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

Expiry review of FSI 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 334 (SEF 334).

Lack of transparency and procedural fairness

PPI wishes to firstly express its disappointment with the lack of proper explanation and reasoning relevant to the determination of PPI's costs and the costs of other cooperating exporters. SEF 334 is critically deficient in this respect and undoubtedly falls well short of the standard expected of a preliminary report upon which interested parties are then expected to respond.

As the Commission's own Dumping and Subsidy Manual explains, the SEF '*sets out the essential facts on which the Commissioner proposes to base recommendations to the Minister. It shows the main conclusions and recommendations as they are known at that point.*' The Dumping and Subsidy Manual goes on to add that '*[t]he SEF documents findings relevant to the type of investigation undertaken and addresses issues raised by interested parties during investigations.* Finally, the Dumping and Subsidy Manual explains that with respect to a review of measures, the SEF will '*set out methods of determining normal value and export price*;'.

In PPI's view, SEF 334 fails to meet any of the stated objectives of the SEF preliminary report and instead, avoids informing interested parties of the Commission's approach or methodology to determining exporter's costs of production. Given the importance of the determination of costs in light of the Commission's preference for constructing normal values, PPI considers that it is prevented from properly defending its interests in this matter as it has no understanding of the Commission's considerations or its reasoning for not rely on exporter's records in determining costs of production.

The lack of procedural fairness in this case is further evident given that PPI had written to the Commission by way of email sent on 16 June 2016, expressing its concerns about the lack of explanation in PPI's visit report surrounding the Commission's determination of costs and its methodology for determining profit. In

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response, the Commission confirmed that *'discussions around market competitiveness and the relationship between CTMS and market competitiveness will be addressed in the SEF.'* This clearly is not the case.

By email on 1 July 2016, PPI again wrote to the Commission seeking clarification and confirmation whether all cooperating exporters had provided costs as requested on a net realisable value basis and whether the Commission had determined the costs for these other exporters on that same net realisable basis. The Commission advised in its reply that *'the same methodology for calculating CTMS (on a Net Realisable Value basis) has been required for all exporters in line with previous cases and continuations.'*

This statement appears to be at odds with the statements in the Commission's visit reports for the other cooperating exporters. In the Kuiburi Fruit Canning Co., Ltd report, the Commission states:

In its response to the exporter questionnaire, Kuiburi provided quarterly cost to make and sell (CTMS) data for FSI pineapple processed during the inquiry period (Confidential Appendix 2). This cost data was provided separately for the Australian and domestic markets, and separately for each product. The verification team verified the completeness and relevance of Kuiburi's CTMS data by reconciling it to audited financial statements in accordance with ADN 2016/30.

In the Siam Agro-Food Industry Public Company Ltd (SAICO) visit report, the Commission states:

The assessment team was able to reconcile the main CTMS line items to the management accounts for completeness, noting that the total cost to make and sell reconciled to the management accounts with an immaterial variance.

The report also summarises the constructed normal value by identifying the addition of *'SAICO's actual cost to make and sell in relation to export sales.'*

In the Dole Thailand Ltd visit report, the Commission states:

The assessment team notes that the CTMS spreadsheet provided by DTL as part of its exporter questionnaire response shows only unit costs. By multiplying the unit CTMS by the annual volume, the assessment team was able to reconcile the CTMS to the financial accounts within a small margin. On this basis, the assessment team considers that the CTMS allocated to FSI pineapples is complete and relevant.

It appears apparent to PPI from a review of these verification reports that the cooperating exporter's cost to make and sell data was able to be reconciled to each company's financial accounting records, which suggests that the costs in their records are already kept on a net realisable value basis, or they were presented on an actual weighted average basis with no adjustment for net realisable value.

Given PPI's concerns that the Commission's preliminary findings and explanations in response to earlier queries, did not accurately accord with the information on the public record and its understanding, PPI again sought confirmation from the Commission via email on 15 July 2016, of the approach and information relied upon in determining PPI's costs of production and the rate of profit included in its constructed normal value.

It is clear then that SEF 334 does not provide interested parties with a reasonable explanation or understanding of the Commission's preliminary findings and proposed recommendations with respect to the determination of costs pursuant to Regulation 43 of *Customs (International Obligations) Regulation 2015* (IO Regulation). To remedy this denial of procedural fairness, PPI requests the Commission to publish an

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addendum to SEF 334, properly outlining its considerations, findings and proposed recommendations, so that interested parties are able to properly make submissions on this critical issue prior to the finalisation of the recommendations.

