MinterEllison

FOR PUBLIC RECORD

1 July 2016

BY EMAIL

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

Dear Sir/Madam

SEF 334 - Invalidity of Inquiry into the Continuation of Anti-Dumping Measures applying to Food Service Industries (FSI) Pineapple exported from Thailand.

We act for Dole Thailand Limited (DTL) and Dole Asia Holdings Pte., Ltd, suppliers of FSI pineapple from Thailand to the Australian market and interested parties in the above inquiry.

The purpose of this submission is to request that the Commissioner:

- find that his decision to conduct the above continuation inquiry under s.269ZHD(4) of the *Customs Act 1901* (Cth) (**Act**) was void *ab initio*;
- revoke that decision;[1]
- revoke the notice published under s.269ZHD(4) of the Act;
- decide under s. 269ZHD(1) of the Act to reject the application of Golden Circle Limited (GCL) referred to in Anti-Dumping Notice No. 2016/21; and
- publish an Anti-Dumping Notice announcing that the continuation inquiry purported to have been initiated on 9 March 2016 has been abandoned.

These requests are based on the following submissions:

1. The original dumping duty notice of 11 October 2001 applying, inter alia, to FSI pineapple from Thailand is invalid and in the absence of an authentic provenance there is no lawful basis for the present purported continuation inquiry.

2. Even if the original dumping duty notice is valid the purported continuation notice published on 14 October 2011 is invalid and the anti-dumping measures expired on 17 October 2011.

[1] *Acts Interpretation Act 1901*: s.33(3).

3. Even if the original dumping duty notice and the subsequent 2011 continuation notice are valid, the present purported continuation inquiry cannot proceed because:

(a) ADN 2015/136 is not a valid notice for the purposes of s.269ZHB of the Act;

(b) GCL's application does not comply with the terms of s.269ZHB and s.269ZHC; and

(c) the Commissioner's decision not to reject GCL's application fails to recognise that the application is non-compliant and the notice published by the Commissioner as a consequence of his decision fails to meet the requirement of s.269ZHD(5).

(d) the Commioner's decisions to conduct two inquiries based on one application that relates to three original dumping duty notices and to conjoin the Philippines and Thailand in each of those inquiries are inconsistent with the requirements of Part XVB of the Act

The Statutory Scheme

Before embarking on a consideration of the lawfulness of the actions over many years of the heads of the investigatory agencies and of responsible Ministers in relation to the alleged dumping of pineapple fruit in containers exported from Thailand and the Philippines, it is necessary to identify the major relevant statutory events governing original dumping inquiries and continuation inquiries.

The catalyst for an original inquiry is an application by a qualifying member of an Australian industry for a dumping duty notice and the acceptance of that application by the Commissioner. The application must identify the goods to which the applicant wishes the requested dumping duty notice to apply[2] and the acceptance, in a public notice, of the application must set out particulars of *the goods the subject of the application*[3]. During the course of an inquiry many of the powers and functions of the Commissioner such as preliminary affirmative determinations are required by the Act to be exercised *...in respect of the goods the subject of the application* ... and at the conclusion of the inquiry, the Commissioner must give the Minister a report *...in respect of the goods the subject of the application*[4].

By the time the Commissioner gives that report to the Minister the scope of the investigation, in terms of the number of exporters or specified countries, may have been reduced by the exercise of one or more of the Commissioner's powers to terminate an investigation, such powers being expressed to operate in relation to *...goods the subject of the application*[5]. However, none of the termination powers authorise any change to the description or scope of the goods that are the subject of the application.

In the ordinary course of events, the recommendations and reasons for recommendations in a report by the Commissioner in relation to the goods the subject of the application are accepted

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[2] Customs Act: s.269TC(1)
[3] s.269TC(4)
[4] s.269TEA(1)
[5] s.269TDA

by the Minister, who then publishes the relevant duty notice describing the goods the subject of the application and declaring that the Dumping Duty Act applies to those goods.

It is that original notice and the description of the goods the subject of the application for that notice that must be the focus of any subsequent application for and initiation of a continuation inquiry under Division 6A of Part XVB of the Act. It appears that a failure to appreciate that focus and its legal consequences has been a major cause of the entropy that has enveloped the attempts over many years by administering authorities to apply and extend anti-dumping measures to exports of pineapple in containers from the Philippines and Thailand.

The Original Dumping Duty Notice

A continuation inquiry is an inquiry into whether anti-dumping measures should be continued and anti-dumping measures are defined in s.269T as the publication of a dumping duty notice under s.269TG. The notice referred to is the original notice in which a Minister declares under s.269TG(1) and (2) of the Act that s.8 of the *Customs Tariff (Anti-Dumping) Act 1975* (***Dumping Duty Act***) applies to the goods. An essential element underpinning the operation of Division 6A of Part XVB of the Act is the existence of a valid original dumping duty notice. We maintain on two grounds that in relation to pineapple in containers from Thailand there is no such notice in existence.

