



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
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**LABOUR, SCIENCE  
AND ENTERPRISE**

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# Preserved Peaches from Spain - Reconsideration of Sunset Review

## Final Report

**Dumping and Countervailing Duties Act 1988**

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September 2019

**Non-confidential**

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## Abbreviations

The following abbreviations are used in this Report:

Act (the)	Dumping and Countervailing Duties Act 1988
AD Agreement (the)	WTO Agreement on Implementation of Article VI of the GATT 1994
CIF	Cost, Insurance and Freight
COGS	Cost of goods sold
EBIT	Earnings Before Interest and Tax
EC	European Commission
EU	European Union
EUR	Euro
FENAVAL	Federación Nacional de Asociaciones de Transformados Vegetales y Alimentos Procesados
FOB	Free on Board
FTE	Full time equivalents
GAIN	Global Agricultural Information Network (USDA)
GOS	Government of Spain
HWL	Heinz Wattie's Ltd
MBIE	Ministry of Business, Innovation and Employment
MED	Ministry of Economic Development
MT	Metric ton/tonne
NIFOB	Non-Injurious Free on Board
NSV	Net sales value
NV(VFDE)	Normal Value (Value for Duty Equivalent)
NZCS	New Zealand Customs Service
NZD	New Zealand Dollar
POR(D)	Period Of Review for Dumping – 1 January 2018 to 31 December 2018
POR(I)	Period Of Review for Injury – 1 January 2014 to 31 December 2018

RFI	Request for Information
Secretary	Chief Executive of Ministry of Business, Innovation and Employment
USDA	United States Department of Agriculture
VAT	Value-Added Tax
VFD	Value for Duty
WTO	World Trade Organization

**Confidentiality of Information**

In a number of instances, information in this report, including figures in the tables, is considered confidential because the release of this information would be of significant competitive advantage to a competitor or its release would otherwise have a significant adverse impact on a party.

In these instances the information been redacted or where possible has been summarised in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. For example, in tables the actual figures have been replaced by figures showing percentage changes from the previous period. Shading has been used to show where this occurs.

For the charts, confidentiality is maintained by deleting the relevant axis values.

Where it has not been possible to show summaries in this manner, the information has not been susceptible of summary because to do so would unnecessarily expose the provider of the information to commercial risk.



## EXECUTIVE SUMMARY

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*This is the Final Report on the reconsideration of the sunset review of anti-dumping duties on preserved peaches from Spain.*

*MBIE undertook a sunset review in 2016 of the continued need for imposition of anti-dumping duties on preserved peaches from Spain, concluding that duties were not warranted. HWL challenged this decision through judicial review.*

*The High Court held that HWL did not have an adequate opportunity to respond to new information that had been provided to MBIE and that MBIE breached obligations of natural justice, quashed the Minister's decision, and directed MBIE to reconsider its sunset review.*

*MBIE consulted with HWL, the GOS and the EC on the proposed approach to the reconsideration.*

This is the Final Report on the reconsideration of the sunset review of anti-dumping duties on preserved peaches from Spain.

In 2016 the Ministry of Business, Innovation and Employment (MBIE) undertook a sunset review of the continued need for imposition of anti-dumping duties on preserved peaches from Spain, following an application by Heinz Wattie's Ltd (HWL).

In March 2017, MBIE completed its sunset review, resulting in the termination of the anti-dumping duties with effect from 23 February 2017, based on the finding that there was not likely to be a continuation or recurrence of injury following the removal of duties.

HWL challenged, through judicial review in the High Court of New Zealand, the decision of the Minister to terminate anti-dumping duties on imports of peaches from Spain on the grounds of a breach of natural justice.

On 4 September 2018, the High Court:

- held that HWL did not have an adequate opportunity to respond to new information that had been provided to MBIE;
- issued a declaration that MBIE's process breached obligations of natural justice owed to HWL as an interested party, by failing to convey to HWL the new material relied on by MBIE in its final report to reach a conclusion contrary to that signalled in MBIE's interim report;
- quashed the Minister's decision to terminate the anti-dumping duties; and
- directed MBIE to reconsider its sunset review of the justification for an anti-dumping duty against Spanish preserved peaches. The reconsideration of the review was to be conducted on terms that consider past, present and future conduct in the import of the products, but without triggering section 14(9)(b) of the Dumping and Countervailing Duties Act 1988 (the Act), so that any anti-dumping duties would only be restored once a decision applying the duty is made. Any duty would only be charged prospectively, and the reconsideration was to be carried out on the terms of the Act as in force in August 2016.

Following the High Court's ruling, MBIE developed a proposed approach to undertaking the reconsideration, and consulted on this proposal with HWL, the Government of Spain (GOS), and the European Commission (EC). MBIE proposed, in light of the Judgment:

- to reconsider whether the absence of anti-dumping duties would likely lead to a continuation or recurrence of dumping;

- to reconsider whether such dumping would likely cause a continuation or recurrence of material injury to the New Zealand industry;
- that the period of reconsideration for dumping (POR(D)) would be 1 January 2018 to 31 December 2018, and the period of reconsideration for injury (POR(I)) would be 1 January 2014 to 31 December 2018;
- to set out the reconsideration of these matters in two reports: an Interim Report within 150 days, and a Final Report within 180 days; and
- that duties would not apply during the reconsideration, and would only be restored prospectively if and when a decision applying the duty is made. If the duties are to be restored, MBIE proposed that they may be applied at a reassessed rate to take account of changes in circumstances since the duties were last calculated.

*HWL agreed with the proposal. The GOS did not comment on the process proposed. The EC expressed some concerns with the proposed methodology, which MBIE addresses in both the Interim and Final Reports.*

HWL agreed with the proposed approach. The GOS did not comment on the process proposed, although it made references to matters to be looked at as part of the reconsideration itself. The EC expressed concerns with the methodology proposed by MBIE, raising the following issues:

- a) updating the period of investigation is equivalent to initiating a new anti-dumping investigation while maintaining standards of assessment applicable to review investigations;
- b) assessing the likelihood of recurrence of dumping and injury based on 2018, when no duty is in force, is contrary to an objective examination; and
- c) based on the World Trade Organisation (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement), the EC does not see how anti-dumping duties could be reinstated more than 2 years after expiry.

MBIE has addressed the matters raised by the EC in Section 5.8 of this Final Report. In summary, MBIE notes that:

- a) Article 13 of the AD Agreement requires that Members maintain judicial, arbitral or administrative tribunals for the purpose of undertaking reviews. MBIE's selection of different periods from the 2016 review for the reconsideration complies with the Court's direction, with this reconsideration necessarily having a different timing than for the 2016 review;
- b) in relation to the consideration of a time period where no duties are in place, the High Court directed MBIE to "consider past, present and future conduct in the import of the products". MBIE also notes that in its analysis, it has considered the impact of anti-dumping duties not being in place, and notes that imports did not increase after duties were removed likely due to a range of causes, including the seasonal nature of the goods, and continued uncertainty

created by the judicial review proceedings. MBIE has made an objective examination of the information available in order to reach its conclusions, as required by Article 11.3 of the AD Agreement; and

- c) if duties are applied, they will be applied at a reassessed rate to take account of changes in circumstances since the duties were last calculated in 2011. If any duties are put in place, MBIE notes that they would remain in force for 5 years after the previous duties were due to expire, namely from August 2016, unless a sunset review is initiated before that date, and any duties put in place will not be backdated prior to the date of their reinstatement. This approach is consistent with the AD Agreement.

*The reconsideration was initiated on 8 March 2019.*

The reconsideration was initiated on 8 March 2019, with notice of the initiation published in the Gazette. The 180-day period ends on 4 September 2019.

*MBIE has addressed the requirement to consider past, present and future conduct in the information used.*

MBIE has relied on information from the 2016 review, and consistent with the High Court’s direction to “consider past, present and future conduct in the import of the products”, MBIE has sought additional information from interested parties for the POR(D), as well as using information from earlier proceedings.

*An Interim Report was sent to interested parties on 2 August 2019. This Final Report takes account of comments received on the Interim Report.*

In line with the process outlined by MBIE, an Interim Report was released on 2 August 2019 providing written advice of the essential facts and conclusions that were likely to form the basis for any final determination to be made, and addressing matters raised by interested parties. Interested parties provided comments on the Interim Report which were taken into account in the preparation of this Final Report. MBIE’s detailed response to the submissions made is contained in Annex 1 of this Final Report.

The comments received have not led to MBIE changing its conclusions regarding the level of dumping and the likelihood of a continuation or recurrence of dumping, or the likelihood of a recurrence or continuation of injury attributable to dumping.

*MBIE concludes that there is evidence that there is a likelihood of the continuation or recurrence of dumping of the subject goods imported from Spain.*

In considering the likelihood of the continuation or recurrence of dumping, MBIE has made specific and notional assessments of normal values and export prices. These assessments indicate that imports in the POR(D) are being dumped, and any future imports of the subject goods from Spain are likely to be dumped.

*During the reconsideration, and before the Interim Report was issued, the EC provided a submission with what it considered to be*

The EC’s submission of 27 May 2019 noted that MBIE’s conclusion in the 2016 review was based on positive evidence of the likelihood of continuation or recurrence of dumping and injury. In response to this, the EC gathered what it considered to be positive evidence of the real situation in the market in the absence of duties in the form of statistics showing that Spanish exports to New Zealand continue to

*positive evidence that Spanish exports to New Zealand continue to be negligible after the duty was removed. MBIE considers that a reasonable explanation as to why imports did not immediately increase relates to the seasonal nature of the goods and external market forces at play; and incorporates evidence from past behaviour which indicates that increased imports from Spain are likely should duties not be put in place.*

*MBIE concludes that if anti-dumping duties are not in place, dumping of imports of preserved peaches from Spain is likely to continue and recur and would likely result in recurrence of material injury to the domestic industry.*

*MBIE has concluded that an ad valorem rate of anti-dumping duty should be applied to the subject goods when imported from Spain.*

*MBIE recommends that the Minister determine*

be negligible after the duty was removed.

MBIE has addressed this matter in Section 5.8 of this report, and notes that the reasons imports did not immediately increase following the removal of duties are likely to be: the seasonal nature of the goods, resulting in limited availability of stocks from the 2016 Spanish crop and the timing of the 2017 Spanish harvest period, coupled with external market forces at play; and the uncertainty caused by the judicial review process around duties applicable to imports of preserved peaches from Spain.

MBIE has also drawn on similarities with the experience following the removal of countervailing duties on preserved peaches from the European Union (EU) when imports had increased; and the situation faced in the investigation in 2011, where an importer stopped importing preserved peaches from Spain as soon as the investigation was initiated, and before duties were imposed, illustrating the uncertainty caused by anti-dumping proceedings.

MBIE considers that taking into account the totality of the evidence available, including seasonality, external market forces, and evidence from past behaviour, as well as the evidence put forward by the EC, it can reasonably conclude that imports of the subject goods from Spain by other importers are likely to increase if duties are not put in place.

MBIE concludes that if anti-dumping duties are not put in place:

- there is likely to be a significant increase in import volumes of dumped preserved peaches from Spain.
- prices of dumped imports from Spain are likely to represent significant price undercutting in relation to HWL's prices.
- the consequent economic impact of the volume and price effects will be an adverse impact on HWL's profits and profitability, return on investments, cash flows, growth and ability to raise capital and investments.

Accordingly, MBIE concludes that in the absence of anti-dumping duties, material injury to the industry is likely to recur.

MBIE notes that this conclusion differs from the final determination in 2016. This difference arises from a broader set of data being assessed following the orders from the High Court to consider past, present and future conduct in the import of the products.

In light of these conclusions, MBIE has reassessed the rate or amount of anti-dumping duty that would be appropriate, and has reached a conclusion on the ad valorem rates of anti-dumping duty at the levels required to prevent injury through price undercutting should be applied to the subject goods when imported from Spain.

In this Final Report MBIE recommends that the Minister:

- Agree to determine anti-dumping duties on the basis of the

*new duty rates in the form of ad valorem rates, agree that the new rates should apply from when the previous duties were due to expire, agree that duties put in place will not be backdated.*

rates reassessed by MBIE for exports of the subject goods from Spain, in the form of *ad valorem* rates of anti-dumping duty, at the levels required to prevent injury through price undercutting, as set out in Section 6.4.3 of this report.

- Agree that the new rates of anti-dumping duties should apply for 5 years from when the previous duties were due to expire, 4 August 2016, unless a sunset review is initiated before that date.
- Agree that any duties put in place will not be backdated to a date prior to the date of their reinstatement.



## 1. Introduction

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### 1.1 Purpose of this report

1. This report sets out the essential facts and conclusions that form the basis for the MBIE's conclusions regarding the likelihood of a continuation or recurrence of dumping and injury, and the reassessed levels of anti-dumping duty necessary to prevent the recurrence of material injury. The report provides a basis for the Minister to make a determination to apply anti-dumping duties to prevent the recurrence of material injury to the New Zealand industry.

### 1.2 Basis for reconsideration

#### 1.2.1 2011 Investigation

2. Anti-dumping duties were first imposed on imports of preserved peaches from Spain on 3 August 2011, following a final determination by the Minister of Commerce under section 13(1) of the Act. This decision was based on the findings of an investigation undertaken by the Ministry of Economic Development (MED, MBIE's predecessor) that was initiated on 7 February 2011, following the receipt of an application from HWL. HWL is the sole New Zealand producer of preserved peaches, being goods "like" those imported from Spain, and constituted the domestic industry for the purposes of the investigation.

#### 1.2.2 2016 Review

3. Section 14(9) of the Act provided that an anti-dumping duty applying to goods shall cease to be payable on those goods from the date that is the specified period after the date of the final determination made under section 13 of the Act in relation to those goods, unless at that date the goods are subject to review under subsection (8) of section 14. Section 14(9A) of the Act provided that the specified period in this case is 5 years.
4. Section 14(8) of the Act provided that the Secretary (MBIE Chief Executive) may, on his or her own initiative, and shall, where requested to do so by an interested party that submits positive evidence justifying the need for a review, initiate a review of the imposition of anti-dumping duty in relation to goods and shall complete that review within 180 days of its initiation.
5. Article 11.3 of the AD Agreement provides:

*Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.*
6. MBIE initiated a review under section 8 the Act of the imposition of anti-dumping duties on peaches in preserving liquid on 4 August 2016, following the receipt of an application from HWL providing positive evidence justifying the need for a review.

7. Following the initiation of the review, MBIE requested information from identified importers, intermediary exporters, Spanish manufacturers, and the GOS. Two of the three importers did not respond to MBIE’s questionnaire and one provided a limited response. A limited response was made by one intermediary exporter, but no responses were received from other exporters or from Spanish manufacturers.
  8. MBIE advised interested parties of the essential facts and conclusions that were likely to form the basis for the Minister to make a determination through an Interim Report released on 30 January 2017. The report concluded that anti-dumping duties should continue. MBIE, in response to that report, received a submission from the EC, which referenced reduced production figures and increased prices in Spain for preserved peaches. The EC claimed that these figures indicated that the saturation of the New Zealand market by Spanish imports was not as likely as alleged in MBIE’s Interim Report. Further analysis showed there was a lack of positive evidence to allow MBIE to conclude that the Spanish industry would resume exports of dumped product to New Zealand at volumes sufficient to cause material injury to the New Zealand industry, if the duties are removed.
  9. In the Final Report, MBIE considered the likelihood of a continuation or recurrence of dumping causing a continuation or recurrence of material injury, should anti-dumping duties be removed. MBIE concluded that:
    - preserved peaches originating from Spain continued to be dumped in very small quantities;
    - should the anti-dumping duties be removed, there was likely to be a continuation of dumping although there was insufficient positive evidence to assess volumes;
    - imports from Spain had slowed down significantly since anti-dumping duties were imposed in 2011; and
    - in the absence of duties, imports of preserved peaches from Spain were likely to be priced below HWL’s preserved peaches should they resume in significant volumes.
  10. The Final Report stated that “based on the lack of positive evidence available to it MBIE is not able to conclude that it is ‘likely’ that the Spanish industry will resume exports to New Zealand at quantities sufficient to cause material injury to the domestic industry.”
  11. In February 2017, MBIE completed its review of the continued need for the imposition of anti-dumping duties on preserved peaches from Spain. The review, which was conducted in accordance with New Zealand legislation and the AD Agreement, resulted in the termination of the anti-dumping duties with effect from 23 February 2017, based on the finding that there was not likely to be a continuation or recurrence of injury following the removal of duties.
- 1.2.3 Judicial review outcome**
12. HWL challenged, through judicial review in the High Court of New Zealand, the decision of the Minister to terminate anti-dumping duties on imports of peaches from Spain on the grounds of a breach of natural justice.

13. On 4 September 2018, the High Court<sup>1</sup>:
- held that HWL had an inadequate opportunity to advance arguments in support of the anti-dumping duties continuing;
  - issued a declaration that MBIE’s process breached obligations of natural justice owed to HWL as an interested party, by failing to convey to HWL the new material relied on by MBIE in its final report to reach a conclusion contrary to that signalled in MBIE’s interim report;
  - quashed the Minister’s decision to terminate the anti-dumping duties; and
  - directed MBIE to reconsider its sunset review of the justification for an anti-dumping duty against Spanish preserved peaches. The review was to be conducted on terms that consider past, present and future conduct in the import of the products, but without triggering s 14(9)(b) of the Act, so that any anti-dumping duty would only be restored once a decision applying the duty is made. Any duty would only be charged prospectively, and the review (reconsideration) was to be carried out on the terms of the Act as in force in August 2016.

#### 1.2.4 Legal framework for reconsideration

14. The Minister’s decision to terminate anti-dumping duties was quashed by the Court. However, no duties were to be applied during the reconsideration period and anti-dumping duties will only be restored prospectively if and when a decision to apply duties is made.
15. The reconsideration under this process was effectively a continuation of the review that was initiated on 4 August 2016. The quashing of the termination decision by the Court means that no final determination was made on the need for anti-dumping duties.
16. The reconsideration of the review has considered all of the information already available in respect of the original review, and any new information, and has produced a new Interim Report and Final Report.
17. The reconsideration was carried out in accordance with the Act as it stood at the time of the 2016 review, and in light of New Zealand’s obligations under the AD Agreement. No public interest test is required as no such test is provided for under that version of the Act.
18. The reconsideration has examined whether, in light of the circumstances of the continuation, “the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury” (AD Agreement 11.3).
19. Where duties are applied, they may be applied at a reassessed rate to take account of changes in circumstances since the duties were last calculated. MBIE notes that, where any duties are to be put in place, they will remain in force for 5 years after the previous

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<sup>1</sup> *Heinz Wattie’s Ltd v the Ministry of Business, Innovation and Employment* [2018] NZHC 2309 [4 September 2018], available at <http://www.nzlii.org/nz/cases/NZHC/2018/2309.html>

duties were due to expire, i.e. 5 years from 4 August 2016, unless a sunset review is initiated before that date. The duties will not be backdated prior to the date of their reinstatement.

### **1.2.5 Consultation**

20. MBIE consulted with HWL, the GOS and the EC on the proposed basis for the reconsideration.
21. HWL agreed with the proposal.
22. The GOS noted that the reactivation of the anti-dumping procedure on preserved peaches originating in Spain stems from a procedural error, as determined by the High Court of New Zealand, but did not comment on the reconsideration of the original sunset review.
23. The EC expressed concern with the methodology proposed by MBIE, since, in its view, updating the period of investigation was equivalent to initiating a new investigation while the standards of assessment would be those applicable to review investigations, which it considered to be a lower standard. The EC commented that it trusted that New Zealand would find a way to comply with a domestic ruling while respecting the obligations committed to in the framework of the WTO. The EC reiterated its concerns in another submission dated 27 May 2019. These matters are further set out in section 1.3.3, and MBIE addresses them in section 5.8.

## **1.3 Proceedings**

### **1.3.1 Matters to be reconsidered**

24. In light of the High Court Judgment, and following consultation with HWL and the GOS and EC authorities, the matters to be reconsidered included the following:
  - a) whether the absence of anti-dumping duties would likely lead to a continuation or recurrence of dumping;
  - b) whether such dumping would likely cause a continuation or recurrence of material injury to the New Zealand industry.
25. If anti-dumping duties are to be applied, a reassessment of the rate or amount of duty may be required.
26. The reconsideration of these matters is set out in two reports:
  - an Interim Report
  - a Final Report.
27. An Interim Report was released on 2 August 2019 providing written advice of the essential facts and conclusions that were likely to form the basis for any final determination to be made, and addressing matters raised by interested parties. Interested parties had until 16 August 2019 to provide comments. Comments were received from the EC, the GOS and HWL within the time frames established.

28. This Final Report addresses the comments received from interested parties and MBIE's consideration of them in Annex 1, and have been taken into account in the preparation of this Final Report where relevant and appropriate,.
29. The reconsideration involved analysis of data in the following periods:
- Dumping analysis – the Period of Review for Dumping (POR(D)) is 1 January 2018 to 31 December 2018 (the 2016 review analysed dumping over the period 1 July 2015 to 30 June 2016).
  - Injury analysis – the Period of Review for Injury (POR(I)) is 1 January 2014 (the start date in the 2016 review) to 31 December 2018, where information is available.

### **1.3.2 Information to be used**

30. In the 2016 review, MBIE used the following information:
- information contained in HWL's application and subsequent submissions;
  - information obtained during MBIE's verification visit to HWL;
  - information in the limited responses from one importer and one intermediary exporter, with no responses received from other exporters or from Spanish manufacturers;
  - information provided by the EC; and
  - information from MBIE's independent research into matters arising in the investigation.
31. Information used in the reconsideration has consisted of all relevant information available and used during the 2016 review, as specified above, as well as information subsequently made available in the reconsideration in order to comply with the High Court's direction that MBIE "consider past, present and future conduct in the import of the relevant products." The new materials that MBIE has relied on are information contained in HWL's request for information (RFI) response and information obtained during MBIE's verification visit to HWL, responses to importer and manufacturer questionnaires to the extent they were provided, submissions by interested parties, and relevant information arising from MBIE's independent research into matters arising during the course of the reconsideration.
32. In light of the High Court Judgment, upon initiating its reconsideration, MBIE circulated to all interested parties a non-confidential version of the information received subsequent to the release of the Interim Report in the 2016 review and other information it relied on in preparing the Final Report on the 2016 review.
33. The information relied on in the reconsideration is summarised in this Final Report, which outlines the essential facts and conclusions that form the basis for the MBIE's conclusions under section 14(8) of the Act, and recommendations to the Minister in relation to determinations to be made by the Minister concerning any new rate or amount of anti-dumping duty or the termination of the duty.

### 1.3.3 Matters raised by the EC

34. In a submission on 19 February 2019, the EC expressed some concerns about the proposed process, which included that:
- updating the period of investigation is equivalent to initiating a new anti-dumping investigation while maintaining standards of assessment applicable to review investigations.
  - assessing the likelihood of recurrence of dumping and injury based on 2018, when no duty is in force, is contrary to an objective examination.
  - based on the AD Agreement, the EC does not see how anti-dumping duties could be reinstated more than 2 years after expiry.
35. Further to the comments made in the consultation phase of the reconsideration, the EC provided comments on 27 May 2019 regarding matters relating to the reconsideration.
36. In the 27 May 2019 submission, the EC reiterated the matters mentioned above. The EC also stated that the analysis carried out in 2017, and the conclusions reached, were correct, and expressed disappointment that MBIE decided to go on with the reconsideration of this review despite what the EC viewed as the methodological inconsistencies pointed out in its submission of 19 February 2019.
37. The EC suggested an alternative source of information concerning domestic sales in the absence of cooperation and available market intelligence concerning normal values, and suggested using sales to third countries. The EC selected sales to Spain's three biggest export markets as a proxy normal value for the example provided, stating that export prices from Spain to New Zealand are higher than the proxy normal values used, and therefore, there would be no dumping.
38. The EC noted in its submission that there is no indication of dumping when comparing Spanish sales to all export markets as a proxy for normal value with the export prices to New Zealand. The EC also stated that given the small number of transactions involved, Spanish export prices to New Zealand may not be representative, and that export prices to the world in 2018 are higher than the weighted average of the proxy normal values.
39. The EC reiterated its view that the methodology used by MBIE in the reconsideration of the review is inconsistent with WTO rules, since, in its view, duties cannot be reinstated two years after they have lapsed on the basis of a review investigation.
40. In response, MBIE noted that it is legally obliged to conduct the process in accordance with the directions given by the High Court. The judgment sets out the Court's directions on the way in which the reconsideration is to be conducted, including the quashing of the Minister's determination:

*[90] HWL is also entitled to the following orders:*

*(a) The second respondent's 1 March 2017 decision to terminate the anti-dumping duty in issue is quashed.*

*(b) MBIE is directed to re-consider its sunset review of the justification for an anti-dumping duty against Spanish preserved peaches. Such review is to be conducted on terms that*

*consider past, present and future conduct in the import of the relevant products but without triggering s 14(9)(b), with the consequence that any anti-dumping duty is only to be restored once a decision justifying such duty is made and then only prospectively from the date of such decision.*

*(c) The review is to be conducted on the terms of the Act as in force in August 2016 when MBIE initiated the sunset review.*

41. MBIE also stated that it would address the matters brought up by the EC in the Interim and Final Reports. MBIE addresses these issues in section 5.8 of this Final Report.