If the Commission decides against this approach, PPI requests the Commission to clearly outline its consideration of PPI's costs of production in light of the Minister's obligations pursuant to Regulation 43 of the IO Regulation. In particular, the Commission should clearly highlight the information it had regard to in deciding that the records of PPI and other cooperating exporters did not reasonably reflect competitive market costs associated with production. Such explanation and identification of relevant information is considered vital to PPI's ability to properly seek review of any proposed decision by the Minister.

Determination of costs

Despite the lack of explanation and understanding of the Commission's decision and its reasons, PPI makes the following observations and comments surrounding the Commission's approach to determining PPI's costs of production.

Firstly, it is noted that the exporter questionnaires sent to PPI requested that costs to make and sell information be presented on a net realisable value method. There was no explanation or discussion in the questionnaire outlining the reasons for requesting that costs be presented in a manner not normally recorded in exporter's records. There was no opportunity in the questionnaire for exporters to submit their actual costs of production as they are normally recorded in the accounts.

Second, the Commission in this case appears to be of the view that the determination of costs on the basis of the alternative net realisable value method, has regularly and consistently been used to determine normal values for FSI and consumer pineapple in previous variable factor reviews and expiry review. This has been confirmed by the Commission on two occasions which advised that *'[t]he same methodology for calculating CTMS is in place for all exporters and is in line with previous cases and continuations.'*

PPI disagrees and considers the Commission's understanding of the methodology adopted in previous inquiries to be mistaken. A review of previous reports on the Commission's website shows that the Commission has never rejected and replaced costs of production on the basis of the net realisable value costing method, in any previous review conducted under Division 5 or 6A of the *Customs Act 1901* (the Act). Instead it has only been adopted in the original dumping investigation (REP 41) and PPI's accelerated review (REP 295). PPI assumes that in all other cases, the Commission relied upon the costs as kept and recorded by each exporter, whether it be on the basis of actual weighted average costs or net realisable costs.

Third, the Commission has not on any occasion during this review sought to understand PPI's actual method for reporting the costs of production for the goods under review. So there can be no doubt that PPI does not separately attribute a different cost or value to the different parts of a whole pineapple and as such, does not record different costs for the different types of pineapple cuts that it sells.

To do so would necessarily involve arbitrary assumptions around the structure of a pineapple and estimates around the value of each part of that pineapple structure. This is not the normal practice for costing of pineapple fruit products or other food products for that matter.

Instead, PPI's costs reflect the actual weighted average costs of the pineapple fruit consumed in production. That is, the unit cost of the fresh pineapple used in the production of slices, tidbits, chunks, diced and crushed are the same on any given day of production. PPI records the actual weighted average unit cost of fresh

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pineapple by dividing the total value of purchased fresh pineapple consumed in production by the total volume of fresh pineapple consumed in production.

Given that this method reflects the 'actual' costs of the pineapple fruit consumed in production and is the principal method used to cost pineapple products, it is unfair and baseless to consider this approach to be unreasonable. The Commission's determination is further weakened when compared and contrasted against the methodology adopted by the Australian industry. An earlier verification report to Golden Circle Limited confirms that PPI's approach to the use of a common average cost for pineapple fruit is utilised by the Australian industry. That report¹ states:

Golden Circle stated that the raw material for all canned pineapple products came from the single parent fruit code and that there was no yield or material pricing differential in its BOM's for the product whether it was sliced, crushed or pieces.

It is noted that for this review, the Commission concluded in its Australian industry visit report 'that Golden Circle's CTMS data is a reasonably complete, relevant and accurate reflection of the CTMS for consumer and FSI pineapple during the period 1 January 2013 to 31 December 2015.'

In PPI's view then, it is entirely irrational and unfair for the Commission to disregard PPI's costs of production as it normally keeps and records them, on the apparent basis of an unreasonable cost allocation method, when that exact same method is used by the Australian industry and was found by the Commission to provide an 'accurate reflection of the CTMS'.

Four, the Commission again made no effort during this review and did not on any occasion seek to understand or query the manner in which PPI had estimated its net realisable adjustment. For the record, the adjustment presented to the Commission was based on the differences in selling prices that it tries to achieve between the various grades of pineapple cuts. It does not reflect the actual differences in selling prices achieved between those various grades of pineapple cuts. To properly estimate PPI's costs on the alternative net realisable value method, it would require a significant amount of time and resources to quantify the 'actual' price differences between the various types of pineapple cuts and grades pineapple product. It is also important to understand that adjusting costs from actual to net realisable involves an examination of not just FSI pineapple, but would also require examining consumer pineapple, pineapple juice and mixed fruit which includes pineapple.

Fifth, it is noted that none of the Commission's visit reports to cooperating exporters refer to net realisable costs or any such adjustments.

