

PUBLIC VERSION



J.BRACIC & ASSOCIATES
TRADE REMEDY ADVISORS

PO Box 3026
Manuka, ACT 2603
Mobile: +61 499 056 729
Email: john@jbracic.com.au
Web: www.jbracic.com.au

17 July 2016

The Director
Operations 3
Anti-Dumping Commission
GPO Box 1632
Melbourne VIC 3001

Expiry review of consumer pineapple exported from Thailand

Dear Director,

This submission is made on behalf of Prime Products Industry Co. Ltd (PPI) in response to the Anti-Dumping Commission's (the Commission) Statement of Essential Facts Report No 333 (SEF 333).

Ascertained export price

Insufficient information to ascertain export price

SEF 333 states that *'sufficient data was not available to enable the Commission to determine export price and normal value for Prime Products and, therefore a dumping margin.'* As such, the Commission has preliminarily determined export prices and normal values under subsection 269TAB(3) and 269TAC(6) respectively, on the basis of a weighted average export price for Thailand from the ABF import database at FOB terms and the weighted average normal value determined for the cooperative exporter from the Philippines, Dole Philippines. PPI considers the Commission's proposed approach to be critically flawed and undoubtedly unreasonable.

Firstly, it is worth pointing out that in reviewing the variable factors, the Minister's powers do not involve making a determination of export price, normal value and a dumping margin. For the purposes of the review, the Minister's power involves either leaving the notice unaltered, revoking the notice or fixing different variable factors. Therefore, in the review of measures, the Minister is simply ascertaining the variable factors and not making a determination of dumping.

PUBLIC VERSION

PPI rejects the view by the Commission that as PPI had no export sales during the review period, it is not possible to establish an export price under subsection 269TAB the Act. This view is inconsistent with the Commission's current and long-standing policy and practice of ascertaining export prices in the absence of export sales.

For example, in the case of an accelerated review, the Commission's current Dumping and Subsidy Manual (December 2013)¹ outlines its policy in circumstances where an exporter has not made export sales to Australia during the nominated review period:

The Commission does not require an applicant for an accelerated review to have already exported some minimum quantity of the goods to Australia. Article 9.5 of the ADA contains two conditions: that the exporter did not export the goods during the investigation period; and that it is not related to an exporter already subject to the duty. In the circumstances where there have been no exportations, any accelerated review will assess the normal value for the goods. If there have been exportations by the applicant exporter, or contracts entered into, those details will also be examined.

This policy is supported by the findings of the WTO Panel² and upheld by the Appellate Body which examined whether Article 9.5 of the Anti-Dumping Agreement subjected the right to an expedited new shipper review to a showing of a "representative" volume of export sales. The Panel found that:

Article 9.5 of the AD Agreement provides that the authorities shall promptly carry out a review, provided that the exporters or producers who have not exported the product subject to a duty during the period of investigation can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. In sum, in case a producer or exporter which (i) has not exported the product to the country concerned during the period of investigation and (ii) is not related to an exporter or producer already subject to the duty requests a new shipper review, the authority is required to promptly carry out such a review.

The accelerated review provisions are equally relevant in the context of a Division 5 review as they both involve the ascertaining of variable factors, with the only difference being that the accelerated review is only open to new exporters.

The ability to ascertain an export price in the absence of export sales is further supported by the Commission's past and current practice. In each case³ where the

¹ Dumping & Subsidy Manual – December 2013, page 158.

² Mexico – Definitive Anti-Dumping Measures on Beef and Rice: WT/DS295/R; para 7.266.

