PUBLIC RECORD

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BY EMAIL

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Dear Director

Reinvestigation - Continuation Inquiry 571 & 572– Consumer Pineapple exported to Australia from the Philippines and Thailand (Goods) – Preliminary Reinvestigation Report

We act for Dole Philippines Inc (**DPI**), Dole Thailand Limited (**DTL**) and Dole Asia Holdings Pte. Ltd. (**DAH**) (collectively **Dole**) in relation to the above matter. We refer to the publication of the Preliminary Reinvestigation Report (**Report**) prepared over a period of almost five months and published on the Electronic Public Record (**EPR**) by the Commission on 27 May 2022 and containing an invitation to interested parties to provide submissions in response within five working days. The Report has been prepared in response to a requirement (**Request**) of the Anti- Dumping Review Panel (**Panel**) on 12 January 2022 under s269ZZL(1)(a) of the Customs Act 1901 (**Act**) to reinvestigate the following specific finding in respect of the goods from the Philippines and Thailand:

> …that there was not sufficient evidence to support a finding that material injury was likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple from those countries.

Our client's focus in this submission is the future status of the expired dumping duty notice of 10 October 2006 applying anti-dumping measures to exports of consumer pineapple from the Philippines. We strongly oppose the Commissioner's recantation on this issue.

On the subject of exports of those goods from Thailand that are the subject of a different dumping duty notice, Dole supports the Commissioner's analyses and preliminary conclusions in the Report that the expiry of the measures should be confirmed.

We also wish to raise the point at this stage that because of the Commissioner's original recommendation and the Minister's decision to allow the anti-dumping measures to expire, there was no reason for interested parties to advance additional arguments or evidence in support of conclusions that had been first revealed in the Statement of Essential Facts published on 19 July 2021 or to contest proposals on variable factors that were destined to be unused. In the latter regard Dole has not had any opportunity to contest the dumping margin claimed by the Commission and consequently rejects arguments based on that alleged margin put forward in the Report.

Resiling from the original decision would also give rise to anomalous situations not envisaged by Division 9 of Part XVB of the Act as well as potential breaches of natural justice and would conflict with the established principle, elaborated below, that administrative decisions should be

based on the latest available information and evidence.

We note that the Commissioner in REP 571 purported to establish an "inquiry period" of 1 January 2020 to 31 December 2020 for the purpose of the continuation investigation. However there is no provision in the Act for the specification of either a dumping or injury inquiry period in a continuation investigation and given that the central responsibility of the Minister is to determine the likelihood or otherwise of certain future events clearly it is the latest available information that must form part of the materials on which his decision is based. Judicial authority for this principle is cited later in this submission and the exclusion of material relating to the period after 31 December 2020 would obviously be a breach of this principle and incompatible with the obligation of the Commission and the Panel to recommend a correct or preferable decision.

Grounds

In its Request the Panel has identified three grounds advanced by Golden Circle Limited (**Golden Circle**) in support of its claim that the Commissioner's finding was not the correct or preferable decision. The Panel's consideration of those three grounds includes a critique of a number of the Commissioner's conclusions in REP 571 and support for many of the contentions of Golden Circle. In a complete about-face, the Commissioner's Report adopts the views of the Panel and neither the Panel nor the Commissioner undertake any significant consideration of the views expressed and evidence supplied by interested parties. The three grounds are, market segmentation, error of law and material injury.