Lastly and vitally important, the Commission's determination is clearly inconsistent with the mandatory requirements imposed on the Minister in determining costs of production, and violates the principle that costs be determined on the exporter's records where those records are in accordance with generally accepted accounting principles and reasonably reflect competitive market costs.

Given the Minister's obligation to determine the costs of production on the exporter's records, unless one of the outlined conditions are not satisfied, PPI considers that SEF 334 does not provide any justification or reasonable basis for the Minister to depart from the default and normal approach to determining costs.

Regulation 43 of the IO Regulation

Article 2.2.1.1 of the WTO Anti-Dumping Agreement (ADA) is the relevant provision that is enacted into Australia's legislation by Regulation 43 of the IO Regulation. The rules of Article 2.2.1.1 of the ADA require

¹ EPR 172, Pineapple, consumer and FSI exported from the Philippines and Thailand; No. 013, page 20.

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that the costs to be normally used in construction of normal value are to *'be calculated on the basis of records kept by the exporter or producer under investigation'*, subject to the following two conditions being satisfied:

- i) the exporter's records are in accordance with the generally accepted accounting principles of the exporting country; and
- ii) the exporter's records reasonably reflect the costs associated with the production and sales of the product under consideration.

Article 2.2.1.1 of the ADA therefore requires the investigating authority to construct a normal value by using the costs on the records of the exporter, where those records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the goods under investigation. This is supported by the Panel's view in *US – Lumber V²* which found:

Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, insofar as those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. [original emphasis]

By comparison, the two corresponding conditions outlined in the Regulation require the exporter's records:

- i) to be in accordance with generally accepted accounting principles in the country of export; and
- ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods.

For the purposes of this investigation, Article 2.2.1.1 and Regulation 43 of the IO Regulation are taken to require the same considerations and determinations.

The interpretation and application of Article 2.2.1.1 has recently been considered by a WTO Panel in *EU – Biodiesel*. In that matter, Argentina claimed that *'the EU erred by determining that the costs of the main raw material in the production of biodiesel, soybean oil and soybeans, were not reasonably reflected in the records kept by the Argentine producers under investigation because those costs were artificially lower than international prices due to the distortion created by the Argentine export tax system.'*

Argentina submitted that *'Article 2.2.1.1 of the Anti-Dumping Agreement requires an investigating authority to calculate a producer/exporter's costs of production on the basis of the records kept by the producer/exporter under investigation, provided that such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country, and reasonably reflect the costs associated with the production and sale of the product under consideration.'* [emphasis added]

In response, the EU argued that *'investigating authorities are only required to use the "costs" reflected in such records under Article 2.2.1.1 where they are "reasonable" for the production of the goods in question. Thus, where such costs are not "reasonable", Article 2.2.1.1 does not preclude investigating authorities from determining that the producer's records do not reasonably reflect those costs, regardless of the fact that they may record the costs that were actually incurred by the producer under investigation.'*

² Panel Report, *US – Softwood lumber from Canada*, WT/DS264/R, para 7.237, p 131.

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Therefore, the core of the dispute centred around whether Articles 2.2.1.1 of the ADA required investigating authorities to examine whether the records reasonably reflect the costs associated with production or whether the costs themselves were reasonable.

The Panel³ summarised Australia's third party position on this issue:

Australia submits that an investigating authority should be permitted to consider whether the costs reflected in the records of the producer/exporter are reasonable, and, where they are not, to adjust or replace them in an appropriate manner. Thus, Article 2.2.1.1 permits investigating authorities to look beyond a producer/exporter's actual records and consider whether the costs reflected therein are reasonably related to the costs of producing and selling the product. For Australia, the reasonableness of costs of inputs or raw materials would be relevant to this analysis.

In Australia's view, to disallow an authority from considering elements that were beyond the direct control of a producer/exporter would render inutile the provision in Article 2.2 of the Anti-Dumping Agreement for cost construction in circumstances of a particular market situation. Further, to limit an investigating authority's scope of analysis to factors that are endogenous to the foreign producers/exporters implies limitations in Article 2.2 that do not exist, and, moreover, contradicts the ordinary meaning of the term "particular market situation".

After carefully analysing and interpreting the ordinary meaning of the terms referred to in Article 2.2.1.1, the Panel did not find support for the interpretation by the EU and Australia, that it is the costs themselves that must be reasonable⁴:

On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in – within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred

Importantly, the Panel⁵ also highlighted some circumstances where the investigating authority is able to examine the reliability and accuracy of the costs recorded in the records:

However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated;

³ Panel report, WT/DS473/R, para 7.202, page 74.

⁴ Ibid., para 7.242, page 83.

⁵ Ibid., footnote 400, page 83.

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and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.

