

PUBLIC



Australian Government
Anti-Dumping Review Panel

ADRP Report No. 145

Food Service and Industrial Pineapple exported from
the Republic of the Philippines and the Kingdom of
Thailand

July 2022

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Abbreviations

Term	Meaning
Act	<i>Customs Act 1901</i>
ADC	Anti-Dumping Commission
ADC Report	The report published by the ADC in September 2021 in relation to FSI pineapple exported from the Philippines and Thailand
Commissioner	Commissioner of the Anti-Dumping Commission
Dole Group	Dole Asia Holdings and other associated entities
FSI	Food service and industrial
Golden Circle	Golden Circle Limited
Goods	Food service and industrial pineapple
Inquiry period	1 January 2020 to 31 December 2020
Manual	Dumping and Subsidy Manual November 2018
Minister	Minister for Industry, Science and Technology (now the Minister for Industry and Science)
Philippines	Republic of the Philippines
Reinvestigation Report	The report provided by the Commissioner to the Review Panel on 24 June 2022 pursuant to s.269ZZL(2) of the Act as result of the reinvestigation
Review Panel	Anti-Dumping Review Panel
Reviewable Decision	The decision of the Minister under s.269ZHG(1)(a) of the Act made on 6 October 2021
Thailand	Kingdom of Thailand

Summary

1. This is a review of the decision of the Minister for Industry, Science and Technology (the Minister) pursuant to s.269ZHG(1)(a) of the *Customs Act 1901* (the Act) not to secure the continuation of anti-dumping measures applying to food service and industrial (FSI) pineapple exported from the Republic of the Philippines (the Philippines) and the Kingdom of Thailand (Thailand) (the Reviewable Decision). The applicant for the review was Golden Circle Limited (Golden Circle).
2. For the reasons set out in this report, I recommend that the Reviewable Decision be affirmed.

Introduction

3. Golden Circle applied under s.269ZZC of the Act for a review of the Reviewable Decision.
4. The application was accepted and notice of the proposed review, as required by s.269ZZI, was published on 15 November 2021.
5. As Senior Member of the Anti-Dumping Review Panel (Review Panel), I directed in writing that the Review Panel be constituted by me in accordance with s.269ZYA of the Act.

Background

6. Anti-dumping measures on at least some of the FSI pineapple exported to Australia from Thailand had been in place since 2001. The anti-dumping measures with respect to exports of FSI pineapple from the Philippines were initially imposed in 2006. The measures were due to expire in October and November 2021, respectively. On 4 January 2021, Golden Circle applied for a continuation of the measures.
7. The application by Golden Circle was not rejected and an inquiry into the continuation of the measures was initiated by the Commissioner of the Anti-Dumping Commission (the Commissioner) on 25 January 2021. The inquiry period for the continuation inquiry was 1 January 2020 to 31 December 2020 (the inquiry period).

8. The Anti-Dumping Commissioner (ADC) published a Statement of Essential Facts on 19 July 2021 and in September 2021 the Commissioner made a report to the Minister on the findings and recommendations made as a result of the continuation inquiry (the ADC Report).¹ The ADC Report stated that the Commissioner was not satisfied that the expiration of the anti-dumping measures in respect of exports of FSI pineapple from the Philippines and Thailand would lead, or would be likely to lead, to a continuation of, or a recurrence of, dumping and the material injury that the anti-dumping measures were intended to prevent. Based on the findings in the ADC Report, the Commissioner recommended to the Minister that the measures expire on the specified dates.
9. The Minister accepted the findings and recommendations of the Commissioner in the ADC Report and on 6 October 2021 issued a notice which declared that pursuant to s.269ZHG(1)(a) of the Act, the Minister had decided not to secure the continuation of the anti-dumping measures then applying to FSI pineapple exported to Australia from Thailand and the Philippines. As a result, those measures expired on 17 October 2021 and 13 November 2021, respectively.

Conduct of the Review

10. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Minister either affirm the reviewable decision or revoke it and substitute a new specified decision. In undertaking the review s.269ZZ(1) of the Act requires the Review Panel to determine a matter required to be determined by the Minister, in like manner as if it were the Minister, and having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
11. Subject to certain exceptions,² the Review Panel is not to have regard to any information other than relevant information pursuant to s.269ZZK, i.e., information to which the ADC had regard or ought to have had regard when making its findings and recommendations to the Minister. The Review Panel must only have regard to relevant information and any conclusions based on the relevant information that are

¹ REP 573 & 574.