## 1.4 Sunset reviews

42. For the purposes of this reconsideration, MBIE has carried out a sunset review under the provisions of section 14(8) of the Act, which states as follows:

*The Secretary may, on his or her own initiative, and shall, where requested to do so by an interested party that submits positive evidence justifying the need for review, initiate a review of the imposition of anti-dumping duty or countervailing duty in relation to goods and shall complete that review within 180 days of its initiation.*

43. In applying the provisions of Section 14(8), in the absence of any specific provisions relating to sunset reviews, MBIE has had regard to the provisions of Article 11.3 of the AD Agreement. In interpreting Article 11.3, MBIE takes guidance from New Zealand legal reports, WTO Panel and Appellate Body findings and approaches taken by other WTO member countries.
44. Article 11.3 requires that a duty be terminated 5 years after it was imposed or last reviewed unless an investigating authority determines in a review that “... the expiry of the duty *would be likely* to lead to continuation or recurrence of dumping and injury” [emphasis added]. Some guidance regarding the interpretation of the phrase “would be likely” has been provided by the New Zealand Court of Appeal which interpreted the phrase to mean “a real and substantial risk..., a risk that might well eventuate”.<sup>2</sup>
45. Guidance can also be found in WTO jurisprudence, e.g. *US — Oil Country Tubular Goods Sunset Reviews*,<sup>3</sup> and *US — DRAMS*.<sup>4</sup> For example, in *US — Oil Country Tubular Goods Sunset Reviews*, the Appellate Body stated (at paragraph 308):

*[W]e agree with Argentina that, in US – Corrosion-Resistant Steel Sunset Review, the Appellate Body equated ‘likely’, as it is used in Article 11.3, with ‘probable’. In that case the Appellate Body stated (at paragraph 111), “. . . an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such result might be possible or plausible.” We also agree with Argentina that this interpretation of ‘likely’ as ‘probable’ is authoritative in*

<sup>2</sup> *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.

<sup>3</sup> *US — Oil Country Tubular Goods Sunset Reviews*, Report of the Panel, WT/DS268/R, Report of the Appellate Body, WT/DS268/AB/R.

<sup>4</sup> *US — DRAMS*, Report of the Panel, WT/DS99/R.

*relation to injury as well, given that the term 'likely' in Article 11.3 applies equally to dumping and injury."*

46. The Appellate Body also noted in *US — Oil Country Tubular Goods Sunset Reviews* (at paragraph 340) that an investigating authority's likelihood determinations under Article 11.3 must be based on "positive evidence" and quoted with approval the following statement by the Appellate Body in *US — Hot Rolled Steel*:

*The term "positive evidence" relates . . . to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means... that the evidence must be of an affirmative, objective and verifiable character and must be credible.*

47. MBIE has also referred to the approaches to sunset reviews taken by the European Union, United States, Canada and Australia.
48. MBIE notes that the consideration of whether duties should be removed does not exist in isolation but is dependent on whether the evidence shows that the expiry of duty would be likely to lead to a continuation or recurrence of dumping and injury. In determining "likelihood", MBIE considers that regard should be had to the timeframe within which an event may occur. Article 11.3 of the AD Agreement makes no express reference to the length of time within which a continuation or recurrence of injury has to take place.
49. Mindful of the particular factors relating to this reconsideration, and taking guidance from the sources referred to above, MBIE approaches all investigations and reviews on a case-by-case basis. Based on its interpretation of the AD Agreement, and in light of the situation of this reconsideration, MBIE adopts the following general principles in considering dumping injury in sunset reviews:
- The legal requirement is for MBIE to determine whether the expiry of the anti-dumping duty would be likely to lead to a continuation or recurrence of dumping and injury.
  - When determining whether the expiry of the anti-dumping duty would be likely to lead to a continuation or recurrence of dumping and injury, MBIE needs to be satisfied, based on positive evidence, that certain events are likely to occur, and that those events will cause dumping and material injury to the industry to continue or recur in the absence of anti-dumping duties.
  - Interpretation of the phrase "would be likely" is guided by a court judgment referring to "a real and substantial risk..., a risk that might well eventuate" and by relevant WTO dispute findings.
  - In considering the likelihood of injury, MBIE may refer for guidance to provisions in the AD Agreement that may be helpful in assessing that likelihood. Those provisions may include, if appropriate, the factors used in Article 3.7 in assessing a threat of injury.
  - In considering whether removal of the duty would be likely to lead to a recurrence of dumping and injury, MBIE considers what is likely to happen in the foreseeable future. The extent to which MBIE is able to make judgments on the likelihood of events occurring in the foreseeable future will depend on the

circumstances of each case and, therefore, the foreseeable future will range from the imminent to longer timeframes, depending on the particular circumstances of the case.

- To gauge the extent to which the removal of the anti-dumping duties will likely cause material injury to the domestic industry in the foreseeable future, MBIE generally requires the domestic industry to provide projections or forecasts of the injury it considers it will suffer as a result of the removal of the duties. MBIE examines these projections in light of the company's past performance (with the duties in place to prevent injurious dumping) and projected future performance (both with the presence and absence of duties) in order to assist it in making a likelihood of recurrence of injury determination.

## **1.5 Treatment of information**

### **1.5.1 Availability of information**

50. Any interested party providing confidential information has been required to show good cause to MBIE as to why the information should be treated as confidential, and is required to furnish a non-confidential summary of the information which is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. Where, in exceptional circumstances, the information is not susceptible of summary, a statement of the reasons why summarisation is not possible must be provided.
51. In addition to circulating to all interested parties a non-confidential version of the information received subsequent to the release of the Interim Report in the 2016 review, MBIE has made available all non-confidential information via the public file for this reconsideration. Any interested party has been able to request both a list of the documents on this file and copies of the documents on it. In addition, MBIE provided all interested parties with the document listing at regular intervals throughout the reconsideration.

### **1.5.2 Assessment of information**

52. The foundation of MBIE's approach to the assessment of information is the relevant provisions of the Act and the AD Agreement, assisted by the interpretation of the AD Agreement provided in WTO jurisprudence.
53. Sections 4 and 5 of the Act set out the bases for establishing export prices and normal values for the purposes of determining the existence and extent of dumping, while section 6 of the Act provides as follows:
- (1) Where the Secretary is satisfied that sufficient information has not been furnished or is not available to enable the export price of the goods to be ascertained under section 4, or the normal value of goods to be ascertained under section 5, the normal value or export price, as the case may be, shall be such amount as is determined by the Secretary having regard to all available information.*
  - (2) For the purposes of subsection (1), the Secretary may disregard any information that the Secretary considers to be unreliable.*

54. Articles 6.6 and 6.8 of the AD Agreement provide as follows:
- 6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.*
- ...
- 6.8 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.*
55. Annex II to the AD Agreement sets out the basis on which investigating authorities can use the best information available in terms of Article 6.8. Article 11 of the AD Agreement, which addresses reviews, provides in Article 11.4, that “The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.”
56. Information relating to those parties who have not provided information is based on the facts available that MBIE considers to be reliable according to the provisions of the Act and the AD Agreement.
57. In an investigation or review MBIE seeks and obtains information directly relevant to that proceeding, and satisfies itself as to the accuracy of the information provided. Such primary information includes questionnaire responses from interested parties; laws, regulations and other official documents; Customs and statistical data; and other relevant data such as exchange rates, interest rates and prices. MBIE can use verification visits and the review of evidence available to substantiate the information provided by interested parties and to assess its reliability.
58. Where MBIE is not satisfied as to the accuracy of the information provided, or where information is not available, other primary information can be used, or secondary information can be used as “facts available”. The use of “facts available”, including secondary information, is limited to instances where information is not available because an interested party refuses access to, or otherwise does not provide the necessary information within a reasonable period or significantly impedes the investigation. In such circumstances, the normal value and export price are to be ascertained having regard to all available information that MBIE considers to be reliable. MBIE is required by the AD Agreement to take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested.
59. In considering “facts available” MBIE can take into account secondary information, such as the application (in relation to dumping); information from previous MBIE investigations or reviews; information from investigations undertaken by counterpart authorities in other jurisdictions; and information from reports and publications covering matters related to the subject matter of the investigation or review. In using secondary information, MBIE undertakes a process of reasoning and evaluating which “facts available” constitute reasonable replacements for missing information that can be considered reliable. In this context, MBIE notes that secondary information that is not

based on positive evidence but relies on inferences and assumptions may not be considered to be reliable.

60. Where information is not available because a party has not provided information requested, and where that information is required in order to make a determination of the existence and extent of dumping or injury, MBIE can have recourse to secondary sources of information to replace the missing information.

## 1.6 Report details

61. In this report, unless otherwise stated, years for evaluating injury are calendar years ending 31 December. Monetary values are in New Zealand Dollars (NZD) or Euros (EUR) unless otherwise specified. In tables, column totals may differ from individual figures due to rounding, and negative numbers are normally shown in parentheses. The term VFD refers to value for duty for New Zealand Customs Services (NZCS) purposes.
62. The POR(D) is 1 January 2018 to 31 December 2018, while the POR(I) involves an evaluation of actual data submitted by HWL for financial years 2014 to 2018 (HWL's financial year is the calendar year). The company also provided forecast information for 2019, 2020 and 2021, in terms of the impact on HWL's domestic operation, for the scenarios that duties are imposed to meet the margin of price undercutting, and that duties are not imposed. It should be noted that in a review, involving as it does the consideration of the likelihood of the continuation or recurrence of dumping and injury, MBIE has had regard to any dumping that may have been occurring prior to the POR(D). MBIE has also taken account of forecasts of both dumping and injury based on past experience and future scenarios.
63. All volumes are expressed on a metric ton/tonne (MT) basis unless otherwise stated. Exports to New Zealand were generally invoiced in EUR. The exchange rates used are those relating to specific transactions, where available, or the Customs exchange rates for the relevant time or shipment, or the rate that MBIE considers most appropriate in the circumstances.
64. This Final Report is closely based on the Interim Report, with any clerical errors corrected and editorial amendments incorporated where necessary and appropriate. This has included some reordering of the material in part 5 of this Final Report.



## 2. Subject Goods and New Zealand Industry

### 2.1 Subject goods

65. The imported goods that are the subject of the reconsideration are described as:

*Peaches in preserving liquid, in containers up to and including 4.0 kg.*

#### Included goods

66. The 2011 Final Report noted that the investigation included peaches in cans of various sizes and glass jars and that the contents of the imports from Spain were variously “whole peaches, peach halves and irregular sliced peaches and all cuts are preserved in syrup.”

67. The Final Report for the 2016 review stated that “MBIE considers that peaches in mediums containing any type or amount of sugar, naturally from the peaches in water or as fruit juice, or sugar syrup, in any concentration, are covered by the [subject] goods description” and that “the canned peaches produced by HWL were a like good to the subject goods which covered all types of packaging.”

68. This reconsideration has followed the same approach as the 2016 Final Report for the goods included.

#### Excluded goods

69. The 2011 Final Report noted that there were some goods imported under the same tariff item as preserved peaches which were excluded from the investigation, namely “goods such as nectarine pulp or puree, preserved peaches suspended in jelly and preserved peaches in containers exceeding 4.0 kg.”

70. This reconsideration has excluded any goods imported under the relevant tariff item in containers larger than 4.0 kg, as well as freeze-dried fruit, pastes and purees.

### 2.2 Tariff description

71. During the POR(D), the subject goods entered under the Customs tariff item and statistical key set out below. The tariff description is broader than the description of the subject goods.

20.08 Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:					
Number	Statistical key		Goods	Rate of Duty	
	Code	Unit		Normal	Pref.
<b>2008.70</b>			<b>– Peaches, including nectarines:</b>		
<b>2008.70.09</b>	<b>00L</b>	<b>Kg</b>	<b>— Other [than cooked and preserved by freezing, not containing added sugar]</b>	5	Free *See Below CA Free
*Unless otherwise indicated, AAN, AU, CN, CPT, HK, KR, LLDC, MY, Pac, SG, TH, TPA and TW rates in the Preferential Tariff are Free.					

72. The subject goods from Spain attract a Normal rate of duty of 5 per cent.
73. Previous tariff concessions, requested by HWL, provided for concessional entry of preserved peaches during particular periods when there was a shortfall of fresh peaches for its canning operation. There have been no tariff concessions of this nature for preserved peaches since 2008.
74. There are no tariff concessions under tariff item 2008.70.09 applying to goods of the description of the subject goods.

## 2.3 Imports of subject goods

75. Table 2.1 shows total imports of subject goods from 2014 to 2018. South Africa and China are significant exporters of preserved peaches to New Zealand (by quantity). Canned peaches from South Africa and Greece are currently subject to anti-dumping duties. Anti-dumping duties on preserved peaches from China were removed in February 2018. Australia, Spain and Greece were minor suppliers in 2018.

**Table 2.1: Imports of subject goods, 2014-2018  
(Customs data, tonnes)**

	2014	2015	2016	2017	2018
Australia	245	56	91	156	77
China	1,244	1,597	1,134	1,235	1,026
Spain	17	52	17	52	37
Greece	33	34	34	33	32
South Africa	2,135	2,411	2,890	2,393	2,476
Other	2	26	113	17	2
<b>Total</b>	<b>3,676</b>	<b>4,176</b>	<b>4,279</b>	<b>3,886</b>	<b>3,649</b>

76. The values reported in this table may differ from those that were presented for the review in 2016, since some imports included in the total in 2016 were not subject goods. In addition to items entering under the concessions noted above, these non-subject goods included peach puree, peaches in jelly, dried peaches, salted peaches, and pie fillings, as well as preserved peaches in containers of over 4 kg.
77. Imports from Spain made up 1 per cent of total imports in the POR(D). The provisions of Article 5.8 of the AD Agreement relating to the termination of an investigation where imports are negligible (less than 3 per cent of total imports) do not apply to sunset reviews.<sup>5</sup>
78. During the POR(D), imports of the subject goods from Spain included peaches in 850g and 2.65kg cans and 2.65kg jars.

<sup>5</sup> See *US – Corrosion-Resistant Steel Sunset Review*, WTO document WT/DS244/R, which related to the application of the negligibility standard from Article 5.8 of the AD Agreement to the conditions for cumulation in Article 3.3, in the case of sunset reviews. See also the Appellate Body report on *US – Carbon Steel*, WTO document WT/DS213/AB/R, in which the Appellate Body found that the *de minimis* standard set out in Article 11.9 of the SCM Agreement (equivalent to Article 5.8 in the AD Agreement) did not apply in sunset reviews.

79. It is relevant to note that the weights of containers are expressed in several ways. For example, the 850g cans imported from Spain represent the net weight of the contents of the can, which has a gross weight of 1kg and a drained weight of 480g, which is the weight indicated in retail advertising in Spain. For the purposes of this reconsideration, the weight value used by MBIE is the net weight, including both fruit and preserving liquid, but not including the container.

## 2.4 Like goods and New Zealand industry

80. Section 3A of the Act provides that for the purposes of the Act, the term **industry**, in relation to any goods, means:
- a. the New Zealand producers of like goods, or
  - b. such New Zealand producers of like goods whose collective output constitutes a major proportion of the New Zealand production of like goods.
81. Section 3(1) of the Act defines **like goods**, in relation to any goods, as:
- a. other goods that are like those goods in all respects, or
  - b. in the absence of goods referred to in paragraph (a), goods which have characteristics closely resembling those goods.
82. To establish the existence and extent of the New Zealand industry for the purposes of an investigation into injury, and having identified the subject goods, it is necessary to determine whether there are New Zealand producers of goods which are like those goods in all respects, or have characteristics which closely resemble the subject goods.

### 2.4.1 Like goods

83. The scope of the subject goods is defined in section 2.1 above.
84. HWL's preserved peaches are sold under brand names Wattie's, Oak or Weight Watchers, of halves or slices in net weights of 410g, 820g and 3kg cans. Based on a previous like goods determination, the Weight Watchers branded preserved peaches are not considered to be like goods to the imported goods.
85. HWL has not produced any new preserved peach products that need to be addressed in relation to a like goods determination.
86. In this situation, MBIE has not been required to revisit the consideration of like goods. However, in the interest of transparency, the remainder of this section sets out the relevant considerations relied on in the original investigation.
87. The original investigation and the 2016 review concluded that HWL produced like goods to the subject goods.
88. To determine whether the goods produced in New Zealand are like goods to the imported preserved peaches from Spain, MBIE considers physical characteristics, function and usage, pricing structures, marketing and any other relevant considerations, with no one of these factors being necessarily determinative. MBIE consideration of each of these factors is discussed below.

**Physical characteristics**

89. Assessing the physical characteristics involves looking at the appearance, size and dimensions, the composition of the product and the production methods and technology utilised to create it.
90. HWL produces preserved peaches in the form of halves, slices or pieces. The composition of its preserved peaches is similar to the preserved peaches imported from Spain.
91. During the POR(D) the preserved peaches were imported from Spain primarily as halves in syrup in 850g and 2.65kg cans, and also as whole peaches in 2.65kg glass jars. In previous periods, imports have included 410g and 840g cans of slices and irregular pieces.
92. While no information has been forthcoming from the Spanish producers on their production methods, HWL noted in its application for the original investigation that the preserved peaches imported from Spain will have been produced using a manufacturing process very similar to that used by HWL. HWL did not comment on the production methods used for other types of packaging.
93. In the original investigation, an importer of preserved peaches from Spain stated that MBIE had overlooked the fact that preserved peaches are internationally classified on the basis of grade, which were reflected in the prices charged by its Spanish supplier, and that irregular preserved sliced peaches (of the type it imported) could be materially distinguished from the regular halved, sliced and diced peaches produced by HWL. The importer identified the main differences as: the proportions of slices and non-slice pieces; irregularity of slice size; irregularity of appearance; and consequential reduced decorative market appeal when compared with the preserved peaches produced by HWL.
94. HWL submitted, in response to this claim, that there is no material distinction between the preserved peaches it produces and those imported. HWL said that preserved peaches are not sold in the New Zealand market by grade as they are in international markets, and that the cut of the peach is not a factor in consumers' buying decisions.
95. In the original investigation, MBIE considered the arguments and examined the information supplied by the importer to substantiate its position, and also considered evidence and submissions made by HWL in response to the claims. MBIE also sighted the contents of the imported preserved peaches, and noted they were not dissimilar in appearance to those produced by HWL. MBIE did not consider that there were differences in the physical characteristics between the two products that were large enough to suggest that the preserved peaches produced by HWL were not like goods to those imported. MBIE considers that these considerations are especially relevant when addressing the likelihood of new imports in the absence of anti-dumping duties. In noting this, MBIE recalls that the imports discussed above were in can sizes that were the same as those predominantly produced by HWL.
96. MBIE concludes the physical characteristics of the goods produced by HWL are similar to those of the subject goods.

**Function and usage**

97. Function and usage covers consumer perceptions, and expectations, and end use, which can assist in reaching conclusions regarding substitutability where relevant.
98. HWL produces preserved peaches for retail and food service sale in New Zealand. The preserved peaches imported from Spain during the POR(D) were sold for retail and food service use through specialty food stores.
99. MBIE notes that the function and usage of the goods produced by HWL are broadly similar to those of the subject goods.

**Pricing structures**

100. Some goods are differentiated by the level at which they are priced to end users, by the costs that are built into the pricing structure, the way in which prices are set, or the users and market they are targeting.
101. The pricing of the subject goods imported during the POR(D) suggests that there are differences that may need to be taken into account in considering the effect of any dumping of imports.
102. Bearing in mind the need to consider the likelihood of imports taking place in the absence of anti-dumping duties, MBIE notes that there is a possibility that new imports from Spain could have similar pricing structures to those produced by HWL. This possibility is reinforced by past patterns of pricing of imports of the subject goods from Spain.

**Marketing**

103. Marketing considerations include: the distribution channels used; customers (both actual and targeted); branding and advertising.
104. MBIE notes that compared with HWL's products, imports from Spain during the POR(D) tended to follow different distribution channels, aimed at different customers, and with branding and advertising positioned for different markets, namely advertising as fine foods and selling to specialist food outlets.
105. However, bearing in mind the need to consider the likelihood of imports taking place in the absence of anti-dumping duties, and taking into account imports in previous years, MBIE notes that there is a possibility that new imports from Spain could follow similar marketing approaches and channels as the HWL product.

**Conclusion**

106. MBIE has considered the available information about like goods produced by the New Zealand industry and has compared the information with the characteristics of the imported subject goods. MBIE has considered the physical characteristics, function and usage, pricing, and marketing.
107. The imported subject goods and the domestically-produced goods are similar in appearance, although there is some variation in the range of styles (halves, slices and dices), the regularity of the cut and in the form of packaging. The goods imported during the POR(D) are sold mostly in larger container sizes than the bulk of domestically-

produced goods, and are predominantly presented as halves. Furthermore, the subject goods and the domestically-produced goods are not generally sold through the same outlets, although they perform the same function and have the same usage. These differences need to be addressed in considering the impact of the subject goods, but are not sufficient to allow a conclusion that HWL does not produce like goods to the subject goods.

108. On the basis of the information available, MBIE concludes that the preserved peaches produced in New Zealand by HWL (excluding the Weightwatchers brand), while not identical to the subject goods in all respects, have characteristics closely resembling the subject goods, and are therefore like goods to the subject goods.

#### **2.4.2 New Zealand industry**

109. MBIE considers that HWL continues to produce like goods and is the sole New Zealand producer of preserved peaches, and therefore remains the New Zealand industry in terms of section 3A of the Act.

### 3. Interested parties

110. Interested parties are those who are to be given notice for the purpose of section 9 of the Act, and include the Government of the country of export; exporters and importers known to have an interest in the goods; and the applicant in relation to the goods. Article 6.11 of the AD Agreement describes interested parties who shall be included, covering the same parties but adding trade associations of importers, exporters or domestic industry. Article 6.12 provides opportunities for some other parties, such as industrial users of the product under investigation and representative consumer organisations, to participate.
111. In the 2016 review the interested parties included the New Zealand producer, HWL; the EC and the GOS; three Spanish manufacturers of the subject goods; two trading intermediaries; and three importers.
112. In calendar year 2018, Customs data shows two suppliers of the subject goods. This reconsideration includes as interested parties the New Zealand producer, HWL; the EC; the GOS; the Federación Nacional de Asociaciones de Transformados Vegetales y Alimentos Procesados (FENAVAL), the sector association for canned fruits and vegetables in Spain, including canned peaches; two Spanish manufacturers of the subject goods; one trading intermediary; and three importers.

#### 3.1 New Zealand industry

113. As set out in section 2.4.2 HWL constitutes the New Zealand industry.
114. HWL provided a response to a Request for Information (RFI) and provided a brief submission on 26 July 2019 commenting on aspects of the EC's submission of 27 May 2019. A verification visit to HWL was conducted on 29-30 May 2019.
115. HWL provided comments on the Interim Report on 15 August 2019. MBIE has addressed these comments in Annex 1 to this Final Report.

#### 3.2 Spanish producers

116. The Spanish producers of the subject goods in the POR(D) for this reconsideration, calendar year 2018, are listed in the table below.

**Table 3.1: Suppliers of subject goods imported from Spain, 2018**  
MT

	2018
Alcurnia Alimentacion sl (Alcurnia)	
Conservas El Navarrico (Navarrico)	
<b>Total</b>	<b>36.9</b>

##### 3.2.1 Alcurnia

117. Alcurnia is a family firm located in Molina de Segura, in the province of Murcia in the south-east of Spain. The company produces fruit preserves, especially peaches and apricots. Annual average production is ██████████ tonnes of raw materials, with peaches

and apricots being the main items. Alcurnia also processes fruit preparations, like fruit jams and aseptic packed fruits for consumer and professional use.

- 118. The harvest season for Spanish peaches is June-August. Preserved peaches are provided as halves in 3x200g packs, 850g halves in syrup, 2.65kg halves in syrup, and 2.65kg slices in syrup.
- 119. Alcurnia has exported to New Zealand for all of the years reviewed, i.e. 2005-2018, with the equivalent of [REDACTED] per year. For the POR(D) the importers were [REDACTED].
- 120. Alcurnia did not provide a response to the questionnaire.

### 3.2.2 Navarrico

- 121. Navarrico is a family-run company located in the Navarra region of Northern Spain, and is a specialist processor of pulses, vegetables and fruit. Navarrico produces a range of products, including whole peaches, mandarins, and fruit cocktail in jars, as well as vegetables and legumes in jars and cans. Preserved whole peaches are available in syrup in jars of 720ml, 999ml, and 1966ml, and as halves in cans of 850ml and 2650ml.
- 122. Navarrico has exported to New Zealand via [REDACTED] to [REDACTED] in each of the years reviewed, i.e. 2005-2018, with [REDACTED].
- 123. Navarrico did not provide a response to the questionnaire.

### 3.3 Importers

- 124. The importers in the POR(D) for this reconsideration are listed in the table below:

**Table 3.2: Importers of preserved peaches from Spain, 2018**  
MT

	2018
Mediterranean Foods (Wgtn) Limited	
Mediterranean Foods South Island Ltd	
Sabato Limited	
<b>Total</b>	<b>36.9</b>

#### 3.3.1 Mediterranean Foods (Wgtn) Limited

- 125. Mediterranean Foods (Wgtn) Limited imported [REDACTED] of the subject goods into New Zealand during the POR(D) from [REDACTED]. The company provided a response to MBIE’s importer questionnaire.
- 126. The importer stated in its questionnaire response that it imports premium peach halves which are on-sold in New Zealand at a premium price, targeted at home customers that are willing to pay these higher prices.

#### 3.3.2 Mediterranean Foods South Island Limited

- 127. Mediterranean Foods South Island Limited imported [REDACTED] of the subject goods into New Zealand during the POR(D) from [REDACTED]. The company provided a response to MBIE’s importer questionnaire.

128. The importer stated in its questionnaire response that it aims to only import superior products from Europe that also represent good value for their customers. It is also stated that as a result, their product mix is usually better quality than can be sourced at a supermarket, and slightly more expensive.