Market Segmentation

In its report reversing its earlier finding that there is segmentation in the consumer canned pineapple market, the Commission continues to acknowledge that Golden Circle enjoys a price premium but then insists that the premium …*does not inoculate it from the forces of competition which frame its value proposition.* It also claims that the consequence of its previous analysis is that …*Golden Circle could achieve any price premium it demands in the market.* These types of straw man claims undermine the integrity of the Commission's conversion to support for the assertions of the Australian industry. We do not contend that Golden Circle is inoculated but we do maintain that there is no evidence of price competition causing material injury and that there is evidence of the absence of such price competition. The submission by Pavé to the ADRP, that is ignored in the Commission's assessment of market segmentation, is merely referenced as indicating the absence of such evidence. Such dismissive treatment ignores the very compelling, objective survey that, as Pavé claims:

> *…clearly demonstrates that there is no evidence that Pavé's prices for consumer pineapple from the Philippines to two of Australia's major retailers have any influence on prices achieved by GC in the premium segment of the market.*
>
> *The scan data shows that GC consumers occupy a different, premium segment and are highly loyal. GC has increased its retail price and still grown Unit Sales, despite out-of-stock periods. Additionally, Dole price promotions do not shift significant volume from GC.*

The relevant consideration is thus not a mere speculation that occasionally a customer may choose a lower priced imported option in preference to the Australian product but the cogent objective evidence from an independent marketing source that demonstrates that there is no significant cross elasticity of demand that might result in causing injury of a material degree..

We have already noted in our earlier submission of 4 February 2022 that the Panel has queried whether the data produced by Pavé is "relevant information" within the meaning of s269ZZK of the Act. We again draw attention to the fact that Pavé completed and submitted an importer questionnaire response to Investigation 571 that contained the pricing data

suitable for inclusion in any analysis of market segmentation by the Commissioner. We submit that the evidence provided by Pavé is relevant information for the purpose of the Panel's inquiry and the reinvestigation being conducted by the Commission.

Furthermore we point out that s269ZHF(3)(b) of the Act provides that recommendations of the Commissioner directed to the Minister may have regard to any other matter that the Commissioner considers to be relevant. The Minister is similarly unconstrained in relation to the material he may have regard to in deciding whether to continue anti-dumping measures.

Also of relevance is the observation of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45 ...*that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision, an implication that the decision is to be made on the basis of the most current material available to the decision-maker.*

This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy."

This observation was followed by Kirby J in *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [41] when expressing the general principle that ...*[W]hen making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration …*

We submit that the relevance of the material provided by Pavé is unquestionable.

The Review Panel states that it has a number of concerns with the Commissioner's original key conclusion that Golden Circle operates in its own market but its stated concerns are limited to alleged inconsistencies with previous reports and the statement by the Commissioner in REP 571 that …*imported and locally produced goods are commercially alike as they are sold to the same customers and/or compete in the same markets.*

The concern regarding previous reports is only justified if it can be established by reference to evidence that the conclusions in those reports on market segmentation were correct and that there have been no material changes to the segmentation profile. However the Commission and the Panel has simply adopted Golden Circle's assumption about the correctness of earlier findings dating back over 15 to 20 years and has ignored the significance of changes in the market over that period. In particular the decision by Golden Circle to exit the private label level due to the limited supply of raw pineapple at prices that have increased by 30% since 2016[3] has accentuated the market divide between its premium priced products and imported products from the Philippines, Thailand and other countries. Whatever the status of historical findings on market segmentation, the market in 2022 is very different to that applying prior to 2017.

The finding in REP 571/572 that Golden Circle's products and the subject imports are "like goods" is superfluous to the requirements of a continuation investigation. In any event the definition of like goods is designed to facilitate the operation of a number of provisions in Part XVB but it does not illuminate the issue of the existence of market segmentation. Concluding that goods are 'like' for specific purposes set out in the Act does not establish either that the overall market for those goods is not segmented or that all goods within the class of like goods are necessarily directly competitive.

In conclusion we do agree with the Panel's characterisation of the Commission's finding that Golden Circle operates in its own market segment as the key to its original conclusion that there is no likelihood of recurring material injury. While identifying later in this submission other factors that could be considered supportive of the Commission's finding, segmentation is undoubtedly a critical consideration. Apart from referring to findings by the Commission in

earlier inquiries, Golden Circle's response to the very extensive and compelling evidence produced by the Commission on the topic has been to simply assert unsupported denials and to claim that its inability to produce evidence of price competition is due to confidentiality issues even though the Commission and interested parties have not been impeded in accessing detailed market information.

