MinterEllison
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MINTER ELLISON BUILDING
25 NATIONAL CIRCUIT FORREST
GPO BOX 369 CANBERRA ACT 2601 AUSTRALIA
DX 5601 CANBERRA www.minterellison.com
TELEPHONE +61 2 6225 3000 FACSIM LE +61 2 6225 1000

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Mr John Bracic
Director, Operations 1
International Trade Remedies Branch
Australian Customs & Border Protection Service
5 Constitution Avenue
CANBERRA ACT 2600

BY EMAIL – itrops1@customs.gov.au

Dear Mr Bracic

Review of Anti-Dumping Measures - FSI Pineapple from Thailand - Statement of Essential Facts (SEF) No. 196.

Note: An asterix symbol next to a deletion indicates a confidential product number.

1. Introduction

On behalf of our clients Dole Thailand Limited (**DTL**), Thai-American Food Company (**TAF**) and Dole Packaged Foods Asia (**DPFA**) [collectively **Dole**], we wish to respond to the above SEF. The primary focus of this submission is the amount of profit to be included in the constructed normal value of two of the six products – [redacted]*- exported to Australia by our client during the investigation period. Before addressing that issue, however, there are threshold questions to be determined.

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2. Threshold Issues

A. The Sufficiency Test

The sufficiency test for [redacted]* involved a comparison with a domestic sale of [redacted]*. That sale, however, was not <u>in the ordinary course of trade</u> for reasons set out below and consequently there were no relevant sales that could form the basis for the ascertainment of a normal value under section 269(TAC)(1) of the *Customs Act 1901* (Cth) (**Act**).

Even if the sole domestic sale of [redacted]* could be regarded as relevant the sufficiency test was flawed. In establishing normal values for the two exported products referred to above Customs has recognised, correctly, that they are identical products except for the carrying medium and have identical costs but then proceeded to conduct separate sufficiency tests that resulted in the absurdity of different normal values for identical products. Furthermore Customs did not undertake a proper or fair comparison as the sales of the export products, almost all of which occurred in one quarter, were compared with the volume of domestic sales across the whole investigation period. The proper comparison envisaged by section 269TAC(14) and countenanced by section 269TACB(2(aa) is clearly of volumes of like goods sold in different markets in a similar period of time.

We submit therefore that on either of the grounds enumerated above the normal value(s) of [redacted]* must be ascertained under section 269TAC(2).

B. The FSI Market

Ascertaining the correct legal basis for calculating a normal value to compare with export prices of [redacted]* requires an understanding of the markets for FSI pineapple in which Dole operates. Firstly it is necessary to clarify the issue of product differences. In section 7.4 of the DTL visit report Customs claims that:

> *We discussed the differences between the different pineapple cuts (slices, chunks, cubes, pizza cut bits, pieces). In section C of its EQR DTL attributes no significant cost difference to different cuts. We are satisfied that the different cuts are comparable without adjustment.*

There is no such statement in section C of the EQR and the claim by Customs is incompatible with its own conclusion in the same section of the report that ...*we consider that these* [types of cuts] *are appropriate factors on which to match the domestic and export models* ... as well as the

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cost information verified by Customs that demonstrates substantial differences in production costs between some types of cuts.

DTL's production of FSI pineapple is destined for [redacted] [**number**] main markets – [redacted] [**description of markets**]

Most FSI products fall into two broad categories – premium products consisting of slices, chunks, cubes and tidbits on the one hand and products frequently described as pizza cut bits or pineapple pieces designed for the budget pizza market. The former are generally high cost/low volume/high margin products and the latter are uniformly low cost/high volume/low margin products.

Apart from one critical element in a constructed normal value to be considered below, Customs has taken account of these different categories when matching domestic and export models.

The products designed for the budget pizza market are [redacted]*. The first is sold to a variety of export markets including Australia and the second is sold exclusively to Australia. [redacted]* is a large volume export product to markets other than Australia and while there has been one small sale of [redacted]* for home consumption in Thailand since production commenced [redacted] it was not in the ordinary course of trade. Thus all three products are essentially export products and there have been no relevant domestic sales.

