Australian Government
Anti-Dumping Review Panel

ADRP REPORT No. 50

Food Service and Industrial (FSI) Pineapple exported from the Kingdom of Thailand

March 2017

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Introduction

1. Kuiburi Fruit Canning Co., Ltd (Kuiburi) has applied pursuant to section 269ZZC of the *Customs Act 1901* (the Act) for review of a decision of the Assistant Minister for Industry, Innovation and Science (the Parliamentary Secretary[1]) to secure the continuation of the anti-dumping measures applicable to Food Service and Industrial (FSI) Pineapple[2] exported from the Kingdom of Thailand (Thailand).

2. The application for review was accepted and notice of the proposed review, as required by section 269ZZI of the Act, was published on 18 November 2016. The Senior Member of the Review Panel has directed in writing, pursuant to section 269ZYA of the Act, that the Review Panel for the purpose of this review be constituted by me.

Background to the application

3. On 2 December 2015, in accordance with subsection 269ZHB(1) of the Act, a notice (ADN number 2015/136) was published on the Anti-Dumping Commission's (ADC) website inviting certain persons to apply to the Commissioner for the continuation of anti-dumping measures on FSI Pineapple exported to Australia from Thailand.

4. On 29 January 2016 Golden Circle Ltd (Golden Circle), the sole manufacturer of FSI Pineapple in Australia, lodged an application for the continuation of the measures, which was within the applicable legislative time frame.

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[1] The Minister for Industry, Innovation and Science has delegated responsibility with respect to anti-dumping matters to the Parliamentary Secretary, and accordingly, the Parliamentary Secretary is the relevant decision-maker. On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science.

[2] The goods the subject of the measures are: *Pineapple prepared or preserved in containers exceeding one litre (food-service and industrial pineapple, that is FSI Pineapple).*

5. The application was accepted by the Anti-Dumping Commissioner (the Commissioner) and a continuation inquiry was initiated on 9 March 2016.[3] The inquiry period for the investigation was 1 January 2015 to 31 December 2015.

6. Pursuant to subsection 269ZHF(2) of the Act, in order to recommend that the Minister take steps to secure the continuation of the anti-dumping measures, the Commissioner must be satisfied that the expiration of the anti-dumping measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measures is intended to prevent.

7. The ADC recommended that the Parliamentary Secretary take steps to secure the continuation of the anti-dumping measures applicable to FSI Pineapple exported from Thailand. The Minister accepted the recommendation and on 12 September 2016 declared under section 269ZHG(1)(b) of the Act that he had decided to secure the continuation of the anti-dumping measures currently applying to FSI Pinepple from Thailand.[4]

8. Kuiburi is affected by the decision of the Minister as it manufactures FSI Pineapple exported from Thailand.

Conduct of the Review

9. In accordance with section 269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the decision under review, or revoke it and substitute a new specified decision. In undertaking the Review, section 269ZZ of the Act requires the Review Panel to determine a matter required to be determined by the Minister, in like manner, as if it was

[3] ADN No. 2016/21.

[4] ADN No. 2016/84.

the Minister having regard to the considerations to which the Minister would be required to have regard, if the Minister was determining the matter.

10. In carrying out its function, the Review Panel is not to have regard to any information other than to *"relevant information"* as that expression is defined in section 269ZZK(6) of the Act. For the purpose of the review, the relevant information is that to which the ADC had, or was required to have, regard when making the findings set out in the report to the Minister.[5] In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that is contained in the application for review, and any submissions received under section 269ZZJ of the Act.[6]

11. If a conference is held under section 269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference, to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. A conference was held with representatives of the ADC on 29 November 2016 for the purpose of clarifying information contained within the relevant ADC Report (REP 334). A non-confidential summary of the conference was placed on the public record.