Ground 1 relates to the form of the attached notice dated 11 October 2001, published in *Gazette No. GN 41* of 17 October 2001 and purporting to be made pursuant to s.269 TG(1) and (2) of the Act. It contains statements of findings and recommendations by the Australian Customs Service (**ACS**) concerning a dumping investigation relating to the exportation from Thailand of Pineapple Juice Concentrate and Pineapple Fruit and the authorship of the publication is ascribed to a National Manager of the Trade Measures Branch of the ACS. The notice does claim that the Minister had accepted the recommendations of Customs and that he had declared that s.8 of the *Dumping Duty Act* applies to past exports of the goods and future exports of like goods but no evidence in support of these claims is contained in the notice or elsewhere in the public record.

We submit that the notice published by the ACS is not a valid notice for the purpose of applying s.8 of the Dumping Duty Act to the goods. S.269TG(1) and (2) of the Act clearly require the Minister to declare by public notice that the section applies and at the time of the publication of the notice the then s. 269ZI equally clearly required the Minister in giving that public notice to publish it in the *Gazette*. He did not do so and consequently there are no current valid anti-dumping measures applying to pineapple in containers from Thailand that can be extended by a purported continuation inquiry.

Ground 2 involves consideration of the terms of the original application made by GCL on 8 January 2001 and accepted by Customs on 29 January 2001. The goods described in the application and ACDN No. 2001/09 were pineapple juice concentrate and Consumer and FSI pineapple in containers exported from Indonesia and Thailand. After initiation Customs terminated the investigation in relation to pineapple juice concentrate from Malaysia on the ground of negligible volumes of exports.

In Trade Measures Branch Report No. 41 (REP 41) Customs found that the goods identified by GCL were three separate goods on the ground that pineapple juice concentrate and Consumer and FSI pineapple were sold into three separate markets[6]. Based on this finding Customs recommended that anti-dumping measures be imposed on a differentiated basis in respect of each of the three goods categories[7] and the Minister accepted the recommendation.

The recommendation of Customs and the acceptance of it by the Minister are clearly inconsistent with the judgement of Nicholas J in *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* 2013 FCA 870 (**Panasia**). That judgement considered the question of consolidated and differentiated notices at length and concluded that the Act only authorised the publication of a consolidated notice applying to the goods as defined by the applicant and accepted by the investigating authority. In reaching this conclusion Nicholas J cited with approval the following view of the WTO Appellate Body in "United States – Measures Relating to Zeroing and Sunset Reviews" issued 9 January 2007 (WT/DS322/AB/R):

> A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."

While the identification of separate markets for subsets of the goods identified as the goods under consideration is an unexceptional practice designed to facilitate an analysis of material injury factors[8], it does not detract in any way from the principle generally adhered to by the Commission and its predecessor authorities that it is not open to the investigating authority to redefine the goods under consideration during the course of the investigation.[9]

However, in 2001 following the single application for dumping duties made by GCL, the acceptance by Customs of the the goods description in that application and the making of a

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[6] REP 41: p.20
[7] ibid., p.117-118
[8] Report No.198 – Dumping of Hot Rolled Plate Steel: section 8.8
[9] e.g. EPR 198: item 89; and Report No. 190 – Dumping of Zinc Coated (Galvanised) Steel and Aluminium Zinc Coated Steel: section 6.8

single report the original notice purportedly published by the Minister declared, unlawfully, that differentiated variable factors applied to three subsets of the goods the subject of the application.

The 2011 Inquiry

The defective provenance of the current inquiry relating to Thailand was further corrupted on 10 January 2011 when GCL lodged a single application for continuation of the three dumping duty notices purportedly applying to *Pineapple Fruit (Consumer and FSI)* from both the Philippines and Thailand On 4 February 2011 in ACDN 2011/05 Customs announced acceptance of the application and the commencement of a single continuation inquiry (No. 171). The inquiry proceeded on a singular basis (eg, the questionnaire form covered both subsets of the goods from both countries) until 25 May 2011 when SEFs 171a and 171b were published in relation to exports from the Philippines of FSI and Consumer Pineapple respectively. This was followed by publication of SEFs 171c and 171d applying respectively to exports of FSI and Consumer pineapple from Thailand. Later in the year four final reports were published including Report No. 171c in relation to FSI pineapple exported from Thailand. The Minister's decision to accept the recommendations in that report and continue the operation of the invalid original notice for a further five years was published in Gazette No. S158 of 14 October 2011. Three similar continuation notices applying to FSI and Consumer pineapple from the Philippines and Consumer pineapple from Thailand were also published. No reason was given in the electronic record or relevant public notices as to how or why the CEO, without authority, purported to transform one continuation application followed by one initiated continuation inquiry into four reports and four sets of recommendations. Similarly no explanation was provided for the Minister's action in making four separate continuation findings in relation to a single application that involved three purported original dumping duty notices. Perhaps the rationale for the action was a mistaken belief that the stain of invalidity dating back ten years could be washed away by an *ex post facto* change of process.