### **3.3.3 Sabato Limited**

129. Sabato Limited (Sabato) imported [REDACTED] of the subject goods into New Zealand during the POR(D) through the Spanish exporter/distributor, [REDACTED], which sourced the shipments from the Spanish producer, [REDACTED]. The company provided a limited response to MBIE's importer questionnaire including details of the type of preserved peaches sourced from [REDACTED], its terms of trade (FOB), and price paid (in EUR).
130. Sabato stated in its questionnaire response that the imported peaches are whole, in large glass jars and sold in New Zealand at a premium price point, advertised as a gift retail offer or a premium fruit offer for fine dining.

## **3.4 Other interested parties**

### **3.4.1 FENAVAL**

131. MBIE was informed by the GOS early in the reconsideration that FENAVAL was willing to cooperate with the reconsideration to defend the interests of the Spanish industry. MBIE sent FENAVAL a questionnaire to gather more information about the Spanish market of preserved peaches, but after receiving the questionnaire, FENAVAL decided not to answer it due to the time and resources needed to prepare a response, which it argued were not justified by the significance of the New Zealand's market for it.

### **3.4.2 Government of Spain**

132. The GOS expressed interest in cooperating in the reconsideration. MBIE sent the GOS a questionnaire including questions on domestic sales of preserved peaches in Spain, sales to New Zealand customers, and other general market information.
133. The GOS was not able to answer some of the questions as it did not have the information nor the legal means to request it from third parties, but was able to provide MBIE with information and export data for Spanish preserved peaches.
134. The GOS provided comments on the Interim Report on 16 August 2019. MBIE has addressed these comments in Annex 1 to this Final Report.

### **3.4.3 European Commission**

135. The EC provided comments in the consultation phase of the reconsideration, on 19 February 2019, prior to initiation. The EC provided another submission on 27 May 2019, once the reconsideration was initiated.
136. Matters raised by the EC are addressed in section 5.8 of this report.
137. The EC provided comments on the Interim Report on 15 August 2019. MBIE has addressed these comments in Annex 1 to this Final Report.

#### **3.4.4 Other parties**

138. MBIE also sought information from a number of participants in the market for preserved peaches, including the supermarket chains, importers and distributors. A limited response was received from one supermarket chain, and comments were received from one importer.

## 4. Dumping investigation

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### 4.1 Dumping

139. Section 3 of the Act defines dumping as:

***dumping**, in relation to goods, means the situation where the export price of goods imported into New Zealand or intended to be imported into New Zealand is less than the normal value of the goods as determined in accordance with the provisions of this Act, and **dumped** has a corresponding meaning*

140. An investigation of dumping establishes the export price in accordance with section 4 of the Act, and the normal value in section 5 of the Act, with adjustments made to ensure that there is a fair comparison, in order to determine the existence and extent of any dumping.

### 4.2 Purpose of reconsideration of dumping

#### 4.2.1 Introduction

141. A sunset review normally determines whether the expiry of the existing anti-dumping duties after five years would likely lead to a continuation or recurrence of dumping and injury and therefore whether there is a continued need for the imposition of anti-dumping duties. This reconsideration of the sunset review of preserved peaches from Spain follows the decision of the High Court in *Heinz Wattie's Ltd v the Ministry of Business, Innovation and Employment*<sup>6</sup> which quashed the Minister's decision to terminate the duties. The situation in this reconsideration is that anti-dumping duties have not been in place since 23 February 2017 so the examination of the likelihood of a recurrence of dumping and injury must take that into account.

142. This section of the report explains the method of comparing export prices with normal values and how these prices have been established over the POR(D), in order to determine whether preserved peaches from Spain are being imported into New Zealand at dumped prices. This section also addresses the likelihood of a continuation or recurrence of dumping in the absence of anti-dumping duties, taking into account information relating to the past, present and future.

143. MBIE recognises that transactions during the POR(D) may not adequately address the issue of the likelihood of dumping recurring if anti-dumping duties are not imposed. This reflects the way in which the market operates in New Zealand as well as the conditions governing the availability of subject goods for export from Spain.

#### 4.2.2 Methodology/review process

144. The AD Agreement allows MBIE to undertake a comparison of export prices and normal values on either a weighted-average-to-weighted-average or transaction-to-transaction basis.

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<sup>6</sup> [2018] NZHC 2309.

### 2018 Exports

145. In view of the small number of export transactions during the POR(D), MBIE has undertaken a transaction-to-transaction analysis for each company. While the Spanish manufacturers and exporters did not provide MBIE with details of their domestic transactions, MBIE was able to select an appropriate Spanish domestic retail selling price which it was able to compare with each export transaction (see section 4.3 below).
146. To arrive at the ex-factory values for each producer, MBIE has made adjustments from the base export and domestic prices, where sufficient information was available, to ensure a fair comparison between export sales of preserved peaches and sales for domestic consumption in Spain. The basis for the adjustments is set out below in relation to each producer.

### Likelihood of dumping

147. In order to consider the likelihood of dumping in the absence of anti-dumping duties, which could involve new producers entering the market, MBIE has also identified an indicative normal value for the Spanish market, based on retail prices with appropriate adjustments, and an export price based on the average export returns achieved by Spanish exporters in markets of a similar size to New Zealand.

#### 4.2.3 Information used

148. The Spanish producers and the intermediary trader did not respond to MBIE's requests for information. However, the importers concerned did provide information. As MBIE has been provided with limited information it has determined export prices and normal values having regard to all available information which can reasonably be relied upon. MBIE has used information provided in:
- questionnaire responses (including exporters and importers);
  - New Zealand Customs import data;
  - previous dumping investigations concerning imports of preserved peaches;
  - information provided by the applicant (HWL);
  - information provided by the GOS; and
  - information sourced from foreign producer websites and supermarket websites.

### 4.3 Export prices

149. Export prices for the Spanish suppliers identified in the POR(D) are determined in accordance with section 4 of the Act. Export prices are the prices at which product are purchased by New Zealand importers from exporters from Spain, that are arm's length transactions, adjusted to allow a fair comparison with the prices of preserved peaches sold in Spain.
150. An explanation is given below for the calculation of export prices for each of the manufacturers of preserved peaches exported from Spain to New Zealand in the POR(D), as well as a notional assessment for consideration of the likelihood of future dumping,

based on data provided by the GOS, used to assess potential export prices from Spain, should anti-dumping duties not be in place.

#### **4.3.1 Alcurnia**

151. Alcurnia did not provide a response to the manufacturer's questionnaire. In the absence of any information from Alcurnia, MBIE has had regard to available information in calculating export prices. This includes information from Customs data and from the importers of Alcurnia products.

##### **Base prices**

152. MBIE has established a base price using information from Customs data and from the New Zealand importers, who provided invoices showing details of shipments during the POR(D).

153. Shipments by Alcurnia during 2018 took place in [REDACTED], with the [REDACTED] shipment including both 850g and 2.65kg cans

154. The base prices are the FOB price for each shipments divided by the total volume of the shipment to derive unit values in EUR/kg.

##### **Adjustments**

##### ***Intermediary margins***

155. The 2018 shipments were made direct from Alcurnia to the importers, so there is no need to take account of any margin for intermediary traders.

##### ***Inland freight, customs and port handling charges***

156. MBIE has not been provided with any information on costs, charges and expenses incurred in preparing the subject goods for shipment to New Zealand that are additional to those incurred for domestic consumption. In the original investigation, and in the 2016 review, MBIE noted that HWL had submitted a proposed deduction of [REDACTED] per cent of the FOB price as an estimate of the cost of inland freight. MBIE established that in previous investigations involving preserved peaches it had used a slightly higher figure of [REDACTED] per cent as the difference between FOB and ex-factory. In the original investigation and in the 2016 review MBIE considered that it was reasonable to use this figure, which was based on all costs and was information that had been applied and verified in previous investigations.

157. MBIE considers that having regard to all available information, this information can be used in the establishment of export prices in the current reconsideration.

##### **Export prices**

158. From the base prices and the adjustments set out above, MBIE has calculated ex-factory export prices for the shipments of preserved peaches by Alcurnia during the POR(D). Prices for the 850g can were the same for both shipments.

**Table 4.1: Export Prices - Alcornia**  
EUR/kg

Goods	Export Price
850 g	
2.65 kg	

**4.3.2 Navarrico**

159. Navarrico did not provide a response to the manufacturer’s questionnaire. In the absence of any information from Navarrico, MBIE has had regard to available information in calculating export prices. This includes information from Customs data and from the importer of Navarrico products.

**Base prices**

160. MBIE has established a base price using information from Customs data and from the New Zealand importer, who provided invoices showing details of shipments during the POR(D).

161. Shipments by Navarrico during 2018 took place in [REDACTED] and all were 2.65kg glass jars.

162. The base prices are the FOB price for each shipment divided by the total volume of the shipment to derive unit values in EUR/kg.

**Adjustments**

**Intermediary margins**

163. Navarrico’s shipments were via an intermediary, [REDACTED], which did not provide any information in response to the exporter questionnaire.

164. In the original investigation MBIE used the intermediary’s margin of [REDACTED] per cent established in an investigation into canned peaches from Greece as the basis for its adjustment. In the 2016 review MBIE had information from another intermediary involved in the review, including commercial invoices which enabled MBIE to calculate the intermediary’s margin as [REDACTED] per cent of the FOB price. In the absence of information from Navarrico or [REDACTED], and since it related to preserved peaches from Spain covered by the review, MBIE considered that it would be reasonable to use the margin of [REDACTED] per cent from the 2016 review.

165. MBIE considers that having regard to all available information, this information can be used to establish export prices in the current reconsideration.

**Inland freight, customs and port handling charges**

166. MBIE has not been provided with any information on costs, charges and expenses incurred in preparing the subject goods for shipment to New Zealand that are additional to those incurred for domestic consumption. An adjustment of [REDACTED] per cent of the FOB price, covering inland freight and other charges, has been made on the same basis as for Alcornia as described above.

167. MBIE considers that having regard to all available information, this information can be used in the establishment of export prices in the current reconsideration.

**Export prices**

168. From the base prices and the adjustments set out above, MBIE has calculated ex-factory export prices for the shipments of preserved peaches by Navarrico during the POR(D). Prices were the same for all shipments.

**Table 4.2: Export Prices - Navarrico**

EUR/kg	
Goods	Export Price
2.65 kg	

**4.3.3 Notional**

169. MBIE is required to assess whether “the expiry of the duty would be likely to lead to continuation or recurrence of dumping . . .” (AD Agreement, Article 11.3). The Appellate Body, in *US – Corrosion-Resistant Steel Sunset Review*, noted that, as this likelihood determination is a prospective determination, “the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated.”<sup>7</sup>

170. The Act and the AD Agreement do not set out methodologies for establishing whether there is a continuation or recurrence of dumping. The Panel, in *US – Corrosion-Resistant Steel Sunset Review*, observed “that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a “likelihood” determination.”<sup>8</sup>

171. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* clarified that “In principle, therefore, investigating authorities are not restricted in the choice of methodology they will follow in making their sunset determinations. In their choice of methodology, however, the investigating authorities should have regard to both “investigatory and adjudicatory aspects” of sunset reviews and make forward-looking determinations on the basis of evidence relating to the past. They must arrive at reasoned conclusions on the basis of positive evidence. In so doing, the investigating authorities may not remain passive. Rather, the authorities have to act with an ‘appropriate degree of diligence’.”<sup>9</sup>

172. Further, the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* has stated: “In view of the use of the word ‘likely’ in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be

<sup>7</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

<sup>8</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.166

<sup>9</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.34.

probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible."<sup>10</sup>

173. Since there were only two exporters during the POR(D), and both of relatively small volumes compared with historic average exports of the subject goods from Spain, MBIE is not satisfied that the export prices established for Alcurnia and Navarrico are representative of the likely export price of preserved peaches from Spain to New Zealand, should duties not be in place. As discussed in Section 5.3.2 below it is considered to be likely that there will be a significant increase in the volume of dumped goods if duties are not in place, and these larger volumes would not come from the two exporters in the POR(D). For this reason, and since MBIE is required to assess the likelihood that dumping would recur if anti-dumping duties are not in place, MBIE has carried out a general analysis to derive a proxy export price of preserved peaches from Spain should anti-dumping duties not be in place.

#### ***Base price***

174. In order to establish a reasonable proxy for a base export price, MBIE considered export sales to markets of broadly equivalent size to New Zealand. All data is at the FOB level.
175. In establishing markets of a broadly equivalent size to New Zealand, MBIE notes that exports to New Zealand in 2018 totalled 53 tonnes. Since 2011, annual export volumes to New Zealand from Spain have ranged between 17 and 202 tonnes. MBIE has therefore considered comparable markets to be those where exports from Spain fall within the range of 20-200 tonnes in 2018, excluding countries within the EU, which form a single market with Spain. Twenty-nine countries fall within the comparable market range in the data provided by the GOS. MBIE notes that the export statistics are likely to include some non-subject goods.
176. The base price is the average FOB price per kilogram.

#### ***Adjustments***

##### ***Intermediary margins***

177. In the absence of relevant information, MBIE has assumed that no adjustment for intermediary traders is required. This view reflects the known situation with regard to Alcurnia.

##### ***Inland freight, customs and port handling charges***

178. An adjustment of 0.5 per cent of the FOB price, covering inland freight and other charges, has been made on the same basis as for the named exporters above.

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<sup>10</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

**Export price**

179. From the base prices and the adjustments set out above, MBIE has calculated ex-factory export prices for potential shipments of preserved peaches for the purposes of the consideration of the likelihood of a recurrence of dumping.

**Table 4.3: Export Prices - Notional**  
EUR/kg

Goods	Export Price
All	

**4.4 Normal values**

180. Normal values are determined in accordance with section 5 of the Act. The normal value is usually the price at which foreign manufacturers of product sell product in their domestic market. The types of sales that can be used to determine normal values can generally be described as arm’s length sales of like goods in the ordinary course of trade for home consumption in the country of export, in this case Spain. Where an exporter makes no such sales, sales by other sellers of like goods in Spain can be used to establish normal values.

181. In the absence of relevant and suitable sales in the ordinary course of trade, normal values can be either (a) constructed on the basis of the sum of cost of production and, on the assumption that the goods had been sold for home consumption in the ordinary course of trade in Spain, reasonable amounts for administrative and selling costs and other costs incurred in the sale, and a rate of profit normally realised on sales of goods of the same general category in the Spanish domestic market; or (b) established on the basis of selling prices to a third country.

182. Because no information has been supplied by Spanish producers or exporters, MBIE has determined normal values under section 6(1) of the Act having regard to all available information.

183. MBIE has used retail prices as the basis for establishing normal values, since these sales are at arm’s length in the ordinary course of trade for home consumption. In considering the adjustments necessary to work back to the ex-factory level, MBIE has taken account of information available from the original investigation and the 2016 review, and information provided by HWL as well as MBIE’s own research. Details of the calculations relating to individual exporters for the POR(D) and for the consideration of the likelihood of the continuation of dumping are set out below.

184. MBIE notes that HWL provided information relating to retail prices in Spain, in which it highlighted two products each from three supermarkets, with average per kg prices calculated for each supermarket (based on the drained weight). This information had been provided in HWL’s application for the 2016 review in relation to normal values. MBIE considers it more appropriate to use specific information relating to the Alcurnia brand, given there have been exports to New Zealand of this brand. Retail price information on the Alcurnia brand was included in the supermarket information provided by HWL but was not selected by HWL for its normal value information, while the notional normal value is based on the full range of subject goods covered by the supermarket

- information. Also, MBIE calculates per kg prices on the basis of net weight and not drained weight, since this provides a better and fairer comparison with the export price and with prices of the goods sold in the New Zealand market.
185. MBIE has considered the proposal made by the EC in its submission of 27 May 2019 regarding the establishment of normal value. The EC stated that in the absence of cooperation and available market intelligence concerning normal values, one alternative source of information concerning domestic sales could be sales to third countries. The EC provided an analysis relying on sales to Spain's three biggest export markets (France, Germany and Portugal) as a proxy for normal values, given the high number of transactions involved (44 per cent of export sales), and the fact that Spain and its three main customers are inside a single market (the EU). These values were compared with export prices to New Zealand. MBIE notes that the trade statistics provided by the EC cover a wider range of goods than the subject goods, as the data provided is for all goods under the tariff heading 200870.
186. MBIE notes that section 5(1) of the Act and Article 2.1 of the AD Agreement provide the primary basis for assessing normal values, namely on the basis of prices for the like product in the ordinary course of trade for consumption in the country of export. Section 2.2 of the AD Agreement states that the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison. The EC's proposal for relying on sales to third countries in the absence of cooperation from Spanish exporters and the lack of available market intelligence concerning normal values is inconsistent with the conditions set out in Article 2.2 of the AD Agreement for the use of third country prices. This was also noted by HWL in a submission of 26 July 2019.
187. Article 6.8 of the AD Agreement states that in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. This is reflected in section 6 of the Act, which states that if sufficient information has not be furnished or is not available to enable the normal value of goods to be ascertained under section 5, the normal value shall be such amount as is determined by the Secretary having regard to all available information. MBIE considers that the retail price information available to it from information provided by HWL is the best information available to fill the gap in primary information on normal values. MBIE notes that retail prices from Spain relate directly to the subject goods and are for sales for home consumption in Spain, and should be used as facts available. Sales to third countries are not to be relied on, as the conditions in section 2.2 of the AD Agreement are not met – there are sales of the like product in the ordinary course of trade in the domestic market of the exporting country, and the prices do permit a proper comparison.

188. An explanation is given below of the calculation of normal values for each of the manufacturers of preserved peaches exported from Spain to New Zealand in the POR(D), and a notional assessment, based on data provided by the EC.

#### **4.4.1 Alcurnia**

189. Alcurnia did not provide a response to the questionnaire. In the absence of information from Alcurnia, MBIE has established normal values on the basis of all available information under section 6 of the Act.

##### **Base prices**

190. As in the 2016 review, MBIE has been able to identify a retail price for the brand and type of the subject goods exported by Alcurnia to New Zealand. This information, drawn from information provided by HWL for the reconsideration, was supermarket price information for April 2018 for El Corte Inglés. The information related to the standard price for the 850g can. The subject goods have been imported in both 850g cans and 2.65kg cans over the POR(D), and since information from Spanish retail prices was not available for the 2.65kg can, MBIE has applied the relative price differential between 850g cans and 2.65kg cans when sold at retail in New Zealand in order to establish a base price for the 2.65kg can.

##### **Adjustments**

###### **Taxes**

191. The base retail price is Value-Added Tax (VAT)-inclusive, so in order to ensure a proper comparison with the export price, the tax element must be removed. As confirmed in the 2016 review, the current VAT rate applicable in Spain to preserved peaches is 10 per cent, so the base price has been reduced accordingly.

###### **Margins and mark-ups**

192. In the original investigation, MBIE used a retail margin of [REDACTED] per cent of the VAT-exclusive price, based on information provided by HWL which was derived from a 2011 report by the Irish Food Board (Bord Bia) on entering the Spanish retail market. The [REDACTED] per cent was at the bottom end of the spectrum of margins contained in the Bord Bia report, since HWL noted that preserved peaches commanded a smaller retail margin of [REDACTED] per cent in the New Zealand market.
193. In the 2016 review, HWL proposed a [REDACTED] per cent margin based on its own prices to retailers and Nielsen data on the average retail price of preserved peaches. In that review MBIE used this margin in its calculations on the basis that the Bord Bia information was dated.
194. MBIE has reviewed the available information in relation to this reconsideration, and in particular has checked the retail margin information provided by HWL. MBIE notes that based on current retail prices, the apparent margin over HWL's sales value for Wattie's brand goods is [REDACTED] per cent, while the lower margin would apply when all preserved peach retail sales are included, i.e. including imported goods not produced by HWL. In these circumstances, MBIE considers that the margins identified in the Bord Bia report may not

be so outdated as previously thought. In particular, MBIE notes that the Bord Bia report indicated that the retail margin range for the major store El Corte Inglés was [REDACTED] per cent.

195. Taking into account all of the information available to it, MBIE considers that an appropriate retail margin for the Alcurnia product is [REDACTED] per cent of the VAT-exclusive retail price.

**Inland freight**

196. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for an adjustment for inland freight, and no adjustment was made.

**Other adjustments**

197. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for any other adjustments.

**Normal values**

198. From the base prices and the adjustments set out above, MBIE has calculated ex-factory normal values for the shipments of preserved peaches by Alcurnia during the POR(D).

**Table 4.4: Normal Values – Alcurnia**  
EUR/kg

Goods	Normal Value
850 g	[REDACTED]
2.65 kg	[REDACTED]

**4.4.2 Navarrico**

199. Navarrico did not provide a response to the questionnaire. In the absence of information from Navarrico, MBIE has established normal values on the basis of available information under section 6 of the Act.

**Base prices**

200. In the original investigation Navarrico provided information relating to its selling price for 840 g jars, and this was used as the base price. In the 2016 review no normal value was established for Navarrico because MBIE was unable to source a Spanish retail price for Navarrico products.
201. MBIE has been able to source a retail price for Navarrico preserved peaches in 700g glass jars, and in the absence of other suitable information, has used the EUR/kg amount for the base price, with an adjustment made to derive a price for 2.65kg jars based on the relative price differential between 850g and 2.65kg cans used for Alcurnia.

**Adjustments**

**Taxes**

202. The base retail price is VAT-inclusive, so in order to ensure a proper comparison with the export price, the tax element must be removed. As confirmed in the 2016 review, the

current VAT rate applicable to preserved peaches is 10 per cent, so the base price has been reduced accordingly.

**Margins and mark-ups**

203. For the reasons outlined above in relation to Alcornia, and taking into account all of the information available to it, MBIE considers that an appropriate retail margin for the Navarrico product is [redacted] per cent of the VAT-exclusive retail price.

**Inland freight**

204. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for any adjustments.

**Other adjustments**

205. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for any other adjustments.

**Normal values**

206. From the base prices and the adjustments set out above, MBIE has calculated ex-factory normal values for the shipments of preserved peaches by Navarrico during the POR(D).

**Table 4.5: Normal Value – Navarrico**  
EUR/kg

Goods	Normal Value
2.65 kg	[redacted]

**4.4.3 Notional**

207. For the purposes of assessing the general likelihood, beyond exports from Alcornia and Navarrico, that other imports of preserved peaches from Spain would likely recur should anti-dumping duties not be in place, MBIE has sought to establish a likely normal value for likely exports from Spain to New Zealand under section 6 of the Act.

**Base prices**

208. In order to establish a base price MBIE has used an average retail price derived from all of the retail price information from Spanish supermarkets for April 2018 provided by HWL. The simple average of retail prices was [redacted].

**Adjustments**

**Taxes**

209. The base retail price is VAT-inclusive, so in order to ensure a proper comparison with the export price, the tax element must be removed. As confirmed in the 2016 review, the current VAT rate applicable to preserved peaches is 10 per cent, so the base price has been reduced accordingly.

**Margins and mark-ups**

210. For the reasons outlined above in relation to Alcornia, and taking into account all of the information available to it, MBIE considers that an appropriate retail margin for the subject goods is [redacted] per cent of the VAT-exclusive retail price.

**Inland freight**

211. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for any adjustments.

**Other adjustments**

212. In both the original investigation and in the 2016 review MBIE noted that it did not have enough information to provide for any other adjustments.

**Normal values**

213. From the base prices and the adjustments set out above, MBIE has calculated notional ex-factory normal values for preserved peaches from Spain in 2018 during the POR(D).

**Table 4.6: Normal values – Notional  
EUR/kg**

Goods	Normal Value
All	

**4.5 Comparison of export price and normal value**

214. The following table shows a comparison of the export prices with the normal values and the dumping margins for Alcurnia and Navarrico, and also for the notional levels established to assist in the consideration of the likelihood that dumping could continue or recur should other agents enter or re-enter the market.

**Table 4.7: Dumping Margins**

Manufacturer	Export price EUR/kg	Normal value EUR/kg	Dumping margin EUR/kg	Dumping margin %
<b>Alcurnia</b>				
	850 g			43.5%
	2.65 kg			26.8%
	Weighted average			42.2%
<b>Navarrico</b>				
	2.65 kg			13.7%
<b>Weighted average</b>				
	Navarrico & Alcurnia			41.4%
<b>Notional</b>				
	All goods			48.0%

215. According to Table 4.7, imports of the subject goods from all sources are dumped, at a weighted average of 41.4 per cent from Navarrico and Alcurnia combined, and with a notional dumping margin of 48 per cent when considering exports to markets of equivalent size to New Zealand as a proxy for export prices of likely exports in the absence of anti-dumping duties.

**4.6 Likelihood of continuation or recurrence of dumping**

216. In considering the likelihood of the recurrence of dumping, MBIE has applied the general principles set out in the description of MBIE’s approach to sunset reviews in section 1.4

- above. The assessment of the likelihood of a continuation or recurrence of injury is addressed in Chapter 5 of this Final Report.
217. As provided in Article 11.3 of the AD Agreement, a review must focus on the likelihood of the continuation or recurrence of dumping should anti-dumping duties not be re-imposed.
218. The original investigation established that all imports of the subject goods from Spain during 2010 were dumped. The 2016 review found that imports of the subject goods in 2015-16 continued to be dumped. In the current reconsideration, with a POR(D) of 2018, the available evidence is that all of the shipments in the POR(D), from all Spanish producers, were dumped at significant margins. MBIE considers that it is reasonable to conclude that imports of the subject goods continued to be dumped in the period between the 2016 review and the current reconsideration.
219. In order to assess the likelihood that imports into New Zealand from other Spanish suppliers of the subject goods would be dumped, MBIE has made a general, notional assessment of normal values and export prices, on the basis outlined above. The outcome of this assessment is that any imports of the subject goods from Spain are likely to be dumped.
220. Based on current prices and best available evidence, MBIE concludes that it is likely that the subject goods imported from Spain will continue to be dumped.

