



Australian Government
Anti-Dumping Review Panel

▶ REPORT OF THE ANTI-DUMPING REVIEW PANEL



WWW.ADREVIEWPANEL.GOV.AU



REVIEW OF A MINISTERIAL DECISION AS IT RELATES TO:

CONSUMER PINEAPPE EXPORTED FROM THE KINGDOM OF THAILAND.

Contents

Introduction	2
Background	3
The Revocation Review	4
The Submission	4
The Review Period	5
The Facts	5
The Circumstances Relied on by Customs	6
The Applicant's Response	8
Reinvestigation	9
Consideration	9
The Variable Factors Review	11
Recommendation Summary	12

INTRODUCTION

1. Siam Agro Foods Industry Public Company Limited (the applicant) is seeking review, pursuant to s269ZZA(1)(c) of the Customs Act [1901] (the Act), of a decision of the then Minister for Home Affairs (the Minister) not to revoke anti-dumping measures imposed on consumer pineapple it manufactures in Thailand and exports to Australia (the revocation review). Alternatively, under the same provision, the applicant seeks review of the variable factors fixed by the then Minister under the anti-dumping measures (the variable factors review). The then Minister's decisions were based on recommendations made in reports (REP195B and 195A respectively for the revocation and variable factors reviews) by the International Trade Remedies Branch of the Australian Border and Customs Protection Service (Customs). The function carried out by the latter has since this application was originally considered, been replaced by the Anti-Dumping Commission. In this review I shall continue to refer to Customs as the relevant recommendatory authority.

2. The application for review was accepted and as required by s269ZZI of the Act notification of the review was published and submissions invited from interested parties. Pursuant to s 269ZYA of the Act the Senior Member directed in writing that I be constituted to undertake the review.

3. The Thai pineapple export market consists of two separate divisions - 'consumer pineapple' and 'food and service industry pineapple' (FSI pineapple) (together referred to as pineapple products). Consumer pineapple consists of pieces, slices or crushed pineapple prepared or preserved in containers not exceeding one litre. It is predominantly sold into the export retail market where quality, rather than price, is a determinative factor. FSI pineapple consists of the same pineapple products prepared or preserved in containers exceeding one litre and is sold into the wholesale market where the predominant factor is price. 'Variable factors' is a term describing the factors (being export price, normal value and non injurious price) used in the calculations determining anti-dumping measures. The variable factors are all defined in the Act and are relevantly referred to later in these reasons.

4. The sole Australian producer of consumer pineapple (and FSI) pineapple is Golden Circle Ltd (Golden Circle). Golden Circle supports the continuation of the measures.

BACKGROUND

5. The following background is uncontroversial:

-on 8 January 2001 Golden Circle applied for the publication of anti-dumping measures (measures) for pineapple products exported to Australia from Thailand ,

-following an investigation the then Minister accepted Customs' recommendation and approved measures for Thai manufactured pineapple products,

-after five years, unless renewed, the Act provides that measures automatically lapse. On 28 September 2006, on the application of Golden Circle, the measures were renewed. Different variable factors were fixed,

-on 4 April 2008 the Federal Court of Australia set aside the measures in respect of the applicant (Thai Pineapple Canning Industry Corp Ltd¹ v Minister for Customs and Border Protection[2008] FCA 443),

-on 14 October 2011 the then Minister accepted recommendations from Customs, made after application by Golden Circle, and measures were re-imposed on the applicant's export into Australia of consumer pineapple.

- s 269ZA(2)(a) of the Customs Act permits an affected party (which term includes the applicant) after the expiration of one year from the re-imposition of the measures to apply for the measures to be reviewed. On 3 December 2012 the applicant applied for the measures to be reviewed,

-on 29 January 2013, on the request of the then Minister made under s269ZA(3) of the Act, the variable factors review was extended to include all Thai exporters of consumer pineapple. The revocation review relates only to the applicant,

- as required by s269ZD of the Act a Statement of Essential Facts (SEF) was published for each review-SEF195B for the revocation review and SEF 195A for the variable factors review. A Statement of Essential Facts sets out Customs preliminary view of the recommendation it proposes making to make to the Minister. The applicant and Golden Circle made submissions in response to the SEFs which Customs must consider when making a final recommendation to the Minister (s269ZDB(3)(iv)),

-on 10 July 2013 the then Minister accepted Customs' recommendations contained in REP 195B recommending the dismissal of the revocation application and REP 195A recommending fixing different variable factors.