We turn now to the grounds on which the current inquiry must be abandoned even if valid original dumping duty notices and valid continuation notices had been published.

ADN 2015/136

We submit that the ADN of 2 December 2015 inviting interested persons to apply for continuation of anti-dumping measures purportedly applying to exports of Consumer and FSI pineapple from Thailand was invalid.

Firstly, contrary to the requirement of s.269ZHB (1) the ADN fails to identify the original dumping duty notice that is due to expire and merely refers to later continuation notices.
A second fundamental error is the conflation in one notice of different anti-dumping measures. Section 269ZHB(1)(a) clearly requires separate notifications for each set of anti-dumping

measures, not an omnibus invitation purporting to cover all extant original notices. The final error in the notice is the purported identification of four sets of anti-dumping measures when in fact there are only three purported original notices.

GCL's Application

The application, reflecting the errors in the ADN 2015/136, does not identify any of the relevant original dumping duty notices and does not, as required in the form approved by the Commissioner, provide the specified date of the measures. Thus the application does not comply with s.269ZHC and consequently, applying s.269ZHD(2)(a) of the Act, the Commissioner should have rejected the application.

Contrary to the provisions of Division 6A of Part XVB of the Act, the application for continuation also purports to relate to multiple anti-dumping measures when it is clear from the terms of s.269ZHB and s.269ZHC that a separate application for continuation must be lodged in respect of each original notice. Furthermore, the application seeks to combine goods from Thailand and the Philippines in the requested inquiry despite the fact that they are not conjoined in any of the original dumping duty notices.

This requirement to submit multiple applications is not simply a matter of form as can be seen from the claims in the application that collectively the expiration of the three anti-dumping measures might lead to a continuation or recurrence of material injury. Such claims are clearly in breach of the requirement of s.269ZHD(2)(b) that in a continuation inquiry the substantive issue is whether the expiry of an individual dumping duty notice might result in the continuation or recurrence of injury. The cumulative approach adopted by the applicant finds no support in the Act, particularly in circumstances where the original notices for Thailand and the Philippines were published five years apart.[10] This fundamental error is repeated by the Commission in SEF 334.

ADN No.2016/21

The manifold flaws in GCL's application are sufficient in themselves to require the Commissioner to reverse his decision to accept an application which does not comply with s.269ZHC. In addition, however, in ADN No.2016/21 the Commissioner relies on one initiation notice to launch a continuation inquiry into three separate purported original notices when the terms of s.269ZHD require that only separate inquiries relating to different anti-dumping measures can be undertaken. Having initiated a single inquiry, however, it is revealed later in the ADN, without explanation, that even though only one application has been lodged the Commission will conduct separate investigations into Consumer and FSI pineapple. In an apparent attempt to confer credibility on this unlawful action the separate 'inquiries' are labelled Nos. 333 and 334 respectively but reference to the electronic record reveals that not only are

[10] *Customs Act*: s.269TAE(2C)

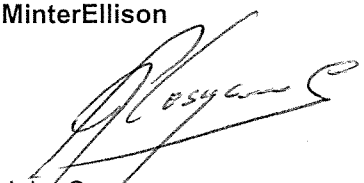
the separate investigations based on the same application but the initial assessment of that application by officers of the Commission is the subject of only one Consideration Report containing one set of recommendations to the Commissioner and which, in relation to evaluation of material injury considerations fails to differentiate between exports from the two countries of origin. This bifurcation of the goods the subject of GCL's application has been maintained by the publication on 27 June 2016 of SEFs 333 and 334 relating to Consumer and FSI pineapple respectively.

The conduct of the current unlawful continuation inquiry repeats the errors of the past by failing to recognise that the basis for a continuation inquiry is the original dumping duty notice and not periodic announcements of the purported extension of such notices, by failing to examine the provenance of the various purported anti-dumping measures and by failing to appreciate that 'measures' in the phrase 'anti-dumping measures' is a singular collective noun referring to a single dumping or countervailing duty notice. The consequences of these failures are the assumptions of the administering authority that it is lawful to conflate separate original notices, to conjoin exporting countries that have never been specified in the same original notice and to deconstruct goods the subject of an application as a basis for conducting multiple inquiries and making multiple recommendations. Such assumptions are manifestly contrary to the relevant provisions of the Act that require, for the purpose of extending the application of a single dumping duty notice, a single application, a single inquiry, a single set of recommendations and a single decision by the Minister to secure or not secure, as the case maybe, the continuation of the particular dumping duty notice.