Ironically, that conclusion is supported by the fact that Golden Circle has acknowledged, or not disputed, that there are a number of factors supporting the existence of three market segments for consumer pineapple;

- it supplies a premium product;
- it obtains substantial price premiums in the market;
- it has increased its prices steadily since 2016;
- it enjoys brand loyalty as the producer of an Australian made product;
- it has elected to sell only to the premium segment due to raw material constraints;
- it has elected to import consumer pineapple to counter raw material shortages;
- it has reduced its locally produced product range due to raw material sources
- it has not been able or willing to furnish the Commission with pricing information that demonstrates injurious price competition from exports from the Philippines..

Error of Law

Golden Circle and the Panel have both claimed that in REP 571/572 the Commission erred in law in its application of s.269ZHF(2) of the Act which is relevantly expressed in the following terms:

> *The Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless the Commissioner is satisfied that the expiration of the measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the dumping…and the material injury that the anti-dumping measure is intended to prevent.*

Golden Circle asserts that the Commission erred in law by stating that the threat of future material injury is not part of the test for the continuation of measures and the Panel appears to agree with this assertion when it states in the Request that … *it is difficult to understand how a threat of material injury from dumping in the event of the measures not being continued is not part of what is contemplated by s.269ZHF(2)*[1] and opines that the Commission possibly misunderstood the test[2].

In our view there was no misunderstanding by the Commission or error of law in its application of the test and there is no difficulty in understanding why a threat (or the likelihood of a threat) of future material injury is neither a legitimate incorporation into the ordinary meaning of the words of the subsection nor is it a warranted additional or substitute test criterion.

If Parliament had intended to expand or modify the test in that manner it could have done so. It did not. Similarly, it could have extended the application of the threat concept in s269TAE beyond s269TG and s269TJ to Division 6A of the Act. It did not.

Golden Circle cited judicial authority allegedly supporting the addition of threat of injury as a test criterion but the Court in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd* [2010] FCAFC 86 observed at [105] that it is not self-evident that s269TAE(2B) is part of the s269ZHF(2) test and at [108] avoided expressing any concluded view on the issue.

Significantly however, the Court at [107] did isolate consideration of the matters listed in

s269TAE(2A) as being potentially relevant in the application of s269ZHF(2) in particular cases while not extending the same observation to s269TAE(2B). The distinction is that while consideration of the other injury factors listed in s269TAE(2A) may illuminate the causation requirement embedded in s269ZHF(2), the terms of that subsection clearly require the establishment of the likelihood of actual future injury, not merely the likelihood at the time of the Minister's decision that there is a threat of future injury. We note in passing that the requirements for a determination of a threat of material injury in Article 3.7 of the *Anti-Dumping Agreement* include proceeding on the basis of facts rather than allegation, conjecture or remote possibility. The potential for conflict with a test that requires the formulation of a forward looking, necessarily speculative hypothesis is obvious.

The significant level of satisfaction that the statutory test requires of the Commissioner would be seriously eroded by the substitution of a subjective threat test that could be enlivened by a mere apprehension that an undesirable likelihood may arise in the future. The potential for conflicting standards could obviously arise in a quite feasible hypothetical situation where the Commissioner or Minister is satisfied that due to expiry of anti-dumping measures a threat of future material injury is likely but actual future material injury is less than likely.

Furthermore, the approach by Golden Circle assumes that a legitimate application of s269ZHF(2) would be for the Commissioner to consider whether the expiration of measures would lead, or would be likely to lead, to a continuation or recurrence of the threat of material injury that the anti-dumping measure is intended to prevent. The terms of the relevant dumping duty notices applying to consumer pineapple from the Philippines imposed dumping duties to prevent actual material injury, not to prevent a threat of such injury. Consequently, on this ground also, the issue of threat of injury is not a relevant consideration in the current review.

