good to imported 'pure' and imported 'light' olive oil. Customs continued to examine the matter further over the course of the investigation, after the views of interested parties were considered.

Extra virgin olive oil has a distinctive taste that varies markedly, depending on the type of olive used. Olive oil with a refined olive oil base, such as 'pure' or 'light', tends to have a blander taste, a less pronounced aroma and is generally paler in comparison with extra virgin olive oil. 'Pure' and 'light' olive oil tends to be less viscous than extra virgin olive oil. The Australian industry does not make an olive oil based on refined olive oil.

Extra virgin olive oil is made from the first pressing of the olive and does not undergo any treatment other than washing, heating, decantation, centrifugation and/or filtration.

Refined olive oil must go through further stages of production. Lampante, the raw material for refined olive oil is from second and subsequent pressings, or from first pressing olive oil that fails the determinant criteria of extra virgin olive oil. Lampante is not suitable for human consumption.

The refining process removes impurities from the lampante oil. This process consists of:

- neutralisation of fatty acids;
- washing (of the oil);
- decolouration;
- deodorising; and
- winterisation (in some cases) to prevent clouding at low temperatures.

Extra virgin does not undergo any of these processes, but is nearly always filtered to remove solids from the oil.

Refined olive oil is mixed with extra virgin olive oil to manufacture what is marketed in Australia as 'light', 'extra light' or 'pure' olive oil. Data from cooperating exporters suggests the proportion of extra virgin olive oil in light olive oil is not greater than 5%. The proportion of extra virgin olive oil in pure olive oil is generally no greater than about 15%. Within a brand, the percentage of extra virgin olive oil to refined olive oil is dependent on the exporter's perception of the customer's taste preference.

#### 4.1.2 Australian industry's claims

In the injury period, the applicant produced extra virgin olive oil in 375 ml glass bottles and two litre plastic containers. Its Viva brand olive oil is marketed as 'Early Harvest' or 'Late Harvest'. In respect of Australian produced extra virgin olive oil being like goods to imported blended olive oil, it made the following claims:

- 'Late Harvest' has a milder taste and aroma than 'Early Harvest'. Therefore Late Harvest olive oil is an effective substitute for imported 'pure' and 'light' olive oil.
- Australian customers do not greatly differentiate between extra virgin and other types of olive oil.
- 'Pure' and 'light' (or 'extra light') olive oil is displayed in proximity to extra virgin olive oil on supermarket shelves and they compete with each other at the retail level.
- The terms 'pure' and 'light' are in themselves misleading in that they:
  - ...are merely marketing descriptions, probably intended to lead consumers to the (false) belief that they contain less impurities, calories/cholesterol and are generally better for health and well being than other olive oils.
- Whether or not olive oil is described as 'pure' or 'light', both are 'fortified' with extra virgin olive oil to make them palatable.
- Extra virgin olive oil is not like to other types of packaged cooking oil as it has its own discrete market sector. Customs cannot, as claimed by some interested parties, expand the investigation to include all packaged foodstuffs as like goods.
- Viva extra virgin olive oil is substitutable for, and has identical end-uses to, imported 'pure' and 'light' olive oil. In terms of physical characteristics, Viva extra virgin olive oil and imported 'pure' and 'light' olive oil closely resemble each other.
- Extra virgin olive oil and imported pure and light olive oil fall within the same tariff heading.

#### 4.1.3 Claims by interested parties

Importers, exporters and industry bodies (such as the Australian Olive Oil Association Inc.) challenged Inglewood's views on like goods. Many of these claims overlap and are summarised as follows:

- Viva's Late Harvest extra virgin olive oil has not positioned itself successfully against pure and light olive oil on supermarket shelves. It is sold alongside other extra virgin olive oils. If extra virgin olive oil is considered like to 'pure' and 'light' then other cooking oils, such as canola, must also be considered as like to extra virgin olive oil and the scope of the investigation should be expanded accordingly.
- While it is true that 'pure' and 'light' olive oil contains extra virgin olive oil, the proportions, in the goods sold to Australia, is so negligible as to

be not a consideration. For example, olive oil sold as extra light may consist of less than 1% extra virgin olive oil – the remainder being refined olive oil.

- After first pressing, extra virgin olive oil does not undergo any further processing apart from filtration and packing. 'Pure' and 'light' olive oil must, however, undergo several stages of production from olive oil lampante before it is suitable for human consumption.
- Due to a better and stronger taste, extra virgin olive oil is more suitable as a bread-dip or salad dressing than 'pure' and 'light' olive oil.
- Where there are brands that consist of both extra virgin olive oil and 'pure' or 'light' olive oil, extra virgin olive oil is priced higher.
- If an investigation is being initiated against packaged olive oil in containers up to four litres, then it should also be initiated against bulk olive oil. The applicant is a large volume importer of allegedly subsidised and/or dumped bulk olive oil and should not be protected by discriminatory duties.

#### **4.1.4 Customs' assessment**

The issue before Customs is whether Australian produced extra virgin olive oil can be considered like goods to imported 'pure' and 'light' olive oil. Customs had regard to the following factors.

##### **4.1.4.1 Physical characteristics**

In terms of the IOOC's definitions extra virgin olive oil, with a maximum of 0.8% oleic acid, falls within the definition of olive oil as do blends of refined olive oil if they contain no more than 0.8% oleic acid.

Customs notes that there are differences in the physical characteristics of extra virgin olive oil and 'pure/light' olive oil.

Extra virgin olive oil, when used for cooking, has a lower smoke point - the temperature at which oil begins to smoke. Extra virgin olive oil begins to smoke at 320°F, while pure or light olive oil begins to smoke at 410°F (Food Edviser – other oils and fats cooking guide). However, extra virgin olive oil is used in cooking.

The Harmonised Tariff Explanatory Notes observes that virgin olive oil has a distinctive odour, taste, colour and chemical characteristics. Blended olive oil may have some or all of these characteristics depending on the amount of extra virgin olive oil added.

##### **4.1.4.2 Substitutability and end-use**

Consideration of whether 'pure/light' and extra virgin olive oil are substitutable is largely based on anecdotal submissions, apart from the above comments in respect of smoke point differences.

The applicant submits that 'pure/light' and extra virgin olive oil are substitutable, whether the end-use is for salads, cooking, bread dips or as an ingredient in other food products.

Other interested parties refute this view, commenting that 'pure' and 'light' olive oil is too bland for salad dressing and extra virgin olive oil imparts too strong a flavour for most cooking.

#### 4.1.4.3 Production process

Olive oil production, in any form, commences with the harvesting of olives, which are then transported to a mill for the manufacture of olive oil.

Refined and extra virgin olive oils undergo different processes of manufacture. Extra virgin olive oil is essentially the product of the first pressing of olive oil. 'Pure' and 'light' olive oils are made from a mixture of refined olive oil and extra virgin olive oil in varying percentages. Within a particular brand, the percentage of extra virgin olive oil in 'pure' olive oil is greater than that in 'light' olive oil.

#### 4.1.4.4 Price

At the wholesale level, pure and light olive oil was cheaper than the same brand of extra virgin olive oil in nearly every sale examined by Customs. The price difference was up to about 15%. For one particular brand, 'pure' olive oil was cheaper than extra virgin olive oil by about 2%, but 'extra light' olive oil was about 25% cheaper than extra virgin olive oil.

At the retail level, the price of 'pure' and 'light' olive oil is again nearly always cheaper than extra virgin olive oil of the same brand. The difference was typically 10-12%, but in one case it was much higher. This suggests the market is segmented by price at the retail level. However, Customs notes that merchandise that is considered a premium product (as extra virgin olive oil appears to be) will often command a premium price over other (perceived) lower grade merchandise of the same type.