¹ Subsequent to the Federal Court decision the Thai Pineapple Canning Industry Corp was taken over by and became a fully owned subsidiary of the applicant.

6. In addition to the applicant Kuiburi Fruit Canning Industry Co. Limited (KFC), Tipco Foods Public Company Limited (Tipco) and Dole Thailand Limited (Dole) among others relevantly export consumer pineapple from Thailand to Australia. As part of their investigation procedures for the fixing of variable factors, prior to making a recommendation to the then Minister, Customs officers visited and verified information provided by both companies as well as by the applicant. It is appropriate to consider the application for review in two parts –the Revocation Review and the Variable Factors Review.

THE REVOCATION REVIEW

7. It is convenient to address the revocation review first. S269ZDA(1A)(b) of the Act relevantly requires Customs to recommend to the Minister that the measures be revoked unless satisfied that the revocation:

‘.....would, or would be likely to lead to a continuation of, or recurrence of, the dumpingand the material injury that the measures are intended to prevent ‘.

There are two elements to be considered- the actual or likely recurrence of dumping and material injury. It is accepted that deciding what is ‘likely’ involves an examination of probabilities rather than possibilities. What is constituted by ‘material injury’ is established by reference to the criteria set out in s269TAE of the Act. On behalf of the applicant review is not sought with respect to likely material injury and I accept that if the finding that there is likely to be a continuation or recurrence of dumping is upheld then it will result in material injury to the Australian consumer pineapple industry.

The Submission

8. On behalf of the applicant it is claimed that the facts established in REP 195B do not provide reasonable grounds to support a conclusion that the continued imposition of measures is warranted. It is claimed that while there may be a possibility of a recurrence of dumping the facts do not support this as amounting to a probability. It is necessary to examine the facts in order to decide if this is the correct or preferred decision. More detailed aspects of the submission are discussed in the consideration section of these reasons.

The Review Period.

9. An investigation period, as required by s 269TC(4) of the Act, of 1 October 2011 to 30 September 2012 was set by Customs. However as the likelihood of a recurrence of dumping is to be considered an extended period was examined. Customs decided this should be extended into the 2014 calendar year to the time at which existing contracts entered into between the applicant and its Australian customers end. The submission is silent on this issue and I accept Customs approach as being reasonable.

The Facts.

10. It is common ground that Thailand suffered a severe drought in 2010 extending into 2011. This resulted in a shortage of supply of pineapples which, in turn, led to an increase in the Thai domestic purchase price. The producers, including the applicant, were obliged to pay the higher prices for the pineapples processed for ultimate export and sale into the Australian market.

11. At the time of the occurrence of the drought the applicant had supply contracts with its Australian customers. The price the applicant could charge its Australian customers for the supply of consumer pineapple was a term of the contracts. The contracts also provided an option for price variation, exercisable by the applicant, should circumstances change. This would permit an increase in the price charged to its Australian customers if the domestic price charged for raw pineapple was to increase.

12. While the applicant had the option of exercising the price variation clause to overcome or ameliorate any losses arising from an increase in the domestic price of pineapples it chose not to do so during the period of 2010-2011 drought. As the result it exported consumer pineapple into the Australian market at dumped prices.

13. The current investigation period commenced after the 2010/2011 drought period had ended. As a consequence the Thai domestic price of pineapples had reduced from the high prices charged during the drought.

14. After the drought ended the applicant entered into new contracts with its Australian customers in which the profit margin had been increased initially by 30% then reducing to 20%. There has not been a resumption of dumping since the introduction of the new contracts. The new contracts also provided a variation clause permitting the applicant to increase the sale price to its Australian customers including in the event of unforeseen circumstances leading to it having to pay increased prices for domestic pineapple.

The Circumstances Relied on by Customs

15. Customs maintain that a combination of factors result in an inherent price volatility of pineapple in Thailand and that it is this volatility which supports a likelihood of dumping reoccurring. The factors referred to are the cost of pineapples, tin plate for the containers, exchange rate fluctuations and demand (REP195B at paragraph 4.4). Of these ,the price paid by the applicant for domestic pineapple is acknowledged as having the greatest impact. The price paid is dependent on the weather – as is patently obvious prices are lower in a good season and conversely higher in a bad season. Factors other than the domestic cost of pineapple do not arise for consideration in the circumstances of this case.

