



RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Anti-Dumping Agreement - Concept of 'destined for consumption'

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[...]





[...]

Purpose:

- Determine whether the WTO Dispute Settlement Body, in its decision-making practices, has already stated its views on the interpretation of the concept of 'destined for consumption' in Article 2.1 of the Anti-Dumping Agreement, and
- Examine whether an interpretation of the concept of anti-dumping has already emerged in the decision-making practices and in the case-law of the authorities responsible for conducting anti-dumping investigations and of the American, Canadian and Australian courts, or of the corresponding provision in Article 2(2) of the basic Anti-Dumping Regulation, in so far as it follows from that regulation that domestic sales are excluded from the determination of normal value if it is established that they are actually export sales.

[...]



SUMMARY

INTRODUCTION

1. Under Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994¹ (the Anti-Dumping Agreement), a product is considered dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product is less than the comparable price, in the ordinary course of trade, for the like product when 'destined for consumption' in the exporting country.
2. Against this backdrop, this study seeks to determine whether the Dispute Settlement Body ('DSB') of the World Trade Organisation ('WTO') and the American, Canadian and Australian courts and authorities responsible for anti-dumping investigations have already stated their views on the interpretation of the concept of 'destined for consumption' in Article 2.1 of the Anti-Dumping Agreement or, as regards the American, Canadian and Australian courts and authorities, on the interpretation of national provisions corresponding to Article 2(2) of the basic anti-dumping regulation², in so far as it follows from those interpretations that domestic sales are excluded from the determination of normal value if it is established that they are actually export sales. This analysis also seeks to determine whether, according to the interpretation retained by those bodies, the concept 'destined for consumption' incorporates a 'subjective' element, i.e. reference to the knowledge or intention of the seller in the exporting country as regards product destination.

I. WTO

3. In relation to the DSB's interpretation of the concept 'destined for consumption' in Article 2.1 of the Anti-Dumping Agreement, it should be noted that in footnote 339 to *EC v Salmon (Norway)*³, the WTO panel found that 'where a producer sells to an unrelated exporter (or a trader) knowing that the product will be exported, that sale cannot [...] qualify as a sale intended for domestic consumption'.
4. However, in so far as the DSB has not since this case further clarified the concept of 'destined for consumption' as defined in Article 2.1 of the Anti-Dumping Agreement, it is not possible to establish with certainty whether the observations made in the abovementioned footnote have normative scope and especially whether it can be deduced from those observations alone that lack of effective knowledge of the end use of the relevant product upon export necessarily means that the sale in question should be considered as intended for domestic consumption, even though the product concerned was exported.

II. UNITED STATES

A. PROCEDURAL AND REGULATORY FRAMEWORK

¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ([OJ 1994 L 336, p. 103](#)), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) ([OJ 1994 L 336, p. 1](#)).

² Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ([OJ 2016, L 176, p. 21](#)).

³ 'European Communities – Anti-Dumping Measure on Farmed Salmon from Norway' (WT/DS 337/R), 16 November 2007.



5. The United States International Trade Commission, an agency of the Department of Commerce ('Commerce'), monitors compliance with the laws and agreements designed to protect American companies against anti-dumping practices. The International Trade Commission ('ITC') investigates whether various sectors of domestic production are harmed by product dumping.
6. If Commerce and the ITC identify the existence of harmful dumping practices, Commerce will order the imposition of anti-dumping duties⁴.
7. Decisions by Commerce may be appealed to the United States Court of International Trade ('CIT')⁵, with jurisdiction for appeal lying with the United States Court of Appeals for the Federal Circuit ('CAFC')⁶. Decisions taken by the CAFC may be appealed to the Supreme Court of the United States, on condition that it grants a writ of *certiorari*⁷.
8. Dumping practices are governed by the provisions of U.S. Code Title 19, particularly § 1671 to § 1677n⁸. In this context, § 1677a provides the rules for establishing 'export pricing', while § 1677b, the equivalent provision to Article 2.1 of the Anti-Dumping Agreement, provides the rules for establishing the 'normal value' of merchandise affected by dumping. The export price is compared to the normal value to determine whether the merchandise in relation to which the anti-dumping investigation is being carried out is being or could be sold at an unfair value⁹.