³ REP 139 – Review of certain hot dip galvanised welded circular hollow sections – September 2008, section 6.1, pages 13-14; REP 180: Accelerated Review LLDPE Thailand - November 2011, section 3.2, page 7; REP191: Accelerated Review Consumer Pineapple by Kuiburi Fruit Canning Co Ltd – September 2012, section 3.4, page 9; REP 196, Review of consumer pineapple exported from Thailand; section 4.4.2; page 14; REP 196, Review of consumer pineapple exported from Thailand; section 4.6.3; page 20; REP 196, Review of FSI pineapple exported from Thailand; section 4.7.3; page 26; section 3.4, page 15; REP 214 – Accelerated Review Aluminium Extrusions – Guangdong Jinxi Cheng – September 2013; REP 250, Accelerated review of prepared or preserved tomatoes from Italy; section 3.1; page 8; REP 259 – Accelerated

PUBLIC VERSION

Commission found that no export sales existed or no representative export sales existed, export prices were ascertained equal to the normal value of like goods, in effect providing a floor price measure which ensured that future exportations were exported at or above the non-dumped normal value.

PPI therefore submits that the Act permits the Commission to continue to apply its current policy and practice of ascertaining an export price equal to PPI's normal value or equal to the normal value of other sellers.

Inappropriate use of facts available provision

SEF 333 correctly describes PPI as a cooperating exporter. All requested and necessary information was provided to the Commission in a timely manner and in the format required. Whilst PPI's submitted information was not the subject of verification, there is no reason for the Commission to doubt its accuracy and reliability. As such, PPI should not be penalised and grouped in with other exporters deemed to be non-cooperative.

Upon review of SEF 333, it is clear that the Commission has not undertaken an objective investigation in basing its determination of export prices on the best available information. Further, in arriving at its preliminary decision to determine export prices in accordance with s.269TAB(3) of the Act, PPI submits that the Commission has not complied with its own policy and its obligations under the WTO Anti-Dumping Agreement to evaluate and assess all relevant information in deciding which information is best for the particular circumstances.

Pursuant to Article 6.8 and Annex II of the WTO Anti-Dumping Agreement, an investigating authority may rely on the facts available where a respondent has failed to provide some or all of the necessary information requested by the investigating authority. Australia's anti-dumping legislation incorporates and reflects those provisions in subsections 269TAB(3) and 269TAC(6) of the Act.

In addressing the function of Article 6.8 and Annex II, in *US – Hot-Rolled Steel*⁴, the Panel stated that *“one of the principle elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the ‘first-best’ information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps ‘second-best’ facts.”*

In *Beef and Rice*⁵, the Panel noted that *‘Annex II, entitled “Best Information Available in Terms of Paragraph 8 of Article 6” contains a number of obligations the investigating authority has to comply with in order for the use of facts available in a given case to be in accordance with Article 6.8 of the AD Agreement.’*

Review for Aluminium Extrusions – Zhaoqing – October 2014, section 3.3, page 12; REP 274 - Accelerated review for zinc coated (galvanised) steel – Zongcheng – January 2015.

⁴ Panel Report, *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, para 7.55; Page 23.

⁵ Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, para 7.166, page 144.

PUBLIC VERSION

The Panel interpreted the conditions of Annex II on the investigating authority as follows:

The use of the term "best information" means that information has to be not simply correct or useful per se, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available". This is reinforced, in our view, by the requirement in paragraph 3 of Annex II that all information which is verifiable, which is appropriately submitted and supplied in a timely fashion is to be taken into account when determinations are made. In similar vein, paragraph 5 of Annex II does not allow an authority to disregard information, even though that information is not ideal in all respects, provided the interested party has acted to the best of its ability. Finally, and perhaps most importantly, such a conclusion is evident from the requirement set forth in paragraph 7 of Annex II that, in case the authorities have to base their findings on information from a secondary source they should do so with special circumspection, and check, where practicable, the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns and from the information obtained from other interested parties during the investigation.

This requirement to undertake a comparative evaluation is supported by the Commission's stated policy in Report 159D⁶ and more recently REP 203⁷. In assessing the use of relevant information for the purposes of determining export price and normal values for uncooperative parties, the Commission notes at page 16 of Report 159D, that:

Thus, in conducting an investigation, Customs and Border Protection should undertake an "evaluative, comparative assessment"⁸ of information provided by interested parties to ensure that "this information [is] the most fitting or appropriate for making determinations..."⁹.