16. In REP195B Customs acknowledge two weather related issues. The first is that severe conditions are the primary cause of price fluctuations in the domestic price of pineapple. The second is that Thailand is not currently the subject of an El Nino weather pattern –the pattern which is most likely to lead to severe drought conditions being experienced. On the evidence I accept that, while there remains the possibility of Thailand experiencing a return of severe drought conditions, that scenario in the time frame to the end of 2014 is unlikely. It is weather unpredictability other than that arising from severe conditions, which Customs claim will likely result in variations in the cost of domestic pineapple.

17. Customs maintain that if the domestic price of pineapple was to rise resulting in unprofitability that the applicant would repeat its earlier demonstrated failure to use the price variation clause to negate or ameliorate the effects of dumping into the Australian market.

18. Uncontested information presented by Customs demonstrates a rise in Thai domestic prices for pineapple in the July to September quarters each year since (and including) 2009 as the result of regularly occurring weather related shortage of supply. Customs concluded that in this period dumping into the Australian market had occurred but that this was absorbed into the profit margin so that dumping was not found when regard was had to the weighted average over a one year investigation period.

19. An examination of daily prices of pineapple in the period October 2012 to and including June 2013 show a fluctuation in price between a low of THB/kg of 3.64 in January 2013 to a high of THB/kg 5.65 in June of the same year-a more than 50% increase. Data sourced from the Thai Office of Agricultural Economics for the stated period record a sharp fall in rainfall to the south, described as the ‘main area’² and east of Thailand. Customs draws two conclusions from this data:

² Attachment 3 to REP195A-a reference which I take to be to the main pineapple growing area within Thailand.

(a) the low price in January 2013 is indicative that the usual price dip expected in September had been delayed until November, and,

(b) the peak price in July 2013 was higher than any other monthly average since the beginning of the review period of 1 October 2011 and that this is the result of a period of non severe drought experienced in February and March 2013. Customs expected the high prices to remain in place until September/October 2013.

20. Customs examined the costs provided by the applicant to make and sell the consumer pineapple for the three months of October 2012, January and May 2013. To this was added the profit margin of 11.8% (calculated in accordance with the variable factors review margin disputed by the applicant). A normal value was then determined after further adjustments to ensure a normal value comparable to an FOB export sale. This information was used to determine a positive finding of dumping for three of six products for one of the selected months. When weighted against the information provided for the other selected months, a positive finding of dumping was found for one product.

21. Customs stated that for two of the products some of the selected months were covered by the most recent price contracts negotiated with the Australian customers. Dumping was also found for one of the products when the calculations were made using the most recent prices. Based on this information Customs were satisfied that dumping was likely to recur up to September/October 2013 given the increased average price of Thai domestic pineapple commencing from June 2013.

22. Customs acknowledged a difficulty in understanding how the findings resulting from the calculations would impact on a yearly weighted average comparison of export prices with normal values but noted that 'these products' account for over 50% of the total export volume. Customs stated that it could not be satisfied that the margin the applicant applied 'will adequately compensate for the export of over 50% of goods at dumped prices for up to six months of a year period'.³ The conclusion reached was that the calculations resulted in a likelihood of dumping recurring.

23. Additionally, Customs charted the six monthly fluctuations in the cost incurred by the applicant in the purchase of domestic pineapple in the 2005-2012 period. The data demonstrated costs peaking in two periods of severe drought in 2006-2007 and 2010-2011 when it is accepted that the applicant traded at a loss. Customs assert that the data also demonstrated that the applicant's export prices during the investigation period continued to be impacted by the 2010-2011 drought. This resulted in an inability to be satisfied that the higher profit margin in the contracts with its Australian customers for the period associated with the 2010/11 drought was

³ REP 195B paragraph 4.4 at p 19

representative of the usual margin the applicant would seek to include in its future export sales to Australia.

24. Customs also considered that the data reflected characteristic volatility in the cost of pineapple to the extent that:

*'...it is difficult to point to a period of normal climate conditions where prices are stable.'*⁴

In circumstances where the cost base of pineapple is significantly impacted by climatic volatility Customs concluded that there were inherent risks in setting long term supply contracts. Customs concluded that the margin the applicant sought to achieve would not adequately account for cost fluctuations so as to ensure that the selling price to Australia would not fall below its costs to make and sell the consumer pineapple.