² See s.269ZZK(4).

contained in the application for review or in any submissions received pursuant to s.269ZZJ.³

12. The Review Panel received the following submissions pursuant to s.269ZZJ of the Act:
 - Dole Asia Holdings and other associated entities (Dole Group);
 - The Department of Agriculture of the Philippines; and
 - ADC.
13. On 12 January 2022, pursuant to s.269ZZL of the Act, I required the Commissioner to reinvestigate certain findings in the ADC Report. I required the Commissioner to report the result of the reinvestigation by 12 April 2022. The Commissioner sought and was granted two extensions of time and the report was provided to the Review Panel on 24 June 2022 (the Reinvestigation Report).
14. If a conference is held under s.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. No conferences were held during the review.
15. In conducting this review, I have had regard to the application for review and documents submitted with the application and to submissions received pursuant to s.269ZZJ of the Act insofar as they contained relevant information or conclusions based on relevant information. I have also had regard to the ADC Report and information referenced in the ADC Report. As required by s.269ZZK(4A) of the Act, I have had regard to the Reinvestigation Report.

Grounds of Review

16. The grounds of review relied upon by the applicant, which the Review Panel accepted, are as follows:
 - The available evidence confirmed that, in the absence of measures, the Australian industry will likely incur material injury from future exports of

³ See above.

FSI pineapple from the Philippines and Thailand as the Australian growers of pineapple and Golden Circle embark on an increase in production strategy.

- The ADC erred 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.

17. I deal with each of these grounds below. Before doing so, however, it is useful to consider the relevant findings by the ADC in the ADC Report which formed the basis for the Commissioner's recommendation to the Minister under s.269ZHF(1) of the Act.

The Commissioner's findings

18. The above grounds relate to the principal question which the Commissioner must address in a continuation inquiry under Division 6A of Part XVB of the Act. This question is posed by s.269ZHF(2) which is relevantly 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.

19. In the ADC Report, it was stated that "the Commissioner is not... satisfied that there is sufficient evidence to support a finding that material injury is likely to be caused by future imports at dumped prices upon the expiration of the measures".⁴ The Commissioner recommended to the Minister that the Minister declare in accordance with s.269ZHG(1)(a) that he had decided not to secure the continuation of the anti-dumping measures concerned.⁵ The Minister accepted that recommendation and on 6 October 2021 made a declaration in those terms.⁶

⁴ REP 573 & 574, section 7.8 at page 49.

⁵ As above, section 8 at page 51.

⁶ Anti-Dumping Notice 2021/118.

20. The basis for the Commissioner's finding for the purpose of s.269ZHF(2) was stated to be the specific findings that:

- Golden Circle had been able to achieve a consistently higher sales price on its FSI pineapple, despite imports from the subject countries and other countries being at lower prices.
- Future imports from Thailand and the Philippines are likely to compete on price with each other and with imports from other countries (not subject to the measures). This competition is at a much lower price point than Golden Circle's sales price. There is insufficient evidence before the ADC indicating that the price of imported goods impacts the prices Golden Circle achieves.
- Due to a limited supply of raw pineapple (not attributable to imports from the subject countries), Golden Circle has focused on the consumer pineapple market rather than the FSI pineapple market, a factor which has led to its declining sales volume for FSI pineapple.
- There is no evidence that Golden Circle has lost sales volumes to imported products or would lose sales volumes if the measures expire, with the data indicating that Golden Circle is able to process all of the raw pineapple it acquires.⁷

Consideration of Grounds

Likelihood that material injury will recur

21. With respect to the ADC's first two points above, Golden Circle notes the evidence before the ADC that Golden Circle's selling prices and the prices for imported pineapple from the Philippines the subject of measures were at similar levels from 2018-2019. Given this evidence, Golden Circle submits it is not clear how the ADC considered that selling prices from the Philippines will compete at the lower prices.

⁷ REP 573 & 574 section 7.8 at page 49.

