MinterEllison

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BY EMAIL

The Director
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Dear Director

Reinvestigation - Continuation Inquiry 573 & 574– Food Service Industry (FSI) Pineapple exported to Australia from the Philippines and Thailand (Goods)

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 File Note published on the Electronic Record (**EPR)** by the Commission on 20 January 2022 inviting interested parties to provide submissions relating to the above reinvestigation required by the Anti-Dumping Review Panel (**Panel**) on 12 January 2022. We also draw the Commission's attention to our earlier submissions to both the Commission and the Panel relating to REP 573/574 and Inquiry 2021/145 respectively.

The Panel described the Commission's finding to be reinvestigated in the following terms:

> …the Commissioner was not satisfied that the expiration of the anti-dumping measures applicable to FSI pineapple exported to Australia from the Philippines and Thailand would lead, or would be likely to lead, to a continuation or recurrence of, the dumping and the material injury the anti-dumping measures are intended to prevent.

The Panel identified two 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. We deal in the first instance with the assertion that the Commission erred in law in its application of s.269ZHF(2) of the Act.

Error of Law

Subsection ZHF(2) 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.
The Commission's application of the test set out in the subsection has been challenged by both Golden Circle and the Panel. The former 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. The Panel appears to agree with this assertion when it states in the requirement for reinvestigation that … *it is difficult to understand how a threat of material injury from dumping in*

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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 is 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 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 cites 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 of the future threat of injury.

The significant level of satisfaction that the statutory test requires of the Commissioner would be seriously eroded by the substitution of a threat test that could be enlivened by a mere apprehension that an unwanted or undesirable likelihood may arise in the future. The potential for conflicting standards could obviously arise in a quite feasible hypothetical situation where the Commissioner 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 relevant dumping duty notices applying to FSI pineapple from the Philippines and Thailand imposed dumping duties based on actual material injury, not 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 as the anti-dumping measures were not intended to prevent a threat of injury.

We submit there is no lawful basis when applying the 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 on the Panel's concern with the observation of the Commissioner reproduced at paragraph 19 of its Request 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 reference to *hypothetical injury* may be justified if it is characterising a threat of injury*, future possible conditions* are of course an intrinsic element in the formation of the satisfaction concerning likelihood required by the statutory test. Apart from this paragraph, the view

[1] Request: para 18
[2] Ibid; para 24

expressed by the Panel and the WTO Appellate Body that the question of continuation of measures requires a forward looking test is 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.

While the Commission gave extensive consideration to past and current market conditions and pricing factors 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.

The Continuation Test

An integral element of the continuation test is the issue of causation – whether a continuation or recurrence of dumping is likely to lead to a continuation or recurrence of material injury. In view of the Commission's well supported conclusion that there is no evidence that the local industry has faced price competition from, or conceded sales volumes to, imports from the subject countries[3], the application of the test only requires consideration of the likelihood of recurrence of material injury.

The most compelling data rebutting any allegation of the likelihood of a recurrence of material injury is that relating to the miniscule presence in the market of exports from the Philippines or Thailand and the complementary data demonstrating the strength in the market of exports from countries or exporters not subject to anti-dumping measures.

In addition there are a number of other factors relevant to the application of the statutory test that are impacting the economic performance of the Australian industry. We urge the Commission to take the opportunity of this reinvestigation to identify those factors and their influence on the causation issue. They include:

- Golden Circle's lack of competitiveness;[4]
- volumes and prices of undumped like goods.
- contractions in demand;
- fresh pineapple availability constraints;
- increased cost of fresh pineapple; and
- imports of like goods by Golden Circle

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 available evidence did not confirm that, in the absence of measures, the Australian industry will likely to incur material injury from future exports of FSI pineapple from the Philippines and Thailand

[3] REP 573/574: p.48
[4] REP 334: p.52

Yours faithfully
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