As non-cooperating exporters do not provide Customs and Border Protection with information so that an individual dumping margin can be determined, all relevant information is actively sought from interested parties. Customs and Border Protection will ordinarily have regard to a breadth of information as a result of this

⁶ Reinvestigation of certain findings in REP 159C – Certain Clear Float Glass,

⁷ Reinvestigation of certain findings in REP 177 – Certain Hollow Structural Sections

⁸ Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

⁹ Appellate Body Report, Mexico – Beef and Rice, WT/DS295/R at para 7.167

PUBLIC VERSION

inquiry. It is then necessary to critically assess this information to ascertain whether it can be relied upon in order to determine export prices and normal values pursuant to subsections 269TAB(3) and 269TAC(6) respectively. If the information is considered to be unreliable, it is disregarded pursuant to subsections 269TAB(4) and 269TAC(7).

On page 17 of that same report, the Commission outlined its approach to the use of relevant information from other cooperating exporters in determining export price or normal values for non-cooperating parties. It stated:

Customs and Border Protection must then scrutinise the verified information of cooperating exporters to ensure that it is reasonable in the circumstances to attribute this information to non-cooperating exporters.

REP 248 contains no evaluative, comparative assessment or any such critical assessment of all relevant information available to the Commission. PPI submits then that the Commission did not undertake such an assessment and did not comply with its own policy guidelines in this area or its obligations pursuant to Annex II of the WTO Anti-Dumping Agreement. Therefore in failing to properly investigate and evaluate other relevant and verified information, the Commission is unable to establish that the information relied upon in determining export prices under s.269TAB(3) of the Act, was the best information to be attributed to PPI.

Assessment of relevant information

As explained above, the Commission is under an obligation to objectively consider and assess all relevant available information in determining export prices pursuant to s.269TAB(3) of the Act. In doing so, the Commission's primary criteria is to examine whether the information provides a reliable basis for establishing an arms-length export price that can be properly compared with the corresponding normal value.

PPI does not have access to and is unable to properly comment on the suitability or otherwise of Thai export sales to Australia during the review period, as reflected in the ABF import database. Although, as noted previously in PPI's submission of 29 March 2016, it is expected that the vast majority of exports of consumer pineapple to Australia from Thailand, would be from exporters exempt from interim dumping duties. This includes Thai Pineapple Canning Industry Corp Ltd (TPC).

PPI understands and accepts that the dumping framework and the findings that flow from the investigations undertaken within that framework, are heavily influenced by the decisions of interested parties to either cooperate or not. Such that non-cooperative parties cannot expect favourable outcomes or treatment, relative to those of cooperative parties. This principle of favourable treatment to cooperating parties is critical to ensuring that interested parties are encouraged to participate in these inquiries so that the findings can be based on the best possible information available.

So it is entirely understandable that the Commission would consider that export price information from the Australian Border Force import database to be relevant and

PUBLIC VERSION

appropriate for determining export prices for non-cooperative exporters. However, in PPI's case, it has made every effort to cooperate with the Commission and the decision to effectively treat it as a non-cooperative exporter and apply the non-cooperative ascertained variable factors, runs counter to the rule of favourable treatment.

Ascertaining the normal value

Normal value based on non-dumped exports from Thailand

As highlighted earlier, it is expected that the vast majority of exports from Thailand during the review period were from exporters that are currently exempt from the dumping duty notice. This includes TPC which has been a regular exporter of consumer pineapple to Australia.

Exports of consumer pineapple by TPC were revoked by the then Minister on 14 January 2014, on the grounds that the revocation of the measures would not lead or likely lead to the recurrence of dumping by TPC. As such, all exports by TPC since the decision by the Minister must be regarded as non-dumped until such time as a determination is made that they are in fact dumped.

As no application has been made or brought by the Australian industry in respect of TPC's exports, it is reasonable to conclude that TPC's export prices of consumer pineapple are neither dumped, nor injurious. On that basis, PPI considers it appropriate and reasonable for the Commission to recommend that the Minister ascertain a normal value for PPI's exports of consumer pineapple, at a price equivalent to the weighted average export price by TPC during the review period.