'Ordinary course of trade' is not defined in the Act or the WTO Anti-Dumping Agreement although one example of its application is the OCOT test in section 269TAAD in relation to sales at a loss. In these circumstances the phrase must be given its common or ordinary meaning.[1] The Appellate Body of the WTO has quoted with approval the following definition:

> *...sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product.*[2]

[1] *Amalgamated Society of Engineers v Adelaide steamship Co Ltd (1920) 28 CLR at 161-2*
[2] *US – Hot Rolled Steel*, para 139

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The conditions and practices under which the sole domestic sale of [redacted]* was made are described in two statutory declarations that form confidential attachments to this submission. Those declarations establish that the volume of the domestic sale was [redacted] [**quantity**] while total export sales since the commencement of production [redacted] [**date**] to the present time have amounted to [redacted] **[quantity]**. The domestic sale was to [redacted] [**customer**], a Thai gourmet caterer, that is a regular customer for DTL's [redacted]*, a premium [redacted] **[product description]**. The circumstances of that sale were that in [redacted] [**date**] 2012 when TAF received an urgent request for supplies from [redacted] [**customer**] there was no stock of [redacted]* available and the [redacted]* was offered and accepted as a temporary alternative. The price charged for the consignment of [redacted]. [**pricing details**] [redacted] [**customer**] has never ordered [redacted]* again but has continued to purchase [redacted]*.

The domestic sale to [redacted]* [**customer**]cannot be characterised as occurring under the normal conditions and practices that had prevailed both prior to and after the date of the sale. It was outside the ordinary course of trade in terms of volume and price and the fact that there was not an equal bargaining position between the seller and buyer in circumstances where the latter was faced with an emergency. The common meaning of the qualifying adjective 'ordinary' also excludes the sale as irrelevant as it did not occur *'in the regular course of events'* or was *'normal'* or *'usual'*.[3]

3. Ascertaining Normal Value

As [redacted]* is sold exclusively to Australia the only appropriate matching products for ascertaining normal values for dumping comparisons are [redacted]*. As both have similar cost and price profiles very little significance attaches to the choice. On the basis of data available to the investigation team during the visit we propose that, if normal value is to be determined under section 269TAC(2)(d), export sales of [redacted]* should be used and if normal value is to be constructed under section 269TAC(2)(c) then cost to make and sell should be determined by reference to costs relating to [redacted]*.

[3] Black's Law Dictionary, Ninth Edition p.1209.

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A. Third Country Sales

Sales of [redacted]* to third countries are set out in Attachment **TCS1** to the EVR and the Customs team has concluded at section 7.2 of the EVR that this ... *sales data would be reliable if required for the purposes of the review inquiry*. As the TMRO has recently pointed out[4] determining normal value by reference to third country sales takes precedence over a production cost based determination unless the Minister directs that s 269TAC(2)(d) should not apply. This issue is not addressed at any stage in the SEF and the omission presumably reflects the frequently repeated statement by Customs that it has a [unexplained] 'preference' for not using third country sales as a basis for normal value. This 'preference' is not based on any apparent interpretation of the legislation and most probably reflects the observation of experts in the field that, when faced with a choice of using either third country sales or constructed values, administering authorities will use ...*which ever one drives up the dumping margin*[5].

In the present matter we submit that in view of the acknowledged availability of reliable third country sales data and the fact that there are no relevant domestic sales of matching products Customs should recommend that the Minister direct that section 269TAC(2)(d) applies and that normal value should be calculated by reference to export sales of [redacted]* to an 'appropriate' third country.

Of the [redacted] other countries to which the product is exported we contend that in terms of OCOT compliance and broadly comparable volumes, sales to [redacted] [**country**] are the 'appropriate' choice in terms of s 269TAC(2)(d). Those sales have been extracted from Attachment **TCS1** to the EVR and have already been provided to the investigation team. We submit that the normal value for the goods like to [redacted]* exported to Australia should be based on those sales without a requirement for any adjustments.

B. Constructed Cost plus Profit

In the event that the Minister does not direct that normal value for [redacted]* should be ascertained under section 269TAC(2)(d) we now turn to a consideration of the proper principles to be applied in determining a normal value under section 269TAC(2)(c).

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[4] TMRO Report – Hollow Structural Sections: paras 123 - 125

[5] Durling & Nicely 2002, *Understanding the WTO Anti-Dumping Agreement*, Cameron & May, London, p.35

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The paragraph requires the Minister to determine and then sum three amounts relating to [redacted]* – production cost, selling and administration cost and profit.

(i) Production Cost

The paragraph stipulates that the actual production cost of [redacted]* must be used. Customs has determined that amount correctly.