22. On the issue of whether or not the prices Golden Circle achieves for its product are affected by the lower priced imports, Golden Circle contends that locally produced and imported FSI pineapple are substitutable for each other. Golden Circle also contends that there is intensive price competition in the FSI segment of the market. There is no cross-reference by Golden Circle however to material before the ADC which supports this.
23. Golden Circle submits that the fact that, as a local manufacturer, it is able to achieve a premium to imported product does not mean that its prices are not influenced by lower-priced substitutable goods. It contends that there exists a cross-elasticity of pricing between locally produced and imported selling prices for FSI pineapple as the goods are wholly interchangeable with each other. Therefore, Golden Circle contends, it cannot be assumed, that because Golden Circle achieves a price premium, it is unaffected by lower dumped prices of imported goods.
24. Finally, on the issue of its prices being affected by imports of dumped product, Golden Circle notes it was unable to obtain any information from its customers but points to the available evidence confirming that selling prices of the imported goods from the Philippines have undercut the locally produced pineapple selling prices. This, it contends, is confirmation that, in the absence of measures, price-effect injury will continue.
25. On the issue of sales volumes and the last two findings by the ADC, Golden Circle notes that the ADC was unable to confirm that processors in the Philippines and Thailand had increased production capacity since the measures were introduced in 2016. In response to material that Dole Philippines had increased its production capacity in 2016, Golden Circle notes that the ADC concluded that an increase in production activity did not necessarily indicate an intention to increase export volumes to Australia, particularly given a pattern of behaviour over an extended period suggesting that the Australian market was not a key focus of exporters in the Philippines.
26. Golden Circle points to the fact that there were no co-operative exporters from the Philippines and that the Government of the Philippines had made representations to the Commissioner not to continue the measures. The latter, it is suggested by

Golden Circle indicates that the Philippines canned pineapple industry was and is interested to increase supply to the Australian market. Golden Circle also points to material from the continuation inquiry into consumer pineapple (REP 571 & 572) that cooperative producers had excess capacity.

27. The ADC had, Golden Circle contends, erred in its assessment of the available excess capacity and failed to recognise that, should the measures expire, exporters in the Philippines and Thailand would increase export volumes to Australia.
28. Golden Circle also refers to its representations to the ADC that it was recovering from prolonged drought conditions and seeking to rebuild pineapple volumes from suppliers and had in place a strategy that would deliver incremental increases from 2022 to 2027. It contends that the industry at the present time is susceptible to injury from dumping as increased volumes of dumped imports would jeopardise the growth strategy that Golden Circle and growers of Australian pineapple had embarked on.
29. Finally, Golden Circle refers to the Dumping and Subsidy Manual (the Manual) and the factors identified for consideration as to the likelihood of a recurrence of material injury. It notes the guidance that there are a range of factors for consideration and no one factor can provide decisive guidance. Golden Circle relies on a list of facts which, it contends, establish that the Australian industry will likely incur material injury from future exports of FSI pineapple as the Australian growers embark on an increase in production strategy. This list is as follows:
 - dumping from the Philippines and Thailand will continue;
 - the Philippines and Thailand are the two largest exporters of processed pineapple globally;
 - the exporters in the Philippines and Thailand have excess capacity with which to supply the Australian market;
 - all import prices from the Philippines and Thailand undercut the Australian industry's selling prices;
 - the Australian market for FSI pineapple is price sensitive;

- whilst Golden Circle’s Australian pineapple sells at a premium to imported pineapple, the two products are substitutable;
 - the Australian industry is susceptible to increased imports at dumped prices as it embarks on a recovery from a drought-affected period where volumes were constrained; and
 - that, in the absence of measures, it is likely that the exporters in the Philippines and Thailand will increase exports to Australia to retard Golden Circle’s ability to re-grow displaced volumes over the period 2022-2027 as planned.
30. In the submission made by the Commissioner to the Review Panel, the Commissioner again outlines his reasons and evidence for his recommendation to the Minister that the measures be allowed to expire. The point is again made that Golden Circle achieves a consistently higher sales price on its FSI pineapple, despite imports from the subject countries being at a lower price. Further the evidence did not establish that the price of imported FSI pineapple impacts on the prices Golden Circle achieves.
31. The Commissioner’s submission cross references the relevant section of the ADC Report for the evidence in support of the above. This evidence is set out in a graph showing the export prices of imports compared to the prices of Golden Circle’s product.⁸ However, I agree with the submission made by Golden Circle that the evidence does not, on the face of it, appear to support the conclusion made by the ADC.
32. First, the evidence does not necessarily support the statement regarding Golden Circle consistently achieving a higher sales price than imports from subject countries. Certainly, this does not apply to imports from the Philippines.
33. I also do not understand what evidence there is which supports the conclusion that the price of imported FSI pineapple does not impact Golden Circles prices. The conclusion appears to be based on the fact that (except for the imports from the Philippines) Golden Circle was able to achieve higher prices.