#### 4.1.4.5 Tariff heading

Virgin olive oil and blended olive oil fall within the same tariff heading.

### **4.1.5 Summary**

The definition of 'like goods' impacts on decisions relating to material injury causation and the scope of measures, if any.

Section 269T(1) of the Act provides the following definition of like goods:

"like goods", in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

Customs initiated the investigation in respect of packaged olive oil, which Customs was satisfied as being olive oil in container sizes of up to four litres inclusive. Bulk olive oil was not under consideration.

Viva is sold in retail packs. It competes with imported olive oil sold in retail packs. Viva does not compete with olive oil sold in bulk containers. The largest package size offered for retail sale, in the market segment where the imported product competes with Viva, is four litres. Bulk olive oil is sold in

tanks of up to 60,000 litres capacity. Customs is satisfied that its examination of olive oil in retail packs only, so far as goods under consideration was concerned, was suitable and appropriate for the purpose of this investigation.

There are obvious differences between extra virgin olive oil and 'pure/light' olive oil such as different production processes, taste and pricing. There are also similarities. Both types of oil start with the harvested olive and are sold in proximity and competition to each other on the supermarket shelf. They are both oils produced from olives for human consumption. Both extra virgin olive oil and 'pure/light' olive oil are commonly referred to as 'olive oil'.

Customs considers that the similarities between 'pure/light' olive oil and extra virgin olive oil outweigh the differences. Customs therefore considers that, on balance, Australian produced extra virgin olive oils have characteristics closely resembling those of imported 'pure/light' olive oil and are like goods.

## **4.2 AUSTRALIAN INDUSTRY**

Section 269TB(1) of the Act specifies that an application for publication of a dumping duty notice may be lodged where, among other things, there is, or may be established, an Australian industry producing like goods.

### **4.2.1 Produced in Australia**

Subsections 269T(2) and 269T(3) of the Act specify that for goods to be regarded as produced in Australia:

- they must be wholly or partly manufactured in Australia; and
- where partly manufactured in Australia, at least one substantial process in the manufacture of the goods must be carried out in Australia.

Customs examined Inglewood's manufacturing process. Inglewood's extra virgin olive oil is produced from olives grown in Australia and from imported bulk extra virgin olive oil. Customs verified product information including cost to make and sell data provided by the applicant. Customs is satisfied that extra virgin olive oil is manufactured in Australia, and that the manufacturing process of manufacturing extra virgin olive oil from olives is substantial.

Customs is satisfied that the conditions of s. 269T(2) & (3) have been met.

### **4.2.2 Australian manufacturers**

Evidence provided by Inglewood confirmed that the applications for dumping and/or countervailing duty notices were supported by 21 of the smaller olive oil producers. Contact details were provided for those producers supporting the application.

Customs is satisfied that there is an Australian industry producing olive oil and that the industry consists of Inglewood and a number of other olive oil producers.

It was argued that Customs should not have initiated an investigation as the applicant only supplies about 2% of the total Australian market. Customs can find no support for the relevance of this claim in either the WTO Agreements

or legislation. Market share is not a relevant consideration in respect of whether an investigation should be initiated.

#### **4.2.3 Support for the application**

Section 269TB(6) of the Act requires that the application be supported by a sufficient part of the Australian industry producing like goods. The application is taken to be supported by 'a sufficient part of the Australian industry' when the person(s) who produce or manufacture the goods in Australia and who support the application:

- account for at least 50 per cent of the total production of that part of the domestic industry that have commented; and
- account for at least 25 per cent of the total production of like goods.

From information provided in the application and other information, Customs estimates the applicant represents about 70% of the Australian industry over the investigation period. No member of the Australian industry opposed the application.

Customs is satisfied the requirements of s. 269TB(6) are met.

## **5 Australian market**

### **5.1 MARKET STRUCTURE**

The major purchasers of olive oil in Australia, whether imported or domestically produced, are the large supermarket chains – Coles (through Grocery Holdings) and Woolworths – for retail sale.

Importers and Australian producers also supply foodservice wholesalers, independent distributors and individual customers.

Virtually all the 'pure' and 'light' olive oil sold in Australia was imported from Greece, Italy and Spain although some of this oil was sourced from non-EU countries. The applicant does not produce blended olive oil which is marketed as 'pure' and 'light', nor did Customs find any other Australian producer of 'pure' or 'light' olive oil.

Woolworths and Grocery Holdings generally purchase olive oil as a result of long term supply contracts. These contracts fix the supplier's price for extended periods. The contractual supply arrangements appear to be a major influence in the pricing of olive oil in Australia at both the wholesale and the retail level.

The applicant, and some importers and exporters, supply their customers directly. Other exporters use a facilitator in Australia to ensure the smooth passage of goods and payments between supplier and purchaser. Other importers and exporters supply distributors that supply smaller supermarkets, delicatessens and other customers.

Australian producers other than the applicant also supply the market. These producers generally fall within two categories; those with a small presence at the wholesale level (i.e. sell to local shops or have a limited presence in the larger supermarkets), and those that sell at 'cellar door'. The cellar door sales are typically very low volume speciality ('boutique') olive oils with an annual output of 1000 kgs or less. Both these categories have a negligible effect on the overall Australian market.

### **5.2 MARKET SIZE**

The Australian market has been estimated using data provided by the applicant and the ABS. The percentages of Australian sales and imported olive oil are given in the following table.

	1999/2000	2000/2001	2001/2002	2002/2003
Sales of Australian production	0.3%	0.9%	2.8%	2.5%
Spain	60.3%	56.4%	51.3%	53.4%
Italy	33.0%	36.1%	37.7%	37.8%
Greece	6.3%	6.6%	8.3%	6.4%
Other countries*	0.0%	0.0%	0.0%	0.0%
Index of market size	100	134	111	148

\*There were imports from 'other countries' over the injury period but they represented less than 0.05% of the total.

## 6 The dumping investigation

This section of the report concerns the allegations of dumping made in respect of exporters of olive oil from Italy and Spain only. Customs did not initiate a dumping investigation in respect of Greece.

Dumping occurs when a product of one country is exported to another country at a price less than its normal value.

### 6.1 BACKGROUND

Customs found there were hundreds of Australian importers of olive oil from Italy and Spain. However, most of these imported small volumes. Customs' selection of importers, for the purpose of verifying import data, was based on whether the companies were nominated in the application and the volume of olive oil they imported from Italy and Spain. Customs also had regard to whether any of the importers had a commercial relationship with a selected exporter.

Customs sent exporter questionnaires to six Spanish exporters. Four responses from exporters, representing about 90% of Spanish olive oil exports to Australia, were received.

Customs sent exporter questionnaires to five Italian exporters. Two responses, representing about 75% of Italian olive oil exports to Australia, were received.

These exporters are listed below:

Exporter/manufacturer (Country)	Responded in full	Visited
Aceites Borges Pont SA (Spain)	Y	Y
Agro Sevilla S Coop Ltd (Spain)	N	N
Basso Fidele E Figli SRL (Italy)	N	N
Casa Oleria Italiana S.p.A. (Italy)	N	N
Colavita Olive Oil (Italy)	N	N
Juan Ballester Rosés Sucesores SA (Spain)	Y	Y
Minerva Oli Spa (Italy)	Y	Y
Moreno SA (Spain)	Y	Y
SOS Cuetara SA (Spain) including Carbonell de Cordoba (Spain)	Y	Y
Unilever Bestfoods Italia s.r.l (Italy)	Y	Y

Through the EC, and Olive Oil Associations in Spain and Italy, other exporters were invited to participate in the investigation, but no further responses were received.

## **6.2 EXPORT PRICE**

### **6.2.1 Italy**

#### **6.2.1.1 Minerva Oli SpA (Minerva)**

In respect of the sales to Minerva Australia and a DDP customer, Customs considers Minerva to be the importer of the goods.