(ii) Administrative, selling and general costs

The paragraph requires the adoption of an hypothesis – namely what would have been the costs associated with a sale of [redacted]* if it had been sold for home consumption in the ordinary course of trade in the country of export. Customs determined the costs correctly in accordance with the hypothesis.

(iii) Profit

The paragraph requires that the determination of profit is made by the adoption of the same hypothesis and by reference to the same hypothetical sale as Customs used correctly in determining administrative, selling and general costs. The correct process therefore was to ascertain the profit that Dole would seek on the same hypothetical sale of [redacted]* on the Thai domestic market. Article 2.2 of the ADA requires that the determined amount must be 'reasonable'.

Instead Customs claimed to determine the hypothetical profit by reference to *...the level of profit achieved by DTL in domestic sales of all FSI pineapple product.* The draft visit report does not identify what legislative provision was claimed to support this determination but clearly it does not reflect the requirements of section 269TAC(2)(c)(ii). Neither that provision nor, significantly, Customs Regulation 181A(2) and the chapeau to Article 2.2.2 of the ADA limit the identification of the appropriate amount of profit to a consideration of the actual profit achieved on domestic sales of all the goods under consideration. The absence of any such limitation is of course an essential part of the statutory scheme because in part the provisions are designed to deal with situations in which there are simply no domestic sales. In such cases consideration of profits achieved by the producer on export sales is the first available option.

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In addition to failing to comply with the imperatives of *fair comparison* and *properly comparable* in the Anti-Dumping Agreement and the Customs Act respectively, the selection of product profit margins that do not include any sales in the ordinary course of trade of comparable products to [redacted]* in comparable volumes highlights the failure of the investigation team to properly apply the statutory hypothesis. Compliance with that hypothesis in the present matter requires consideration of what profit Dole would seek on domestic sales of [redacted]* in comparable volumes to exports of [redacted]* to Australia. The only material relevant to providing an answer to that question is the amount of profit achieved on export sales in the ordinary course of trade of [redacted]* to markets other than Australia. Our calculation of margins for that product, forwarded to Customs by email of 7 May 2013 and derived from the material presented to and verified by Customs, are [redacted]% if sales in Thailand to export traders are included and [redacted]% if such sales are excluded. ***We submit that the profit margin to be added to the cost to make and sell*** [redacted]* [after section 269TAC(9) adjustments] ***should be no greater than*** [redacted]***%***

That outcome is confirmed by careful analysis of the interaction between relevant statutory provisions and Customs Regulation 181A. The transition from adopting the statutory hypothesis to identifying a principle to underpin the ascertainment of a reasonable profit is provided for in the regulation which sets out a primary calculation method and three secondary non-hierarchical methods. The transition also covers the identification of the sale(s) to be considered in applying the terms of the regulation. Section 269TAC(2)(c)(ii) concludes with the phrase ...*the profit on that sale.* 'That sale', correctly identified by Customs as a sale of [redacted],* is the sale that must be assessed according to the terms of the Regulation as provided for in section 269TAC(5B). As there are no domestic sales of [redacted]* in the ordinary course of trade the primary method in the regulation requires the Minister to work out the amount of profit by reference to export sales of [redacted]* in the ordinary course of trade. Applying that methodology confirms that the appropriate profit margin is about [redacted]%.

Even if the flawed approach by the investigation team involving consideration of average profits achieved on all domestic sales is adopted the resulting amount of profit is not that contended for by Customs. The primary method in the regulation involves using... *data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade.* [Emphasis added]. Customs has identified DTL as the exporter and producer and details of relevant sales by DTL were provided to Customs as an email attachment on 7 May

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2013. The attachment reveals that DTL's overall profitability on domestic sales during the investigation period was minus [redacted]%. However about [redacted]% of sales by DTL were non-OCOT sales and the overall margin achieved on the remaining profitable sales was [redacted]%. ***Even on this flawed approach we submit, therefore, that it is 'reasonably possible' to work out the amount of profit by using the production and sales data provided to and verified by Customs and that the Minister must use that level of profit in calculating a constructed normal value.***

Although there is no lawful reason to look beyond the mandatory application of the primary criterion we make the following observations in relation to the application of the secondary criteria.

Regulation 181A(3)(a) requires the identification of the actual amounts realised by DTL in the domestic market for the same general category of goods, a phrase that a WTO Panel[6] has interpreted to permit a narrower rather than a broader approach to goods identification. The identification process is not limited specifically to OCOT sales under the sub-regulation but the preferred interpretation of this delegated legislation is that the requirement of OCOT sales in the primary legislation should prevail. Consequently on the basis of the calculations set out above it is again a margin of [redacted]% that should be added to the CTMS.