⁸ REP 573 & 574 section 7.7.1 Figure 20 at page 46.

34. The fact that a locally made product may be able to achieve a higher price than imported product does not, of itself, mean that those lower prices are not affecting the price the local product is able to achieve. The presence of imported product which undercuts the local product may prevent the local product from being able to increase its prices further. I note that the ADC found that Golden Circle suffered price suppression and low overall profit and profitability during the 2019- 2020 period.
35. The conclusion reached by the ADC does not seem to allow for any price elasticity. It would mean that no matter how much the margin grew between the imported product and Golden Circle's product, there would be no switch by customers to the lower priced product. I note that the ADC found that Golden Circle's FSI pineapple is sold to the same customers and/or competes in the same markets as the imported FSI pineapple and has the same end uses and/or is substitutable.⁹
36. I agree with Golden Circle's submission that it cannot be assumed that because the imported FSI pineapple has a lower price point, it does not have any impact on the prices Golden Circle achieves for its product.
37. With respect to the issue of future injury in the form of loss of sales volume which Golden Circle is likely to suffer if the measures are not continued, I note that the ADC found that imports from Thailand and the Philippines are likely to continue upon the expiration of the measures and that they will continue to be at dumped prices. However, the ADC found that there was no evidence Golden Circle would lose sales volumes if the measures expired as it was able to process all of the raw pineapple it acquired.¹⁰
38. The ADC dismissed Golden Circle's claims that the expiration of the measures would impact Golden Circle's pineapple processing plans or it rebuilding its supply of pineapples. However, at least part of the ADC's reasoning in rejecting Golden Circle's claim was the view taken that the threat of material injury is not part of the legislative test for whether or not the measures should continue. For the reasons

⁹ As above section 3.5 at page 15.

¹⁰ REP 573 & 574 section 7.8 at page 50.

given below, I am concerned that with this comment, the ADC may have misunderstood the test in s.269ZHF(2).

39. Given the concerns I have expressed above regarding the specific findings made in the ADC Report, I am not convinced that there was an adequate basis outlined in the ADC Report for the Commissioner not being satisfied that it was likely that material injury would be suffered by the Australian industry if the measures were allowed to expire. However, the analysis and material referenced in the ADC Report was not sufficient to allow me to come to a view as to whether or not the Commissioner should have been satisfied.
40. For the above reasons, I required the Commissioner pursuant to s.269ZZL of the Act to reinvestigate the finding in the ADC Report that 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 Reinvestigation

41. The Commissioner provided the Reinvestigation Report on 24 June 2022. The Reinvestigation Report reported that the Commissioner was not satisfied that in the absence of measures, the Australian industry will likely incur material injury from future exports of FSI pineapple from the Philippines and Thailand.
42. The finding with respect to exports from the Philippines was on the following basis:
 - the low volume of exports from the Philippines;
 - the market share of FSI pineapple not subject to measures was over 90% during the inquiry period and is likely to be influencing market behaviour and causing price injury to Australian industry;
 - the presence of significantly lower priced competition available in the market not subject to measures;
 - the overall substantial decrease in the Australian market for FSI pineapple;

- export prices not being set relative to existing measures;
- no evidence of the Australian industry suffering volume injury during the inquiry period;
- Golden Circle's supply constraints that are not attributable to dumping.¹¹

43. The finding made with respect to exports from Thailand was on the following basis:

- the low volume of exports from the Thai exporters subject to measures;
- the market share of FSI pineapple not subject to measures was over 90% and is likely to be influencing market behaviour and causing price injury;
- the presence of lower priced competition available in the market not subject to measures from Thailand and other countries;
- the overall substantial decrease in the Australian market for FSI pineapple;
- export prices not being set relative to existing measures;
- no evidence of Australian industry suffering volume injury during the inquiry period;
- Golden Circle's supply constraints that are not attributable to dumping.¹²

44. In conducting the reinvestigation, the ADC sought and received submissions both before and after publication of a preliminary reinvestigation report which report set out the preliminary findings made as a result of the reinvestigation. I note that Golden Circle made submissions to the ADC both before and after publication of the preliminary reinvestigation report.

45. In its submission to the ADC following publication of the preliminary reinvestigation report, Golden Circle submitted that:

¹¹ Reinvestigation Report, section 3.1.1 at page 9.