#### **4.7 Conclusions relating to dumping**

221. MBIE has ascertained export prices and normal values for imports of the subject goods from Spain on the basis of available information, as provided for in section 6 of the Act. On the basis of the resulting dumping margins, MBIE is satisfied that there is sufficient evidence for it to conclude that there is a likelihood of the continuation of dumping of the subject goods imported from Spain.



## 5. Injury investigation

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### 5.1 Basis for consideration of likelihood of injury

#### 5.1.1 Legal basis and methodology

222. MBIE’s approach to sunset reviews is recorded in section 1.4 above. In considering the likelihood of a continuation or recurrence of injury, MBIE has applied the general principles set out in that section.
223. MBIE carries out its injury analysis for reviews on the basis of section 8 of the Act and Article 11 of the AD Agreement. MBIE interprets these provisions to mean that the likelihood of a continuation or recurrence of injury is to be considered in the context of the likely impact on the industry, arising from the likely volume of the dumped goods and their likely effect on prices.

#### ***New Zealand legislation***

224. The basis for considering material injury is set out in section 8(1) of the Act:
- 8. Material injury to industry—(1) In determining for the purposes of this Act whether or not any material injury to an industry has been or is being caused or is threatened or whether or not the establishment of an industry has been or is being materially retarded by means of the dumping or subsidisation of goods imported or intended to be imported into New Zealand from another country, the Secretary shall examine—*
- (a) The volume of imports of the dumped or subsidised goods; and*
- (b) The effect of the dumped or subsidised goods on prices in New Zealand for like goods; and*
- (c) The consequent impact of the dumped or subsidised goods on the relevant New Zealand industry.*
225. The Act goes on to set out a number of factors and indices which the Secretary shall have regard to, although noting that this is without limitation as to the matters the Secretary may consider. These factors and indices set out in section 8(2)(a) to (d) of the Act include:
- The extent to which there has been or is likely to be a significant increase in the volume of dumped goods, either in absolute terms or relative to production or consumption;
  - The extent to which the prices of dumped goods represent significant price undercutting in relation to prices in New Zealand;
  - The extent to which the effect of the dumped goods is or is likely significantly to depress prices for like goods of New Zealand producers or significantly to prevent price increases for those goods that otherwise would have occurred;
  - The economic impact of the dumped goods on the industry, including actual or potential decline in output, sales, market share, profits, productivity, return on investments, and utilisation of production capacity; factors affecting domestic prices; the magnitude of the margin of dumping; and actual and potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investments.

226. In addition, the Secretary must have regard to factors other than dumped imports which may be injuring the industry, since in accordance with Article 3.5 of the AD Agreement, it must be demonstrated that the dumped imports are, through the effects of dumping, causing material injury. These factors, set out in section 8(2)(e) of the Act, include the volumes and prices of non-dumped imports of the goods; contraction in demand or changes in the patterns of consumption; trade restrictive practices of and competition between the foreign and domestic producers; developments in technology; and the export performance and productivity of the domestic industry.
227. The Secretary is also required by section 8(2)(f) of the Act to have regard to the nature and extent of importations of dumped goods by New Zealand producers of like goods, including the value, quantity, frequency, and purpose of any such importation.

### **AD Agreement**

228. Reviews are addressed in Article 11 of the AD Agreement, and require findings relating to the likelihood of injury. The relationship between Article 11 and Article 3 of the AD Agreement which addresses injury in an investigation, has been the subject of dispute settlement in the WTO.
229. In *US — Oil Country Tubular Goods Sunset Reviews*, the Appellate Body upheld the Panel's finding that the obligations set out in Article 3 (in relation to the determination of injury) do not apply to likelihood-of-injury determinations in sunset reviews.<sup>11</sup> However, the Appellate Body also noted that this was not to say that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in Article 3. The Appellate Body considered that certain of the analyses mandated by Article 3 and necessarily relevant to the original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a reasoned conclusion. The Appellate Body stated that, in this respect, it was of the view that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to a likelihood determination under Article 11.3. It seemed to the Appellate Body that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination, but that determination results from the requirements of Article 11.3, not Article 3, and must rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions."<sup>12</sup>

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<sup>11</sup> WTO document WT/DS268/AB/R, paragraph 285.

<sup>12</sup> *Ibid*, paragraph 284.

**MBIE Approach**

230. Bearing in mind the views of the Appellate Body, as outlined above, MBIE notes that with regard to an injury determination, section 8 of the Act sets out a number of factors and indices which the Secretary shall have regard to, although noting that this is without limitation as to the matters the Secretary may consider. These factors and indices are considered under the relevant headings below. Furthermore, the demonstration of a causal relationship between dumped imports and any current or likely injury must be based on an examination of all relevant evidence and any known factors other than the dumped imports which are causing injury, or are likely to cause injury to the domestic industry. Any injury, or likely continuation or recurrence of injury, caused by factors other than dumping must not be attributed to the dumped imports.
231. In considering injury in a review, MBIE normally examines whether the removal of the duties would be likely to lead to the continuation or recurrence of injury. In the current reconsideration the examination is whether the re-imposition of anti-dumping duties following the quashing of the Minister’s determination by the High Court is necessary to ensure that there is no current injury, or recurrence of injury. If it is concluded that dumping and injury would likely continue or recur, MBIE makes a reassessment of the rate or amount of duty under section 14(6) of the Act in order to establish whether the duty to be re-imposed is sufficient to prevent injury, or whether a different rate of duty is necessary.

**5.1.2 2011 investigation**

232. The 2011 investigation was initiated on the basis of a threat of material injury to the domestic industry, rather than the occurrence of actual injury. For the purpose of assessing whether there was a threat of material injury, MED relied on historical and forecast financial information.
233. The 2011 investigation noted that there was a significant rate of increase in imports of preserved peaches from Spain since the third quarter of 2010. [REDACTED] imported [REDACTED] per cent of Spanish preserved peaches over the dumping period, and noted that it hoped to [REDACTED] an import volume of approximately [REDACTED] kg of Spanish irregular sliced peaches per annum, although the company did note that this would be dependent on the supply of irregular sliced peaches from its Spanish supplier, and currency exchange rates. [REDACTED] also noted that its aim was to achieve [REDACTED].
234. MED stated in 2011 that if [REDACTED] was to import [REDACTED] kg of preserved peaches annually, then in the 2012 April year Spanish imports would increase to approximately [REDACTED] kg representing an approximately [REDACTED] per cent increase since the 2011 year.
235. The 2011 investigation concluded that there had been a significant rate of increased dumped imports into the New Zealand market since 2009, [REDACTED], indicating the likelihood of substantially increased importations of dumped

imports. MED was satisfied that the New Zealand industry was threatened by material injury attributed to dumped imports.

236. Thus, the 2011 dumping investigation into preserved peaches from Spain found a threat of material injury, based on findings, that:
- there had been a recent significant increase in imports of dumped goods from Spain indicating the likelihood of imminent, substantial increases in imports.
  - there was evidence that Spanish exporters had sufficient freely disposable capacity and inventories to supply preserved peaches to New Zealand indicating the likelihood of substantially increased dumped imports into New Zealand, in the near future.
  - there were significant levels of current price undercutting indicating that preserved peaches from Spain were entering New Zealand at prices that would have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.
  - there were few barriers to entry for an importer of preserved peaches in the New Zealand market and New Zealand importers and retailers had the existing distribution systems in place to facilitate the importation of significantly increased volumes of preserved peaches from Spain into New Zealand.
  - further dumped exports were imminent and unless protective action was taken material injury attributable to dumped imports would occur to the New Zealand industry in terms of a decline in sales revenue, a decline in profits and profitability, a decline in return on investments; and an adverse impact on growth.
237. On the basis of the above considerations, MED concluded that anti-dumping duties were warranted in order to prevent material injury to the New Zealand industry due to dumped imports from Spain.

### 5.1.3 2016 sunset review

238. The 2016 review identified three importers of preserved peaches from Spain in the POR(D) - Mediterranean Group Ltd, Sabato Ltd, and Neill Cropper and Co Ltd. [REDACTED] had stopped importing preserved peaches from Spain when the 2011 investigation was initiated and did not resume imports when the investigation was concluded, after duties were imposed. Due to the fact that there were no imports made by [REDACTED] in the POR(D) for the 2016 review, [REDACTED] was not identified as an interested party.
239. By analysing imports made in the POR(D) by interested parties, the 2016 review concluded that there was a likelihood of a continuation of dumping should duties expire, but based on the lack of positive evidence available to it, MBIE was unable to conclude that the Spanish industry would resume exports of dumped product to New Zealand at volumes sufficient to cause material injury to the New Zealand industry, if the duties were removed. Thus, the 2016 sunset review found that:
- while import volumes at the time were small, they indicated that there were still supply lines available for the import of preserved peaches from Spain.

- prices from Spain would undercut prices of other imports, and HWL's prices, suggesting that, if the anti-dumping duties were removed from Spain, these products would likely hold a price advantage over imports from all other sources.
- given the size of the Spanish industry relative to the size of the New Zealand market, the Spanish industry could, over longer timeframes, have the capacity and intention to resume exports into New Zealand in volumes that would be significant relative to New Zealand production and consumption.
- barriers to entry to the New Zealand market are extremely low, and the New Zealand market is easy to access.
- there had been a small appreciation of the NZD against the EUR since 2011, suggesting that conditions were more favourable at the time of the review for importers looking to source goods from Europe.
- there was a lack of positive evidence available to conclude that it was likely that the Spanish industry would resume exports to New Zealand in quantities sufficient to cause material injury to the domestic industry.

240. On the basis of these findings, MBIE concluded in the 2016 review that the continuation of anti-dumping duties was not warranted in order to prevent material injury to the New Zealand industry due to dumped imports from Spain.

## 5.2 Injury information submitted by HWL

241. MBIE is satisfied that HWL is the only New Zealand producer of like goods, and therefore HWL constitutes the New Zealand industry for the purpose of this reconsideration.

242. HWL provided comments on what it considered would be the likely effect on its financial performance for its sales of preserved peaches (i) if anti-dumping duties on preserved peaches from Spain were in place and (ii) if anti-dumping duties were not in place.

243. The information provided by HWL includes details of production, revenue, cost of production, gross profit (contribution margin), fixed costs (including selling and administration costs), and earnings before interest and tax (EBIT). Actual data was provided by HWL for the POR(I), and forecasts were provided for 2019, 2020 and 2021.

### 5.2.1 Forecasts without duties in place

244. HWL's strategy if anti-dumping duties are not in place is [REDACTED]. HWL stated that it would [REDACTED]. For this reason, the forecast sales volume in the 2019, 2020 and 2021 financial years is the same whether or not the duties are in place. The injury is reflected in the net sales value (NSV) and EBIT figures.

245. HWL's forecast NSV per tonne for its Oak and Wattie's brands is based on the HWL-assessed likely imported price of Spanish peaches if the anti-dumping duties are not in place, relying on Trade Map Data to make an assessment on the likely export price in the absence of duties. The price undercutting estimate calculated by HWL is [REDACTED] per cent for the Oak brand, which is the margin by which HWL would [REDACTED].

HWL would also [redacted]. This estimate is relied on for the forecasts presented in Tables 5.5, 5.7, 5.9 and 5.12. MBIE has included additional information in these tables reflecting its calculations of price undercutting margins, which differ from those used by HWL.

### 5.2.2 Forecasts with duties in place

246. HWL’s sales volume and NSV forecasts for its 2019, 2020 and 2021 financial years (if anti-dumping duties are in place) are based on the company’s budgeted sales figures. The budgeted NSVs are themselves based on forecast pricing strategy information. Forecasts provided by HWL with duties appear to assume that the magnitude of the duty is equivalent to the margin of price undercutting.

## 5.3 Import volumes

247. Under section 8(2)(a) of the Act, MBIE is required to have regard to the extent to which there has been or is likely to be a significant increase in the volume of imports of dumped or subsidised goods either in absolute terms or in relation to production or consumption in New Zealand.

248. In a review, MBIE must determine whether the expiry of the duty (or in this case, the non-reimposition of a duty), would be likely to lead to the continuation or recurrence of injury.

249. In examining these matters, MBIE has reviewed the level of historic imports, and has also examined considerations relating to the likelihood that volumes of dumped imports are likely to recur. This section includes MBIE’s evaluation of both the historical and forecast injury information provided by HWL.

### 5.3.1 Import volumes from Spain

250. Import volumes from Spain during the POR(D) are low and come from a few shipments by specialist food retailers and distributors, restricting the assessment of whether there has been or is likely to be a significant increase in the volume of imports. For this reason, MBIE considered data between 2005 and 2018 to assess import volumes and likely scenarios (Table 5.1).

**Table 5.1: Imports and market, 2014-2018, tonnes**

	2014	2015	2016	2017	2018
Spanish Imports	17	52	17	52	37
Total Imports	3,676	4,174	4,277	3,886	3,649
Sales by HWL					
New Zealand Market					

251. The table above shows fluctuations in imports from Spain since 2014, ranging between 17 and 52 tonnes, as well as some fluctuations in total domestic sales by HWL since 2014, with fluctuations in total domestic sales by HWL ranging between [redacted] tonnes. The change in New Zealand market size reflects fluctuations arising from import volumes from all sources, as well as domestic sales by HWL. As noted above, the imports from Spain during this period were mainly by the importers from the POI(D).

### 5.3.2 Likely import volumes

252. While the current trade may not indicate a likelihood of increase, MBIE must consider the likelihood that other suppliers and importers will enter the market in the absence of anti-dumping duties.
253. HWL claims that initial imports from Spain are likely to be made in December 2019, and are likely to be made by [REDACTED]. Volumes would become significant in 2020 as more importers are able to switch their source of supply.
254. The likelihood of a recurrence of significant volumes of dumped imports sufficient to cause material injury is related to factors such as:
- the price advantage (in the absence of duties) which such imports may hold;
  - the capacity and intent of the Spanish preserved peach industry to substantially increase its exports to New Zealand;
  - the ease of entry into the New Zealand market;
  - the ability and intent of importers to handle a significant increase in imports from Spain;
  - the ease of distribution of goods within New Zealand;
  - exchange rates; and
  - the evidence from previous behaviour.
255. In assessing these matters, MBIE has followed the direction of the High Court to consider past, present and future conduct with regard to imports. This has led MBIE to a different conclusion from that reached in the 2016 review.

#### 5.3.2.1 Price advantage held by the imported products

256. The analysis below shows that preserved peaches from Spain are likely to undercut HWL's prices if imports resume, in the absence of anti-dumping duties.
257. MBIE calculated a likely Spanish ex-wharf price, in the absence of anti-dumping duties, for all years between 2011 and 2018. Ex-wharf prices for Spanish exports were calculated making use of the data provided by the GOS on total exports of the tariff item at the 6-digit level for volumes and values in EUR. Per unit values were calculated and converted to NZD relying on the average exchange rate of the EUR and NZD for each year, as posted by NZCS. An estimate of insurance, freight and customs duty was obtained as the median value per unit of insurance, freight and customs duty paid by Alcornia, since this is the supplier of goods most similar to those produced by HWL. The ex-factory values used for Wattie's and Oak were those used in the 2011 investigation, 2016 review, and current reconsideration. Table 5.2 compares these estimates with ex-factory prices for Wattie's and Oak.

**Table 5.2: Spanish ex-wharf price, Wattie’s and Oak ex-factory prices  
NZD, 2011-2018**

	2011	2012	2013	2014	2015	2016	2017	2018
Spanish Exports								
Wattie's								
Oak								

258. As indicated by Table 5.2, Spanish exports, as assessed by the ex-wharf price, significantly undercut the Wattie’s brand, and undercut the Oak brand by a smaller amount. A further analysis of price undercutting is presented in section 5.5.1.

**5.3.2.2 Capacity of the Spanish industry**

259. In the original investigation, HWL claimed that Spanish preserved peach producers had “huge surplus capacity” which made their product easily available to importers. HWL continues to believe that there is surplus supply compared with demand, and several reports were provided to support this claim. HWL also noted, in its comments on the Interim Report, that Spanish producers would retain safety stocks which would be of a sufficient level to take a significant market share and cause injury to the New Zealand industry. HWL noted that it takes only a relatively small volume of imports, in the region of 100-300 tonnes, to have an injurious effect.

**USDA and other reports**

260. In the 2016 review, HWL provided MBIE with a United States Department of Agriculture (USDA) Global Agricultural Information Network (GAIN) report for Spain, produced in 2011, which indicated that the preserved peach industry in Spain produced at that time around 95,000 MT per annum.

261. The report also showed that in 2010/11, imports of preserved peaches into Spain were 3,026 MT and exports were 46,575 MT.

262. MBIE has sourced a 2018 USDA Foreign Agricultural Service (FAS) GAIN report<sup>13</sup> which does not provide figures on preserved peaches.

263. The 2011 USDA GAIN report also stated that “[t]he canning industry in Spain is going through rough adjustments and consolidation of the sector continues due to the financial crisis, the difficulties in the access to credit and the increasing competition from countries like China.”

264. In the 2016 review, HWL also provided an article from Foodnews (dated June 2016) which stated that the 2016 Spanish preserved peach production will be in the region of 92,000 tonnes.

<sup>13</sup> USDA Foreign Agricultural Service GAIN, 24 August 2018, Report No. SP1820, EU-28 Stone Fruit Annual 2018 [https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Stone%20Fruit%20Annual\\_Madrid\\_EU-28\\_8-24-2018.pdf](https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Stone%20Fruit%20Annual_Madrid_EU-28_8-24-2018.pdf)

265. In the 2016 review, MBIE also sourced a USDA Foreign Agricultural Service report titled “Fresh Peaches and Cherries: World Markets and Trade” which highlighted the decreased production in Spain. That report noted in respect of fresh peaches/nectarines that EU production was projected to fall by 217,000 tons as unfavourable weather lowered yields in top producers Spain and Italy.
266. For this reconsideration HWL provided MBIE with several articles by Agribusiness Intelligence looking at the preserved peach industry globally. One article, “The core peach industry unites for global consumption boost,” states that 82,343 crop tonnes were processed in 2018 in Spain. Based on crop the recovery HWL attains in New Zealand that would equate to 80,300 tonnes of canned peaches.
267. Two other articles from this source, “Spanish peach raw material prices to weaken” and “Spanish canned peach industry sets prices for the season” indicate there were carryover stocks heading into the 2018 season, hence the reduced demand. This would also indicate there was stock available for importers to import into New Zealand if they had acted. This is further supported by commentary in the Agribusiness Intelligence article “Canned Peach Supply Overtakes Demand.”

#### **Russian import restrictions**

268. On 7 August 2014, the Russian Federation introduced import restrictions on a range of EU agricultural products, notably meats, dairy products, and fruit and vegetables. The ban is set to run until 31 December 2019<sup>14</sup>. Although some companies were able to partly divert trade flows to other international markets in response to the deteriorating trade relationships, overall trade diversion did not compensate for losses of EU exports to Russia and mitigate all economy-wide negative impacts.<sup>15</sup> Fresh peaches from Spain were one such good strongly impacted by these trade restrictions.
269. As a result of the import restrictions, Spain lost more than 180 million consumers of fruit. Exploring new markets posed some problems, as they did not demand peaches, were not accustomed to consume them, or already had other suppliers in place. This led to lower prices due to a higher domestic supply of peaches with the same demand.<sup>16 17</sup>
270. In 2017, the market was saturated, with an excess of 40,000 tonnes of fresh peaches in part due to the commercial tension between the EU and Russia. Representatives from around the country requested removal of the excess supply from the market. External

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<sup>14</sup> [https://ec.europa.eu/agriculture/russian-import-ban\\_en](https://ec.europa.eu/agriculture/russian-import-ban_en)

<sup>15</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603847/EXPO\\_STU\(2017\)603847\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/603847/EXPO_STU(2017)603847_EN.pdf)

<sup>16</sup> <https://www.freshplaza.es/article/9061106/espana-la-union-extremadura-exige-un-plan-para-arrancar-500-hectareas-de-melocoton-y-nectarina/>

<sup>17</sup> [https://www.eldiario.es/andalucia/enclave\\_rural/agricultura\\_y\\_pesca/Andalucia-agricultura-ganaderia-rural-veto\\_ruso\\_0\\_542096722.html](https://www.eldiario.es/andalucia/enclave_rural/agricultura_y_pesca/Andalucia-agricultura-ganaderia-rural-veto_ruso_0_542096722.html)

- markets did not have the capacity to absorb this supply, leading to the excess supply of fresh peaches.<sup>18</sup>
271. Growers associations around the country requested the removal of hundreds of hectares of peach and nectarine orchards (500 hectares in Extremadura and 2,000 in Cataluña, relying on a financial contribution of 4,500-5,000 euros per hectare, over a 2 year period, from the Ministry of Agriculture, Fisheries, and Food).<sup>19</sup> <sup>20</sup> This amounts to a reduction of almost 10 per cent of the cultivation area.<sup>21</sup>
272. Spain is set to receive an additional EUR 7 million from Brussels to remove almost 20,000 tonnes of peaches and nectarines to face this crisis. This is an extension on the assistance received up to June 2018 of EUR 9.7 million for peaches and nectarines. The objective of the funding was to compensate the producers that opted to distribute their excess production to specified organisations (schools, animal feeding, compost, transformation through juicing).<sup>22</sup>
273. The 2018 USDA FAS GAIN report on stone fruit states that “[t]he value of EU-28 stone fruit exports continues to decline as a result of the 2014 Russian embargo imposed on agricultural and food products, including stone fruit, from the European Union.” This could result in an increase in production of preserved peaches.
274. The information from the 2011 USDA GAIN report showed that Spanish preserved peach production was 85,000 metric tonnes in 2010, and recent Agribusiness Intelligence articles suggest that 82,343 crop tonnes were processed in 2018, equating to 80,300 tonnes of canned peaches. MBIE considers that these sources provide reliable indications of the Spanish peach canning industry’s current available capacity for selling preserved peaches outside the EU.

#### **EC submission to 2016 review**

275. The submission provided by the EC in the 2016 review stated that the saturation of the New Zealand market by Spanish importers was not as likely as MBIE had claimed. The submission was produced by a Netherlands agency which promotes imports from developing countries.
276. The EC pointed to the following details in the report:

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<sup>18</sup> <https://www.larazon.es/economia/crisis-de-precios-en-la-fruta-del-hueso-al-sobrar-40-000-toneladas-JH15748724>

<sup>19</sup> <http://www.elintelecto.com/2019/01/14/melocoton-nectarina-rusia-espana/>

<sup>20</sup> <https://www.freshplaza.es/article/9061106/espana-la-union-extremadura-exige-un-plan-para-arrancar-500-hectareas-de-melocoton-y-nectarina/>

<sup>21</sup> <https://www.freshplaza.es/article/9074185/espana-cataluna-aprueba-un-plan-de-arranque-de-melocoton-y-nectarina/>

<sup>22</sup> <https://www.20minutos.es/noticia/3127070/0/espana-millones-bruselas-crisis-fruta-hueso/melocoton-nectarina/>

- demand for canned peaches (in the EU) was expected to be stable in 2016.
- canned peach production was lower in all main production regions, including Spain.
- canned peach prices in Spain were 5 per cent higher in 2016 than in 2015.

277. This report did not provide details concerning canned and preserved peaches in particular, including production and export volumes and the ability and intent of Spanish producers to supply global markets, including New Zealand.

#### **Conclusions regarding capacity**

278. The New Zealand market for processed peaches is not large compared to other international markets. This fact, in itself, suggests that the Spanish producers would not find it difficult to supply the New Zealand market with sufficient product at short notice if the demand arises.

279. On the totality of the information collected in respect of the freely disposable production capacity of the Spanish preserved peach industry, MBIE is satisfied that Spanish preserved peach manufacturers and exporters have sufficiently freely disposable capacity to substantially increase dumped exports to New Zealand and that other export markets are unlikely to absorb that capacity to such an extent that it would prevent exports to New Zealand in meaningful quantities from occurring.

280. On this basis, MBIE is satisfied that there is sufficient freely disposable capacity of the Spanish exporters to supply preserved peaches to New Zealand, if anti-dumping duties are not in place.

#### **5.3.2.3 The ease of entry into the New Zealand market**

281. MBIE has in the past considered the preserved peach market to be highly competitive. HWL does not have any exclusive customers, and the market is always open to new sources of supply. MBIE has concluded in previous investigations and reviews concerning preserved peaches that barriers to entry to the New Zealand market are extremely low, for reasons such as the ability of house brand customers to terminate contracts and switch suppliers at short notice, the lack of contractual agreements between supermarkets and suppliers and the ability of brokers to source the subject goods from anywhere in the world to take advantage of market opportunities. MBIE has found no reason to change its previous conclusion.

#### **5.3.2.4 The ability and intent of importers to handle a significant increase in imports and the ease of distribution**

282. In its RFI response and during MBIE's verification visit, HWL reiterated that if duties are not in place, then it is [REDACTED]  
[REDACTED]  
[REDACTED]. As explained in section 5.8, [REDACTED] provided a submission on this matter. [REDACTED] stated that the volumes available for export to NZ were limited at the time of the 2011 investigation, and it maintained its previous comments that its

volume was only likely to be small. This is consistent with what was stated by [REDACTED] in 2011, when the volume imported was approximately [REDACTED] tonnes.