Normal value based on Dole Philippines

PPI has not been provided sufficient information by the Commission to properly understand that basis of the normal value ascertained for Dole Philippines, in particular the like good domestic models and the Australian exported models. PPI considers this information critical to its ability to properly respond to the Commission's preliminary findings and defend its interests in this matter.

Notwithstanding the lack of sufficient understanding of the normal value ascertained, PPI makes the following observations.

Firstly, the whole point of the review of measures and variable factors is to allow the Minister to vary the notice such that goods exported to Australia are not being sold at prices less than their corresponding normal value. The Commission has preliminarily found that Dole Philippines export prices were on average approximately 6.2% below the corresponding weighted normal value. Therefore, it is open to the Minister to ascertain Dole Philippine's variable factors so that a fixed amount of interim dumping duty is imposed on its future exports, equivalent to the difference between the ascertained normal and ascertained export price.

PUBLIC VERSION

However by contrast, PPI's circumstances are that it has never exported consumer pineapple products to Australia at dumped prices and does not intend to commence exporting at dumped prices. So in PPI's view, the primary and only objective of the Minister is to ensure that contemporary ascertained variable factors are imposed against PPI's future exports to ensure that it is prevented from exporting at prices less than the ascertained normal value. In this case, the ascertained normal value outlined in SEF 333, is the weighted average normal value ascertained for Dole Philippines.

Therefore, to ensure that future exportations of consumer pineapple by PPI are not at dumped prices, the Minister need only ascertain PPI's export price at the same level as the ascertained normal value. This would guarantee that PPI's future exports are not dumped and consistently reflect the fact that it has not previously exported to Australia at dumped prices.

This approach was recently adopted by the Commission in circumstances similar to PPI. In the review of canned tomatoes from Italy by Calispa S.p.A.¹⁰, the Commission stated that:

It is not possible for the Commission, in the absence of exports or perhaps an irrevocable contract for supply, to reasonably anticipate the product mix that might be exported to Australia.

The Commission went on to add:

In considering the range of alternative approaches, the Commission considers that the outcome should ensure that the effectiveness of the remedy for injurious dumping is upheld, but any outcome should, where possible, also avoid unintended or unnecessary consequences.

In that case, the Minister set an equal ascertained export price and ascertained normal value, which ensured a minimum floor price below which export prices were subject to an interim dumping duty. In the same manner, PPI requests the Commission to reconsider its approach and recommend that PPI's ascertained export price be set at the same level as its ascertained normal value which reflects a non-dumped price by Dole Philippines.

Another key reason to consider recommending that PPI's ascertained export price be set equal to the ascertained normal value based on Dole Philippines' information, is the inability to ensure proper comparison.

As explained earlier, the Commission has not provided any information or a reasonable non-confidential summary of the information relied upon for ascertaining PPI's normal value and export price. This information is considered critical to PPI properly understanding the type of consumer pineapple products included in the

¹⁰ REP 250, Accelerated review of prepared or preserved tomatoes from Italy; section 4.2.4; page 12.

PUBLIC VERSION

Commission's preliminary findings, and specifically its ability to identify and submit claims for adjustment to ensure proper comparison.

Notwithstanding the lack of a non-confidential summary, PPI considers that the normal value and export prices preliminarily recommended do not allow for a proper comparison. Firstly, it is expected that the raw pineapple costs in the Philippines and Thailand will be different, as they are heavily impacted by the particular weather conditions in the respective countries. Therefore, it is not reasonable to compare export prices from Thailand against domestic prices and costs in the Philippines. PPI expects that the Commission is in a position to properly compare and assess relative pineapple costs between the two countries given information presented by cooperating exporters.

Also the Commission makes no mention of the types of models sold domestically and constructed for Dole Phillipines, and whether those same types were reflected in the export sales information taken from the ABF import database. This again is critically important as the relative prices per kilogram net weight varies considerably depending on the size of the can.