12. Unless otherwise indicated, in conducting this Review, I have had regard to the application (including documents submitted with the application or referenced in the application) and the submissions received pursuant to section 269ZZJ of the Act, insofar as they contained conclusions based on relevant information. I have had regard to the ADC Report, and information relevant to the review which was referenced in the ADC Report. This latter information included relevant submissions made to the ADC by interested parties.I have also had regard to information obtained at the conference held pursuant to section 269ZZHA of the Act.

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[5] Section 269ZZK(6)(ca).

[6] Section 269ZZK(4).

13. The ADC also provided relevant documents containing confidential information. These documents and the correspondence with the ADC concerning them was not made publicly available.

14. Submissions were received within the 30 days required by section 269ZZJ of the Act from the Commissioner and Golden Circle.

15. On 9 January 2017, pursuant to section 269ZZL of the Act, I requested the ADC to reinvestigate the findings in REP 334 as to the reasons why there is a likelihood that Kuiburi would resume dumping, and thereby contribute to the material injury sustained by the local industry, notwithstanding the establishment of a negative dumping margin over the investigation period.

16. On 22 February 2017 I received the ADC's reinvestigation report, REP 389.

Grounds for Review

17. The grounds relied upon by Kuiburi challenge a number of key findings by the ADC. Kuiburi contends that these findings were not correct or preferable. The findings which Kuiburri seeks to have reviewed are:
    i. the ADC's decision to apply a rate of profit to a constructed normal value was incorrect;
    ii. the ADC's acceptance of a profit rate applicable to another market to arrive at an unsuppressed selling price (USP) and non-injurious price (and IP) is flawed;
    iii. the recurrence of material injury from dumped imported goods fails to recognise the fact that the average selling price of Kuiburi sales to Australia increased approximately 25% in 2015 over 2014; and
    iv. the decision to recommend the continuation of measures for twenty year section.

Consideration of Grounds

18. In its application, Kuiburi claimed that the ADC incorrectly determined certain domestic sales of like goods (pineapple puree) not to be in the Ordinary Course of Trade (OCOT), and therefore excluded them from the calculation of the Weighted Average Cost to Make and Sell (WACTMS). It asserts that had such sales been included, a negative dumping margin would have been generated.

19. The basis of Kuiburi's claim is that the ADC incorrectly calculated the WACTMS of the like goods for the purposes of determining whether the like goods were likely to have recovered the cost of such goods, within a reasonable period for the purposes of subsection 269TAAD(1)(b) of the Act.

20. The WACTMS calculated by the ADC differs from the WACTMS calculated by Kuiburi because the ADC calculated a WACTMS for each model based on the total sales volume for each model over the inquiry period. However, Kuiburi asserts that the WACTMS should have been based on the total production volume over the inquiry period.

21. In support of its claim, Kuiburi relied upon the following quotation from the *Dumping and Subsidy Manual* (the Manual) to demonstrate that the ADC did not follow its stated procedure:

> *"If, under Step 1, it was found that the sales at a loss were in substantial quantities, another calculation is required. For those sales found to be sold at a loss and in substantial quantities, the selling price of each individual sale is compared to the weighted average cost to make and sell (WACTMS) calculated for that model during the investigation period.*
>
> *If the loss making price is less than the WACTMS that sales price is held to have failed to provide for cost recovery. The Commission has an administrative rule that 'a reasonable period' referred to in the sections of the Act cited above is normally the investigation period.*

The outcome of Steps 1 and Step 2 is that where the sales at a loss are equal to or greater than 20% the only sales that may be included in the determination of normal value are those sales that are initially profitable and those loss making sales that provide for recovery of costs."

22. Prior to the telephone conference conducted on 29 November 2016, the ADC produced a spreadsheet demonstrating the application of its WACTMS methodology. In the course of the conference, the ADC made reference to the spreadsheet and demonstrated that the calculation of the WACTMS is consistent with the method of calculation used in the quoted example from the Manual.