283. MBIE notes that [REDACTED] comments about anti-dumping duties removing a Spanish peach variety from the market indicates that the duties had the intended effect, not by eliminating Spanish peaches from the market, but by eliminating the threat of injury posed by [REDACTED] importing behaviour.
284. New Zealand has well-developed distribution channels for preserved peaches, giving widespread access to the New Zealand market.
285. MBIE has consistently found in other canned and preserved peach reviews and investigations that the New Zealand market is easy to access, as are its distribution systems. There do not appear to be any changes to the market that would change these conclusions.

### 5.3.2.5 Exchange rates

286. A further consideration in assessing the likelihood of an increase in import volumes of preserved peaches from Spain, in the absence of anti-dumping duties, is the movement of the NZD against the EUR. In most cases, shipments from Spain are invoiced in EUR.
287. MBIE has analysed the change in the NZD:EUR exchange rate from 2011 (the time of the original investigation) to 2019. Chart 5.2 shows the change in the value of the NZD against the EUR over this period.

**Chart 5.1: NZD:EUR Average monthly exchange rate**



288. The information shows that there was a small appreciation of the NZD against the EUR between 2011 and 2016, suggesting that conditions were more favourable for importers looking to source goods from Europe, including Spain. However, since 2016 there has been a small depreciation of the NZD against the EUR.

### 5.3.2.6 Evidence from previous behaviour

289. The evidence of import volumes over the period 2005-2018 indicates that when duties are removed, imports increase, and when duties are imposed, imports decrease. This evidence reinforces HWL's argument that in the absence of anti-dumping duties it is likely that opportunistic importers will source imports from Spain. Evidence from HWL also suggests that preserved peaches from Spain are the lowest-priced of the major exporters,

and that in the absence of anti-dumping duties would be the logical source for such imports.

290. In analysing HWL’s claim regarding the behaviour of opportunistic importers, MBIE has assessed the price responsiveness of current importers of preserved peaches from Spain, South Africa and China through simple regression techniques. MBIE notes that data on imports of the subject goods from Spain is too limited for a representative analysis. The analysis shows that imports from South Africa are highly price elastic; demand in this market is sensitive to a change in price. Imports from China also indicate a high degree of price elasticity of demand. In a market situation where importers are strongly influenced by the price of the good, this evidence indicates that it is likely that importers source a lower priced alternative should an economic incentive be present. The non-imposition of anti-dumping duties from Spain could provide such an incentive.
291. Further evidence of the likely increase in imports is found in the original 2011 investigation and the 2016 review and in the submission to this reconsideration by [REDACTED], as addressed in section 5.8 of this Final Report.

### 5.3.3 Conclusion on import volumes

292. In respect of the likely import volumes of preserved peaches from Spain, if the anti-dumping duties are not in place, MBIE concludes that:
- Import volumes of preserved peaches from Spain reduced following the imposition of anti-dumping duties and have not increased significantly since the removal of anti-dumping duties in February 2017. Uncertainty in the NZ market pending the judicial review outcome, including the current reconsideration, is likely to be one of the reasons why imports have not resumed in significant quantities; availability could be another reason.
  - Imports of preserved peaches from Spain, despite a depreciation of the NZD against the EUR, are likely to be priced significantly below HWL’s preserved peaches should imports of Spanish preserved peaches resume in significant volumes, in the absence of duties.
  - Spanish producers of preserved peaches have the capacity to resume exports of preserved peaches into New Zealand in volumes that would be significant relative to New Zealand production and consumption.
  - There is ease of entry into the New Zealand market for imports of preserved peaches from Spain and there are available distribution systems that could be used should imports from Spain resume. Importers are likely to have the ability to deal with a resumption of imports of preserved peaches from Spain.
  - Previous experience indicates that when duties were removed then imports from Spain increased, and when duties were imposed they decreased. This is supported by MBIE’s regression analysis.
  - MBIE accepts that New Zealand would not be considered a priority destination for Spanish exporters, due to its market size and geographic distance. However, MBIE does not consider that this attitude of exporters would prevent New Zealand importers from arranging imports of preserved peaches from Spain (as shown by present and past import volumes).

293. In considering the above conclusions MBIE notes the guidance summarised in section 1.4 above, that “would be likely” is to be interpreted to mean “a real and substantial risk..., a risk that might well eventuate”, while the WTO Appellate Body has indicated that a continuation or recurrence of dumping and injury must be ‘probable’ (not simply possible or plausible) and that an affirmative determination must be based on positive evidence (i.e. evidence of an affirmative, objective and verifiable character and which is credible). Taking into account the factors above, MBIE concludes that, should anti-dumping duties not be in place, a recurrence of imports of preserved peaches from Spain in significant quantities is likely. In this context, MBIE accepts HWL’s contention that 100-300 tonnes would represent a significant quantity of imports.

## 5.4 Price effects

294. MBIE seeks to compare prices at the first point of competition in New Zealand, i.e. the first point of sale in the New Zealand market. This will normally be at the ex-factory and ex-wharf or ex-importer’s store levels, to ensure that differences in distribution costs and margins do not confuse the impact of dumping. MBIE notes, however, that the goods imported during the POR(D) do not enter the same distribution channels as the bulk of HWL’s production, and the pricing of these imports at the retail level is considerably higher than the prices achieved by HWL in supermarket sales. Thus, while there may be price undercutting at the ex-wharf level, this is not sustained though to the retail level where consumers make their choices.
295. In undertaking its analysis of price effects, MBIE has considered the position in regard to actual imports during the POR(D), as well as the notional position derived for likely imports from Spain.
296. HWL has estimated a likely import price of Spanish exports of [REDACTED], resulting in price undercutting of [REDACTED] per cent for the Wattie’s brand and [REDACTED] per cent for the Oak brand.
297. MBIE has assessed the validity of the price undercutting estimate by HWL. By relying on the Spanish export data, MBIE generated its own estimates of likely undercutting by analysing likely Spanish ex-wharf price (as discussed in section 5.4.2.1, and presented in section 5.5.1 below). MBIE’s estimate of the likely Spanish ex-wharf price is [REDACTED], equivalent to a price undercutting percentage of [REDACTED] per cent for the Wattie’s brand, and [REDACTED] per cent for the Oak brand.
298. All forecasts provided by HWL make use of an undercutting value of [REDACTED] per cent. Although the magnitude of the estimates presented by HWL is larger than what would be obtained utilizing an estimate of [REDACTED] per cent undercutting, as identified by MBIE, MBIE is satisfied with the trends identified by HWL in its forecasts.
299. For all price effect analyses carried out, estimates for the Wattie’s and Oak brand have been separated. This approach differs from that previously taken in other reviews and investigations on preserved and canned peaches, but follows the approach taken by HWL. Given that price impacts appear to differ for each brand, in the first instance affecting the Oak brand, MBIE believes it is appropriate to analyse them separately.

### 5.4.1 Price undercutting

300. The purpose of the price undercutting comparison is to establish whether or not there is price undercutting attributable to dumping. The determination that price undercutting exists is not by itself a determination of the extent of injury, that is, the margin of price undercutting is not a measure of the extent of the economic impact on the industry. Any impact is measured in terms of the factors and indices set out in section 8(2)(d) of the Act.

301. Section 8(2)(b) of the Act provides that the Secretary shall have regard to the extent to which the prices of the dumped or subsidised goods represent significant price undercutting in relation to prices in New Zealand (at the relevant level of trade) for like goods of New Zealand producers. Where possible (and if sufficient information is available), the level of trade is determined for each importer and therefore the prices may be considered at different points in the supply chain for different importers.

#### Level of trade

302. HWL's major customer groups are [REDACTED]. The food service sector is made up of institutional and accommodation sectors. Aged and health care areas predominantly buy peaches in juice, and boarding hostels (schools and armed forces) and hotels mainly buy peaches in syrup.

303. Preserved peaches may be imported by supermarkets or distributors directly instead of buying from HWL. MBIE considers that the most appropriate level of trade is ex-wharf versus HWL's ex-factory price (that is, its FIS price less freight to store). Costs included in an ex-wharf price are those incurred to import the goods into New Zealand such as overseas freight, insurance, port service charges and Customs duty.

#### HWL prices

304. HWL provided a schedule of ex-factory prices per tonne for each type of preserved peaches it sells and MBIE has used this information for the price comparison exercise (with the imports).

#### Import price of Spanish preserved peaches

305. MBIE has used actual import prices of Spanish preserved peaches using information provided by the New Zealand importers and data from NZCS. This includes all shipments to New Zealand over the POR(D) of the goods being reconsidered. To derive ex-wharf imported prices, MBIE has added estimated import duties (customs duty) and destination costs (including port handling and clearance costs) to the CIF prices.

306. In order to address the likely imports, other than actual imports, MBIE has identified notional prices at the ex-wharf level, based on the Spanish data as used in the dumping analysis.

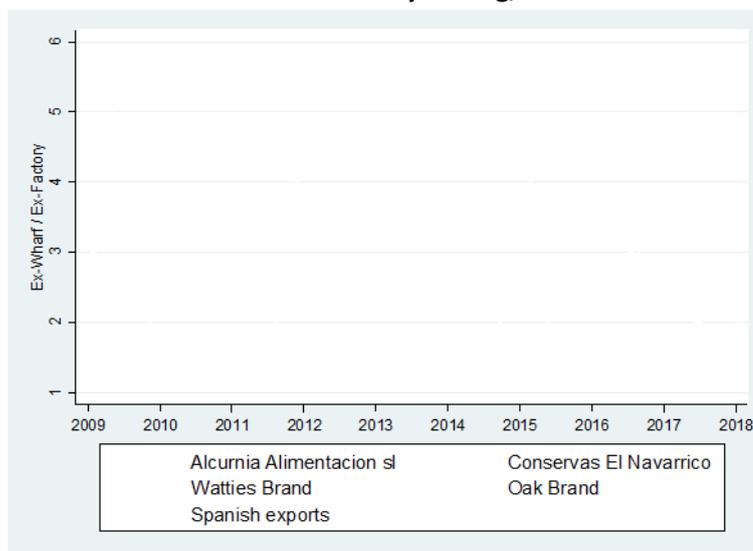
**Price undercutting comparison**

307. The table below shows the level of price undercutting for Wattie’s and Oak brands on a per kg basis. Undercutting is measured both as an absolute value, and as a percentage of HWL’s average ex-factory price for each brand. The ex-wharf values used for Alcurnia and Navarrico were calculated for each as a weighted average of all imports from these suppliers in the POR(D). The values for Spanish Exports are based on Spanish export data as described above. These results are accompanied by a price advantage analysis in Chart 5.3, which graphically shows these estimates.

**Table 5.3: Price Undercutting (NZD per kg)**

	Undercutting Value		Undercutting Percentage	
	Watties	Oak	Watties	Oak
<b>Alcurnia</b>				
<b>Navarrico</b>				
<b>Spanish Exports</b>				

**Chart 5.2: Price Undercutting Ex-wharf and Ex-Factory Pricing, 2009-2018**



308. As indicated in Table 5.3 and Chart 5.3, exports by Alcurnia undercut the Wattie’s brand by a weighted average of [redacted] per cent in the POR(D), and undercut the Oak brand by a weighted average of [redacted] per cent. Exports by Navarrico did not undercut either the Wattie’s or the Oak brand during the POR(D). Spanish exports in the absence of anti-dumping duties (as assessed as likely Spanish ex-wharf price in section 5.4.2.1 above) undercut the Wattie’s brand by [redacted] per cent, and the Oak brand by [redacted] per cent.

**5.4.2 Price depression**

309. Section 8(2)(c) of the Act provides that the Secretary shall have regard to the extent to which the effect of the dumped or subsidised goods is or is likely significantly to depress prices for like goods of New Zealand producers.

- 310. Price depression occurs when prices are lower than those in a market unaffected by dumping, usually in a previous period, and refers to reductions in prices used by domestic producers in order to deal with competition from dumped goods.
- 311. The 2011 investigation found that HWL had not experienced price depression, but this was not surprising as the application was made on the basis of a threat of injury to the domestic industry.
- 312. HWL has provided average selling prices for its financial years for the POR(I) on a per kilogram basis. The figures are at the level of net sales value, meaning trade spend has been deducted. The following table shows the average selling price for preserved peaches per kilogram.

**Table 5.4: Average selling price (NZD per kg)**

		2014	2015	2016	2017	2018
<b>Oak</b>	Average Selling Price					
	As % of 2014		99%	100%	101%	97%
<b>Wattie's</b>	Average Selling Price					
	As % of 2014		102%	102%	94%	95%

- 313. Table 5.4 shows that there has been price depression for the Oak and Wattie’s brands since duties were taken off in February 2017. Given that there have been no significant imports of Spanish peaches in this time, the price depression to 2018 appears to be unrelated to the removal of anti-dumping duties from Spain.

**Likely impact of having no duties in place**

- 314. HWL considers that the preserved peach market is mature and that wholesale and retail sectors of the market are highly competitive. Supermarkets generally stock a range of brands of preserved peaches other than those supplied by HWL.
- 315. As explained in section 5, HWL has forecast for 2019, 2020 and 2021 likely average net selling prices if anti-dumping duties are not in place. For the forecasts without duties, the scenario sees HWL [REDACTED]. Based on 2018 figures, [REDACTED].
- 316. MBIE has mirrored the approach taken by HWL regarding forecasted values, that is, [REDACTED]. MBIE’s assessment differs from HWL’s assessment only in that the price undercutting estimate is lower, as MBIE identified [REDACTED] per cent undercutting for the Oak brand.
- 317. Table 5.5 shows HWL and MBIE’s forecasted average selling prices for the Oak and Wattie’s brand.

**Table 5.5: Forecast average selling price (per kg)**

		With Duties			Without Duties		
		2019	2020	2021	2019	2020	2021
<b>HWL Assessment</b>							
<b>Oak</b>	Average Selling Price						
	As % of 2014	102%	102%	102%	100%	76%	76%
<b>Wattie's</b>	Average Selling Price						
	As % of 2014	91%	91%	91%	89%	68%	68%
<b>MBIE Assessment</b>							
<b>Oak</b>	Average Selling Price						
	As % of 2014	102%	102%	102%	101%	95%	95%
<b>Wattie's</b>	Average Selling Price						
	As % of 2014	91%	91%	91%	91%	85%	85%

318. The table above shows that if anti-dumping duties are in place, HWL forecasts that its average prices will increase relative to the 2014 price for the Oak brand, and decrease for the Wattie’s brand. However, if anti-dumping duties are not in place, HWL’s price will remain static in 2019 for the Oak brand, and slightly lowered for the Wattie’s brand, and both brands will decline in 2020 and 2021, with the new Oak prices representing 76 per cent of the 2014 price, and the new Wattie’s prices representing 68 per cent of the 2014 prices. MBIE’s forecasts for the scenario where duties are in place are identical to HWL’s, as both forecasts assume that the duties counteract the price undercutting, but forecasts without duties differ, as MBIE assumes a price undercutting percentage of 85 per cent. MBIE also identifies a decrease in average selling prices for both the Oak and Wattie’s brand, but of a lower magnitude than those estimated by HWL.

**Conclusion on price depression**

319. There is evidence of price depression in the POR(I). MBIE concludes, however, that this price depression is not related to actual imports from Spain, but should anti-dumping duties not be in place, and should there be a recurrence of imports of preserved peaches from Spain, MBIE believes that HWL will likely reduce its prices, resulting in significant price depression.

**5.4.3 Price suppression**

320. Section 8(2)(c) of the Act also provides that the Secretary shall have regard to the extent to which the effect of the dumped or subsidised goods is or is likely significantly to prevent price increases for those goods that otherwise would have been likely to occur. Such price increases could be in response to increases in costs, or changes in supply or demand of a product.

321. MBIE generally bases its assessment of price suppression on positive evidence, in particular the extent to which cost increases have not been recovered in prices. This will be reflected as an increased ratio of costs to sales revenue.

322. The 2011 investigation found that there were significant levels of price undercutting indicating that preserved peaches from Spain were entering New Zealand at prices that would have a significant suppressing effect on domestic prices.

323. The following table shows HWL’s cost of goods sold (COGS) relative to sales revenue over the POR(I). COGS are relied on instead of total costs in this reconsideration, since the analysis is undertaken separately for the Wattie’s and Oak brands, and selling, administration and general expenses were not provided separately for the Wattie’s and Oak brands by HWL.

**Table 5.6: Price suppression (NZD per kg) [Indexed]**

		2014	2015	2016	2017	2018
<b>Oak</b>	Net Sales Revenue					
	COGS					
	COGS as % of Revenue	1000	957	1034	971	966
<b>Wattie's</b>	Net Sales Revenue					
	COGS					
	COGS as % of Revenue	1000	923	1015	1031	960

324. The table above shows that over the POR(I), COGS have fluctuated relative to sales revenue, indicating that there has been no suppression of prices over the POR(I).

**Likely impact of having no duties in place**

325. HWL considers that its COGS will likely remain the same whether duties are or are not in place. It has included a forecast rise of 1.5 per cent to take account of inflation. HWL considers that a decline in its revenue would occur rather than any increase in costs in response to any dumped imports from Spain.

326. HWL has provided forecasts for COGS if anti-dumping duties are and are not in place. MBIE has mirrored the approach taken by HWL regarding forecasted values, differing from HWL’s assessment only in that the price undercutting estimate is lower, as MBIE identified 0.5 per cent undercutting for the Oak brand.

327. Table 5.7 shows these forecasts.

**Table 5.7: Forecast price suppression (NZD per kg) [Indexed]**

		With Duties			Without Duties		
		2019	2020	2021	2019	2020	2021
<b>HWL Assessment</b>							
<b>Oak</b>	Net Sales Revenue						
	COGs						
	COGS as % of Revenue	1000	1015	1030	1000	1325	1345
<b>Wattie's</b>	Net Sales Revenue						
	COGs						
	COGS as % of Revenue	1000	1015	1030	1000	1325	1345
<b>MBIE Assessment</b>							
<b>Oak</b>	Net Sales Revenue						
	COGs						
	COGS as % of Revenue	1000	1015	1030	1000	1085	1101
<b>Wattie's</b>	Net Sales Revenue						
	COGs						
	COGS as % of Revenue	1000	1015	1030	1000	1085	1101

328. Table 5.7 shows that both the Oak and Wattie’s brand are likely to experience price suppression in 2020 and 2021 if duties are not in place. The Oak brand is forecast to

experience much stronger price suppression than the Wattie’s brand, [REDACTED]. This price suppression would be a direct consequence of HWL [REDACTED], whereas COGS are forecasted to remain relatively constant, rising by an estimate of inflation. MBIE’s estimates identify the same trends specified by HWL, but of a lower magnitude, as these are based on a lower price undercutting percentage.

### **Conclusion on price suppression**

329. MBIE concludes that there is no evidence of price suppression over the period under review in relation to actual imports. However, HWL is likely to experience price suppression with both the Oak and Wattie’s brands should duties not be in place, and likely increases in imports occur, but will experience stronger price suppression in the Oak brand. Should there be no duties, and should there be a resumption of dumped imports from Spain, HWL is likely to experience significant price suppression by 2020 for both the Wattie’s and Oak brand.

### **5.4.4 Conclusion on price effects**

330. There is evidence of current price undercutting in respect of certain types and sizes of preserved peach imports from Spain although no evidence that HWL’s prices have been depressed or suppressed over the POR(I) as a result of dumped imports from Spain.
331. MBIE concludes that there is evidence that likely imports of preserved peaches from Spain, if they were to resume at dumped prices, would significantly undercut HWL’s prices, resulting in HWL’s prices being depressed and suppressed.

## **5.5 Economic impact**

332. Section 8(2)(d) of the Act provides that the Secretary shall have regard to the economic impact of the dumped or subsidised goods on the industry, including:
- actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilisation of production capacity;
  - factors affecting domestic prices;
  - the magnitude of the margin of dumping; and
  - actual and potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investments.

### **5.5.1 Output**

333. Dumped imports can affect the industry’s production volume through increased supply of goods to the market through price competition.
334. HWL’s output is dependent on the size and quality of the peach crop and its contracts with growers. HWL forecasts for a peach crop of [REDACTED].

335. Because HWL processes the entire raw peach crop available each year from its contracted growers and [REDACTED], its output is unlikely to be affected by the presence of the subject goods in the market, and output is unlikely to be a useful indicator of injury caused by dumped goods. Furthermore, it is unlikely that the industry will be experiencing any decline in output due to imports of preserved peaches from Spain due to the relatively low volume of such imports.

336. HWL maintains a [REDACTED] with its peach growers. The company is currently [REDACTED]. HWL considers that it would have two options concerning the peaches it will buy from its growers in the 2020 and 2021 financial year if the duties were removed. HWL would (i) [REDACTED], or (ii) [REDACTED].

337. [REDACTED]

338. For the reasons outlined above, HWL’s output is unlikely to be affected by the non-application of anti-dumping duties in the near future.

**5.5.2 Sales volume and revenue**

339. Movements in sales revenue reflect changes in volumes and prices of goods sold. Dumped imports can affect both of these factors through increased supply of goods to the market and through price competition.

340. In the 2011 investigation, HWL had not experienced material injury in respect of sales, but this was not surprising as the application was made on the basis of a threat to injury to the domestic industry. HWL projected future losses in both sales volume and sales revenue if anti-dumping duties were not imposed on imports from Spain.

341. The following table shows HWL’s historical sales volume and sales revenue of preserved peaches, including imports of Oak brand, over the POR(I).

**Table 5.8: Sales volume and revenue [Indexed]**

		2014	2015	2016	2017	2018
<b>Oak</b>	Sales Volume (Tonnes)					
	As % of 2014	-	100%	101%	107%	103%
	Sales Revenue (\$)					
	As % of 2014	-	99%	102%	109%	99%
<b>Wattie's</b>	Sales Volume (Tonnes)					
	As % of 2014	-	119%	118%	109%	116%
	Sales Revenue (\$)					
	As % of 2014	-	121%	120%	103%	111%
<b>Total HWL</b>	Sales Volume (Tonnes)					
	As % of 2014	-	113%	112%	108%	112%
	Sales Revenue (\$)					
	As % of 2014	-	115%	115%	104%	108%

342. Table 5.8 shows that, in the POR(I) relative to 2014, volume and revenue were reasonably constant for the Oak brand but have been steadily higher for the Wattie’s brand.
343. Anti-dumping duties on preserved peaches from Spain were imposed in August 2011 and terminated with effect from 23 February 2017. For the Oak brand, sales volumes in 2017 and 2018 were higher than in previous years, while sales revenue increased in 2017 and declined slightly in 2018. For the Wattie’s brand, sales volumes and revenues in 2017 and 2018 were lower than in previous years. HWL’s total sales volume and revenue, combining figures for both brands, declined in 2017 before largely recovering in 2018.
344. The decline in sales volume and revenue in 2017, following the termination of anti-dumping duties does not appear to be attributable to dumped imports of Spanish peaches, given the relative low level of imports each year.

**Likely impact without duties**

345. HWL has forecast its sales and revenue for 2019, 2020 and 2021 with and without duties. Its forecasts if duties are in place are based on budgeted figures. Budgeted net sales value (revenue) figures are based on forecast pricing strategy information. If duties were not in place, HWL [REDACTED]. MBIE has mirrored the approach taken by HWL regarding forecasted values, differing from HWL’s assessment only in that the price undercutting estimate is lower, as MBIE identified [REDACTED] per cent undercutting for the Oak brand.
346. Table 5.9 shows HWL’s forecasts for the 2019, 2020 and 2021 financial years for sales volume and revenue in the presence and absence of duties. The estimates for the Oak brand are lower than those presented in Table 5.8, as forecasted injury information [REDACTED]. Estimates for the Oak brand in Table 5.9 are sales of those produced domestically only. For this reason, no percentage relative to 2014 is presented.

**Table 5.9: Forecast sales volume and revenue [Indexed]**

		With Duties			Without Duties		
		2019	2020	2021	2019	2020	2021
<b>HWL Assessment</b>							
<b>Oak</b>	Sales Volume (Tonnes)						
	As % of 2014	-	-	-	-	-	-
	Sales Revenue (\$)						
	As % of 2014	-	-	-	-	-	-
<b>Wattie's</b>	Sales Volume (Tonnes)						
	As % of 2014	112%	112%	112%	112%	112%	112%
	Sales Revenue (\$)						
	As % of 2014	102%	102%	102%	100%	77%	77%
<b>MBIE Assessment</b>							
<b>Oak</b>	Sales Volume (Tonnes)						-
	As % of 2014	-	-	-	-	-	-
	Sales Revenue (\$)						
	As % of 2014	-	-	-	-	-	-
<b>Wattie's</b>	Sales Volume (Tonnes)						
	As % of 2014	112%	112%	112%	112%	112%	112%
	Sales Revenue (\$)						
	As % of 2014	102%	102%	102%	102%	95%	95%

347. Table 5.9 shows that HWL’s volume will remain the same for the 2020 to 2021 years with or without duties. Revenue, however, is more varied between scenarios, as HWL [REDACTED]. If duties remain, HWL’s revenue is forecasted to remain at the same level. Without duties in place, HWL’s revenue for the Oak brand will decrease in 2020 and 2021 and for its Wattie’s brand is forecast to decrease in 2020 and 2021 to [REDACTED] per cent of what it was in 2014. MBIE has identified the same trends specified by HWL, but has forecast the Wattie’s brand to decrease in revenue by a smaller amount in 2020 and 2021 than that identified by HWL.

**Conclusion on sales volume and revenue**

348. Sales volume and revenue have remained relatively stable over the POR(I). If duties are not in place, and should there be an increase in dumped imports that compete with HWL’s brands, MBIE concludes that there is likely to be a decline in revenue, as HWL is forced to [REDACTED].