For these sales, Customs calculated export price in accordance with s. 269TAB(1)(c) of the Act.

In respect of sales by Minerva to other customers, Customs considers the Australian customers to be the importers.

For these sales, Customs calculated export prices in accordance with s. 269TAB(1)(a) of the Act.

#### **6.2.1.2 Unilever Bestfoods Italia s.r.l (Unilever)**

Customs considers Unilever Australasia, a subsidiary of Unilever, was both the exporter and importer of the goods.

Customs calculated export price in accordance with s. 269TAB(1)(c) of the Act.

### **6.2.2 Spain**

#### **6.2.2.1 Aceites Borges Pont SA (Aceites Borges)**

For sales directly to Australian customers, Customs calculated export price in accordance with s. 269TAB(1)(a) of the Act.

For sales where there was involvement from Borges Australia, Customs considers that Aceites Borges was both exporter and importer. Customs calculated export prices for these sales in accordance with s. 269TAB(1)(c) of the Act.

#### **6.2.2.2 Juan Ballester Rosés, Sucesores SA (Ballester)**

Customs calculated export price in accordance with s. 269TAB(1)(a) of the Act.

#### **6.2.2.3 Moreno SA (Moreno)**

Customs calculated export price in accordance with s. 269TAB(1)(c) of the Act.

#### **6.2.2.4 SOS Cuetara SA (Cuetara)**

Customs calculated export prices in accordance with s. 269TAB(1)(a) of the Act.

## **6.3 NORMAL VALUE**

### **6.3.1 Italy**

#### **6.3.1.1 Minerva**

Customs found that sales by Minerva were arms length and there was a sufficient volume of domestic sales in the ordinary course of trade to determine normal values in accordance with s. 269TAC(1) of the Act.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

#### 6.3.1.2 Unilever

Customs found that sales of olive oil by Unilever were arms length and it had a sufficient volume of domestic sales in the ordinary course of trade to determine normal values under s. 269TAC(1) of the Act.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

### **6.3.2 Spain**

#### 6.3.2.1 Aceites Borges

Customs established normal values in accordance with s. 269TAC(1) of the Act, based on domestic price information of another seller of like goods in Spain.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

#### 6.3.2.2 Ballester

As for Aceites Borges, Customs found the 'other sellers' provision of s. 269TAC(1) of the Act to be appropriate in this instance.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

#### 6.3.2.3 Cuetara

Subsequent to the visit to Cuetara, the company claimed that Customs had erred in its calculation of normal value because average cost data was used over the investigation period, instead of applying actual cost data. It also claimed that Customs' application of rebates on a weighted average basis over all sales instead of in respect of the specific customers to which the rebates were paid, distorted those selling prices. The company provided evidence to support its claims.

Customs considered Cuetara's claims and found them to be reasonable. Additional data was sought and provided to Customs to support the company's claims.

Customs found that domestic sales of like goods by Cuetara were arms length and there was a sufficient volume of domestic sales in the ordinary course of trade to determine normal values under s. 269TAC(1) of the Act.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

#### 6.3.2.4 Moreno

As for Aceites Borges and Ballester, Customs found the 'other sellers' provision of s. 269TAC(1) to be appropriate in this instance.

Section 269TAC(8) adjustments were made to ensure proper comparability with export prices.

#### 6.4 DUMPING MARGINS

Customs calculated weighted averages of export prices and their corresponding normal values for each exporter. Dumping margins, and the method used to derive them are summarised in the following table:

Country	Exporter	Method	Dumping margin *
Italy	Minerva	s. 269TACB(2)(a)	2 – 10%
	Unilever	s. 269TACB(2)(a)	0 – 2%
Spain	Aceites Borges	s. 269TACB(2)(a)	2 – 10%
	Ballester	s. 269TACB(2)(a)	undumped
	Moreno	s. 269TACB(2)(a)	undumped
	Cuetara	s. 269TACB(2)(a)	2 – 10%

\* For confidentiality reasons, dumping margins are shown as falling within a range.

## **7 Subsidisation**

### **7.1 BACKGROUND**

The applicant claimed that a production aid subsidy and possibly other countervailable subsidies were paid in respect of olive oil exported to Australia from Greece, Italy and Spain.

Customs sent questionnaires to the following exporters, requesting details of any subsidies that may affect the price of the goods exported to Australia.

<b>Exporter/manufacturer (Country)</b>	<b>Responded</b>	<b>Visited</b>
Aceites Borges Pont SA (Spain)	Y	Y
Agro Sevilla S Coop Ltd (Spain)	N	N
Agro Vim SA (Greece)	Y	N
Argolis SA (Greece)	N	N
Basso Fidele E Figli SRL (Italy)	N	N
Casa Oleria Italiana S.p.A. (Italy)	N	N
Colavita Olive Oil (Italy)	N	N
Elais Oleaginous Products SA (Greece)	Y	N
El Renieris (Greece)	N	N
Emman. Papaioannou (Greece)	N	N
Juan Ballester Roses Sucesores SA (Spain)	Y	Y
Lyrakis Family SA (Greece)	N	N
Minerva SA Edible Oils Enterprises (Greece)	Y	N
Minerva Oli S.p.A (Italy)	Y	Y
Moreno SA (Spain)	Y	Y
Sokratis Kordatos (Greece)	Y	N
SOS Cuetara SA & Carbonell de Cordoba (Spain)	Y	Y
Unilever Bestfoods Italia s.r.l (Italy)	Y	Y
Union of Agricultural Cooperatives of SITIA (Greece)	N	N

In reaching its conclusions as to whether countervailable subsidies were paid in respect of olive oil exported to Australia Customs sought information from the applicant, the EC, the governments of the countries concerned, exporters, other interested parties and publicly available sources. Responses to the SEF were also considered. Customs also engaged the services of an independent economist to comment on the production aid and any effect it may have on prices.

Customs also examined relevant WTO jurisprudence.

## 7.2 LEGISLATION

The Minister may sign a countervailing duty notice if the price of imported goods is influenced by a subsidy and if the Minister determines that such a subsidy is countervailable.

'Subsidy' is defined in s. 269T of the Act. Whether a subsidy is countervailable is determined by s. 269TAAC, which states:

*For the purposes of this Part, a subsidy is a countervailable subsidy if:*

- (a) it is specific; and*
- (b) it is not an excluded subsidy.*

Section 269TAAC further defines what is meant by a specific subsidy. At s. 269TAAC(2) it states a subsidy is specific:

- (a) if, subject to subsection (3), access to the subsidy is explicitly limited to particular enterprises; or*
- (b) if, subject to subsection (3), access is limited to particular enterprises carrying on the business within a designated geographical region that is within the jurisdiction of the subsidising authority; or*
- (c) if the subsidy is contingent, in fact or law, and whether solely or as one of several conditions, on export performance; or*
- (d) if the subsidy is contingent, whether solely or as one of several conditions, on the use of domestically produced or manufactured goods in preference to imported goods.*

## 7.3 OPERATION OF THE PRODUCTION AID SUBSIDY

Production aid is a scheme administered by the EC, usually through producer organisations in the countries concerned. According to the 'Working Paper of the Directorate-General for Agriculture – The Olive Oil and Table Olives Sector', nearly all olive growers in Greece and Italy belong to producer organisations, as do 80% of olive growers in Spain.

The current scheme derives from Council Regulation No. 136/66/EEC, enacted in 1966. The scheme has been amended from time-to-time, most recently in 1998.

In essence, production aid is a subsidy paid to EU olive growers to provide a fair income based on the amount of olive oil extracted from their olives. The result of the scheme, whether intended or not, has been to increase olive oil production in the EU.