We submit there is no lawful basis when applying the continuation test to introduce or substitute a requirement that the Commissioner be satisfied that the threat, rather than the actuality, of material injury is a likely consequence of the expiry of measures. As stated above If Parliament had intended to expand or modify the test in that manner it could have done so. It did not.

We also take this opportunity to comment again on the Panel's concern with the observations of the Commissioner that on the one hand his assessment of the likelihood of recurrence of material injury …*included consideration of the potential for future injury if the dumping duties were allowed to expire* …and on the other that …*[t]here is no legal basis on which future possible conditions or hypothetical injury are relevant to an assessment of material injury in a continuation inquiry*. While the Commissioner's unfortunately expressed and incorrect proposition requires an unqualified retraction, the view expressed by the Panel and the WTO Appellate Body that the question of continuation of measures requires a forward looking test is otherwise consistently shared by the Commission and the Commissioner in the Customs Manual and numerous reports including REP 571/572 where it is stated at page 47 that .

> *The commission notes that its assessment of the likelihood of certain events occurring and their anticipated effect, as is required in a continuation inquiry, necessarily requires an assessment of a hypothetical situation. The Anti-Dumping Review Panel has supported this view, noting that the commission must consider what will happen in the future should a certain event, being the expiry of the measures, occur. However, the Commissioner's conclusions and recommendation must nevertheless be based on facts.*

This statement by the Commission makes it clear that, as a matter of policy, it adopted a forward looking perspective when applying the statutory test for continuation although as

noted above that perspective was compromised by the unauthorized introduction of an "inquiry period" that appears to have ended on 31 October 2020, thus excluding consideration being given to the latest available information relevant to the issue of the expiry of measures..

Material Injury

An integral element of the continuation test in s269ZHF(2) is the issue of causation – whether a continuation or recurrence of dumping is likely to lead to a recurrence of material injury. Both Golden Circle and the Panel have queried how the Commission could have concluded in REP 571 that there is no evidence of pricing pressure caused by cheaper imports after acknowledging the presence of price undercutting, price suppression and reduced profit and profitability and have challenged the Commission's well supported original finding that there was no material injury caused by dumping in the investigation period. The Commission itself has now aligned itself with those claims by asserting that there is no market segmentation and that factors such as price suppression and undercutting and substitutability have caused and will cause future material injury.

In relation to substitutability it is not an issue of whether the potential exists for a customer to switch from a premium product to one from another market segment. The question of relevance to the existence of causation is whether in fact substitution has occurred or is likely to occur. No evidence of actual substitution has been produced by Golden Circle and the Commission appears to have relied on applying economic theory to circumstances that do not exist in the real world.

Similarly, in relation to such issues as price suppression and undercutting, the assertions of Golden Circle and the Commission are limited to claims of the existence of the factors without addressing whether they are the result of dumping or whether they have or are likely to contribute to any material injury.

The absence of supporting data, including the lack of any substitute for the Commission's original retail selling price analysis, contrasts with the availability of the timely analysis accompanying the Pavé submission that demonstrates the existence of substantial market segmentation and the absence of price competition.

Supply

In practical terms raw material supply for Golden Circle's canned pineapple operation is limited to Australian grown fresh pineapple. Raw material imports are not an option. Consequently the reliability and sufficiency of raw material supply has been critically influenced by a range of developments in the fresh fruit industry over the past twenty years during which anti-dumping measures have been in operation.