**5.5.3 Market share**

349. Should duties not be in place, HWL claims that it is likely that opportunist importers will take advantage of the potential for cheaper imports from Spain. Over time, HWL expects that importers sourcing from other markets will shift their supply to Spain.

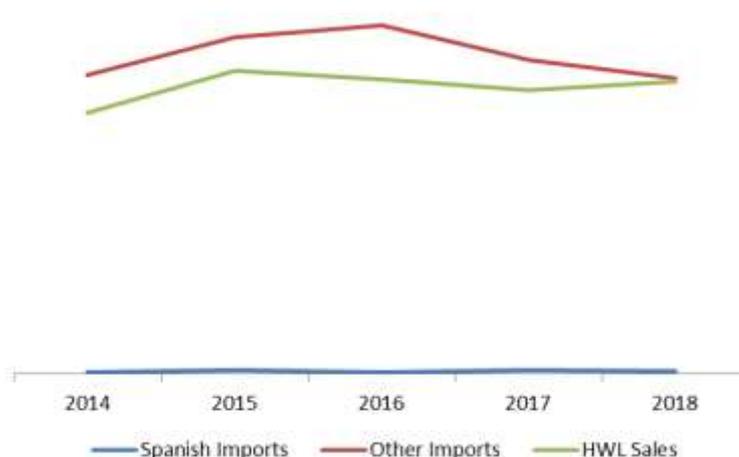
350. The following table shows market share and changes in market share during the POR(I). HWL’s sales include its imports as HWL did not provide historical sales excluding import volumes.

**Table 5.10: Market share (tonnes)**

	2014	2015	2016	2017	2018
Spanish Imports	17	52	17	52	37
Other Imports	3,659	4,122	4,260	3,834	3,612
HWL Sales					
NZ Market					
As % of NZ Market					
<i>HWL Sales</i>					
<i>Spanish Imports</i>					

351. Table 5.10 above shows that HWL maintained its share of preserved peaches in a growing market over 2014 and 2015. HWL also maintained the share in 2016 and 2017 through fluctuations in the market, and grew their share in 2018. This information is shown graphically in the chart below.

**Chart 5.3: Market Share (tonnes)**



**Likely impact without duties**

352. If the situation of no duties continues to apply, HWL intends to maintain its market share by [redacted]. HWL has said that it will [redacted]. [redacted]. MBIE considers it likely that HWL would maintain its market share up to this point, given [redacted].

**Conclusion on market share**

353. MBIE concludes that HWL has maintained a relatively consistent market share over the POR(I). Over the period 2014 - 2015, HWL’s market share remained steady in a growing market, and maintained its share in 2016 and 2017 through steady fluctuations. In the short to medium term, it is unlikely that HWL will lose market share if duties are not in place since [redacted]. However, HWL has stated that over the longer term increased competition from dumped imports from abroad will likely [redacted].

### 5.5.4 Profit

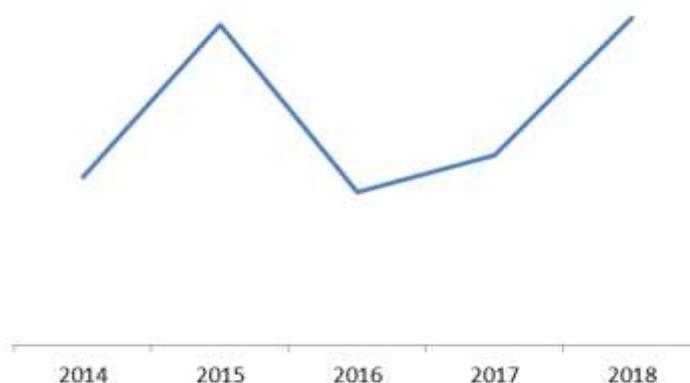
- 354. Changes in net profit reflect changes in prices, sales volumes or costs. Dumped imports can impact on any or all of these.
- 355. The 2011 investigation found that HWL’s profits were threatened by increased volumes of dumped imports from Spain. MBIE concluded that it was likely HWL would suffer a material loss of profit if duties were not imposed.
- 356. The following table shows HWL’s earnings before interest and tax (EBIT) in the POR(I). Figures include sales of imports, as historical data was not provided by HWL excluding sales of imports.

**Table 5.11: EBIT**

	2014	2015	2016	2017	2018
EBIT (000's)					
% change on previous year					
% of sales revenue					
EBIT per kg					
% change previous year					

- 357. The table shows a significant increase in EBIT from 2014 to 2015 – it increased by [redacted] per cent. As a per kilogram measure it also increased significantly, by [redacted] per cent on 2014. In 2016 EBIT fell from the previous year by [redacted] per cent, but in 2017 and 2018 rose again. As a percentage of sales revenue, EBIT rose [redacted] percentage points in 2015, declined by [redacted] percentage points in 2016, but rose again in 2017 and 2018. This information is shown graphically in the chart below.

**Chart 5.4: EBIT (NZD 000)**



#### Likely impact without duties

- 358. HWL has claimed that should duties not be in place, dumped imports from Spain would re-enter the market, resulting in undercutting of HWL’s prices, causing price depression and suppression. These price effects would cause losses in revenue, causing, *inter alia*, a decline in profits.
- 359. HWL has provided the following forecasts for 2019, 2020 and 2021. MBIE has mirrored the approach taken by HWL regarding forecasted values, differing from HWL’s

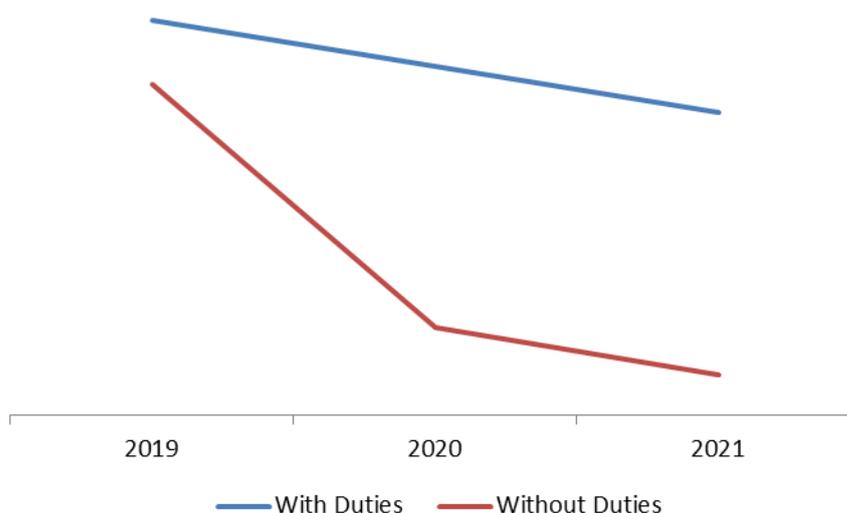
assessment only in that the price undercutting estimate is lower, as MBIE identified 10 per cent undercutting for the Oak brand.

**Table 5.12: Forecast EBIT**

	With Duties			Without Duties		
	2019	2020	2021	2019	2020	2021
<b>HWL Assessment</b>						
EBIT (000's)						
% of sales revenue						
EBIT per kg						
<b>MBIE Assessment</b>						
EBIT (000's)						
% of sales revenue						
EBIT per kg						

- 360. Should the duties be in place, HWL has forecast that EBIT will fall when measured both absolutely and on a per kilogram basis. As a percentage of sales revenue, EBIT is forecast to remain at small negative levels as a percentage of sales revenue for both 2020 and 2021.
- 361. If the duties are not in place, HWL has forecast that EBIT will decline significantly in all measures, in both 2020 and 2021. The reduction in EBIT and EBIT per kilogram is expected to be large in 2020 as importers negotiate new supply contracts with Spanish manufacturers and begin importing shipments towards the end of 2019. HWL has forecast significant negative effects on its profits, if the duties are not in place, resulting directly from [redacted]. MBIE agrees with the trends identified by HWL, but has identified them as a lower magnitude, since the price undercutting estimate used by MBIE is lower than that used by HWL. This information is shown graphically in the chart below.

**Chart 5.5: Forecast EBIT (NZD 000)**



**Conclusion on profits**

- 362. HWL had mixed profit performance in the POR(I), although EBIT was positive in each of those years.

363. HWL forecasts that by 2020, by which time the full effects of not having duties in place will be felt, annual profits will turn into significant losses as [REDACTED].

364. MBIE is satisfied with the trends identified by HWL in forecasted EBIT, but reiterates the matter raised that the price undercutting value of [REDACTED] per cent is larger than that identified by MBIE, suggesting that forecast EBIT loss for 2020 and 2021 is unlikely to be as large as that forecasted by HWL. Regardless, MBIE concludes that should duties be removed and should there be a resumption of dumped imports from Spain, HWL is likely to experience significant declines in EBIT.

**5.5.5 Productivity**

365. Productivity is the relationship between the output of goods and the input of resources used to produce them. Changes in productivity are affected by output levels and by the level of capacity utilisation.

366. Productivity is not directly affected by whether anti-dumping duties are in place in the short term. Productivity is mainly affected by the amount of seasonal labour employed when the crop is due for processing. Total labour costs are variable depending on total size of the crop, size of the fruit, yield and factory efficiency in processing.

367. The following table shows productivity figures in relation to domestic production volume per employee and production volume per hours worked from 2014 to 2018.

**Table 5.13: Productivity [Indexed]**

	2014	2015	2016	2017	2018
Domestic Production (kg)					
Seasonal Staff (FTE)					
Permanent Staff (FTE)					
Total Staff					
Total Hours					
Production Volume per Employee (tonnes)	1000	1322	1313	1256	750
Production Volume per Hours Worked (Indexed)	1000	1000	1260	1182	1071

368. The table shows that production volume per employee improved between 2014 and 2015, then fell slightly in 2016 and 2017, and fell dramatically in 2018. MBIE notes that production depends on the total size of the crop, yield and finished tonnage. As this causes production volume to vary, productivity is not a particularly useful factor in this case when assessing injury caused by dumped imports.

**Likely impact without duties**

369. HWL has said that productivity will not change for its 2020 and 2021 financial year whether duties are or are not in place. Peaches are canned early in the year, and production will have occurred before the importers have had a chance to bring in any shipments. HWL will be unlikely to be competing against the dumped goods until around December 2019. [REDACTED], so again it is unlikely productivity will be affected by the presence or absence of duties.

After 2021, when the crop purchasing contract expires, if duties are not in place, HWL has said [REDACTED].

#### **Conclusion on productivity**

370. The figures show that productivity improved from 2014 to 2016, and remained relatively constant between 2016 and 2018 when measured by production volume per hours worked, showing there has been no adverse effect on productivity over the POR(I). Productivity is not likely to be affected [REDACTED].

#### **5.5.6 Return on investments**

371. Return on investments measures profit against the value of the investment in a business. A decline in return on investments will result from a decline in returns with or without a relative increase in the investment factor being used. Movements in return on investments affect the ability of the industry to retain and attract new investment.
372. HWL's view in previous reviews has been that it is difficult to provide any meaningful information on return on investments narrowed to preserved peaches. HWL's assets are used to produce a number of different types of seasonal and non-seasonal fruit and vegetable products. It is therefore difficult to find a meaningful measure of return on investments for preserved peaches which make up between [REDACTED] and [REDACTED] per cent of HWL's business.

#### **Likely impact without duties**

373. HWL has commented that it is likely its return on investment for preserved peaches would be adversely affected should duties not be in place. MBIE considers that a decline in profitability indicates that there would likely be a corresponding decline in the rate of return on investments. MBIE has concluded above that there is likely to be a significant decline in profits should the duties be removed. MBIE therefore considers there will likely be a corresponding decline in the rate of return on investments.

#### **Conclusion on return on investments**

374. MBIE concludes there is no evidence that the rate of return on investments has been adversely affected over the POR(I). MBIE further concludes that should duties not be in place, and should there be a resumption of dumped imports, there would likely be a decline in the rate of return on investments corresponding with the decline in profits.

#### **5.5.7 Utilisation of production capacity**

375. The utilisation of production capacity reflects changes in the level of production, although in some cases it will arise from an increase or decrease in production capacity. In either case, a decline in the utilisation of production capacity will lead to an increase in the unit cost of production, and a consequent loss of profit.
376. HWL's potential production capacity for preserved peaches is determined by the availability of raw peaches from its growers. HWL has previously advised that its capacity to process peaches is [REDACTED] metric tonnes per day, giving a total production capacity over

two months (its processing season) of [REDACTED] metric tonnes. [REDACTED]

377. The current crop is expected to produce [REDACTED] tonnes of raw peaches, with a recovery rate of [REDACTED]. Approximately [REDACTED].
378. MBIE’s view has previously been that production capacity utilisation is not a useful measure of injury, given that capacity utilisation is dependent on other factors, including the quantity of raw peaches available, competition for parts of the canning line which are common to other fruit and vegetable products and the storage life of the raw fruit.
379. HWL noted that [REDACTED]

#### **Conclusion on utilisation of production capacity**

380. While the Act requires utilisation of production capacity to be considered as an injury factor, MBIE does not consider it is a useful measure in this case since production is dependent on other factors including the supply of raw peaches.
381. There is not likely to be any impact on the industry’s utilisation of production capacity [REDACTED]

#### **5.5.8 Magnitude of the margin of dumping**

382. The magnitude of the margin of dumping can be a useful indicator of the extent to which injury can be attributed to dumping, particularly when it is compared with the level of price undercutting.
383. MBIE has found dumping margins ranging between 13.7 and 48.0 per cent. The margin of price undercutting ranges from [REDACTED] (according to the brand and exporter) indicating that the margin of price undercutting is less than the margin of dumping.

#### **5.5.9 Factors affecting domestic prices**

384. HWL said that its behaviour and that of importers and retailers affect prices in the market, but the main influence is from retailers. Competition between retailers wanting to increase profits and gain customers was the main driver of prices. Any dumped preserved peaches or indeed lower priced preserved fruit would have a direct effect on prices achieved by HWL.
385. The market for preserved peaches is mature, and lower prices would not significantly increase total sales. Rather, the effect would be to redistribute market shares.

#### **5.5.10 Other adverse effects**

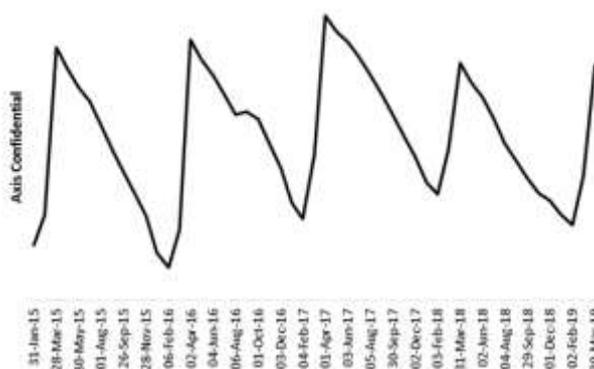
##### **Cash flow**

386. HWL said that cash flow continues to be managed at corporate level, so cash flow broken down to the level of preserved peaches is not meaningful. Furthermore, HWL has noted that expenditure and revenue are very uneven given the seasonal nature of preserved peach production.

**Inventories**

- 387. Production over a relatively short period once a year means that inventory is at its peak soon after production and then declines as inventory is sold down over the next 12 months. HWL aims to carry about [REDACTED] at the beginning of each production period in case demand outstrips expected sales in the upcoming year.
- 388. HWL provided Chart 5.4 showing the inventories of preserved peaches on-hand since 2015 (on a monthly basis), indicating the seasonal nature of production and inventory levels.

**Chart 5.6: Preserved Peach Inventory Tonnes**



- 389. Chart 5.4 shows the peaks and troughs of HWL’s year, with peaks occurring at the end of HWL’s processing season.
- 390. The business has indicated a desire [REDACTED]. Year on year, it is unknown what will really happen in terms of the local crop. If HWL achieves the low end only they [REDACTED]. If they hit the best estimate, they [REDACTED].
- 391. MBIE considers that, because of the way HWL manages its inventory level, the amount of inventories on hand is not a good indication of injury. HWL stated that if duties are not in place, it would expect its inventories to [REDACTED].

**Employment and wages**

- 392. HWL employs seasonal staff on an ‘as required’ basis from [REDACTED].
- 393. HWL provided estimates of the number of full-time permanent and seasonal employees that are engaged in the domestic production of preserved peaches during the production process.
- 394. The number of full time equivalents (FTEs) was derived from the total number of hours worked, divided by the number of peach production days, divided by eight hours being a standard shift. In season HWL operates 24/7 being three eight-hour shifts.

395. The number of staff varies each year and is dependent on the volume of peaches to be processed. [REDACTED]
396. HWL also provided information on the hourly wage rates for seasonal staff engaged directly in the production of preserved peaches. The figures were provided for 2012-2019 financial years. The figures showed that the average annual wage rate has steadily increased over time.
397. HWL stated that, should the duties remain in place, it would expect that wage levels would increase year-on-year slightly as new wage rates are negotiated.
398. Given that HWL has forecast [REDACTED], if duties are not in place, and given that the company processes the entire peach crop available from its contracted growers each year, MBIE considers that it is unlikely that there could be any adverse effects on employment and wages directly relating to the production of preserved peaches. In effect, HWL's employment and wage level does not appear to be a good indication of injury. Should the duties not be in place, the company expects that wages would [REDACTED].

### **Growth**

399. HWL said that there had been no impact (from dumping) on its ability to grow the seasonal business. The company noted that [REDACTED] but instead focused on its own brands and support for its [REDACTED] through a series of targeted billboard advertisements, which have become HWL's main advertisement strategy.
400. It was again noted that the peach crop was an important part of its business and any significant decline [REDACTED].
401. MBIE considers that any detrimental effects on growth would be reflected in other injury indicators such as sales, profits and return on investment. While there is no effect on these factors currently caused by dumped imports from Spain, MBIE considers that they are likely to be adversely affected if the duties are not in place and if significant volumes of dumped imports resume.

### **Ability to raise capital and investment**

402. HWL confirmed, as has previously been the case, that any proposed capital expenditure [REDACTED]. There was generally a [REDACTED] payback period, and HWL said that there was a hierarchy of investment approvals within the company structure depending on [REDACTED]. There had been [REDACTED] significant capital expenditure by HWL [REDACTED], when it invested in a [REDACTED] peach processing plant.

403. HWL stated that, should the duties not be in place, and on the assumption that HWL is successful in arguing to have anti-dumping duties re-applied for China and continued for South Africa, it is likely Spain will become the leading exporter to NZ. In this instance HWL will analyse the merits of a trade remedies case and assuming the conclusion is still that there are no applied duties, [REDACTED]

404. HWL also stated that should the duties be restored, and assuming HWL is successful in arguing to have anti-dumping duties applied for China and South Africa, the ability to raise capital and investments will remain at similar levels in the foreseeable future.

## 5.6 Other causes of injury – non-attribution analysis

405. Sections 8(2)(e) and (f) of the Act provide that the Secretary shall have regard to factors other than the dumped goods which have injured, or are injuring, the industry, including—

- the volume and prices of goods that are not sold at dumped prices;
- contraction in demand or changes in the patterns of consumption;
- restrictive trade practices of, and competition between, overseas and New Zealand producers;
- developments in technology;
- export performance and productivity of the New Zealand producers; and
- the nature and extent of importations of dumped or subsidised goods by New Zealand producers of like goods, including the value, quantity, frequency and purpose of any such importations.

### 5.6.1 Non-dumped imports

406. HWL has been competing successfully with non-dumped goods for many years, including imports from Australia. There was a significant presence of Australian preserved peaches in the market until 2012 (confirmed by import data and the strong presence of [REDACTED], an Australian brand, in the AC Nielsen data). The [REDACTED] had been in the market for a number of years but was withdrawn. HWL stated that the [REDACTED] appears to be re-entering the market, but HWL is unsure of the commercial arrangements.

407. HWL was not aware of any other increased competition from non-dumped sources.

408. In addition to preserved peaches of Spanish origin, there are currently anti-dumping duties payable on canned peaches from Greece and South Africa. MBIE consequently considers that imports from these sources enter New Zealand at the equivalent of non-dumped prices. Goods from Australia have free access to the New Zealand market under the Closer Economic Relations Agreement and no anti-dumping action can be taken against Australian imports.

409. The major source of imports, after South Africa, has been China. Imports from China are currently in a similar situation to Spanish imports, in that a reconsideration based on an order from the High Court is currently being undertaken, with the termination of anti-dumping duties in February 2018 having been quashed. Imports from China of preserved

peaches have included a reasonable proportion of product presentations and packaging other than those imported from Spain either currently or in the past. Information provided by HWL suggests that global prices of Chinese exports tend to be higher than those from Spain.

### **Conclusion on non-dumped imports**

410. There does not appear to be any significant increased competition from non-dumped imports.

### **5.6.2 Change in consumption and demand**

411. Changes in the pattern of consumption or a reduction in demand can also be a potential cause of material injury to the New Zealand industry.
412. HWL said that the [REDACTED]. HWL did note that there had been a recent decrease in demand for preserved fruit in general, led by a decline in ambient fruit demand.

### **5.6.3 Restrictive trade practices**

413. Restrictive trade practices of overseas or New Zealand producers, such as price ceilings, other statutory measures, or exclusive dealer arrangements, can negatively affect the financial position of New Zealand manufacturers when they are not the beneficiaries of the restrictions. Competition between overseas and New Zealand producers of preserved peaches can be a cause of material injury independent of any dumping. For example, the existence of a price war or the constant threat of new competitors to the New Zealand market can cause a fiercely competitive environment where it is difficult for a New Zealand manufacturer to make a positive return. While this will generally be reflected in the price effects outlined in section 5.4 above, there may be factors other than straight pricing that can reflect competition between domestic and imported goods.
414. MBIE notes that while HWL is in a monopoly position in relation to the production of preserved peaches in New Zealand, the openness of the market to imports ensures that there is adequate competition.
415. HWL continues to have concerns that the EU preserved peach industry is receiving assistance under the EC's agricultural subsidy programme, even though the programme continues to undergo reform under its common agricultural policy.
416. MBIE considered the European Commission's single payment scheme in a 2009 sunset review of the countervailing duty on preserved peaches from the European Union and found insufficient evidence that preserved peach processors were benefitting from the scheme. As a result the countervailing duties that were in place at that time were terminated.
417. There is no evidence of any restrictive trade practices which might be operating to advantage imports or disadvantage the New Zealand industry, or that competition goes beyond price effects.

#### 5.6.4 Developments in technology

418. HWL continues to produce peaches in cans [REDACTED]. There has been no significant change in technology other than the import into the New Zealand market of peaches in plastic pottles and plastic jars, as HWL does not have the capacity to produce these domestically.

#### 5.6.5 Export performance and productivity

419. In any given year, if there is a better than expected peach yield, HWL will look to export a negligible amount of preserved peaches to [REDACTED] (in 2017, total exports by HWL amounted to [REDACTED] tonnes). HWL removed all the costs of the exports from the injury data that it provided.

420. MBIE considers that such a small export volume would not have a negative effect on HWL's profitability. Productivity would not be adversely affected either, as these peaches are produced at the same time as the rest of preserved peach production.

#### 5.6.6 Imports by the industry

421. Section 8(2)(f) of the Act provides that in examining the volume, price effects and consequent impact of dumped or subsidised goods, the Secretary shall have regard to the nature and extent of importations of dumped or subsidised goods by New Zealand producers of like goods, including the value, quantity, frequency, and purpose of any such importations.

422. HWL imports preserved peaches to [REDACTED]. However, HWL has developed its growing and processing operations to become more reliable and have less variation in production.

423. HWL did not import any preserved peaches from Spain during the POR(D), but has imported from Spain in the past. Chart 5.5 shows the volume of imports from Spain from 2005 to 2018, and identifies the portion of all imports attributed to HWL.

**Chart 5.7: Import of Preserved Peaches from Spain  
HWL isolated from other shipments**



424. HWL made some significant importations of canned peaches from South Africa during the POR(D), [REDACTED], but has removed imported peaches from the forecasted injury data provided.

**5.6.7 Conclusion on other causes of injury**

425. MBIE is satisfied that it has examined other potential causes of injury and has not attributed injury caused by these factors to the dumped imports from Spain.

**5.7 Conclusions on the continuation or recurrence of injury**

426. In relation to the likelihood of a recurrence of material injury should anti-dumping duties not be in place, MBIE concludes that:

- a significant increase in import volumes of dumped preserved peaches from Spain is likely since the Spanish industry has the capacity to resume exports in volumes that would be significant relative to New Zealand production and consumption; there is ease of entry into the New Zealand market for imports of preserved peaches; there are available distribution systems that could be used should imports resume; and importers are likely to have the ability to deal with a resumption of imports of preserved peaches from Spain.
- if dumped imports from Spain were to resume in significant volumes, they would likely significantly undercut HWL’s prices. As a result, HWL would likely [REDACTED], resulting in depression and suppression of its prices.
- consequent upon the likely price and volume effects, if duties are not in place and imports resume in significant volumes, HWL’s [REDACTED].
- if HWL [REDACTED], it would likely be able to maintain its market share. However, if duties are not in place, HWL [REDACTED].

- as a result of the likely price effects, HWL’s profits and profitability would likely suffer.
- as a consequence of the adverse economic impacts set out above, including a significant decline in revenue and profits, HWL is likely to experience adverse impacts on return on investments, cash flow, growth and ability to raise capital and investments.
- there is unlikely to be an adverse impact on productivity, utilisation of production capacity, inventories, employment and wages [REDACTED].
- there continue to be opportunistic importers in the market that stopped importing likely due to anti-dumping duties, and have not re-entered the market since anti-dumping duties were removed likely due to perceived uncertainty regarding the judicial review proceedings.