Conclusion

We submit that the Commissioner must take the necessary actions, requested above, to abandon forthwith the current continuation inquiry concerning exports of FSI pineapple.

Yours faithfully
MinterEllison



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enclosure

Commonwealth of Australia Gazette
No. GN 41, 17 October 2001

AUSTRALIAN CUSTOMS SERVICE

CUSTOMS ACT 1901 - PART XVB

NOTICE PURSUANT TO SECTION 269TG(1) AND SECTION 269TG(2)

FINDING ON PINEAPPLE JUICE CONCENTRATE EXPORTED FROM THAILAND AND PINEAPPLE FRUIT EXPORTED FROM INDONESIA AND THAILAND

The Australian Customs Service has completed its investigation into the alleged dumping of;

- pineapple juice concentrate exported from Thailand;
- pineapple fruit prepared or preserved in containers greater than 1 litre (fruit FSI) exported from Indonesia and Thailand; and
- pineapple fruit prepared or preserved in containers less than 1 litre (fruit consumer) exported to Australia from Thailand.

In Report No. 41 for pineapple juice concentrate exported from Thailand, Customs concluded that:

- exports of the goods from Thailand have been at dumped prices;
- the Australian industry has suffered injury;
- dumped imports from Thailand have caused material injury to the Australian industry producing like goods; and
- material injury would continue to be caused to the Australian industry if the goods continue to be exported to Australia at dumped prices.

For pineapple fruit in containers greater than 1 litre exported from Indonesia and Thailand, Customs has concluded that:

- exports of the goods from Indonesia are not dumped;
- exports of the goods from Thailand, excluding **Malee** Sampran Public Co Ltd, have been at dumped prices;
- the Australian industry has suffered injury;
- dumped imports from Thailand have caused material injury to the Australian industry producing like goods; and
- material injury would continue to be caused to the Australian industry if the goods continue to be exported to Australia at dumped prices.

For pineapple fruit in containers less than 1 litre exported from Thailand, Customs has concluded that:

- exports of the goods from Thailand have been at dumped prices;
- the Australian industry has suffered injury;
- dumped imports from Thailand have caused material injury to the Australian industry producing like goods; and
- material injury would continue to be caused to the Australian industry if the goods continue to be exported to Australia at dumped prices.

Customs recommended that anti-dumping action be taken against the goods exported from Thailand, excluding those exports by **Malee** Sampran Public Co Ltd.

The Minister accepts the recommendations from Customs and declares that **s.** 8 of the *Customs Tariff (Anti-Dumping) Act 1975* applies to:

- pineapple juice concentrate and like goods exported to Australia from Thailand after 28 August 2001 but before publication of this notice;
- pineapple fruit prepared or preserved in containers greater than 1 litre and like goods exported to Australia from Thailand after 4 October 2001 but before publication of this notice;
- pineapple fruit prepared or preserved in containers less than **1 litre** and like goods exported to Australia from Thailand after 4 October 2001 but before publication of this notice;
- like goods exported to Australia from Thailand after 11 October 2001.

Customs will not publicise normal values, export prices and non-injurious prices as they may reveal confidential details of the companies concerned. Individual companies have been advised of the measures applicable **to** their transactions.

Customs final finding report contained a preliminary affirmative determination under section 269TD of the Customs Act *1901* by the delegate of the Chief Executive Officer of Customs in respect of exports from Thailand of pineapple fruit prepared or preserved in containers greater than 1 litre and pineapple fruit prepared or preserved in containers less than 1 litre.

However, Customs has not implementated that determination, instead implementing the decision of the Minister to impose interim dumping duties on those exports.

Report No. 41 contains the reasons for Customs recommendation and is available on request from the Trade Measures Office Management, Australian Customs Service, Canberra, telephone (02) 6275 6057 or on the internet at: http://www.customs.gov.au/notices/reports/report41.pdf

Interested parties may request a review of the Minister's decision by lodging an application for review with the Trade Measures Review Officer in the approved form and manner within 30 days of the publication of this notice. The legislation relating to the review of ministerial decisions is set out in the Customs Act commencing at s. 269ZZA.

Enquiries about this notice may be directed to Dave Clark (02) 6275 6044.

SUE PITMAN
National Manager
Trade Measures Branch
CANBERRA ACT

11 October 2001

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