B. INTERPRETATION OF THE CONCEPT 'DESTINED FOR CONSUMPTION'

9. In relation more specifically to the interpretation of the concept 'destined for consumption' by the US courts, it should be noted, first, that the *INA Walzlager* judgment¹⁰ in which the CIT clarified that in order to determine whether certain sales in the domestic market of the exporting country should be excluded from the determination of normal value, it must be established whether the seller knew or should have known that the merchandise was not intended for domestic consumption in the export country based on the specific facts and circumstances surrounding the sales ('knowledge test')¹¹.
10. The response to the question of whether the seller knew or should have known that the merchandise was not intended for domestic consumption is generally derived from extrinsic

⁴ Subtitle B of Title VII Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (19 U.S.C. § 1673 et seq.) and subsequently amended; Summary of Statutory Provisions Related to Import Relief, USITC Publication 4468 (2014), https://www.usitc.gov/import_injury/documents/pub4468_2014.pdf, pp. 7 to 11; see An Introduction to U.S. Trade Remedies, <https://enforcement.trade.gov/intro/index.html>.

⁵ See Section 516A(a)(2)(B)(i) Tariff Act of 1930, as amended by 19 U.S.C § 1516a(a)(2)(B)(i) (2012) and 28 U.S.C. §1581(c) 2012; Ct. Int'l Trade (Judge Kelly) 8 January 2019, *Stupp Corp and Maverick Tube Corp. v United States and Seah Steel*, [Consol. Court No 15-00334](https://www.usitc.gov/2019/01/08/15-00334), p. 7.

⁶ 28 U.S.C. § 1295(a)(5); see Trendl, *Judicial Review of Anti-dumping Determinations in the United States*, Global Trade and Customs Journal, Volume 7, Issue 5 (2012), pp. 283 to 289.

⁷ See, in general, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=Writ%20of%20Certiorari&text=The%20primary%20means%20to%20petition,of%20the%20case%20for%20review>.

⁸ U.S. Code, Title 19. Customs Duties, Chapter 4. Tariff Act of 1930, Subtitle IV. Countervailing and Anti-Dumping Duties, <https://www.law.cornell.edu/uscode/text/19/chapter-4/subtitle-IV>.

⁹ See footnote 8, <https://www.law.cornell.edu/uscode/text/19/1677a> and <https://www.law.cornell.edu/uscode/text/19/1677b>.

¹⁰ *INA Walzlager Schaeffler KG v United States*, 3 February 1997, 957 F. Supp. 251 (Ct. Int'l Trade 1997), pp. 264 and 265.

¹¹ See footnote 10, pp. 262 to 264.

sources. This criterion of ‘imputed’ knowledge should be distinguished from the criterion of actual knowledge, which, in essence, requires an admission by the relevant seller¹².

11. In the *INA Walzlager* case¹³, the CIT found that the evidence available proved that the relevant selling company had made sales on the domestic market based on its list of ‘export prices’, implying that it knew that the purchaser intended to export the merchandise. Furthermore, the remarks by the representative of the company visited by Commerce were sufficient to impute knowledge to the selling company. Consequently, according to the CIT, it was highly unlikely that the company in question was unaware of its purchasers’ activities. This was not a situation in which the reseller decided to export the merchandise on one occasion; on the contrary, the reseller specifically stated that it was an exporting company. Based on this evidence, the CIT ruled that Commerce’s decision to exclude the sales in question from the determination of normal value complied with the law¹⁴.
12. Another case worth noting is the *Tung Mung* case¹⁵, where the CIT, referring to the *INA Walzlager* judgment¹⁶, clarified that to determine whether a producer knew or should have known that the merchandise in question was to be exported, Commerce must take into consideration the place where the product is ‘consumed’. According to the CIT, merchandise sold in the home market in order to be used to produce other merchandise, not covered by the investigation, which is exported, is considered consumed in the home market and is not therefore considered as intended for export¹⁷.
13. The *INA Walzlager*¹⁸ and *Tung Mung*¹⁹ judgments have both been cited in recent case-law²⁰. In particular, in *Coalition of American Flange Producers v United States* (CTI, 17 June 2020)²¹, the CIT