23. However, in its submission the ADC indicated that:
    - *"having considered which of the two methods is correct and preferable, the Commission considers that the WACTMS should have been calculated as the amount in Kuiburi's application for review for the following reasons:*
        - The Commission's practice is to calculate the quarterly CTMS [cost to make and sell] of each model in this manner for the purpose of assessing whether domestic sales are profitable and therefore in the ordinary course of trade. This is how the quarterly CTMS was calculated for Kuiburi. Therefore, it follows that the WACTMS should be consistent with this calculation;
        - Kuiburi sold a substantial volume of like goods in a quarter where the production volume was the lowest and the unit CTMS was highest, therefore by weighting the CTMS for the inquiry period in the Commission's original calculations based on sales volumes this had the unintended effect of increasing the WACTMS; and
        - this method best reflects the provisions of the Act, the Regulations and generally accepted accounting practicesection".

24. In its submission the ADC attached a confidential attachment containing a revised dumping margin and ascertained normal value. The attachment reveals a negative dumping margin for the inquiry period. I accept that the

attachment correctly determines the relevant normal value and dumping margin.

25. Section 269ZHF(2) of the Act relevantly provides "*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 would 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*".

26. Section 269ZHF(2) of the Act gives effect to obligations within Article 11 of the World Trade Organization (WTO) Anti-Dumping Agreement. Consistent with Article 11, section 269ZHF of the Act adopts a *"likelihood" or "likely"* test. A WTO panel decision has held that *"likelihood"* or *"likely"* carries with it the ordinary meaning of *"probable"* and that *"a likely standard amounts to the view that where a recurrence of dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force".*[7]

27. Undertaking a continuation inquiry requires a prospective examination of the likelihood of future dumping and material injury. In its reinvestigation report (REP 389) the ADC referred to the decision of the Federal Court in *Siam Polyethylene Co Ltd v Minister for Home Affairs (No.2),*[8] where the Court held that the word *"likely"* in section 269ZHF(2) of the Act was taken to mean *"more probable than not".*

28. In REP 389 the ADC concluded that *"Kuiburi is likely to continue exporting FSI pineapple to Australia in substantial volumes and it is also possible that*

[7] US – DRAMS, WT/DS99/R, 29 January 1999.

[8] [2009] FCA 388 at [49].

Kuiburi could increase its export volumes to Australia in the future should anti-dumping measures be removed".

29. However, the ADC reviewed Kuiburi's export volumes, export strategy, production capacity and export prices and concluded that Kuiburi does not appear to be pursuing an aggressive export pricing strategy to Australia and has not shown a propensity to dump FSI pineapple into the Australian market in recent years. The ADC indicated Kuiburi's past export conduct is a reliable indicator of its likely future conduct, and that this does not support a finding that dumping is likely to recur, in the sense that it is more probable than not.

30. Therefore, on balance, the ADC concluded it would not be satisfied that the expiration of the anti-dumping measures in relation to Kuiburi would lead, or would be likely to lead, to a continuation of, or recurrence of, the dumping that the anti-dumping measures are intended to prevent. As such, the ADC would not be satisfied that Kuiburi would contribute to the material injury (from dumped goods) sustained by the local industry. I agree with the new findings of the Commissioner made as a result of the re-investigation. In light of this conclusion I determine that the decision of the Parliamentary Secretary, on 12 September 2016, to continue the measures against Kuiburi was not correct and preferable.

31. Given this outcome, it is unnecessary for me to address the remaining three grounds of appeal outlined in Kuiburi's application for review.

Recommendations/Conclusion

32. I recommend that the Parliamentary Secretary revoke his decision, made on 13 September 2016, to publish a notice under section 269ZHG(1)(b) of the Act securing the continuation of anti-dumping measures applying to FSI Pineapple exported to Australia as they apply to Kuiburi and substitute a decision not to secure the continuation of those anti-dumping measures.

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Paul O’Connor

Panel Member

Anti-Dumping Review Panel

Date: 14 March 2017