The Applicant's Response

25. The submission on behalf of the applicant characterizes Customs' approach as being based on the sole ground of conjecture that the volatility of pineapple costs is likely to lead to the applicant selling its product at dumped prices over the next 12 months. It rejects the conjecture on the basis that in reaction to the losses experienced as the result of the 2010-2011 severe drought, the export prices to Australia have been increased and provide a sufficient margin to account for unforeseen cost increases. As stated earlier the margin was increased initially to 30%. It was also stated that the export prices for the October 2012, January and May 2011 provided for substantial profit margins greater than 20%.

26. While the data on the weather predictions and the general data on price volatility is not contested by the applicant, the submission takes issue with Customs' calculations for the October 2012, January and May 2013 periods. It is claimed that the calculations are meaningless because they were based on the 2013-2014 contract prices whereas the actual prices were the 2012-2013 contract prices. It is also claimed that when Customs usual weighted average product margin method of calculation is invoked, there is no dumping in this period. The calculations carried out by the applicant in attachment 4 to its submission show an average negative dumping margin of 11%. This is so even when the 'highly inflated profit margin of approximately 11.8%' -a figure which is challenged by the applicant in the variable factors review -is included.

27. The applicant submits that even if there was a large unexpected increase in the domestic purchase cost of pineapple causing dumping, the applicant would do as it did in 2010/2011-namely increase its contract export prices as soon as possible to achieve its desired margin. The claim by Customs that the applicant demonstrated an unwillingness to respond to unforeseen cost increases is accordingly rejected.

⁴ ibid at p 20

Reinvestigation

28. As the result of the concerns expressed by the applicant as set out in paragraph 26 supra I requested the Anti-Dumping Commissioner, who now has responsibility for reporting to the Review Panel requests for reinvestigations made pursuant to s269ZZL(1) of the Act, to reinvestigate the methodology used to make the calculations. The results of the reinvestigation set out in report dated 6 December 2013, a copy of which is maintained on the public record, was to affirm the methodology utilised as set out in confidential attachment 4 to REP195B. It was reported that the 2012/13 contract prices were the contact prices relevant to the end of the review period. The dumping margin was then calculated by comparing those export prices with the corresponding constructed normal values calculated in accordance with s269TAC(2) for the months concerned.

Consideration

29. The calculations by Customs for the October 2012, January and May 2013 months are acknowledged as not giving rise to dumping when assessed on the weighted average over the usual investigation period of one year. That is not the point. The point is that the figures confirm a weather affected price volatility which can result in dumping. The issue for the review panel is whether this should be regarded as being 'likely', in the sense of probable, to lead to a recurrence of dumping with resultant likely material injury to the Australian industry.

30. I accept that the Thai domestic prices for pineapple, as for all field agricultural products wherever situated, are weather dependent. The data gathered by Customs shows a pattern of price increases during July to September in each year. The data also demonstrates unpredictable price volatility in other periods.

31. I cannot accept the statement that the applicant increased its prices 'as early as possible' following the domestic price increases associated with the 2010/11 drought. I take the fact that it did not exercise the variation option available to it in the then existing contract as being indicative that it may not do so again if similar circumstances should ensue. This is not the sole determinative of the issue but it is a factor demonstrating that the applicant does not regard any disadvantage to Australian industry from its actions if material damage arises from the dumping of its product as being important. I appreciate a desire to retain its Australian market as against other international competitors may have been a factor in the applicant deciding not to invoke the contractual arrangements in place to increase its export prices using the variation clause. That however ignores the potential adverse results arising from dumping into the Australian market in circumstances where the applicant could have taken action under its existing contractual arrangements to negate such a result occurring.

32. As the Customs' Dumping and Subsidies Manual acknowledges in Chapter 31, deciding what is 'likely' involves undertaking a prospective examination. It is axiomatic that prospective examinations involve some conjecture. What has happened in the past may provide guidance as to what is likely to happen in the future. However, what has occurred in the past is not the only, and may not be the determinative feature when considering what is likely to occur in the future. Care must be taken not to predict the future solely by reference to what a party did on one occasion in the past. The purpose is not to punish an applicant for past actions but to assess the degree of likelihood of a future recurrence of dumping given the totality of the circumstances. Reaching such a decision necessarily involves a value judgment-made even more difficult because the decision involves making a future projection. The elements which inform such a decision are qualitative in nature and cannot be measured quantitatively.