¹² It should be noted that to determine whether a party knew or should have known that the merchandise was intended for the United States, Commerce must take into consideration: (1) whether that party prepared or signed certificates, shipping documents, contracts or other documentation stating that the destination of the merchandise was the United States; (2) whether that party used packaging or labelling stating that the merchandise was intended for the United States; (3) whether any unique features or specifications of the merchandise otherwise indicated that the destination was the United States; and (4) whether that party admitted that it knew that its sales were destined for the United States (see to that effect, Federal Register /Vol. 69, No 152 /Monday 9 August 2004 /Notices, p. 48199, available at <https://www.govinfo.gov/content/pkg/FR-2004-08-09/pdf/FR-2004-08-09.pdf>).

¹³ Cited above, footnote 10, paragraph 9.

¹⁴ *INA Walzlager Schaeffler KG v United States*, 3 February 1997, 957 F. Supp. 251 (Ct. Int’l Trade 1997), p. 265: ‘The sales from the export price list and the statements of the company representative indicate, at the very least, FAG should have known the sales were not for home consumption. The concept of imputed knowledge implies that the information regarding knowledge must be derived from extrinsic sources. The only way to determine actual knowledge is through an admission of the respondent. Without such an admission, Commerce had to look to other evidence to determine whether FAG should have known that the goods were not for home consumption. The evidence demonstrates that FAG made sales to one of the companies on the basis of its “export price” list which implies that FAG knew the reseller intended to export the goods. In addition, the comments of the representative of the firm visited by Commerce were sufficient to impute knowledge to FAG. It is highly unlikely that FAG would have no knowledge of the activities of its buyers. This was not a situation in which the reseller decided to export the merchandise on one occasion but, rather, the reseller specifically stated that it is an exporter firm. Based on this evidence, the Court finds Commerce’s decision to exclude the sales from FAG’s home market database consistent with law.’

¹⁵ *Tung Mung and YUSCO v United States*, Consol. Court No: 99-07-00457, Slip Op. 01-83 (Ct. Int’l Trade 3 July 2001).

¹⁶ Cited above, footnote 10, paragraph 9.

¹⁷ See footnote 14, p. 46: ‘In determining whether the producer knew or should have known that the subject merchandise will be exported, Commerce looks in part to the place where the product is “consumed”. Merchandise cannot be “sold [...] for consumption in the exporting country”, 19 U.S.C. § 1677b(a)(1) (B)(i), if it has already been consumed in the home market. Merchandise sold in the home market, even if ultimately destined for export, is “consumed” in the home market if it is used there to produce non-subject merchandise prior to exportation.’ In this particular case, certain YUSCO stainless steel plate in coils, the Plaintiff-Intervenor in the *Tung Mung* case, were further processed by the purchaser on the domestic Taiwanese market into tubes and pipes and exported to a third country (p. 39).

¹⁸ Cited above, footnote 10, paragraph 9.



also found that a producer need not know the final destination of merchandise sold so long as the producer has actual or constructive knowledge it will be exported outside the home market²².