¹² As above, section 3.1.2 at page 9.

- the ADC had not sufficiently considered the Review Panel's concerns in its preliminary reinvestigation report:
 - in the absence of measures, Golden Circle will be materially injured from exports at dumped prices as it seeks to recover production capability via a planned, staged recovery to 2027;
 - it is experiencing injury from dumped exports, with significant dumping margins calculated for exporters from the Philippines and Thailand; and
 - the measures have resulted in increased pricing from the Philippines and Thailand and despite the low market share held by these exporters, these will have an influence on the market and on industry profit and profitability in the absence of measures.
46. Golden Circle also did not consider that the ADC had given regard to the effectiveness of the measures for exports of FSI pineapple from the Philippines and Thailand. With regard to this last point, I note the analysis conducted by the ADC of the impact of the measures. In particular, the ADC found that export prices from the Philippines are not set relative to the measures.¹³ A similar finding was made with respect to exports from Thailand.¹⁴
47. I have considered the report made by the ADC on its reinvestigation in light of the other points made by Golden Circle. The points made with respect to the injury from dumped exports are, I consider, answered by the analysis made by the ADC of the import volumes, market share and pricing of imported product and Australian industry prices. This analysis and the material upon which it is based support the reasons given by the ADC for its finding with respect to the exports of FSI pineapple from the Philippines and Thailand.
48. While it remains a possibility that exporters presently subject to measures could, when measures are removed, decrease their export price or increase volumes and cause material injury to the Australian industry, this is not sufficient to support the

¹³ Reinvestigation Report, section 3.6.4 at page 15.

¹⁴ As above at page 16.

measures being continued. There must be a finding that it is likely, not just possible, that this will occur.

49. Given the result of the reinvestigation, I accept that the evidence supports the finding under s.269ZHF(2) that the Commissioner was not satisfied that in the absence of measures, the Australian industry will likely incur material injury from future exports of FSI pineapple from the Philippines and Thailand. For this reason, I find that this ground of review does not establish that the Reviewable Decision was not the correct or preferable decision.

Error of Law

50. According to Golden Circle, the ADC erred in law in its application of s.269ZHF(2) of the Act. The basis for this contention is the comment in the ADC Report that the “threat of future material injury” is not part of the test for the continuation of measures. Golden Circle relies on a quote from the decision of the Full Court of the Federal Court in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd*¹⁵ as authority for the contention that the phrase “material injury” when used in s.269ZHF(2) bears the same meaning as it does in Division 1 of Part XVB of the Act (particularly s.269TAE) and those matters set out in s.269TAE(2A) (for the purpose of s.269TAE(1)) at the very least may bear upon the formation by the Commissioner of the state of satisfaction in s.269ZHF(2).
51. Golden Circle notes that s.269TAE, in turn, relevantly speaks of material injury to an Australian industry being “threatened” and refers to s.269TAE(1), (2), (2A) and (2B).
52. The ADC notes in the ADC Report 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 ADC Report refers to a previous Review Panel report as noting that the ADC 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.¹⁶

¹⁵ [2010] FCAFC 86.

¹⁶ REP 573 & 574, section 7.2 at page 38.

53. The ADC Report also refers to the Manual to note that a number of factors will be relevant in assessing the likelihood that dumping and material injury will continue or recur and that no one factor can necessarily provide decisive guidance.
54. The above approach to the test in s.269ZHF(2) seems at odds with the comment in the ADC Report that the ADC notes that the threat of future material injury is not part of the test for the continuation of measures.¹⁷ It is possible that the ADC is simply making a point that the language of s.269ZHF(2) does not refer to the “threat” of material injury in such terms. However, 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). The threat would of course have to be of material injury that is likely to occur should the measures not be continued.
55. The concern caused by the comment in the ADC Report regarding the threat of material injury is heightened by the submission made by the Commissioner to the Review Panel pursuant to s.269ZZJ on this point. In that submission the following comment is made:

*There is no legal basis on which future possible conditions or hypothetical injury are relevant to an assessment of material injury in a continuation inquiry.*¹⁸

56. A continuation inquiry does include a consideration of hypothetical injury. It is quite possible that the measures in place during the inquiry period are preventing material injury to the Australian industry. After all, that is what is intended by applying the measures and it is contemplated by s.269ZHF(2) in the reference to a recurrence of the material injury.
57. If there is a threat of material injury recurring if the measures are allowed to expire, then such a threat must be considered when conducting an inquiry into whether measures should be continued. I note that in a submission on behalf of the Dole Group, MinterEllison contends that considering whether there is a threat of material injury may involve an assessment limited to whether there is a 'possibility' of such

¹⁷ As above section 7.7 at page 49.