Other features of the scheme are:

- Each significant olive producing member country of the EU is allocated a national guaranteed quota (NGQ) each marketing year. This acts as a maximum limit on the quantity of oil to which aid can apply.
- There is also provision for part of the production aid to be allocated for support to table olives, proportionately reducing the NGQ.

- When a member state's production in any marketing year falls short of its NGQ, part of the shortfall can be carried forward to the next marketing year and the balance is redistributed to other member states that exceeded their NGQs.
- Generally, olive trees planted after 1998 are excluded from the aid. Eligible plantings may be subject to reductions in eligibility or exclusion from aid if the growers fail to comply with requirements relating to an olive cultivation register.

NGQs and the amount of aid payable vary each marketing year. An advance is paid based on the previous year's production and appears to be reconciled to actual entitlements at some later date. Actual aid appears not to have been ascertained since the 2000/2001 marketing year.

Reforms of the production aid system are due to commence in 2005. These changes have been deferred from the 2001/2002 harvest year.

#### **7.4 APPLICANT'S CLAIMS**

The applicant submitted that in the injury period, production aid was being paid in respect of olive oil imported from Greece, Italy and Spain and that it was a countervailable subsidy.

The applicant also submitted that certain other EC subsidies were in place, acknowledging there is no evidence that these subsidies had operated for several years. These subsidies were described as storage aid, export refunds and financing of measures to improve the quality of olive oil. The applicant noted that subsidies in respect of these schemes have not been paid during the investigation period.

The production aid paid to olive growers is claimed by the applicant to have had a consequential price effect on olive oil, through the production stage, that lowered the price in respect of olive oil sold to Australia.

Production aid, in the view of the applicant, confers a benefit in accordance with s. 269TACC of the Act, and is therefore an actionable subsidy.

#### **7.5 IS THE PRODUCTION AID AN ACTIONABLE SUBSIDY?**

Customs is satisfied that production aid is a subsidy within the meaning of s. 269T of the Act. However, it is necessary to consider whether it is an actionable subsidy. This is discussed in the following sub-sections. For a subsidy to be actionable it must be specific and not excluded.

##### **7.5.1 Specificity**

Customs is satisfied that production aid was a specific subsidy in terms of s. 269TAAC of the Act as, from the evidence reasonably available to it:

- the subsidy was explicitly limited to particular enterprises (olive growers);
- access to the subsidy was established by objective criteria set out in EC Regulations that stipulated that production aid was limited to olive growers; and

- those criteria were adhered to in the administration of the subsidy.

### **7.5.2 Excluded subsidy**

Excluded subsidies are described in paragraphs (a), (b) and (c) of Article 8.2 of the Agreement on Subsidies and Countervailing Measures (ASCM). A domestic support measure as described in Annex 2 to the Agreement on Agriculture is also an excluded subsidy.

Article 8.2 (a) refers to subsidies in respect of research activities. Customs is not satisfied on the evidence that production aid was paid in respect of research.

Article 8.2 (b) refers to subsidies in respect of assistance to disadvantaged regions within a particular country. Customs is not satisfied on the evidence that production aid was solely for this purpose. Although the payment of production aid may have incidentally benefited disadvantaged regions within a particular country, Customs considers that this was not the primary purpose of the scheme. Production aid is also given to olive growers in 'non-disadvantaged' regions of the EU.

Article 8.2 (c) refers to subsidies in respect of assistance to promote adaptation of existing facilities to new environmental requirements. Customs is not satisfied on the evidence that production aid was for this purpose.

Domestic support measures described in Annex 2 to the Agreement on Agriculture have, as a fundamental requirement no, or minimal, trade-distorting effects or effects on production. These measures also, among other criteria, shall not have the effect of providing price support to producers.

Production aid is a form of price support for olive producers in that it is meant to ensure that olive growers receive a fair income from the sale of olives to make olive oil. It is also intended to ensure a certain level of production for those countries that receive the subsidy. Customs does not conclude that production aid is a domestic support measure as described in Annex 2 to the Agreement on Agriculture.

In the circumstances, Customs concludes that the production aid is not an excluded subsidy.

### **7.5.3 Direct or indirect subsidy**

Section 269T(2AC) states:

*A subsidy is taken to have been received in respect of particular goods:*

- (a) whether the benefit conferred by the subsidy is conferred directly or indirectly in relation to those goods; and*
- (b) whether or not the subsidy involves, or will involve, the payment or grant of any form of financial assistance.*

In the circumstances, Customs is of the view that it is appropriate to treat the GUC as being extra virgin and blended olive oil in package sizes of 250 ml to four litres inclusive.

In this instance Customs is of the view that the subsidy is not paid in respect of the GUC. It is paid in respect of unrefined and unfiltered olive oil neither of

which is exported to Australia (except for miniscule amounts of packaged unfiltered extra virgin olive oil). Customs considers this oil, produced directly from the olive, to be an upstream product from the GUC.

However, it is commonly acknowledged that a subsidy is paid to olive growers in respect of the olive oil they produce. Therefore, it is appropriate for Customs to consider whether a subsidy paid in respect of goods other than the GUC confers a benefit. In the circumstances, it is appropriate for Customs to consider whether pass through of benefit has been conferred in respect of the GUC. This is discussed later in this section.

#### 7.5.3.1 Applicant's claims

The applicant made a number of claims about subsidy:

- A previous countervailing investigation is relevant when considering whether a benefit has been conferred (Trade Measures Report No. 66 – Canned Tomatoes from Italy). In that report, Customs found that production aid was a form of price support that conferred a benefit in relation to the exported goods. The applicant claims that the findings in the canned tomatoes investigation apply to this investigation.
- Irrespective of whether olive growers are producers of olive oil, through independent mills or by co-operatives, the production aid subsidy involves a direct transfer of funds from a government to an enterprise by whom the goods exported to Australia are produced. Where olive growers are not olive oil producers, the producers still pay a much lower price for the olive oil.
- Whether olive oil producers are separate entities to olive growers (and in some cases the olive oil goes through several processing stages) is of no relevance.
- Article 5 of Regulation No 136/66/EEC states that production aid shall be granted for olive oil. This was said to demonstrate that production aid affects the price of olive oil.
- Customs should consider what would be the price of olive oil in the Australian market, but for the benefit of production aid.
- The proposed changes to the subsidy scheme that may come into effect on 1 November 2004 appear to constitute a countervailable subsidy. The EC may seek a review of any measures if this should not prove to be the case.
- There is a difference between the *United States – Softwood Lumber (Provisional Countervailing Duties DS236)* (Canadian softwood lumber) case and the current investigation. The production aid is granted for olive oil, the product exported to Australia, not an upstream product, as was the case in Canadian softwood, so no examination of pass through is required.

Just prior to the release of the SEF, the applicant provided Customs with a legal opinion from a Senior Counsel in respect of the subsidy. Customs has examined that opinion.

In response to the SEF, the applicant provided Customs with a second opinion from the same Senior Counsel. In his second opinion, Senior Counsel commented:

If the ACS and the Minister are prepared to treat oil as one like product then it follows from the finding by the ACS that Production Aid is paid on the amount of olive oil extracted from olives that Production Aid is a financial contribution that is “made in connection with” the production of the goods exported to Australia ... .<sup>2</sup>

The Senior Counsel continued:

If ... the ACS and the Minister are not prepared to treat all olive oil as one like product or are not satisfied that the olive growers to whom Production Aid is paid form part of an enterprise that produces olive oil ...the ACS and the Minister ...may find it appropriate ... to determine whether and, if so to what extent, the payment of Production Aid to the olive growers is “passed through” so as to benefit the olive oil exported to Australia.<sup>3</sup>

The Senior Counsel concluded:

If the ACS and the Minister are prepared to accept the accuracy of the conclusion of [the economist engaged by Customs] that Production Aid “provide[s] a stimulus to production” resulting in a world price that is at least 17 percent below the price that would hold in the absence of intervention then it will be open to the ACS and the Minister to find ... that the benefit of the Production Aid is passed through to the olive oil exported to Australia ... .<sup>4</sup>

The economist engaged by the applicant noted:

I have no doubt that there is significant pass through of the olive oil subsidy to consumers, both in the EU and elsewhere in the world... .