14. Moreover, a knowledge test is also applied by US courts and authorities in situations other than those involving the definition of the concept 'destined for consumption'²³ – specifically to define the concept of 'exportation to the United States' under § 1677a on 'export price'²⁴.
15. The *Hiep Thanh* judgment provides important clarification concerning application of the knowledge test under § 1677a on 'export price'²⁵. That case involved determining whether merchandise sold by a Vietnamese company to an unaffiliated Mexican customer is 'destined for the United States' if the Mexican purchaser exports them to the United States for consumption but the Vietnamese company is unaware of this ultimate destination.
16. In that particular case, Commerce determined that when only two entities are involved in the sale of the products, application of the knowledge test is neither necessary nor appropriate. According to Commerce, a knowledge test is a framework that is of use in identifying the first party in a transaction chain with knowledge of the US destination where there are multiple entities involved in such chains prior to importation. In the *Hiep Thanh* case²⁶, there were only two entities involved prior to importation – the Vietnamese company and the unaffiliated purchaser. Consequently, Commerce determined that the contested sales were in fact made for exportation to the United States.
17. The CIT upheld this analysis, referring to the *Chevron* case-law²⁷, according to which the courts should defer to the agency's answer or interpretation unless the answer is unreasonable, so long as Congress had not spoken directly on the precise issue in question
18. It should also be noted that the *Hiep Thanh* judgment²⁸ is in line with the general approach of Commerce, which consists of interpreting the expression 'exportation to the United States' as meaning any sale to an unaffiliated party where the merchandise is to be delivered to a destination in the United States, regardless of whether the underlying documentation indicates later export to a third country. Simple delivery to a US port (in itself and independently of subsequent entry for consumption) constitutes such 'exportation'. If a sale is concluded involving

¹⁹ Cited above, footnote 15, paragraph 12.

²⁰ See to that effect Ct. Int'l Trade (Judge Kelly) 8 January 2019, *Stupp Corp and Maverick Tube Corp. v United States and Seah Steel*, Consol. Court No 15-00334, p. 27.

²¹ Ct. Int'l Trade 17 June 2020, *Coalition of American Flange Producers v United States*, 44 CIT __, 448 F. Supp. 3d 1340 (2020).

²² See footnote 17, p. 1354: 'The Government is correct that, under *INA Walzlager*, a producer need not know the final destination of merchandise sold so long as the producer has actual or constructive knowledge it will be exported outside the home market.'

²³ Ct. Int'l Trade (Judge Goldberg) 12 March 2003, *Wonderful Chemical Industrial v United States*, Slip Op. 03-26, Court No 00-07-00369, III.A.1. ('Application of the knowledge test has been permitted in various contexts.')

²⁴ See above, paragraph 8 and footnotes 8 and 9.

²⁵ Ct. Int'l Trade (Judge Gordon) 15 February 2012, *Hiep Thanh Seafood Joint Stock Co v United States*, 36 C.I.T. 219 (2012).

²⁶ Cited above, footnote 25, paragraph 15.

²⁷ [Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.](https://www.law.cornell.edu/wex/chevron_deference), 468 U.S. 837 (1984); see https://www.law.cornell.edu/wex/chevron_deference; see CAFC 28 August 1995, *Federal Mogul Corp. v United States* (Circuit Judges Mayer, Plager and Clevenger), 63 F.3d 1572, pp. 1581-1582 ('Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of "the foreign policy repercussions of a dumping determination."')

²⁸ Cited above, footnote 25, paragraph 15.



the delivery of merchandise to the United States, there is a significant risk that it could enter the US market for consumption there²⁹.

19. Commerce seems to have adopted this approach based on the consideration that if it did not, some respondents would be in a position to exclude US sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the merchandise entered the United States for consumption and thus became part of US commerce subject to anti-dumping duties.