The application of regulation 181A(3)(b) requires the identification of at least two other exporters or producers who are selling like goods on the domestic market; - see *EC –Bed Linen* (Appellate Body). Tipco stated in its review application that it does not sell domestically and the visit reports for SAICO and the Natural Fruit Company both concluded that the companies did not sell domestically. This appears to leave only KFC as a possible other seller on the Thai domestic market and even if that is the case it is insufficient to identify a 'weighted average' of profits realised by other exporters for the purpose of calculating a profit for DTL. Consequently this provision provides no basis for an assessment of a notional profit margin for DTL.

Regulation 181A(3)(c) & (4) provide for the use of any other reasonable method, having regard to all relevant information, but limited to an amount of profit that does not exceed that achieved by other exporters on sales in Thailand. (This criterion does not exclude consideration of profits made in export sales or sales to export traders). We have already drawn attention above to the relevance of the imperatives of *fair comparison* and *properly comparable* in calculating an

[6] Thailand – H-Beams, paras. 7.112 – 7.115

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amount of profit that Article 2.2 of the ADA stipulates must be 'reasonable'. Those imperatives are also paramount in informing the creation of a 'reasonable method' for the purpose of the sub-regulation as is the requirement to follow the statutory hypothesis set out in section 269TAC(2)(c)(ii).

4. Normal Values must be 'Normal'

The Appellate Body of the WTO has emphasised that a normal value must not be based on abnormally low or abnormally high prices.[7] Obviously the same principle applies to any consideration of appropriate levels of profit as an element of a constructed normal value. This principle is ignored in the SEF with Customs implicitly asserting that the normal profit on a sale of [redacted]* for the purpose of a constructed normal value should be about 400% greater than the actual average profit realised on all sales in the ordinary course of trade of that product during the investigation period.

The concept of normalcy and the related goal of normal value assessments that are 'reasonable' are also undermined by the overall findings of Customs in the SEF. There are a range of factors that will justify modest differences in determined normal values attributable to producers/exporters in competition with one another. However in circumstances where claimed dumping margins for co-operating exporters range from -12% to +22% and average profit margins from zero to [redacted]% any informed observer can only conclude that Australian Customs has got things seriously wrong.

5. Errors of Interpretation

While the SEF provides no legal rationale for the profit attributed by Customs to hypothetical sales of [redacted],* it does provide some insights into the intrinsic errors of interpretation committed by Customs when regard is had to the treatment of exporters other than Dole. It is apparent from the relevant sections of the SEF that there is an automatic assumption that the primary methods of determining profit require an assessment based only on home consumption sales in the overseas domestic market.

This assumed limitation finds no support in:

- Article 2.2 of the ADA;
- Article 2.2.2 of the ADA; or
- Customs Regulation 181A(2),

and is clearly inconsistent with one of the purposes of a constructed normal value – namely to address situations where there are no sales of like goods in the domestic market.

[7] US – Hot Rolled Steel, paras. 140-158

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What, then, is the source of assumption? The answer appears to lie in a section of the current Customs Manual[8] that begins promisingly enough:

> *Profit is ascertained in each case so as to obtain the best estimate possible of a fair market price in the domestic market of the country of export.*

Regrettably this admirable statement of the purpose of the profit ascertainment process is immediately followed by an unsupported segue into identifying profits realised solely in home market sales. The only apparent explanation for this egregious error is the false belief that the assumption set out in section 269TAC(2)(c)(ii) requires consideration of profit to be limited to sales in the domestic market of the country of export..This ignores the fact that the statutory provision is merely establishing an hypothesis which in the present matter can be expressed as – *what would be the profit component of a fair market price for* [redacted]* *if it was sold for home consumption in Thailand*?

As neither that product nor products of the same general category are so sold regard must be had to levels of profit achieved in export sales of those products. As already observed there is not a scintilla of evidence to suggest that if the opportunity arose for Dole to sell [redacted] *on the domestic market in quantities comparable to export volumes that it would seek any greater amount of profit than is currently achieved on export sales.

Yours sincerely
MINTER ELLISON

John Cosgrave
Director, Trade Measures

Contact:: John Cosgrave Direct phone: +61 2 6225 3781 Fax: +61 2 6225 1781
E.mail: john.cosgrave@minterellison.com

[8] Dumping & Subsidy Manual – August 2012, p.39