I have also been asked whether the pass-through of benefit of the subsidy is significantly affected according to whether the subsidy is paid to the grower (as is the case) or to the processor. In my view the dynamics of the entire supply chain are not affected. The benefit of the subsidy travels with the product, i.e. the olive oil, and it should make no difference where in the chain the subsidy is injected.<sup>5</sup>

#### 7.5.3.2 Claims of other parties

The EC, exporters and importers provided responses relevant to the question of whether a benefit is conferred. These are summarised as follows.

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<sup>2</sup> Supplementary opinion of applicant’s Senior Counsel, para 61.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> ‘The extent to which EU olive oil subsidy is passed through to consumer prices: an economist’s opinion pp 6-7.

- Subsidies are paid at the grower level, the first stage of a long chain in the production of olive oil. Any price paid by the ultimate customer is the result of market forces of supply and demand only.
- There is little or no vertically integrated processing of olives with common ownership. The mills are either independent or co-operative in nature. The processors are independent of the mills and all trading is at arms length.
- Prices are dependent on supply and demand. Neither mills nor co-operatives set prices with regard to any other factor.
- A large number of growers are independent of mills. They deal with each other in arms length transactions and market prices are paid. Any oil sold in the EU in a vertically integrated process constitutes only a minor part of total production and is sold almost exclusively on the EU market.
- There are sufficient transactions between the recipient of production aid and the final purchaser to sever any link in terms of benefit conferred.
- The WTO *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (the Panel) finding on Canadian softwood lumber supports the view that the pass through effect of subsidy must be demonstrated. The finding states;
 

We are of the view that an authority may not assume that a subsidy provided to producers of ‘upstream’ input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm’s-length transaction between the two.
- The existence of a benefit to the exporters of olive oil must be demonstrated by positive evidence. The amount of the alleged subsidy, which passes through from olive growers, to eventually benefit the exported product must be determined.;
- An investigating body is not allowed to simply assume a benefit to olive growers has passed through. Such a determination cannot be made without an investigation. Without any evidence to the contrary, it must be presumed that aid granted to olive growers does not benefit producers and exporters.
- The opinion of the independent economist engaged by Customs is misleading so far as a 17% drop in world prices due to subsidy is concerned. The basic assumption in the model used by the economist is that the EU olive oil market is closed. The EU olive oil market is not closed as non-EU markets represent more than 20% of world production and nearly 30% of consumption.

#### 7.5.3.3 Economist's comments

Customs engaged the services of an independent economist to consider the effects of production aid paid to olive growers and the subsequent effect, if any, on olive oil prices to Australia. The economist's advice is limited to

aspects of the European olive and olive oil market and does not represent an expert opinion on the interpretation of the subsidies provisions of the Customs Act.

The economist provided a public report in which he stressed any conclusions drawn had been qualified because of the unavailability of certain relevant information. Key conclusions in the report are:

- One of the consequences of the production aid paid to growers was to provide a stimulus to production, resulting in lower world prices. However, he reported that insufficient data was available to conclude absolutely whether any benefit to downstream producers has been conferred.
- The world price of olives has dropped by at least 17% as a result of EC subsidies. However, part of this effect can be attributed to higher production, resulting in lower world prices. In his view, it is questionable as to what extent grower payments influence prices beyond the farm gate, apart from its effect on the quantity of olive oil.
- A degree of vertical integration may suggest that a subsidy paid at one level of production, and industry concentration, may affect the competitiveness of prices further down the production chain. The absence of such vertical integration indicates that it is less likely that a subsidy paid in the initial stages of production would affect prices further downstream.
- In Greece, there appears to be little vertical integration. The market is characterised by a large number of growers operating on a small scale.
- In Italy, there appears to be some degree of vertical integration. Like Greece, the Italian market is also characterised by a large number of small growers operating on a small scale. The independent refineries seem to be in sufficient number to limit any anti-competitive behaviour.
- Spanish olive oil production appears to be on a larger scale than other European countries. Only a small proportion of the Spanish industry appears to be vertically integrated. There may be a degree of cost and revenue pooling across different operations by grower owned cooperatives.
- It is likely that prices paid for services throughout the olive oil sector are competitively determined.

#### 7.5.3.4 Benefit conferred – summary

It should be noted that a benefit must be conferred on a recipient - a legal entity. A benefit is not conferred on a product.

A benefit, in the form of financial assistance, is conferred on olive growers in Greece, Italy and Spain by a subsidy paid in respect of olive oil derived from their olives. The olive grower is the recipient of the benefit – not the olive oil itself. The olive oil is, at this point, not in a form suitable for sale at the retail level. The further processing of the olive oil is discussed in Section 3 of this report. Customs is of the view that this further processing, and eventual sale

to the exporter, involves arms length transactions. Customs considers the olive grower to be an upstream producer of olive oil.

Several interested parties, including the applicant, noted that production aid was paid to olive growers on the basis of the olive oil derived from their olives. The applicant considers that all of the benefit would pass through to the price of the goods. The applicant also considers that it is not necessary to demonstrate, or quantify, any pass through of benefit. The EC considers that, based on WTO jurisprudence, it is necessary to demonstrate a pass through of benefit in this circumstance for olive oil produced in the EU.

A significant amount of olive oil exported to Australia from Italy and Spain has been produced from non-EU olive oil. These goods do not receive the benefit of the production aid, so pass through considerations are irrelevant. The EC submitted that in 2001/2002, 11.5% of its olive oil exports were re-exports from non-EU countries. Customs found up to 100% non-EU oil in the investigation period from some of the exporters it visited.

Customs did not visit any Greek exporters. All those that responded to the exporter questionnaire stated that they did not receive any benefit from the production aid.

Customs visited exporters of about 80% of the combined exports of the GUC to Australia. In the case of these exporters there were arms length transactions in the sales chain between the olive growers and the exporters. For example:

- a sale from the mill or grower to a refiner or filterer (often through a trader or 'middleman' and an olive oil exchange); and/or
- a sale to a blender or packer who prepares the olive oil for domestic or export sale.

Customs is therefore satisfied that olive oil produced by the grower is an input product to the goods exported to Australia. Customs is also satisfied that there is little vertical integration for the companies involved in the exportation of olive oil to Australia from Greece, Italy and Spain.

The economist engaged by Customs observed that, because of the number of stages in the selling process between olive grower and the exporter, pass through of benefit could not be demonstrated. Based on the information available to him, his view is that market forces alone dictate the price of each transaction.

Customs requested information in respect of pass through from exporters it visited in Italy and Spain. Each of the exporters advised it was not the recipient of a benefit, either directly or indirectly, from the production aid. The purchases of olive oil by exporters from olive oil suppliers were arms length transactions.

At appropriate stages in the investigation, including at formal consultations, Customs requested further information from the EC. The EC partially answered a series of questions put to it by Customs, but the data provided in support of the claim that pass through of benefit did not occur was inconclusive. The EC's view was that, whether or not there was a benefit from any pass through, the amount of benefit could not be quantified.

Customs notes several relevant comments made in the Appellate Body Report in respect of 'Certain Softwood Lumber from Canada' (the Report). The Report states in part that:

Where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed, however, that the subsidy bestowed on the input passes through to the processed product.<sup>6</sup>

In this instance, Customs is satisfied that the above reference to 'input' is analogous to olive oil produced by olive growers.