III. AUSTRALIA

A. PROCEDURAL AND REGULATORY FRAMEWORK

20. In Australia, the Anti-Dumping Commission ('ADC'), which comes under the Department of Industry, Science and Resources, is the authority in charge of anti-dumping investigations.
21. When the ADC receives an application from Australian industry presenting prima facie evidence of dumping allegedly harmful to that industry, the ADC launches an investigation and drafts a report for the Minister for Industry advising whether to impose anti-dumping or countervailing duties on merchandise from the foreign countries cited in the application.
22. The decisions of the ADC may in some conditions be reviewed by the Anti-Dumping Review Panel ('Review Panel').
23. Under the Judiciary Act 1903³⁰ and the Administrative Decisions (Judicial Review) Act 1977³¹, decisions to impose anti-dumping measures may also be subject to judicial review by the Federal Court or by the Federal Circuit Court.
24. In terms of the applicable substantive law, Section 269TAC of the Customs Act 1901³² ('1901 Act') lays down rules for establishing the 'normal value' of relevant goods in their country of exportation while Subsection 269TAC(1)³³ is the provision equivalent to Article 2.1 of the Anti-Dumping Agreement.
25. Regarding the interpretation of the concept 'destined for consumption'³⁴ under Subsection 269TAC(1), it should be noted that Review Panel Report No 56 of January 2018 on the investigation 'Prepared or preserved tomatoes exported from Italy' dealt specifically with the issue of characterising what at first view appeared to be internal sales as export sales and which

²⁹ [Issues and Decision Memorandum for the Final Results of the New Shipper Review of Chlorinated Isocyanurates from the People's Republic of China: Heze Huayi Chemical Co., Ltd.](#), 5 April 2012, pp. 3 and 4.

³⁰ <https://www.legislation.gov.au/Details/C2018C00347>.

³¹ <https://www.legislation.gov.au/Details/C2021C00035>.

³² https://www.legislation.gov.au/Details/C2021C00307/Html/Volume_3 The 1901 Act is the main law governing the scope of application of anti-dumping regulations in Australia, along with the Customs Tariff (Anti-Dumping) Act 1975 (<https://www.legislation.gov.au/Details/C2016C00716>). The 1975 Act was enacted to give effect to the original General Agreement on Tariffs and Trade The Act was further revised in 1981 (Act No 66 of 1981) to facilitate Australia's adherence to the revised GATT anti-dumping codes. Section 6 of the 1975 Act provides that the 1901 Act is incorporated and shall be read as one with the 1975 Act.

³³ Subsection 269TAC(1) provides as follows: 'the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export [...]' (see Anti-Dumping Commission, Dumping and Subsidy Manual, November 2018, https://www.industry.gov.au/sites/default/files/2019-05/adc_dumping_and_subsidy_manual.pdf).

³⁴ 'Sold [...] for home consumption [...]'.



were therefore not included when determining normal value³⁵. In that case, the Review Panel examined an ADC decision ruling, inter alia, that domestic sales of unlabelled cans in the exporting country were not suitable for use in calculating their normal value because those unlabelled cans could potentially be sold abroad and the manufacturer did not have control over or awareness of the end destination for those goods.

B. INTERPRETATION OF THE CONCEPT 'DESTINED FOR CONSUMPTION'

26. In its report, the Review Panel accepted the producer's argument that the relevant criterion to decide whether or not a sales transaction should be considered 'for home consumption' is the producer's awareness when fixing the price. According to the producer concerned, on condition that the producer in question is not aware – for a particular reason (such as contractual arrangements, etc.) – of the fact that the final destination of the goods is for export, any sales transaction to an unrelated customer established in the exporting country should be considered as having been made 'for home consumption'. In this respect, the producer concerned referred to both the DSB report in *EC v Salmon (Norway)*³⁶ and to the knowledge test applied in the United States.
27. The Review Panel therefore invited the ADC to reinvestigate its finding that sales in the domestic market of the (unlabelled) cans at issue in that case were unsuitable for use in calculating a domestic sale price on the basis that the Commission was uncertain whether the goods would enter home consumption.
28. Following this request, the ADC adopted a new recommendation to the effect that sales of the cans at issue should be considered entered into home consumption as defined in Subsection 269TAC(1)³⁷.
29. In support of this conclusion³⁸, the ADC referred to Article 2.1 of the Anti-Dumping Agreement and its interpretation by the DSB in *EC v Salmon (Norway)*³⁹. In this respect, the ADC stated that a key factor for establishing whether goods should be considered destined for domestic consumption is the producer's knowledge as to whether those goods will be subsequently exported.
30. On the other hand, the ADC referred to the findings of Report No 196 Review of Anti-Dumping Measures – Food Service and Industrial Pineapple Exported from Thailand⁴⁰ ('REP 196') of the International Trade Remedies Branch⁴¹, which was the authority with competence to investigate allegations of dumping before the ADC was established in 2013. Referring more specifically to the