427. On the basis of the above considerations, MBIE concludes that if the anti-dumping duties are not in place, dumped imports of preserved peaches from Spain are likely to continue and increase, and would likely result in the recurrence of material injury to the domestic industry.

428. MBIE is satisfied, having considered all mandatory requirements in addition to other relevant factors, both as presented by interested parties to this investigation and those discovered in the course of the reconsideration, that given the continued dumping of preserved peaches from Spain, in the absence of anti-dumping duties there is a likelihood of a recurrence of material injury to the New Zealand industry.

## 5.8 Response to matters raised by the EC

429. As explained in section 1.3.3, the EC raised several concerns in the consultation phase of the reconsideration, prior to initiation as well as during the reconsideration. The EC’s comments are addressed in this section.

### 5.8.1 Matters raised in consultations

430. The EC noted that MBIE’s conclusion in the 2016 review was based on positive evidence relating to the likelihood of continuation or recurrence of dumping and injury. In its submission, the EC provided evidence of the actual situation in the market in the absence of duties, noting that its assessment showed that the likelihood analysis carried out and the conclusions reached in 2017 were correct.

431. The evidence provided by the EC was in the form of statistics showing that Spanish exports to New Zealand continued to be negligible after the duties were removed (2017-2018). The EC showed that in 2018 imports from Spain represented 0.9% (36 tonnes) of total New Zealand imports of preserved peaches. It also showed that import levels in the absence of the duty were at similar or even lower levels than import levels while the duty was in force (2011-2017). The EC claims that in these circumstances, it is not possible to demonstrate that any potential injury suffered by the domestic industry is caused by these low import volumes from Spain.





441. MBIE has considered the evidence provided by the EC with respect to import volumes in 2017 and 2018 after anti-dumping duties were removed. MBIE has also considered the other evidence available to it, including the submissions from other interested parties, as well as past behaviour. MBIE considers, after taking account of all of the evidence, that the reasons why imports did not immediately increase following the removal of duties is likely to relate to the seasonal nature of the goods, as well as external market forces arising from the judicial review proceedings. MBIE considers that evidence from past behaviour indicates that imports of the subject goods from Spain by other importers are likely to increase if duties are definitively removed.

## 5.8.2 Matters raised during the reconsideration

### *Updating the period of review*

442. The EC is concerned that updating the period of investigation is equivalent to initiating a new anti-dumping investigation while maintaining standards of assessment applicable to reviews.

443. MBIE notes that:

- Article 13 of the AD Agreement requires that Members maintain judicial, arbitral or administrative tribunals for the purpose of undertaking reviews of administrative actions including reviews of determinations within the meaning of Article 12.
- as a result of a judicial review, the New Zealand High Court quashed the original determination to terminate anti-dumping duties, and directed MBIE to re-consider its sunset review in respect of preserved peaches from Spain.
- the High Court stated that “such a [sunset] review is to be conducted on terms that consider, past, present and future conduct in the import of the relevant products . . . .”
- MBIE’s selection of different periods from the 2016 review for the reconsideration of likely dumping and injury complies with the Court’s direction to consider past, present and future, with the present necessarily having a different timing from the 2016 review.
- MBIE has applied the provisions of Article 11.3 of the AD Agreement to the review reconsideration.
- MBIE has not carried out the review reconsideration as if it were an original investigation, but has assessed the likelihood of the expiry of duties leading to continuation and recurrence of dumping and injury in the same way as it would in any sunset review, including the most recent information about dumping and injury.

444. MBIE considers that its reconsideration of the review meets the requirements of the AD Agreement, in a reconsideration resulting from, and following, a judicial review.<sup>23</sup>

**Objective examination**

445. The EC stated that assessing the likelihood of recurrence of dumping and injury based on 2018, when no duty is in force, is contrary to an objective examination.

446. MBIE notes that:

- In relation to the concern of considering a time period where no duties are in place, MBIE was directed by the High Court to reconsider its sunset review in terms that “consider past, present and future conduct in the import of the products.” MBIE’s process gave effect to this direction in undertaking this analysis.
- In its analysis, MBIE has considered the impact of anti-dumping duties not being in place, and notes that imports did not increase after duties were removed, likely due in part to continued uncertainty for importers and exporters, including uncertainty created by the judicial review proceedings.
- In undertaking the reconsideration on the basis directed by the High Court, MBIE has made an objective examination of the information available in order to reach its conclusions regarding the likelihood of the continuation or recurrence of dumping and injury, as required by Article 11.3 of the AD Agreement.
- This report sets out the evidence and considerations MBIE has relied upon in reaching its conclusions.

**Reinstatement of anti-dumping duties**

447. The EC stated that, based on the AD Agreement, the EC does not see how anti-dumping duties could be reinstated more than 2 years after expiry.

448. MBIE notes that it is bound by the High Court direction on this matter, which effectively meant that the 2016 review was not completed.

449. MBIE notes that:

- If duties are applied, they will be applied at a reassessed rate to take account of changes in circumstances since the duties were last calculated in 2011.
- If any duties are put in place, they would remain in force for 5 years after the previous duties were due to expire, namely from August 2016, unless a sunset review is initiated before that date. This approach is consistent with the AD Agreement.

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<sup>23</sup> MBIE notes that the AD Agreement indicates that judicial reviews may affect timing elements in some instances. While it addresses a different matter, footnote 20 to the Agreement states, “[i]t is understood that the observance of the time-limits” when assessing final liability for payment of anti-dumping duties “may not be possible where the product in question is subject to judicial review proceedings.”

- Any duties that are put in place will not be backdated prior to the date of their reinstatement.
- This would mean that should the domestic industry wish duties to remain in place beyond the outcome of this reconsideration and reassessment of duties, they would have to request a sunset review within 5 years from the date of the original expiry date of 4 August 2016.

450. The second submission by the EC, on 27 May 2019, stated that the conclusions reached in the 2016 sunset review were correct.

451. MBIE notes that this conclusion differs from the final determination in 2016. This difference arises from a broader set of data being assessed as a result of the orders from the High Court to consider past, present and future conduct in the import of the products.



## 6. Anti-dumping duties

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### 6.1 Reassessment of anti-dumping duties

452. Section 14(6) of the Act states that the Secretary may initiate a reassessment of any rate or amount of anti-dumping or countervailing duty determined under subsection (4), including any elements of any formula used to establish such a rate or amount:

- a) on the initiative of the Secretary; or
- b) where a request for a reassessment is submitted to the Secretary by an interested party who submits evidence justifying the need for a reassessment; or
- c) following the completion of a review carried out under subsection (8)—

and the Minister may determine a new rate or amount in accordance with subsection (4), and, in that event, shall give notice of the new rate or amount.

453. Rather than carrying out a reassessment following the completion of this reconsideration of a review, MBIE has decided to carry out a reassessment of anti-dumping duties on the initiative of the Secretary, and included its provisional reassessment in the Interim Report to allow for comment by interested parties. MBIE decided to take this approach given:

- considerable time has elapsed since the 2016 review, a remedy may be needed to prevent a recurrence of material injury and all interested parties need certainty about any anti-dumping duties
- interested parties needed an opportunity through the Interim Report process to comment and defend their interests before anti-dumping duties, if required, are applied.

454. In this section, MBIE outlines the final conclusions reached on the proposed form and rate of anti-dumping duties, taking into account comments made on the Interim Report.

### 6.2 Form of anti-dumping duty

455. An anti-dumping duty may take one of three main forms:

- ad valorem duty rate
- a specific duty
- reference prices.

#### 6.2.1 Ad valorem duty rates

456. An ad valorem duty is a duty based on the margin of dumping or the margin of injury (if the margin of injury is less than the margin of dumping), and is expressed as a percentage of the VFD of the goods.

457. Ad valorem duty rates can usually be provided to all parties, and therefore are transparent. They are also convenient to apply and are unlikely to be substantially affected by exchange rate movements.

458. Ad valorem rates of duty can be evaded if invoice values of goods subject to duty are manipulated, particularly if imported in conjunction with similar goods which are not

subject to anti-dumping duties. MBIE considers that the likelihood of invoice manipulation is low for the subject goods.

### 6.2.2 Specific duties

459. A specific duty is a set amount per unit of products based on the monetary value of a margin of dumping. It has the advantages of being convenient to apply, impossible to evade by incorrectly stating the value of duty, and clearly indicates to the importer the amount of duty payable.
460. However, a specific duty can operate effectively only when prices and exchange rates are consistent and stable, otherwise duty amounts could be collected that are either greater than or less than required to remove either injury or dumping.
461. MBIE considers that specific duty amounts are not the best way of applying duties in the circumstances of the current case, because there is a history of exchange rate changes.

### 6.2.3 Reference prices

462. A reference price approach imposes duty based on the difference between the transaction price and a benchmark price. Where the transaction price is lower than the benchmark price, the amount of the difference is the duty payable. A reference price can be based on either a domestic price (in the exporting country) or the New Zealand domestic industry's non-injurious price (a lesser duty).
463. Reference price duties have the advantage of clearly signalling to particular exporters and importers what non-dumped or non-injurious prices are. Additionally they are collected only when goods are priced below the reference price. Therefore, duty is only collected to the extent necessary to remove either injury or dumping.
464. Reference prices are most suitable when dealing with movements in export price and exchange rates (if expressed in the currency of the normal value). A Normal Value (Value for Duty Equivalent, (NV(VFDE))) is set in the currency of the normal value, but Non-Injurious FOBs (NIFOBs) are expressed in the currency of the importing country.
465. Reference prices usually remain confidential to parties other than the particular importer due to the use of confidential information in their calculation, except NIFOB amounts may be released to the domestic industry because they are based on the domestic industry's unsuppressed selling prices in the absence of price undercutting.
466. Reference prices are particularly useful for dealing with situations where a lesser duty is applicable, that is, a duty set at less than the margin of dumping but at a level that would still not be injurious to the industry.
467. The reference prices approach does however have several disadvantages. It is claimed that duties are more easily evaded than other forms of duty, by overstating the VFD of the goods. They are set at a fixed level based on a snapshot of prices and costs, which usually changes over time and becomes less accurate. While significant changes which may occur over time in prices and exchange rates can be addressed by a reassessment of reference prices, the duties may not be functioning effectively for some time before the duties are reassessed.

468. Reference prices may also be less transparent, as they may be set using confidential information from the domestic industry or exporters which require the amounts to be suppressed as confidential. At the end of the 2011 investigation, all of the NIFOB and alternative NV(VFDE) amounts for all exporting manufacturers were suppressed as confidential. A NV(VFDE) amount for other suppliers was however published.
469. MBIE considers that NIFOB reference prices are not the best way of applying duties in the current case, because of possible price changes affecting price undercutting levels.

### **6.3 Original imposition of duties**

470. Anti-dumping duties were first imposed on imports of preserved peaches from Spain by a notice published on 11 August 2011.
471. The 2011 anti-dumping duties were in the form of reference prices per kilogram, and duty was paid to the extent that the value of imports was lower than the reference prices. The reference prices were set as follows:
- for each of the investigated Spanish manufacturers exporting to New Zealand, at a non-injurious FOB level (NIFOB), reflecting the margin of injury; and
  - for other suppliers of Spanish preserved peaches, at a normal value (VFD equivalent) (NV(VFDE)) level, reflecting the margin of dumping.<sup>24</sup>
472. The reference prices were on a per kilogram basis and did not distinguish between different container sizes.
473. To avoid the possibility of exchange rate movements causing the NIFOBs to exceed the margin of dumping, alternative reference prices were set for the Spanish suppliers at the NV(VFDE) amount. The NV(VFDE) reference prices applied if they were lower than the NIFOB amounts due to exchange rate movements
474. Anti-dumping duties were collected on only one shipment of Spanish preserved peaches, namely in 2015, and were terminated with effect from 23 February 2017 following the 2016 review.

### **6.4 2019 reassessment of duties**

#### **6.4.1 Goods subject to duty**

475. The imported goods that may be subject to anti-dumping duties are described as:
- Peaches in preserving liquid, in containers up to and including 4.0 kg.*
476. There were only two exporters of the subject goods during the POR(D). Exports by one of those exporters, Alcornia, were in two different can sizes which, on a per kilogram basis, had different export prices and different margins of dumping. In calculating anti-dumping

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<sup>24</sup> NIFOBs address only the level of injury caused by dumping and are lesser duties than the NV(VFDE)s which are set at the full dumping margin.

duties, therefore, MBIE considers that different amounts or rates of duty should apply to the different container sizes exported by Alcurnia.

## 6.4.2 Level of anti-dumping duty

### 6.4.2.1 Full margin of dumping

477. The amount of an anti-dumping duty shall not exceed the margin of dumping (section 14(4) of the Act and AD Agreement Article 9.3), and the amount of anti-dumping duty levied in respect of an exporter shall not exceed its margin of dumping.
478. MBIE has calculated actual and notional margins of dumping for 2018. On the basis of the dumping calculations, duties at the full margin of dumping may be set by reference to an ad valorem rate, a specific amount, or an NV(VFDE) amount in the currency of the exporter. Changes to exporters' prices and exchange rate movements will affect the amount of duty collected.
479. To the extent practicable, MBIE will normally recommend duties that minimise the possibility of collecting amounts that are more than the margin of dumping. An importer is able to apply for a refund of anti-dumping duty if fluctuations in prices mean that the amount of anti-dumping duty paid by that importer exceeds the margin of dumping calculated over the imports within a set period of time.

### 6.4.2.2 Duties at less than the margin of dumping

480. Anti-dumping duties are intended to remedy injury attributable to dumping, not to punish an exporter or provide a domestic industry with protection beyond the injurious impact of the dumping. For this reason, it is desirable that the duty should normally only remedy the amount of injury attributable to dumping.
481. Section 14(5) of the Act states that "the Minister shall have regard to the desirability of ensuring that the amount of anti-dumping duty . . . is not greater than is necessary to prevent the material injury or a recurrence of the material injury or to remove the threat of material injury to an industry." Article 9.1 of the AD Agreement states, inter alia: "It is desirable that . . . the duty be less than the margin [of dumping] if such lesser duty would be adequate to remove the injury to the domestic industry."
482. MBIE has calculated margins of price undercutting for the Spanish exporter during 2018 and on the basis of notional prices. On the basis of the price undercutting calculations, duties at a non-injurious level may be set as an ad valorem rate, as a specific amount, or by reference to a NIFOB in New Zealand dollars. Changes to exporters' prices and exchange rate movements will affect the amount of duty collected.

### 6.4.2.3 Preferred duty level

483. MBIE's analysis shows that dumping margins on preserved peaches from Spain are greater than price undercutting margins. Therefore MBIE considers that anti-dumping duties should be applied at a lesser duty rate to remove injurious dumping but not at the full dumping margins.
484. HWL's strategy is [REDACTED]. The price

at which imports affect HWL’s pricing response is [REDACTED]  
 [REDACTED]  
 [REDACTED] Of course,  
 when considering the effect of price undercutting on the volume of sales then all sales,  
 including both the Oak and Wattie’s brand sales, were considered.

485. MBIE considers, therefore, that the level of injury likely to be caused by dumped imports is indicated by the extent of undercutting of the unsuppressed price of the Oak brand. MBIE notes that it has found no price suppression for the Oak brand during the POR(I).

486. MBIE has used [REDACTED] when calculating lesser duty rates or amounts.

**6.4.2.4 Preferred form of anti-dumping duty**

487. MBIE considers that, in this case, anti-dumping duties should be applied as ad valorem rates, which are transparent, can be applied to remove only the injury caused by dumping and will not be significantly affected by exchange rate movements.

**6.4.3 Proposed rates of duty**

488. MBIE considers that the following rates of duty are necessary to remove material injury.

Spanish Manufacturer	Ad Valorem Rates
Alcurnia Alimentacion sl	
- 850g	2.5%
- 2.65kg	15.9%
Conservas El Navarrico	No duties
Other subject goods	7.9%



## 7. Conclusions

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489. On the basis of the information available it is concluded that the continued non-imposition of anti-dumping duties on preserved peaches from Spain would likely:
- lead to a continuation and recurrence of dumping and
  - lead to a recurrence of material injury to the domestic industry.
490. MBIE’s conclusion is that the imposition of anti-dumping duties is necessary to prevent a continuation and recurrence of dumping and a recurrence of material injury to the New Zealand industry producing the subject goods.
491. In light of these conclusions, MBIE has reassessed the rate or amount of anti-dumping duty that would be appropriate, and has reached the conclusion that an ad valorem rate of anti-dumping duty at the levels required to prevent injury should be applied to the subject goods when imported from Spain.
492. In accordance with the directions of the High Court, the reassessed duties would apply from the date of the Minister’s determination on this reconsideration, while the five year period provided for in section 14(9A) of the Act will end on 4 August 2021.



## 8. Recommendations

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493. It is recommended that the Minister:

- Agree to determine anti-dumping duty rates for exports of the subject goods from Spain, in the form of ad valorem rates of anti-dumping duty, at the levels required to prevent injury through price undercutting, as set out in Section 6.4.3 of this report, and in the table below:

Spanish Manufacturer	Ad Valorem Rates
Alcurnia Alimentacion sl	
- 850g	2.5%
- 2.65kg	15.9%
Conservas El Navarrico	No duties
Other subject goods	7.9%

- Agree that the new rates of anti-dumping duties should apply for 5 years from when the previous duties were due to expire on 4 August 2016, unless a sunset review is initiated before that date.
- Agree that any duties put in place will not be backdated to a date prior to the date of their reinstatement.
- Sign the *Gazette* notice publicly notifying the above decision.

Jim Robinson  
 Manager, Trade and International  
 Science, Innovation and International Branch  
 Labour, Science and Enterprise Group



## Annex 1: Comments received on the Interim Report

### A. EC

EC Submission	MBIE Comment
<b>Methodology</b>	
<p>The EC considers that MBIE’s methodology is flawed, since the duties expired more than two years ago, and the use of data from past, present and future as instructed by the High Court does not allow for an objective examination based on positive evidence as required by Article 3.1 of the AD Agreement. The EC claims that such an analysis mixes data and information from different periods and concepts, i.e. the assessment of the actual situation after duties have expired, and a likelihood analysis which would be relevant to a sunset review.</p> <p>The EC also recalls that the original 2011 investigation was based on a threat of injury, which means that the industry has actually never suffered any injury from Spanish imports. The 2016 review showed that the situation of the domestic industry improved considerably, as shown by indicators such as sales, gross profits or EBIT which increased significantly. The EC suggested that since injury to the domestic industry had been only</p>	<p>MBIE notes that the outcome of the High Court judgment in quashing the decision to terminate the anti-dumping duties on preserved peaches from Spain was that the duties did not expire in February 2017. The purpose of the reconsideration is to determine whether they should be continued, and in recognition that time has elapsed, the High Court directed that MBIE should conduct the reconsideration on terms that consider past, present and future conduct in the import of the relevant products without triggering the provisions of section 14(9) of the Act relating to the continuation of duties during a review.</p> <p>MBIE does not accept that the High Court direction relating to past, present and future conduct does not allow for an objective examination based on positive evidence. The methodology used is explained in section 1.4 of this Final Report, and MBIE has based its conclusions on an objective examination of the positive information available, in the context of an examination of likelihood that necessarily involves an assessment of the future impact of known facts.</p> <p>The EC comments on the fact that the original investigation concluded that there was a threat of injury seems to indicate a belief that where anti-dumping duties are imposed on the basis of a threat of injury, then there can be no subsequent sunset review of the need for the continuation of the duties. This position is clearly not consistent with the Act or the AD Agreement.</p>

<p>threatened it could only mean that it was now in a very comfortable position. The EC did note that the non-confidential version of the Interim Report did not allow an assessment of the situation of the domestic industry, but in any event this could not be attributed to Spanish imports since they have been negligible since 2011.</p>	<p>MBIE has noted the EC's comments on the availability of information in the non-confidential version of the Interim Report, and has ensured that the Final Report includes appropriate summaries. MBIE also sent these summaries to all interested parties prior to the release of the Final Report.</p>
<p>In summary, The EC claims that the methodology used in the reconsideration is flawed; a likelihood analysis is appropriate in order to examine whether the continued imposition of measures is necessary to prevent injury, but it cannot be used in a situation where measures have expired two years beforehand.</p>	<p>The level of imports from Spain since the imposition of anti-dumping duties may have been negligible but the point of a review is to determine the likelihood of the removal of duties leading to a recurrence of material injury, and necessarily includes an assessment of that likelihood on the basis of known information.</p>
<p><b>Likelihood of continuation or recurrence of dumping and injury</b></p>	
<p>The EC recalls the requirement of the AD Agreement that anti-dumping duties should remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. The EC also recalls that the continuation of anti-dumping duties is only justified if there is dumping and the domestic industry is suffering injury or, if there is a likelihood of recurrence of dumping and/or injury.</p>	<p>MBIE notes that the issue addressed in the reconsideration is whether the non-application of anti-dumping duties (i.e. the reinstatement of duties following the quashing of the 2017 termination), would be likely to lead to continuation or recurrence of dumping and injury. As noted in Footnote 9 to Article 3 of the AD Agreement:</p> <p style="text-align: center;"><i>Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article</i></p>
<p><i>Likely import volumes and prices</i></p>	
<p>The EC notes that the Interim Report mentions that Spain has freely available capacity to resume exports to New Zealand in large quantities, and also mentions that production actually decreased significantly between 2016 and 2018. The EC notes that this is in line with Spanish export figures, which showed a decrease of around 20 per cent. The EC also notes that the Interim Report mentions that output depends on a</p>	<p>MBIE addressed issues and evidence relating to likely import volumes in sections 5.2, 5.3 and 5.4 of the Interim Report. In particular, in section 5.4.2.3 of the Interim Report, having reviewed all of the information available on the capacity of the Spanish industry to increase its exports to New Zealand, MBIE noted that the New Zealand market is not large compared to other international markets and was satisfied that Spanish</p>

<p>number of factors such as crops, yield and also on import restrictions in other third countries. Consequently, according to the EU, any forecasts of future export volumes to New Zealand are highly speculative, in particular as far in the future as 2021.</p> <p>The EC points out that given the factors identified regarding Spanish output, Spanish export prices to New Zealand have fluctuated by up to 20 per cent upwards and downwards, so again, forecasts are highly speculative and cannot give reliable indications of future export behaviour.</p> <p>The EC claims that there is no indication of intentions to resume exports to New Zealand in significant quantities, since exports have been negligible since February 2017. The EC argues that the decrease in Spanish production and exports since 2016 is more likely to be the reason for negligible export volumes to New Zealand since duties lapsed.</p>	<p>producers and exporters did have sufficient freely available capacity to substantially increase dumped exports to New Zealand and that other export markets were unlikely to absorb that capacity to such an extent that it would prevent exports to New Zealand in <u>meaningful quantities</u> from occurring [emphasis added].</p> <p>MBIE notes that in the New Zealand context, “meaningful quantities” can be 100-300 tonnes, which is close to the range achieved in previous years when anti-dumping duties were not in place, and is well within the capacities of the Spanish industry to provide. MBIE also notes that given these levels of meaningful imports, a key element is the intention of New Zealand importers to seek out available supplies of preserved peaches, rather than Spanish exporters of preserved peaches seeking out markets in New Zealand.</p> <p>MBIE has clarified its assessment of the level of meaningful quantities of imports in the Final Report, and does not consider that its assessment of the likelihood of increased imports is “highly speculative” – rather it is based on a careful assessment of the available information.</p> <p>The basis for the EC statements on prices of Spanish exports to New Zealand appear to be based on general trade statistics, which include non-subject goods and would tend to average out values for different goods and different suppliers.</p>
<p><i>Situation of the domestic industry</i></p>	
<p>The EC notes that information regarding most indicators, such as market share, productivity or profits, has been kept confidential, and not even indexes or ranges have been provided. The EC identifies from the Interim Report that sales volume would remain stable and sales revenues would decrease by around 7 per cent, while output is dependent on the size of the peach crop and contracts with growers and MBIE considers it to be unlikely to provide a useful indicator of injury. The EC suggests that output</p>	<p>As noted above, MBIE has provided additional information, including non-confidential summaries of confidential information in the areas identified by the EU. The revised summaries were provided to interested parties on 15 August 2018.</p> <p>MBIE notes that while sales volume and sales revenue decreased in 2017 this has not been attributed to dumped imports of Spanish peaches (paragraph 346 of the Interim Report refers).</p>