The authors of the Report also agree with the original Panel Report finding that:

If it has not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or the exporter of the product, then it cannot be said that subsidisation in respect of that product ... has been found.<sup>7</sup>

## **7.6 CONCLUSION – THE PRODUCTION AID**

In all of the circumstances, Customs is of the view that pass through of benefit has not been demonstrated. Customs is satisfied that, after the sale by the olive grower, market forces drive the price of each transaction in the selling chain in a (generally) non-vertically integrated industry. The pass through of the benefit of the subsidy from the recipient to the exporter has not been established.

'Pass through' refers to the need to demonstrate that the subsidy paid to olive growers bestows a financial benefit on the exporter.

Customs is not satisfied that production aid confers a benefit on the exporter and, for that reason, it considers that the subject production aid is not a countervailable subsidy.

## **7.7 INSTITUTO DE COMERCIO EXTERIOR (ICEX)**

Customs found that certain Spanish exporters received money from the Spanish government in respect of marketing and promotion. The scheme is commonly referred to as ICEX. It is designed to assist exporters in respect of promotional costs in countries to which they export.

Not all exporters availed themselves of the scheme. For those that did, the amount paid was proportional to the amount of importer's expenditure approved under the scheme. For those exporters that received payment in respect of ICEX, the amount paid was insignificant relative to the export price of the goods.

In all of the circumstances, Customs is not satisfied that the ICEX scheme is a specific subsidy. Customs considers that ICEX is not a countervailable subsidy.

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<sup>6</sup> World Trade Organization – United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada – para 140.

<sup>7</sup> Ibid para 146

## **8 Economic condition of the industry**

### **8.1 AUSTRALIAN INDUSTRY'S CLAIMS**

Inglewood claims that it had suffered material injury from the commencement of its olive oil production in 1999. It claims to have suffered material injury in the form of:

- price undercutting;
- price depression;
- price suppression;
- negative profits and profitability;
- negative return on investment; and
- reduced ability to raise capital.

Customs examined data obtained from Inglewood, importers and other sources such as the ABS for the period 1 July 1999 to 30 September 2003 to assess injury.

### **8.2 VOLUME EFFECTS**

Although the applicant did not claim any volume related injury, Customs examined volume effect as part of its overall assessment of injury to the Australian industry.

#### **8.2.1 Sales volume and market share**

Relative sales volume and market share of the Australian industry and imports is shown in the table at section 5.2 to this report.

As shown in section 5.2, the Australian industry has increased its market share over the investigation period from 0.3% to 2.5%, in a market that has increased in size from an index of 100 to 148. Details of sales volume and market share are at **confidential appendix 1**.

Customs concludes that the Australian industry has not suffered volume related injury over the injury period.

### **8.3 PRICE EFFECTS**

#### **8.3.1 Price undercutting**

Price undercutting occurs where the imported product sells below the price of the equivalent Australian manufactured product.

Price undercutting at the wholesale level is relevant for injury assessment as that is where the applicant sells its products in competition with imports.

The applicant sold extra virgin olive oil in two bottle sizes: 375 mls (glass) bottles and two litres (plastic) bottle. Customs notes two factors that must be considered in respect of price undercutting in this instance.

The first factor is that there are differences between the Australian produced product and the GUC sold in the Australian market. The main product sold by

the Australian industry is in the 375 ml glass bottles. The closest sizes for imported olive oil are either a small volume of olive oil in 250 ml glass bottles or, predominately, 500 ml glass or plastic bottles.

The relative cost of packaging and the amount sold per package are factors that must be considered in any price analysis. On a per litre basis, price undercutting of the 375 ml Viva product is up to approximately 30% when compared to olive oil in an imported 500 ml glass bottle. The packaging differences are not sufficient to avoid the conclusion that the Australian industry is suffering injury in the form of price undercutting.

The second factor is that Viva does not produce a type or 'model' of olive oil that forms part of the goods under consideration – 'pure' and 'light'. Although Australian produced olive oil has characteristics closely resembling imported pure and light olive oil, Customs considers that it is not identical.

One of the obvious differences is that imported 'pure' and 'light' olive oil is usually significantly cheaper than extra virgin olive oil (section 4.1.4.4 refers). For price undercutting purposes, the most relevant assessment is to compare the price of locally produced extra virgin olive oil to the price of imported extra virgin olive oil (the nearest equivalent type). The comparison in the above paragraph was between imported and locally produced extra virgin olive oil. The level of price undercutting, as noted, was up to approximately 30% for extra virgin olive oil. The level of price undercutting in respect of imported 'pure' and 'light' olive oil is up to approximately 50%.

In the case of two litre containers a direct comparison of package size and oil type showed that there was price undercutting for extra virgin olive oil at the wholesale level of about 15% and about 20% for 'pure' and 'light' olive oil.

The prices of imported and Australian produced olive oil at the wholesale level are at **confidential appendix 2**.

Customs is satisfied the applicant has suffered injury in the form of price undercutting.

### **8.3.2 Price depression**

Price depression is when an industry, for some reason, lowers its prices.

Over most of the investigation period, the applicant suffered price depression. In the last quarter of the investigation period, Viva's prices recovered slightly. Overall, Viva's olive oil prices in September 2003, was about half of that of September 1999. Over the last quarter of the injury period (from 1 July 2003 to 30 September 2003) the applicant was able to increase its per litre price by about 7%, relative to the 2002/2003 financial year.

An analysis of price depression in respect of Viva is at **confidential appendix 3**.

Customs is satisfied the applicant has suffered injury in the form of price depression.

### **8.3.3 Price suppression**

Price suppression occurs when an industry is unable to raise its prices to recover costs.

Apart from minor quarterly fluctuations, Inglewood has not been able to raise the prices it charged for olive oil over the injury period (see above). Although the applicant's costs decreased during the injury period, those costs were greater than the selling prices. In this instance, price suppression was linked to price depression in that it could not raise its prices to recover costs.

An analysis of price suppression is also at confidential appendix 3.

Customs is satisfied that the applicant has suffered injury in the form of price suppression.

## **8.4 PROFIT EFFECT**

An assessment of profitability is essential in considering whether injury is material. Customs had regard to, among other things, the Ministerial Direction of 4 September 1990 that states:

The Government expects that material injury, or the threat thereof, will only rarely be taken as proven when the Australian industry producing like goods has not suffered, or is not threatened with, a 'material' diminution of profits ...

Apart from its first quarter of operations, the applicant has not made a profit since it commenced production of olive oil. In terms of the Ministerial Direction it is not the 'material' diminution of profits that is an indicator of injury, rather, it is the absence of any profit at all after the 1<sup>st</sup> quarter of the injury period.

The company's profitability, or ratio of profit to sales values, has been negative throughout the injury period, although tending towards profitability.

An analysis of profit effect is at **confidential appendix 4**.

Customs is satisfied the applicant has suffered profit related injury.

## **8.5 OTHER INJURY FACTORS**

### **8.5.1 Return on investment**

As noted previously, Inglewood has not made a profit since it began operations, apart from the first quarter of the injury period. This has caused constraints on the owner's ability to draw money out of the business. The company has been further constrained in its ability to advertise. The company has therefore had to rely on further investor funds to remain operational.

Customs is satisfied the applicant has suffered injury by having negative returns on investment.

### **8.5.2 Ability to raise capital**

During the industry visit, Customs was given copies of recent documents from a financial institution that refused an application by Inglewood for additional borrowings. These indicate that the institution concerned believed that,

among other reasons, imports would erode Viva's market share and affect profitability.

