

MinterEllison

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BY EMAIL

The Director
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GPO Box 2013
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Dear Director

Continuation Inquiries - SEF 573 and 574– Food Service and Industrial (FSI) Pineapple exported to Australia from Thailand and the Philippines (Goods)

We act for Dole Thailand Limited (**DTL**) and Dole Philippines Inc (**DPI**) respectively in relation to the above matters. We refer to the above Statement of Essential Facts (**SEF**) and wish to record our support for the Commissioner's proposed recommendation to the Minister that the dumping duty notices expire on the specified expiry days.

The evidence based conclusion on which that recommendation is based is nuanced. The Commissioner accepts that dumping will continue and acknowledges the possibility that such dumping will materially injure the Australian industry but on the basis of the evidence before him the Commissioner is not satisfied that such an outcome is likely. In our view having regard to the Commission's reasoned statement of the material findings of facts and the comprehensive analysis of the probative evidence which supports those findings, an even stronger criterion than that set out s269ZHF(2) of the *Customs Act 1901 (Act)* could readily be satisfied. The SEF in fact supports a reasonable satisfaction that expiry of the measures would not lead or would not be likely to lead to a recurrence of material injury..

The criterion for the continuation of anti-dumping measures involves an assessment of the likelihood of future exports the subject of the dumping duty notice causing future material injury to the Australian industry. The assessment must inform the formation by the Commissioner of a degree of satisfaction concerning the effect of those exports on the economic performance of the Australian industry. Obviously the degree of difficulty in establishing that such an effect is likely is significantly increased in circumstances in which there is evidence of other factors that are likely to influence that economic performance. In the present case the significant presence of exports from other countries, exempt exports from Thailand and the continuing success of Golden Circle in achieving premium prices are examples of such factors. So too are the shortages of raw materials for processing as Australian growers have increasingly shifted their focus to the more lucrative fresh fruit market.

We also note the dramatic reduction in recent years of exports of FSI pineapple subject to measures leading to a current market share of less than 5% and the entrenched position of exempt exports and exports from other countries . We submit that this situation is incompatible



with any suggestion that in future years exports formerly subject to measures are likely to cause material injury to the Australian industry.

We also wish to point out that in making his decision on the expiration of measures under s269ZHG of the Act the Minister is authorised to consider not only the Commissioner's report but also ...*any other information he considers relevant*. Such 'other information' certainly includes Australia's obligations under the WTO Anti-Dumping Agreement (**ADA**). Subject to one qualification, Article 11(3) of the ADA mandates the termination of dumping measures not later than five years after inception. That is the rule, not the exception.¹ The temporary nature of anti-dumping measures is further reinforced by Article 11(1) and by the demanding criterion that must be met to justify activation of the exception.

The requests in the present matter to extend the application of measures to twenty-five years in the case of Thailand and twenty years in the case of the Philippines are, in our view, clearly inconsistent with Australia's international obligations and should be rejected by the Minister.

Yours faithfully
MinterEllison



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¹ Appellate Body Reports, US – Oil Country Tubular Goods Sunset Reviews, para 178.