<p>and sales volume are closely linked, and underlines that since sales volume and sales revenue of the domestic industry decreased by around 10 per cent in 2017 this could not be attributed to the negligible Spanish imports.</p>	
<p><i>Summary</i></p>	
<p>In summary, it seems to the EC that it has not been demonstrated that there would be a recurrence of material injury if duties lapse. The industry appears to be in a comfortable situation and any changes in this situation would not be attributable to other factors and not to Spanish imports.</p>	<p>MBIE's conclusions relating to sales volume and revenue were that in the absence of anti-dumping duties there was likely to be a decline in revenue over the forecast period of 2019-2021, contributing to a likelihood of a recurrence of injury attributable to dumped Spanish imports.</p>
<p><b>Causality</b></p>	
<p>The EC notes that climate conditions are an important factor which impacts on size and quality of crops and thus on prices, and that Spain had a difficult year in 2018 due to extreme heat and 2019 appears to be similar. The EC underlined that the New Zealand domestic industry had imported canned products from Spain and other sources in the past, with levels depending on variations in size and quality of crops in New Zealand.</p> <p>The EC notes that the domestic industry in New Zealand has developed its growing and processing operations to become more reliable with fewer variations in production. The EC suggests that this indicates that the industry had difficulties with its growing and processing operation which shed doubt on the causal link, while in any event, variations in output can arise from variations in the size and quality of the crop.</p> <p>The EC notes that the report of the 2016 Review referred to imports from China, and points out that the references to other imports in the Interim Review did not refer to imports from China, which needed to be analysed and taken into account.</p>	<p>In examining the likelihood of a recurrence of material injury to the New Zealand industry, MBIE has addressed the injury factors provided for in the Act and the AD Agreement, and has also considered other causes of injury as set out in section 8(2)(c) of the Act and Article 3.5 of the AD Agreement. The particular considerations relating to an assessment of causality in a review were set out in section 5.1.1 of the Interim Report. The situation regarding the availability of Spanish fruit was addressed in sections 5.2, 5.3 and 5.4 of the Interim Report, and the position regarding HWL's output was set out in section 5.6.1 of the Interim Report.</p> <p>MBIE is satisfied that it has correctly assessed the likelihood of material injury to an industry attributable to a continuation or recurrence of dumping of preserved peaches from Spain, and has not attributed injury from other causes to dumped imports.</p> <p>MBIE notes that the passage from the Final Report of the 2016 Review referred to by the EC discussed comparative price competition from other countries supplying preserved peaches to the New Zealand market. Paragraph 151 of the report noted:</p> <p><i>The figures in the table above show that imports from Spain,</i></p>

<p>The EC suggested that MBIE needed to consider whether the re-imposition of anti-dumping duties would be in the public interest, since the Interim Report noted that the imposition of duties in 2011 removed competition but also removed a “tasty Spanish peach variety” which was not in the public interest.</p>	<p><i>China, South Africa and Australia are undercutting HWL’s prices by between nil and 40 percent. Spain (in the absence of anti-dumping duties) would undercut prices of other imports, and HWL’s prices. This suggests that, if the anti-dumping duties were to be removed from Spanish preserved peaches, these goods would likely to hold a price advantage over imports from all other sources.</i></p> <p>The reference to imports from other countries in the Interim Report was in the context of imports of dumped goods, but imports from China should have been addressed in the analysis. MBIE has made additions to the text of section 5.6.1 of this Final Report to reflect this. In doing so, MBIE notes that imports from China include preserved peaches in presentations other than those imported from Spain either currently or in the past.</p> <p>The provisions of the Trade (Anti-dumping and Countervailing Duties) Act 1988 relating to the public interest test do not apply to this reconsideration. As directed by the High Court, the reconsideration has been carried out under the provisions of the Dumping and Countervailing Duties Act 1988 as it stood at the time of the original review. At that point in time the public interest test has not come into force and therefore public interest considerations are outside the scope of the reconsideration. In any event the passages referred to by the EC came from a submission by an importer and were not conclusions or statements by MBIE.</p>
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**B. GOS**

GOS Submission	MBIE Comment
<p>The GOS considered it important to note that the reason why High Court had annulled the decision taken in the original decision was not because the data did not support that decision but on the grounds of a breach of natural justice. In particular, HWL had not been given the opportunity to give arguments supporting anti-dumping duties in relation to the future</p>	<p>MBIE notes that reconsideration has been undertaken as a result of directions by the High Court, and on the basis of a process discussed with the parties.</p> <p>The reconsideration has considered the evidence available to MBIE on the</p>

<p>capacity of the Spanish preserved peach industry, due to MBIE's failure to convey to HWL the new material that it relied on in the final report to reach a conclusion contrary to that signalled in the interim report.</p> <p>The GOS did not understand why MBIE had not maintained the decision taken in 2017 to terminate the anti-dumping duties if the data that led to that decision had not changed since then. Moreover, there was a lack of new evidence to suggest that the decision made in 2017 could be considered incorrect and data and evidence suggested the opposite.</p>	<p>matters that it is required to address in reaching a conclusion on the likelihood of whether the non-application of anti-dumping duties will lead to a recurrence or continuation of dumping and injury.</p>
<b>Likelihood of recurrence of dumping</b>	
<p>The GOS noted that it was difficult to comment on the methodology used because the non-confidential report did not allow a proper understanding of the methodology used.</p> <p>The GOS considered that due to the lack of actual data from Spanish companies, the methodology proposed by the EC was correct and compatible with the AD Agreement. The GOS did not share MBIE's interpretation that the methodology was not compatible with Article 2.2 of the AD Agreement, and considered it would have verified that there were no dumping practices on the part of Spanish exporters.</p>	<p>Paragraphs 181 to 182 of the Interim Report set out MBIE's response to the methodology proposed by the EC, and why it was not considered to be consistent with the AD Agreement. In particular, MBIE notes that prices to third countries can be used only when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, and MBIE has been able to use retail prices in Spain for the subject goods as the basis for determining normal value.</p>
<b>Likelihood of recurrence of injury</b>	
<p>The GOS noted that import levels in the absence of duty were at similar or lower levels than when the duty was in force, therefore the analysis in February 2017 was correct. There was no new evidence which would allow a conclusion that Spanish exports would resume at quantities sufficient to cause material injury to the domestic industry.</p>	<p>MBIE's reconsideration has focused on addressing the likelihood of dumping and injury in the absence of anti-dumping duties, and has carefully considered all relevant factors and the evidence available in regard to them. The conclusions reached are reasoned and adequate.</p>
<b>Evolution of imports since the termination of the measures in 2017</b>	
<p>The GOS considered that MBIE was not complying with the High Court's</p>	<p>MBIE has taken appropriate account of past, present and future conduct,</p>

<p>ruling as it was not taking into account all the past, present and future conduct in the import of Spanish peaches. The GOS claims that MBIE has deliberately discarded import data from Spain which was favourable to Spanish companies, and focused on past behaviour of Spanish companies in explaining that imports increased in periods when there were no trade defence measures.</p>	<p>and has not discarded information “favourable to Spanish companies.” The past behaviour which was considered related to New Zealand importers, not to Spanish exporters, while the consideration given to past experience in the absence of duties was directly relevant to consideration of current and future behaviour.</p>
<p>The GOS notes that MBIE has ignored the time lapse from 2017 to 2018 when there were no anti-dumping duties and imports have not increased, and in fact had decreased and were very small.</p> <p>The GOC concluded that Spanish imports were negligible and could not cause material injury or pose a threat to the New Zealand industry.</p>	<p>MBIE notes that it has carefully considered the likely effect of the non-application of duties, including considerations relating to the period since February 2017. These matters were addressed in sections 5.2, 5.3 and 5.4 of the Interim Report.</p> <p>MBIE notes that a review considers the likelihood of a recurrence of continuation of injury and must, therefore, consider not just the current situation but also the likely future situation.</p>
<p>The GOC notes that MBIE’s new position is based on two elements – the existence of the judicial review process, and the alleged fall in fresh peach production in 2016.</p> <p>Regarding the judicial review process, MBIE has accepted HWL’s arguments that uncertainty in the market is a possible reason why imports have not increased. The GOS strongly disagrees that this could change the commercial strategy of Spanish companies.</p> <p>The GOS notes that there are interpretations of the WTO Appellate Body on the standards for maintaining measures, which must be based on positive evidence and facts demonstrating the likelihood of the continuation or recurrence of dumping or injury rather than mere conjecture.</p> <p>The GOS was surprised that MBIE justified the preliminary decision to extend the measures on the assumption that Spanish exporters had decided not to export to New Zealand because of market uncertainty. This conclusion was not supported by any data or evidence that Spanish</p>	<p>MBIE’s position is based on a range of considerations, all of which were set out in some detail in the Interim Report, and in particular in sections 5.2, 5.3 and 5.4. MBIE has amended the text of paragraph 300 (paragraph 297 in this Final Report) to ensure that the uncertainty regarding the outcome of the judicial review proceedings (including this reconsideration), is just one of the reasons why imports may not have resumed in significant quantities.</p> <p>MBIE considered HWL’s claims regarding uncertainty arising from judicial review in the context of information relating to the past response of New Zealand importers to the initiation of anti-dumping investigations.</p> <p>MBIE outlined relevant WTO dispute body findings in section 1.4 of the Interim Report (and this Final Report).</p> <p>MBIE has drawn no conclusions relating to the commercial strategy of Spanish exporters, nor has it made any assumptions about the knowledge that Spanish exporters might have regarding judicial review proceedings. Indeed, this would have been difficult in light of the lack of cooperation by</p>

<p>companies or the Spanish government were aware of the existence of the judicial review and its implications. The GOS outlined the timeline of its understanding of the situation, and set out some of the reasons why Spanish companies would not take account of the judicial review proceedings.</p> <p>The GOS suggests that if exports to New Zealand had increased they would be harming the New Zealand industry and if they did not increase they would be avoiding the imposition of duties. The GOS completely rejects the argument that the commercial strategy of Spanish producers in 2017 and 2018 was influenced by the uncertainty of a judicial process, which has no basis of facts or reality.</p>	<p>Spanish companies. MBIE’s considerations relating to uncertainty were focused on the behaviour of importers, and this was clearly set out in the Interim Report.</p> <p>MBIE emphasises that it has not advanced an argument that the commercial strategy of Spanish producers was influenced by the judicial review proceedings.</p>
<p>The GOS notes the Spanish production levels for 2016 and 2018 set out in the Interim Report, and considers that the facts back the decision taken in 2017 regarding the likelihood of the recurrence of injury. The GOS suggests that if production now is less than in 2016 it seems unlikely that Spanish companies would redirect a significant part of their production to the New Zealand market, since New Zealand has never been a significant client of their declining production.</p> <p>The GOS notes the mention of the Russian restrictions on a range of EC agricultural products, including fresh peaches from Spain, and this would cause an increase in the production capacity of Spanish preserved peaches. However, according to the GOS these statements are not supported by any evidence and are speculation.</p> <p>The GOS notes that the Russian measures would appear to be in contradiction to the allegation of a lack of fresh peaches in the 2016 season which, according to the GOS, was used by MBIE to justify the decrease in exports to New Zealand in 2017. Even so, this decrease would relate to 2017, not 2018.</p> <p>In any event, according to the GOS, there is not an automatic link between the levels of the peach harvest in Spain and production levels of preserved</p>	<p>MBIE has reviewed all of the information available to it in considering the likelihood of the recurrence or continuation of material injury. It is regrettable that Spanish producers and the relevant trade association did not choose to cooperate in the reconsideration and provide relevant information. In this situation MBIE is required to use the facts available to it.</p> <p>MBIE’s analysis of the position following the Russian restrictions noted the possibility of increased production of preserved peaches as a result (paragraph 276 of the Interim Report), and also noted reports from other industry commentators that there was a likelihood of carryover stocks in 2018 and that canned peach supply had overtaken demand (paragraph 270 of the Interim Report).</p> <p>MBIE also notes that it does not require significant levels of imports to have adverse effects on the New Zealand industry, and that such levels would be readily available from Spain, even if overall production showed a declining trend. MBIE has clarified its consideration of such levels in this Final Report.</p> <p>MBIE is satisfied that there is a likelihood that in the absence of anti-dumping duties imports from Spain could increase to levels that will cause</p>

<p>peaches, since domestic and export fresh peach consumption are more significant alternatives. The GOS notes that the evolution of the capacity was influenced by many factors, which MBIE had not studied, and the facts were that production declined between 2016 and 2018.</p> <p>The GOS underlined that the facts did not support the Interim Report conclusion that it is likely, in the absence of anti-dumping duties, that the Spanish industry would export to New Zealand at quantities sufficient to cause material injury, and the 2017 decision was correct.</p>	<p>a recurrence of injury to the domestic industry.</p>
<p><b>Attractiveness of the New Zealand market</b></p>	
<p>The GOS points out that the New Zealand market is not attractive for Spanish producers, and is a marginal market accounting for less than 1 per cent of total Spanish exports. The EU has traditionally been the main market. The Interim Report expressly acknowledged that sales of Spanish companies were occasional and particular, and it was not likely they would cause material injury to the New Zealand industry.</p> <p>The GOS notes that Spanish exporters have not entered into commercial agreements with the main food retail groups or the main food service providers. Consequently, it was difficult to expect from them any significant growth as they did not expect to enter the main distribution channels for preserved peaches in New Zealand. Rather, the importers of Spanish peaches identify them as gourmet products and are marketed accordingly, and cannot be considered to be a significant threat to the New Zealand industry.</p>	<p>MBIE is aware of the nature and scope of recent imports of preserved peaches from Spain, and has highlighted the fact that these imports operate in a different market from HWL’s products. This is reflected in the Interim Report.</p> <p>As noted in the Interim Report, MBIE is required to address the likelihood that dumping and injury will recur or continue, which means that MBIE must look beyond the existing patterns of trade and consider whether the non-application of anti-dumping duties could lead to a recurrence or continuation of dumping and injury. In undertaking this consideration, MBIE’s focus has been on a range of factors, including the availability of goods from Spain, and the likely behaviour of New Zealand importers. These matters were fully covered in sections 5.2, 5.3 and 5.4 of the Interim Report.</p>
<p><b>Conclusion</b></p>	
<p>The GOS notes that imports have not increased since the removal of anti-dumping duties, and MBIE has not provided any evidence that this will change in the future, only mere speculations that are contradicted by hard facts. The GOS concludes that the decision taken in 2017 was correct and</p>	<p>MBIE has outlined above the considerations that have led to a conclusion that there is a likelihood that the absence of anti-dumping duties is likely to lead to a recurrence or continuation of dumping and injury. In particular, MBIE stresses that its consideration of the likelihood of an</p>

<p>there was no positive evidence that could lead to a conclusion that it was likely that the Spanish industry will resume exports to New Zealand. There has been no 2018 evidence that would invalidate that conclusion.</p> <p>In view of the negligible quantities of Spanish imports into the New Zealand market, the fact that Spanish production of preserved peaches has been decreasing year after year, and the lack of attractiveness of the New Zealand market, confirm that it is not likely that there will be an increase of imports in such quantities as to cause material injury to New Zealand producers.</p>	<p>increase in imports has taken account of the likely behaviour of New Zealand importers as well as other factors including the availability of stocks in Spain.</p>
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### C. HWL

HWL Submission	MBIE Comment
<p>HWL identified what it considered to be inconsistencies with previous submissions and comments that it would like amended.</p>	<p>The matters raised by HWL are clarified and discussed below.</p>
<p>HWL was supportive and interested in understanding MBIE's construction of the notional value used to calculate dumping margins and the proposed remedy. HWL completed its own analysis and considered the assumptions to calculate normal value.</p>	<p>MBIE notes that the notional values were not "constructed" in the sense provided for in section 5(2) of the Act, but were derived from retail prices, in the case of the normal value, while the export price was based on all available information.</p>
<p>HWL provided some commentary in regard to treating the impact of price effects on the Wattie's and Oak brands that it considered needed further explanation.</p>	<p>The matters raised by HWL are clarified and discussed below.</p>
<p>In paragraph 180 of the Interim Report, HWL noted the prices it had provided for Alcornia were on promotion and asked for clarification of the actual retail price that MBIE had used in its analysis.</p>	<p>The price used by MBIE was the standard price, which was identified in the material provided by HWL, rather than the special price. This has been clarified in the relevant section of the Final Report.</p>

Clarification of commentary	
<p>HWL states that with regard to paragraph 262 of the Interim Report, HWL’s “claims” need to be put in context. In particular, HWL notes that:</p> <ul style="list-style-type: none"> <li>• Spanish producers would retain safety stocks which would be of a sufficient level to take significant market share and cause injury to the New Zealand industry. The retention of safety stocks is reflected by HWL’s own practice.</li> <li>• It takes only a relatively small volume of imports, in the region of 100-300 tonnes to have an injurious effect. The relative size of the Spanish industry and the safety stock available to meet this level.</li> <li>• HWL’s seeks the reference to “huge surplus capacity”. HWL does not dispute that there is a surplus supply versus demand.</li> </ul> <p>In paragraph 278 of the Interim Report it is implied that the market would need to be “saturated”, but HWL claims that it has never been about market saturation as a determinant as mentioned in the EC’s previous submissions. HWL repeats its comment that it takes only 100-300 tonnes of dumped canned peaches to cause injury.</p> <p>With regard to paragraph 415, HWL agrees with MBIE’s conclusions given the relatively static market share held by HWL, which would appear to support the view that the current remedies are having the required effect.</p> <p>With regard to paragraph 447, HWL notes that information available to it</p>	<p>MBIE has included reference to HWL’s views regarding safety stocks in section 5.3.2.2 of this Final Report, and has also clarified the level of imports that are likely to cause injury to the domestic industry.</p> <p>The reference to claims by HWL that Spanish producers had “huge surplus capacity” came from the 2011 Final Report, and in view of the length of time since that claim was made MBIE has amended the relevant text in this Final Report</p> <p>The reference to saturation was used by the EC in its submission to the 2016 Review, and was picked up from HWL’s application for the 2016 Review, at paragraph 50, where it was stated “Additionally in Non-Confidential Appendix 1.9 is a reference from website Foodnews that the 2016 canned peach production will be in the region of 90,000 tonnes. An industry this large would be able to <u>saturate</u> the New Zealand market of 5,649 tonnes with its discretionary stocks.” <i>[emphasis added]</i></p> <p>It should be noted that MBIE has not itself consider that there is any requirement that a market be “saturated” in order to cause injury. MBIE’s conclusion regarding the likelihood of increased imports was set out in paragraphs 281-283 of the Interim Report.</p> <p>Noted.</p> <p>MBIE notes the concerns raised by HWL, but does not consider that in</p>

<p>counters this argument. HWL claims to have evidence relating to imports from China which indicates that invoice values to customers in different countries were different, suggesting invoice manipulation. HWL referred to an affidavit in the legal proceedings regarding the review of preserved peaches from China.</p>	<p>relation to the subject goods and imports from Spain there is no evidence to suggest that invoice manipulation would be a significant issue.</p>
<p><b>Notional Value</b></p>	
<p>HWL notes and agrees with the comments in paragraphs 100-108 of the Interim Report in relation to the price premium for goods sold by current importers of preserved peaches from Spain. HWL also agrees MBIE’s comments in paragraph 169 that in some cases use of a proxy or notional value may be appropriate.</p> <p>However, HWL challenges the assumption made in paragraph 171 of the Interim Report of the use of a subset of countries where exports range from 20-200 tonnes, and notes that there is evidence, as indicated in paragraph 293, that if the import price is favourable then brands will move to Spain as a source of supply.</p> <p>HWL suggests that the range of import countries should include those up to and including current volumes from New Zealand’s largest import source, South Africa, which were 2,476 tonnes in 2018.</p> <p>HWL has undertaken its own analysis based on TradeMap data, using USD, and found 35 countries between 20 and 200 tonnes. HWL has also completed an analysis of countries between 20 and 2,476 tonnes which includes 62 countries. The analysis was repeated for countries importing a range between 1,026 and 2,476 tonnes which represents the range of imports from China and South Africa into New Zealand, since imports of this magnitude are, according to HWL, the most likely scenario if Spain becomes the lowest cost source.</p> <p>HWL provided a table summarising its analyses outlined above. Based on HWL’s assessment of the adjustments made by MBIE. HWL believes that</p>	<p>MBIE has checked its analysis and can confirm that the Spanish data shows there were 29 non-EU countries covered by the 20-200 tonne range, and the export price for these countries was the value used in the Interim Report (the inclusion of EU countries would make 35 countries in this range).</p> <p>The range of 20-200 tonnes reflected the range of imports actually achieved in export volumes to New Zealand from Spain since 2011, and MBIE continues to believe that this provides the most appropriate basis for comparison for the analysis of both dumping and price undercutting. HWL has claimed that an injurious level of imports would be 100-300 tonnes, but MBIE has based its analysis on the range of imports actually achieved, and which has a high end at the mid-point of the injurious levels proposed by HWL. In addition, since the figures are being used for dumping calculations, the comparison must seek to ensure that there is price comparability, including the quantities involved.</p> <p>MBIE also considers that an assumption that imports currently made from China and South Africa would shift completely to Spain is too speculative to provide a basis for the likelihood assessments required in a review.</p> <p>MBIE notes that the Spanish data is in EUR, not the USD used by TradeMap.</p> <p>MBIE does not consider it necessary to change the basis on which it has assessed notional values for exports from Spain for use in the dumping and price undercutting analyses.</p>

<p>the CIF (Cost, insurance and freight) value calculated by MBIE to be approximately \$2.07/kg, compared with the 1.90/kg calculated by HWL for the 20-200 tonne countries. HWL suggests that this difference could mean that the GOS data shows a higher per kilogram value or the assumed freight, insurance and clearance values are higher. The values for the higher volumes of exports are lower as the volumes increase.</p> <p>HWL recommends that MBIE should look at GOS data for comparable export markets between 1,026 and 2,476 tonnes to establish a notional base price. HWL considers that the proposed level of undercutting and the ad valorem duty rate may be understated by up to four times by using the sample in MBIE’s analysis.</p>	
<p>HWL has also requested that the notional value in Table 4.3 of the Interim Report should be released as non-confidential if the export statistics from Spain are publicly available.</p>	<p>The notional export price in Table 4.3 was considered to be confidential because its release could allow the calculation of the values used by MBIE in relation to adjustments made from the raw base price, which include confidential information. The Spanish trade statistics are publicly available and provide the basis for the calculation of the raw base price.</p>
<p><b>Price Effect Analysis</b></p>	
<p>HWL sought an elaboration of the statement in paragraph 302 of the Interim Report that the “approach differs from that previously taken in other reviews.”</p>	<p>MBIE has noted that previous reviews, including the 2016 Review, appear to have used total HWL sales, i.e. an average of all Wattie’s and Oak brand sales of domestically-produced goods, when undertaking price comparisons to assess the level of price undercutting.</p> <p>In view of HWL’s approach to the pricing of its brands, the key comparison is with Oak brand prices, which effectively determine the level of Wattie’s brand prices. It would not be appropriate to include this margin between brands within the scope of an analysis of the real level of price undercutting. Of course, when considering the effect of price undercutting on the volume of sales then all sales, including both the Oak and Wattie’s brand sales, are considered.</p>

	The Final Report, at section 6.4.2.3, clarifies this point.
<b>Price Undercutting and Remedy</b>	
<p>HWL has queried why there is description of “No duties” for Navarrico, since in the past a zero duty has been applied, which allows the review of a duty without the need to initiate a new investigation.</p> <p>HWL believes that MBIE has incorrectly used the Oak price to establish undercutting and a remedy. HWL believes that the correct comparison is to use the average revenue from all types and sizes of domestically-produced preserved peaches. HWL argues that the injury is to the business manufacturing like goods and is not injury to one component.</p> <p>HWL notes that the total business is considered in the EBIT analysis, since the Wattie’s brand price is explicitly linked to the Oak brand and both brands drive the revenue that is impacted by dumping. HWL suggests that an objective examination would not confuse a marketing strategy with the establishment of a remedy that seeks the removal of injury caused by dumping.</p> <p>HWL refers to a 2011 Australian Federal Court case to support a suggestion that the AD Agreement requires the calculation of a single margin of dumping for a particular exporter in respect of the goods under investigation.</p> <p>HWL argues that this means that to apply a single dumping margin in order to calculate a remedy requires an objective examination of the material injury to HWL’s business and not only to one part of the business producing preserved peaches in various presentations. HWL argues that by</p>	<p>The use of “no duties” to describe the outcome for Navarrico correctly reflects the conclusion that dumped imports from Navarrico are not likely to cause injury to the domestic industry. This does not mean that any review of the duty would require a new investigation to be initiated because a dumping investigation, and review, relate to a country and to all imports from that country, irrespective of whether or not they have been subject to anti-dumping duties.</p> <p>As explained above, MBIE has taken account of HWL’s explicit approach to the pricing of its brands, so that the key comparison is with Oak brand prices, which effectively determine the level of Wattie’s brand prices. Given the margin between the prices of the brands, it would not be appropriate to include this margin within the scope of an analysis of the real level of price undercutting.</p> <p>Of course, when considering the effect of price undercutting on the volume of sales and on injury factors such as EBIT, then all sales, including both the Oak and Wattie’s brand sales, are considered.</p> <p>MBIE is aware of the Australian <i>Panasia</i> case, which referred to the WTO Appellate Body findings in <i>US – Zeroing (Japan)</i>, in WTO document WT/DS322/AB/R, at paragraph 114, which stated that:</p> <p><i>Thus, it is evident from the design and architecture of the Anti-Dumping Agreement that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer</i></p>

using the Oak brand as a base price to establish undercutting, MBIE is ignoring the real impact of dumping on the business and the resultant remedy does not address the material injury.

HWL also considers that in view of the requirement to have one dumping margin per exporter, then only one dumping duty can be applied to Alcornia.

*examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the Anti-Dumping Agreement.*

WTO dispute findings provide guidance, but the Appellate Body's position on dumping margins does lead to real difficulties in effectively applying the provisions of the AD Agreement as they are written. This is particularly the case when the dumping assessment is undertaken on a transaction-to-transaction basis and when identifying lesser duty duties necessary to remove injury.

Nevertheless, in regard to the matters raised by HWL, the question of whether or not there should be a single dumping margin per producer is not relevant to the establishment of an anti-dumping duty that will remove injury by removing price undercutting. MBIE is satisfied that by addressing the price undercutting margin in relation to the Oak brand, the remedy effectively addresses the margin in respect of the Wattie's brand.

MBIE considers that it is appropriate to have margin for different goods from individual producers where there are different prices and margins of dumping for those goods, such that an averaging of the kind promoted by HWL could lead to an outcome not envisaged by the legislation when the dumping analysis is undertaken on a transaction-to-transaction basis.