¹⁸ Attachment A to the Submission by the Commissioner of the Anti-Dumping Commission dated 15 December 2021 at paragraph 20.

injury. However, it notes that the statutory test requires more, it is a 'likelihood' that must be established to the satisfaction of the Minister.¹⁹

58. If the level of threat was only a possibility of injury then, I agree, it would not pass the test in s.269ZHF(2). In order to pass the test set by s.269ZHF(2), the material injury threatened would have to be likely to occur if the measures expired or it was more probable than not that the threat would eventuate.
59. There is judicial authority that a threat of material injury within the meaning of s.269TG(1) and (2) and s.269TAE(2B) may, in some circumstances, come within the type of material injury referenced in s.269ZHF(2). Subsections 269TG(1) and (2) refer to material injury which is threatened because of dumping and can be the basis for taking measures. Subsection 269TAE(2B) requires that in determining whether or not material injury is threatened to an Australian industry the Minister take into account only such changes in circumstances as would make that injury foreseeable and imminent unless measures were imposed.
60. In the first instance decision of Justice Rares in *Siam Polyethylene Co Ltd v Minister of State for Home Affairs* [No 2]²⁰, his Honour stated “a review under Div 6A of Pt XVB is not intended as a complete replication of the process under Div 3 involved in the initial imposition of anti-dumping measures. But the continuation review under Div 6A is still directed to the purpose of preventing material injury or the threat of such an injury caused by dumping.”
61. While his Honour’s decision was overturned on appeal, I do not read the judgment of the Full Court as disagreeing with this approach. Indeed, the passages relied upon by Golden Circle in the Full Court decision would appear consistent with this approach.
62. In any event, a consistent legislative intention can be inferred from the language of s.269ZHF(2), as well as that of s.269TG(1) and (2), that the Australian industry does not have to have already suffered or be suffering material injury from dumping for the measures to be applied or continued. It can be readily inferred that the legislative objective is to prevent such injury occurring or recurring.

¹⁹ Letter from MinterEllison to the Review Panel dated 15 December at page 4.

²⁰ [2009] FCA 838.

63. Accordingly, I am concerned that the ADC, in its approach to the task to be undertaken in a continuation inquiry, may have misunderstood what is required. It is not sufficient simply to consider what has occurred during the inquiry period but based on the material and evidence obtained during the inquiry to consider what is likely to occur if the measures in place are not continued. This includes a consideration of what hypothetically may happen, including any material injury which may not be occurring during the inquiry period and the threat of such injury.
64. For the above reasons, I requested the reinvestigation by the Commissioner of the finding in the ADC Report that 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 Reinvestigation

65. In the Reinvestigation Report, the ADC states that it agrees that an assessment of the likelihood, or otherwise, of the continuation or recurrence of material injury in the context of existing measures necessarily requires a future-oriented analysis and that this, by its very nature, involves consideration of the hypothetical situation that is the absence of measures.
66. The ADC also notes that the language of s.269ZHF(2) does not refer to 'threat', in contrast to the language of s.269TAE. However, the ADC agrees that the Australian industry does not have to currently be suffering material injury from dumping for the measures to be continued.
67. This last comment appears to accept implicitly that a threat of material injury from dumping, if the measures are not continued, is contemplated by s.269ZHF(2). Of course, such a threat would have to be more likely than not to eventuate to meet the test in that sub-section.
68. The language in the ADC Report did support the concern raised by Golden Circle as to whether there had been a misconstruction by the ADC of s.269ZHF(2) in the ADC Report. However, I am satisfied that the ADC did not err in its application of

the statutory test in its approach to the reinvestigation and the findings made in the Reinvestigation Report.

69. For this reason, I find that this ground of review does not support a finding that the Reviewable Decision was not the correct or preferable decision.

Recommendation

70. For the reasons given above and based on my review of the grounds in the application for review, I consider that the Reviewable Decision was the correct or preferable decision.
71. Pursuant to s.269ZZK(1)(a) of the Act I recommend that the Minister affirm the Reviewable Decision.



Joan Fitzhenry
Senior Panel Member
Anti-Dumping Review Panel
15 July 2022