Inglewood attributes its inability to obtain loan funds to its inability to raise olive oil prices. This had a negative effect on its cash flow.

Customs is satisfied the applicant has suffered injury by having a reduced capacity to raise capital.

### **8.5.3 Assets**

Inglewood claimed the value of its assets declined slightly over the injury period. Customs found this to be the case up to 30 June 2003. There was no data available in respect of the last quarter of the injury period.

Customs does not consider this factor to be injurious to the Australian industry.

### **8.5.4 Capacity utilisation**

Customs found that capacity utilisation increased up to 2001/2002 but declined in 2002/2003 and in the last quarter of the investigation period. Customs found that the overall capacity of Inglewood's plant was increased during the injury period.

Customs does not consider this factor to be injurious to the Australian industry.

### **8.5.5 Employment and wages**

Employment increased slightly up to June 2003 in terms of total numbers employed. Although the total hours worked increased up to 2001/2002 it declined in 2002/2003. Similarly, total wages increased up to 2001/2002, but reduced in 2002/2003.

Customs does not consider this factor to be injurious to the Australian industry.

### **8.5.6 Inventory**

The value and volume of material held in inventory increased up to 2001/2002, but declined during the investigation period.

Customs does not consider this factor to be injurious to the Australian industry.

### **8.5.7 Production output**

Inglewood's production increased on an annual basis up to 2001/2002, but declined slightly during the investigation period.

Customs does not consider this factor to be injurious to the Australian industry.

### **8.5.8 Research and development**

Relatively little has been spent on research and development during the investigation period.

Customs does not consider this factor to be injurious to the Australian industry.

## **8.6 EC'S RESPONSE TO THE SEF IN RESPECT OF INJURY**

In its response to the SEF the EC commented that Inglewood's company results are '...regularly described as satisfactory ...'. It questions how Customs can draw certain negative conclusions in respect of financial performance when Inglewood's financial statements report '...positive appreciation of Inglewood's operation'.

Customs injury analysis was based on an examination of data in respect of the South Australian Olive Corporation (SAOC) as indicated, for example, in the application and the public file. SAOC is the subsidiary of Inglewood that manufactured and produced the Viva brand of olive oil. It reports separately to its parent. Its ownership of SAOC entitled Inglewood to be considered the applicant and has been referred to as such through this report and other documents.

An examination of Inglewood's financial data, without reference to that of SAOC, is of little relevance.

## **8.7 GOVERNMENT ASSISTANCE**

Customs found no evidence of any specific government assistance given to Inglewood that would offset any injury it may have suffered.

## **8.8 CONCLUSIONS - INJURY**

Customs found the applicant suffered injury in the form of:

- price undercutting;
- price depression;
- price suppression;
- lack of profits;
- negative returns on investment; and
- the company's ability to raise capital has decreased.

Customs found no evidence that the applicant suffered volume related injury.

Other potential injury factors regarded in this investigation by Customs as part of the 'normal ebb and flow of business' and therefore are not considered to have caused injury to the applicant were:

- sales revenue for olive oil increased;
- capacity utilisation increased up to 2001/2002 but declined over 2002/2003;
- marginal decline in assets over the injury period;
- inventory increased over the first part of the injury period, then declined; and
- production increased up to 2001/2002, but declined over 2002/2003.

Having regard to all the above factors, Customs is satisfied that the applicant's claim that it had suffered injury is reasonable.

## **9 Causation**

### **9.1 BACKGROUND**

Although the Australian industry may have suffered injury, the Minister must not sign a dumping or countervailing duty notice if the dumping and countervailable subsidy were not, of themselves, the cause of material injury. Injury caused by other factors must not be attributed to dumping and/or countervailable subsidy. The temporal coincidence of dumping/subsidy and injury alone is insufficient reason for the Minister to impose measures.

Customs concludes that that the production aid is not a countervailable subsidy, and that no other countervailable subsidies existed in respect of olive oil exported from the EU over the investigation period. In this circumstance, Customs is not required to consider causation of injury in respect of subsidy. However, for the purpose of this section of the report Customs will examine, where appropriate, causation as though there were a potentially actionable subsidy to ensure that all aspects of the investigation have been addressed.

Customs found, of the six exporters it visited, two exporters were not dumping and one exporter had a negligible margin of dumping. Whether dumping is causing material injury to the Australian industry can only be considered in respect of the remaining three exporters; Aceites Borges and Cuetara (Spain) and Minerva (Italy).

### **9.2 AUSTRALIAN INDUSTRY'S CLAIMS**

Inglewood made the following claims:

- The market price for olive oil sold in Australia is led by dumped and subsidised olive oil, against which the Australian industry must compete in the key supermarket sector. If there were no dumped or subsidised imports from the EU, then the Australian industry would be able to compete. At the present time, the Australian industry cannot increase its prices to allow it to make a profit.
- In the application, Inglewood provided a model to calculate the effect of subsidy on the price of olive oil in the Australian market. The model provides different scenarios, in respect of the assumptions made, about the mark-up on olive oil and varying ratios of imported and locally produced olive oil. The model indicates Inglewood would be in a better financial position in the absence of dumped or subsidised imports in the market.
- From 2004 there will be sufficient local olives for it not to require imported olive oil for use in its own product.
- While Inglewood has suffered the 'normal' problems associated with the start-up phase of a new industry entering a mature market, these difficulties have been compounded by the presence of dumping and subsidisation. The establishment of an Australian olive oil industry has been materially hindered by these unfair trading practices.

- The applicant does not consider that there are any factors, other than dumping and subsidy, that have distorted the Australian market in such a way as to not allow it to make a profit.

### **9.3 CLAIMS BY OTHER INTERESTED PARTIES**

The EC, exporters and importers provided responses relevant to causation. These are summarised in the following paragraphs.

- The production aid is paid to olive growers on their olive oil production. The aid is therefore paid in respect of a different product to that under investigation. Without positive evidence to the contrary, it must be presumed that there is no pass through of benefit.
- The applicant assumes (without substantiation) that the recipients of the production aid are the same as the producers/exporters, which is not the case. There are several arms-length sales between the olive grower and the sale of finished product. As there is no pass through of benefit, production aid cannot cause injury to the Australian industry.
- The current production aid scheme will be repealed in November 2004. A replacement scheme will decouple production of olives from payments. The recipients of subsidy under the replacement scheme will be free to carry out any agricultural activity, with certain exceptions. Any subsidy paid will be non-specific. Therefore, there is no threat of injury, caused by a countervailable subsidy, from the new scheme.
- The growers of a significant proportion of olive oil exported to Australia in the investigation period did not qualify for the production aid. It was imported into the EU from non-EU countries and subsequently exported to Australia.
- The applicant has tried to establish itself in a mature market, that comprised almost exclusively of imported olive oil. It may have anticipated the need for the imposition of a trade defence measure as part of its business plan. This at best can only be considered a case of material retardation of an industry. The Agreement on Agriculture does not allow the imposition of countervailing duties on allegedly subsidised agricultural products that are deemed to cause material retardation.
- When making the decision to invest in the olive oil industry, the complainant relied on a temporary circumstance in market conditions where prices were unusually high. Returns on investment may have been based on unrealistic long-term expectations. Any injury it is suffering is as a result of this decision.
- The applicant is in the start-up phase, which is the only cause of its injury. It is unrealistic to expect importers and exporters to align their prices to be relative to the high prices of a new company in such a situation.
- The applicant's source of injury is from within. This is demonstrated by the Australian industry continuing to require allegedly dumped and subsidised olive oil to continue to survive. Yet, paradoxically, it

complains about allegedly dumped and subsidised imports from the very countries it imports from.