In 2000 there were 327 pineapple growers producing about 125,000 tonnes of fresh fruit annually. Of that production 100,000 tonnes was sold to Golden Circle for processing into canned pineapple and pineapple juice with the balance going to the domestic fresh fruit market.[1]

By 2020 there were only approximately 75 growers producing about 70,000 tonnes with Golden Circle's purchases reduced to just over 20,000 tonnes. In the same year the farm gate value of fresh fruit was $1,140 per tonne and the average price for processed fruit was $366 per tonne.[2]

It is clear that over a 20 year period the focus of pineapple production in Australia has shifted dramatically to the fresh market with increased plantings of improved fresh fruit varieties and the attraction of substantially improved revenues. This inexorable trend is partly and grudgingly

[1] https://www.ishs.org/ishs-article/529_4
[2] https://www.planthealthaustralia.com.au/industries/pineapples/

conceded by the Commission at page 24 of REP571/572 in the following terms:

> *The commission considers Golden Circle may continue to experience supply constraints due to the availability of raw pineapples. In these circumstances, the commission considers that the expiration of the measures will not necessarily have injurious effects on Australian industry's sales volumes. However, the commission also notes that should supply constraints ease, the presence of dumped goods in the market could impact Golden Circle's ability to increase market share.*

Contrary to that statement the clearly correct, preferable and frank conclusions to be drawn from the industry data are:

- Golden Circle will continue to experience supply constraints and the severity of those constraints is likely to increase
- the expiration of measures will not have injurious effects on Golden Circle's sales volumes
- Golden Circle's market share is limited by supply constraints, not by the presence of exports from the Philippines.
- Because of declining throughput, Golden Circle's cost of production must be under constant pressure which must exacerbate the company's long term underlying lack of competitiveness.

Causation

Thus it is supply constraints that are overwhelmingly the dominant factor governing Golden Circle's economic performance. Volume and market share related injury cannot be attributed to exports from the Philippines and price related injury is excluded by the protection afforded Golden Circle by market segmentation. In addition, even if segmentation is discounted, it is the increasing cost pressures caused by supply constraints added to the industry's underlying uncompetitiveness that are the cause of any price related injury.

The assertions by Golden Circle and the Commission that the local industry's economic performance is sensitive to pricing of imports and that such performance is not shielded by market segmentation constitute an hypothesis that is demolished by the scan data provided by Pavé. That hypothesis implies that:

- If Golden Circle's RRPs increase, volume should move to Dole
- If Golden Circle is out of stock, volume should move to Dole
- If Dole has a price discount and at the same time Golden Circles prices are steady, volume should move to Dole

In the real world none of these cause/effect scenarios has occurred to any material degree.

It only remains to identify factors other than dumped imports that could be expected to contribute to any injury being suffered or likely to be suffered by Golden Circle. Those factors include the volumes and prices of consumer pineapple exported from countries not subject to measures, a static overall market (excluding the impact of Covid), imports of the goods by Golden Circle and the company's withdrawal from the market of a number of product lines

Also contributing to material injury is the fact, established by the Commission in the previous continuation inquiry into exports of consumer pineapple from the Philippines andThailand, that the non- injurious price was higher than the normal valuesfor all exports from the Philippines and Thailand. That finding remains in place today. This confirms that Golden Circle is not competitive with undumped exports and that factors other than price undercutting, price suppression and impaired profitability are contributing to any material injury being suffered by

the Australian industry.

We submit that the cumulation of these other factors make it likely that even if Golden Circle did suffer future injury following the expiry of measures, it is most unlikely that a material degree of such injury can be attributed to any dumping of the subject goods.

Conclusion

We request that the Commission report the following results of its reinvestigation to the Panel:

- the Commission did not err in law in its application of s.269ZHF(2) of the Act in stating that the threat of future material injury is not part of the test for the continuation of the measures.
- the Commission correctly found that the market for Golden Circle's Australian product constituted a separate segment in which exports of canned pineapple by Dole from the Philippines had no material influence on prices.
- there was not sufficient evidence to support a finding that material injury was likely to be caused by future imports at dumped prices upon the expiration of the anti-dumping measures then applying to imports of consumer pineapple from the Philippines and Thailand.

Yours faithfully
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