³⁵ https://www.industry.gov.au/sites/default/files/adrp/2017_56_-_certain_prepared_or_preserved_tomatoes_-_report_-_for_public_record_-_redacted.pdf (in particular § 213 to § 229).

³⁶ Cited above, footnote 3, paragraph 3.

³⁷ This recommendation was welcomed by the Review Panel in its Report No 56.

³⁸ The Commission's comments are available at: https://www.industry.gov.au/sites/default/files/adrp/2017_56_-_tomatoes_-_adc_reinvestigation_report_-_public.pdf.

³⁹ Cited above, footnote 3, paragraph 3.

⁴⁰ <https://www.industry.gov.au/sites/default/files/adc/public-record/025-rep196.pdf>.

⁴¹ The International Trade Remedies Branch of the Australian Customs and Border Protection Service.

verification reports⁴² drawn up in the investigation that gave rise to REP 196, the ADC concluded as follows in its comments for the Review Panel:

'The Commission is of the view that in REP 196 a finding that domestic sales were not entered for home consumption in the country of export was predicated upon the knowledge of the [producer] that the goods would be subsequently sold into an export market. This appears consistent with Article 2.1 of the [...] Anti-Dumping Agreement [...] and the interpretation espoused in the Report of the Panel in *EC v Salmon (Norway)*⁴³.

The Commission further notes that in REP 196 the issue of goods being sold for home consumption was considered on [a producer] by [producer] basis, that verification activities were undertaken to evidence that the [producer]'s knowledge as to the subsequent exportation of the goods sold into the domestic market was sound, and only those sales thus identified as having been subsequently exported were removed from the relevant exporter's domestic sales listing.⁴⁴

31. In light of those observations, the ADC found that its original conclusion was wrong. In confirming that sales of (unlabelled) cans on the domestic market were unsuitable for use in calculating a domestic sale price in so far as it was uncertain whether they were to be entered for home consumption, the ADC overlooked the producer's knowledge as to the destination of the goods as a determining factor. This type of approach implies that internal domestic sales could only be taken into consideration where the ADC was certain that the goods would be consumed in the

⁴² The visit report for Natural Fruit Co. stated as follows: 'Natural stated that, as far as they are aware, none of its Thai customers sold the GUC into the domestic market in Thailand during the review period. For completeness, we confirmed that Natural have no actual knowledge of the final destinations of the GUC [goods under consideration] provided to Thai trading companies pursuant to these "domestic" transactions.' (<https://www.industry.gov.au/sites/default/files/adc/public-record/014-verificationreport-exporter-naturalfruitco.ltd.pdf>, p. 17). Similarly, the visit report for Thai Pineapple Canning Industry Corp Ltd in the same investigation states: 'We also confirmed that SAICO [Siam Agro-Food Industry Public Company Limited] sold a very small volume of consumer pineapple to traders registered in Thailand. We confirmed that these sales were not "true domestic" sales as SAICO understood them to be intended for export by the traders. To satisfy ourselves of the veracity of SAICO's claim that all "domestic" sales were not "true domestic" sales, we requested, and [Thai Pineapple Canning Industry Corp Ltd (TPC)] provided, an SAP summary report of all sales of canned pineapple by customer. We selected the customer with the greatest sales volume (excluding sales from SAICO to TPC) and confirmed that the customer was a Thai trading company whose operations relate to the export of the goods. We are of the opinion that this product was bound for export, and not for consumption in Thailand.' (<https://www.industry.gov.au/sites/default/files/adc/public-record/011-verificationreport-exporter-naturalfruitco.ltd.pdf>, p. 24). Still in the same case, the visit report for Dole Thailand Limited ('DTL') found that DTL was selling goods on the domestic market to customers for resale on both the export market and the domestic market. The Commission noted that only goods identified as sold on an export market were excluded from DTL's domestic sales listing (<https://www.industry.gov.au/sites/default/files/adc/public-record/016-verificationreport-exporter-dolethailandlimited.pdf>).