Applying this interpretation and standard to PPI's circumstances, it is clear that the Commission's proposed determination of costs is entirely flawed and without any reasonable basis. Given the lack of proper assessment, consideration or consultation with PPI and other cooperating exporter's, it is also clear that the Commission has failed to comply with the requirements of Regulation 43 of the IO Regulation and Article 2.2.1.1 of the ADA.

Determination of profit

Similar to the determination of costs of production, PPI considers that SEF 334 provides little understanding of the basis and methodology used by the Commission to calculate the profit used in PPI's constructed normal value. For example, SEF 334 provides no information or explanation whether the profit was calculated on the basis of cooperating exporter's domestic selling prices compared to their actual costs or the Commission's adjusted net realisable costs. Although the Commission has subsequently confirmed by email following a request for clarification, that the calculated profit '*involved a comparison of domestic selling prices with costs determined on a net realisable value*', PPI continues to have concerns that this does not accurately reflect the approach undertaken.

In addition, PPI does not consider that SEF 334 provides sufficient information and reasoning for the interested parties to properly understand and respond to the Commission's determination of profit. To that end, PPI requests that the Commission either detail and respond to the following issues in an addendum to SEF 334, or address them in sufficient detail in the final report so that PPI can properly

Firstly, was the calculation of profit on domestic sales across the relevant cooperating exporters undertaken on a consistent cost basis? That is, has the method for determining net realisable costs been consistently applied for each of the exporters and PPI. For example, if the net realisable costs have not been consistently adjusted to take account of the actual differences in selling prices between the different types and grades of pineapple cuts, then the determined average profit from those cooperating exporters with domestic sales is distorted when applied to a different cost base for PPI which had no domestic sales.

Second, SEF 334 states that '*the amount of profit was worked out under subsection 45(3)(b) of the Regulation using the weighted average of the actual amount realised by other exporters or producers from the sale of like goods in the domestic market.*' The Commission provides no explanation or understanding whether its interpretation of like goods in section 45(3)(b) was limited only to those domestic sales that were 'most' like the goods exported by PPI, or whether like goods was interpreted to mean all domestic sales that fall within the definition of like goods, irrespective of whether they were exported or not. PPI requests that the Commission confirm whether all, most like or a different subset of like goods were used to calculate the weighted average profit.

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Third, as noted in the previous point, SEF 334 highlights that profit was determined using actual amounts realised. PPI requests that the Commission confirm that the calculated profit included all losses incurred by those cooperating exporters which had made domestic sales of like goods.

Fourth, if the Commission's calculation of profit was in fact undertaken by comparing selling prices and net realisable costs of the cooperating exporters, PPI questions the validity of that profit in terms of meeting the definition of 'actual' amounts realised. The actual amounts realised by the cooperating exporters are just that – the actual amounts realised on their domestic sales of like goods. Where the costs are kept on an actual weighted average basis and not net realisable value basis, the actual amounts realised can only be determined by comparing those domestic sales with the corresponding actual costs of those like goods.

By contrast, the Commission's calculated profit which compares selling prices with adjusted net realisable costs, reflects an abstract and speculative amount that was not actually realised by those exporters. This is supported by the Appellate Body's interpretation of Article 2.2.2(ii) which is equivalent to section 45(3)(b) utilised by the Commission. The EC – Bed Linen, the Appellate Body concluded:

“Here, we note especially that Article 2.2.2(ii) refers to ‘the weighted average of the actual amounts incurred and realized by other exporters or producers’. (emphasis added) In referring to ‘the actual amounts incurred and realized’, this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase ‘actual amounts incurred and realized’ includes the SG&A actually incurred, and the profits or losses actually realized by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin.

As such, PPI requests the Commission to identify and explain how its calculated profit based on adjusted costs not normally recorded in the exporter's records, is consistent with the obligation to ensure that the rate of profit to be included in PPI's constructed normal value reflects the actual amounts realized by these other cooperating exporters.

Finally, it is noted that the Commission provides no understanding of the nature of the domestic sales made by the relevant cooperating exporters and in particular their level of trade. In the absence of such information, PPI does not consider that it is able to properly identify and claim any adjustments to its normal value which might be the direct result of a rate of profit influenced by domestic sales made at a different level of trade than PPI's exports, and to a different level of trade than those of PPI's exports.

As the Commission is aware, all of PPI's export sales were made to an intermediary agent, which then on-sold to the end-user importer in Australia. As such, PPI's exports reflect a direct sale from a manufacturer to a trading intermediary that does not take possession of the goods but simply arranges for the goods to be shipped to Australia. PPI requests that the Commission provide sufficient information which would allow PPI to reasonably determine and claim an adjustment for differences in the level of trade between its export sales and the domestic sales upon which profit was determined.

Yours sincerely

John Bracic