- The applicant only produces extra virgin olive oil. It cannot claim to have suffered injury as a result of the imports of other sorts of olive oil.
- The applicant is a relatively small producer of olive oil. It is likely to have a much higher unit cost than large-scale European producers. This injury cannot be attributed to alleged dumping or subsidy.

## **9.4 CUSTOMS' CONSIDERATION OF CAUSATION**

### **9.4.1 Background**

Customs has found there was no volume-related injury to the applicant. Any profit-related injury was directly related to the price the applicant charged for its oil and therefore, can only be considered in the context of the following price related injury factors:

- price undercutting;
- price depression; and
- price suppression.

### **9.4.2 Volume effect**

Customs found no evidence of material injury caused by volume-related factors.

### **9.4.3 Price effect**

Customs is of the opinion that the following factors are relevant in considering whether goods sold at dumped and/or subsidised prices caused injury to the Australian olive oil industry.

- The applicant suffered price-related injury in the form of price undercutting, price depression and price suppression.
- Olive oil from Italy and Spain has been exported to Australia at dumped prices over the injury period.
- There is competition between olive oil exported to Australia at dumped prices from Italy and Spain, olive oil exported to Australia at undumped prices from the EU (including Italy and Spain) and Australian produced extra virgin olive oil.
- There is competition between olive oil sourced from growers in the EU, olive oil sourced from growers outside the EU and Australian olive oil.
- Olive oil from growers receiving production aid has been exported from the EU to Australia over the investigation period.
- Olive oil from olives grown in non-EU countries has been exported to Australia over the investigation period.

Customs considers the following factors would have affected the Australian industry regardless of the presence of goods sold at dumped prices in the Australian market:

- From the starting point of having no market share, the applicant has bought market share in an established market and has lowered its price over the injury period to maintain that market share.
- The applicant has had significant start-up costs which affected both price and profitability of the Viva product.
- The applicant is not a large-scale producer when compared with major exporters with which the Viva brand competes. Economies of scale suggest a relatively small producer, such as Inglewood, would incur a greater per unit cost and must charge a higher price to recover those costs.
- The applicant established itself in the Australian market when the world price of olive oil was relatively high. The subsequent lowering of world olive oil prices, including within Australia, appears to be part of the cycle of supply and demand.
- A significant influence in determining the prices of Viva products was the purchasing strategies of the major supermarkets – these strategies also affected the prices of olive oil from Greece, Italy and Spain.
- The applicant's extra virgin competes with imported blended forms of olive oil – Inglewood does not produce any blended olive oil.

Customs calculated that approximately two-thirds (by volume) of the olive oil exported to Australia is undumped (**confidential appendix 5**). Of the remaining one-third, as noted previously in this report, the Australian produced olive oil has suffered price undercutting of up to 50%. This level of undercutting occurred for 'house brand' product only, which customs considers to be a different sector of the olive oil market to that with which Viva competes. The major selling point of house branded product is that it is significantly cheaper than 'labelled' brands. The labelled brands sell on the basis of quality and command a price premium. The applicant had regard to the price of labelled brands when setting selling prices for Viva olive oil.

Inglewood sold its Viva olive oil in 375 ml and two litre containers. An examination of olive oil prices at the wholesale level by container sizes shows:

- For 500 ml containers of olive oil house brand product was the cheapest and was dumped – the cheapest olive oil sold at undumped prices was approximately 10% more expensive than the house brand sold at dumped prices.
- Olive oil in 750 ml containers was not sold at dumped prices.
- For one litre containers of olive oil house brand product was the cheapest and was dumped – the cheapest olive oil sold at undumped prices was approximately 20% more expensive;
- for two litre containers of olive oil, the cheapest dumped and undumped product was the same price;
- for three litre containers of olive oil, the cheapest dumped and undumped product was the same price; and
- for four litre containers of olive oil, there was no dumped product.

Customs notes that, in respect of subsidy, many of the above factors also applied. In respect of the claim that subsidised goods were causing injury to the Australian industry, Customs considers the following significant:

- world prices are driven by the dominant position of EU production, most of which is subsidised;
- there is a significant presence in the Australian market of olive oil originating from olives grown outside the EU, where there is no production aid; and
- the price of the non-EU oil is also affected by the need for producers to compete with EU prices.

#### **9.4.4 Profit effect**

As Customs found no volume related injury, the question of profit related injury is directly related to the price the Australian industry charged for its olive oil. Over the investigation period, Viva was the highest priced olive oil in the Australian market and it competed against cheaper olive oil, both dumped and undumped. The magnitude of the losses incurred by the applicant suggest there were factors other than dumping that caused most of its injury especially given the low levels of dumping margins.

#### **9.4.5 Other injury factors**

In respect of negative returns on investment and inability to raise capital, these are related to the level of profit made by the applicant over the injury period. In Customs' view, this is related to the price it received for its olive oil which has been discussed above.

In respect of other injury factors, such as changes in inventory levels, it is Customs' opinion that these are part of normal business operations and not related to dumping or subsidy.

### **9.5 CONCLUSION**

Customs considers the main causes of price injury to the Australian industry were:

- low world prices due to the production aid;
- the dominance and buying power of supermarket chains in the Australian market; and
- the difference in economies of scale between producers of imported olive oil and the applicant.

Customs also considers the applicant's main competition was from the labelled products in 500 ml and two litre containers. About two-thirds of labelled products (by volume and value) were not sold at dumped prices.

Customs considers the segmentation between house brands and labelled products is a critical factor. Customs considers an increase in the price of house brand oils would not appreciably impact on the prices of the labelled oil with which the Viva brand competes.

For the above reasons, Customs is not satisfied that dumped imports caused material injury to the Australian industry.

## **10 Termination**

After considering responses to the SEF and other relevant matters, Customs therefore recommends that, in accordance with s. 269TDA of the Act, the CEO terminate the investigations into subsidy of olive oil from Greece, Italy and Spain and of dumping from Italy and Spain.

Customs found that:

- the production aid was not an actionable subsidy;
- there were no other actionable subsidies in respect of olive oil from Greece, Italy and Spain;
- olive oil from Moreno (Spain) and Ballester (Spain) was not sold to Australia at dumped prices;
- the margin of dumping for olive oil exported to Australia from Unilever (Italy) was less than 2% (negligible); and
- olive oil from Italy and Spain sold at dumped prices caused negligible injury to the Australian industry.

## 11 Evidence relied upon

In reaching the conclusions contained in this report, Customs had regard to:

Issue	Section of Report	Evidence relied upon
Goods under consideration	3	Applicant's submission, IOOC definitions and submissions from the EC, importers and exporters.
Like goods	4	Applicant's submissions and submissions from the EC, importers, exporters and industry groups.
Australian Industry	4	Applicant's submission and submissions from the EC, importers and exporters.
Olive oil market in Australia	5	Applicant's submission, submissions from importers and exporters, data gathered from the applicant, importers and exporters, ABS data, Customs' commercial data base.
Export price	6	Submissions from importers and exporters, data gathered from importers and exporters, ABS data, Customs' commercial data base.
Normal value	6	Exporters' submissions, information gathered from exporters.
Subsidy	7	Submissions provided by the applicant, submissions from the EC, exporters, the Spanish government, WTO reports, independent economist's report.
Economic condition of the industry	8	Submissions and data provided by the applicant, submissions and data provided by importers, exporters, ABS data, Customs' commercial data base
Cause of material injury	9	Submissions and data provided by the applicant, submissions from the EC, importers, exporters, ABS data, Customs' commercial data base

## **12 Appendices**

Confidential appendix 1	Sales volume and market share data
Confidential appendix 2	Wholesale price data
Confidential appendix 3	Price depression and price suppression analysis
Confidential appendix 4	profitability analysis
Confidential appendix 5	Analysis of proportion of dumped and undumped olive oil