⁴³ Cited above, footnote 3, paragraph 3.

⁴⁴ 'The Commission is of the view that in REP 196 a finding that domestic sales were not entered for home consumption in the country of export was predicated upon the knowledge of the exporter that the goods would be subsequently sold into an export market. This appears consistent with Article 2.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (also referred to as the Anti-Dumping Agreement), and the interpretation espoused in the Report of the Panel in *EC v Salmon (Norway)*. The Commission further notes that in REP 196 the issue of goods being sold for home consumption was considered on an exporter by exporter basis, that verification activities were undertaken to evidence that the exporter's knowledge as to the subsequent exportation of the goods sold into the domestic market was sound, and only those sales thus identified as having been subsequently exported were removed from the relevant exporter's domestic sales listing.' (https://www.industry.gov.au/sites/default/files/adrp/2017_56_-_tomatoes_-_adc_reinvestigation_report_-_public.pdf, p. 26).



exporting country. And, according to the ADC's new decision, this is contrary to Subsection 269TAC(1)⁴⁵. This new decision was upheld by the Review Panel.

IV. CANADA

32. In the Canadian legal system, neither the courts nor the authorities in charge of anti-dumping investigations seem to have interpreted the concept 'destined for consumption' as set out in Article 2.1 of the Anti-Dumping Agreement or the corresponding national provision.

CONCLUSION

33. In contrast to the Canadian legal system, in which neither the concept 'destined for consumption' as provided for in Article 2.1 of the Anti-Dumping Agreement nor the corresponding national provision have been interpreted by the competent courts or authorities, analysis of the decision-making practices of the DSB and of US and Australian case-law and administrative decisions has enabled several relevant cases to be identified. However, in terms of the information garnered, the decisions handed down in the United States and Australia are more instructive than those handed down by the WTO.
34. As regards the decision-making practices of the DSB, it should be noted that although the WTO panel observed, in the context of *EC v Salmon (Norway)*⁴⁶, that the concept 'destined for consumption' as provided for in Article 2.1 of the Anti-Dumping Agreement includes a reference to the seller's knowledge, the scope and validity of this observation remain uncertain.
35. In contrast, the analysis clearly shows that the competent US courts and authorities apply the knowledge test to determine whether certain sales on the domestic market of the exporting country should be excluded from the determination of normal value. In essence, this test involves establishing whether the seller knew or should have known that the merchandise was not destined for domestic consumption in the exporting country based on the specific facts and circumstances surrounding the sales, irrespective of the final destination of the merchandise sold.
36. Lastly, the Australian authorities responsible for anti-dumping investigations also appear to apply a knowledge test which is focused on the producer's knowledge as to the destination of the goods.

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⁴⁵ This approach removes the knowledge of the exporter as to whether the goods are exported as the determining factor and instead implies that domestic sales can only be considered where the Commission has certainty that the goods will be consumed in the country of export. This shift in approach is, in the Commission's view, not consistent with the intent of Subsection 269TAC(1). (https://www.industry.gov.au/sites/default/files/adrp/2017_56_-_tomatoes_-_adc_reinvestigation_report_-_public.pdf, p. 26)

⁴⁶ Cited above, footnote 3, point 3.