For example, the current retail price for a 227g can of 'Love Dole' pineapple chunks in juice is \$7.14/kg, compared to \$4.61/kg for exactly the same product in a 432g can. This represents a price premium of 55% for the smaller can of an identical product.

This potential and likelihood for further differences in prices are evident when comparing different products all together. For example, it is noted that the Woolworths stocks Dole pineapple pieces in juice sold in 115g tetra pak packaging. This product retails for \$8.70/kg and is expected to be significantly more expensive to produce than an equivalent product in cans.

Therefore, PPI requests the Commission to inform it of the types of products used to calculate the ascertained normal value and corresponding ascertained export price, and also examine and consider whether due allowance is required for differences in raw material costs, different packaging and different can sizes which are all expected to affect prices.

If the Commission finds that the ABF import database does not sufficiently identify the product characteristics to enable adjustments to be made, PPI contends that the Commission should in that circumstance, ascertain for cooperating exporters only, an export price that is equivalent to the ascertained normal value based on Dole Phillipines. This would address the issue of proper comparison and also properly reflect the fact that PPI has never exported consumer pineapple to Australia at dumped prices.

Third country exports

As the Commission has correctly noted, PPI was a cooperating exporter that submitted a completed exporter questionnaire response (EQR). In its EQR, PPI

PUBLIC VERSION

provided a list of export sales information to third country export markets of consumer pineapple products. PPI expects that this information is requested for the purposes of possibly establishing third country normal values as noted at Section F of the questionnaire itself:

Your response to this part of the questionnaire may be used by the Commission to select sales to a third country that may be suitable for comparison with exports to Australia.

Sales to third countries may be used as the basis for normal value in certain circumstances. The Commission may seek more detailed information on particular third country sales where such sales are likely to be used as the basis for determining normal value.

It is also noted that the Commission's Dumping and Subsidy Manual explains that '[a] detailed examination of third country prices is not undertaken if there is sufficient information to establish normal value under the other methods.' Given that Commission concluded that insufficient information existed to ascertain normal value on the basis of domestic sales or a constructed selling price, it is expected that the Commission would have considered and examined whether PPI's third country exports were appropriate. Instead the Commission made no contact with PPI on any occasion during the consumer pineapple review to query or request any further detailed information in respect of its export sales.

There is nothing to suggest that a normal value based on PPI's third country exports would not be appropriate in the circumstances. Indeed the normal value provisions (which apply across Part XVB of the Customs Act 1901) provide for alternate methods of determining normal value in precisely such circumstances where there are no, or low volume of, comparable sales on the domestic market.

PPI therefore requests the Commission to reconsider whether its third country exports are appropriate for ascertaining normal value, and if so, strongly consider recommending that the ascertained export price be set equal to this ascertained normal value. This would ensure that future exports by PPI are sold to Australia at prices no less than the non-dumped normal value.

Conclusion

In conclusion, PPI considers the Commission's approach to treating it in the same manner as non-cooperative exporters is highly irregular and negates the benefit that is and ought to be afforded to cooperating parties.

The Commission's inability or unwillingness to properly ascertain normal value on PPI's own information in the absence of export sales during the review period, also raises adverse implications for reviews.

PUBLIC VERSION

The Commission's position appears to be that an exporter must have made an export sale in order for the corresponding normal value to be ascertained on the basis of the exporter's own information. However, the likely consequences of the Commission's approach will be to encourage exporters to contrive an outcome by ensuring that minimal exportations have taken place during the review period.

This is clearly not the intent of the dumping system or the intent of PPI, as it has previously sought a contemporary ascertained normal value as part of its most recent new shipper review. PPI is simply seeking to commence exporting to Australia at a price reflecting a non-dumped fair value, so that it can properly compete in the Australian market. The interim dumping duty proposed in SEF 333 does not correctly reflect the fact that PPI has not exported consumer pineapple to Australia at dumped prices and as such, should not be penalised in the same way as non-cooperating exporters who may have previously exported goods at dumped prices.

Yours sincerely

John Bracic