33. Customs have not referenced their approach solely to the applicant's past actions regarding dumping but have undertaken a careful analysis of historical weather related data to conclude market volatility in the Thai domestic price of pineapple regardless of exceptional or severe weather conditions. I accept that analysis which has been confirmed after reinvestigation. Not without some hesitation I accept that the applicant's past disregard for the contractual opportunity open to it to vary the terms of its contract with its Australian customers to avoid or ameliorate past dumping as a relevant but non determinative factor of its likely future conduct.

34. Another factor of concern was as to whether the increased sales margin charged to the applicant's Australian customers came about because of the imposition of the anti-dumping measures, and that if the measures were revoked dumping would resume. I am satisfied that such a conclusion is unwarranted. The evidence is that the applicant operated at a loss in the period in which it was paying high domestic prices for pineapple. It seems probable that the increased sales margin resulted from a desire to return to profitability rather than as a reaction to the imposition of the anti-dumping measures.

35. The evidence clearly demonstrates that dumping by the applicant occurred because of unusually high domestic prices charged for pineapple resulting from the severe drought conditions experienced in Thailand in 2010-11. Customs acknowledge that it is unlikely that there will be a repeat of such severe drought conditions in the foreseeable future. As earlier stated all field agricultural reliant products are subject to weather fluctuations which impact prices. That is the very nature of such products. While as the result there is inevitably some fluctuation in prices resulting from weather pattern variations, the increased margin charged by the applicant to its Australian customers is more likely than not sufficient to absorb those price variations on a weighted average basis over any 12 month period. In my view the combination of these factors outweigh the uncertainty attaching to the applicant's likely reaction to invoking the price variation clause should

conditions unexpectedly lead to a rise in Thai domestic pineapple price such that dumping may recur.

36. For these reasons I am satisfied that revocation of the measures would not lead or be likely to lead to a recurrence of the dumping.

37. I recommend that pursuant to s 269ZZK(1) of the Act that the Minister revoke the measures under review.

THE VARIABLE FACTORS REVIEW

38. It is necessary to consider the variable factors review should the Minister decide not to accept the recommendation to revoke the measures. REP195A recommended a change to the variable factors. The issue challenged by the applicant is the reasonableness of the method used in the calculation of 'normal value'.

39. On behalf of the applicant no challenge is mounted to the fact that a constructed value methodology, pursuant to s 269TAC(2)(c) of the Act, was used to determine normal value. However it is submitted in the application to the Review Panel that the methodology used in the determination of profit on sale as an element of normal value under s269TAC(2)(c)(ii) does not comply with the requirement in Customs Regulation 181A(3)(c) in that it was an unreasonable methodology.

40. Calculation of the profit margin was made by reference to the weighted average profit realized on FSI pineapple sales by two other Thai based pineapple manufacturers –Dole Thailand Limited and Kuiburi Fruit Canning Co. Limited. The applicant submits that it is unreasonable to use profit margin arising from the domestic sale of FSI pineapple to calculate the profit margin for consumer pineapple. The applicant maintains that consumer and FSI pineapple differ in the following respects:

- commercial likeness because they are sold into different segments of the market, consumer pineapple into the retail market and FSI pineapple into the distribution market, and,
- they are not directly competitive, and,
- have significantly different production costs and selling prices.

As the result it is-

'...absolutely unreasonable to consider that the profit achieved in domestic sales of FSI pineapple by other Thai producers is representative of the profit that could be achieved in domestic sales of consumer pineapple'⁵.

It is submitted that no explanation as to why Customs made the recommendation to the then Minister is not evident in REP195A. In the absence of a Thai domestic market for consumer pineapple it is submitted that a zero amount of profit ought be determined.

⁵ submission page 16

41. In REP195A Customs accepted the differences referred to in the ultimate paragraph⁶. Regulation 181A(3) provides three non hierarchical methods pursuant to which the Minister may work out the profit in circumstances where he/she is unable to rely on Regulation 181A(2). Relevantly they are :
Regulation 181A (3)....

(a) by identifying the actual amounts realized by the exporter or producer from the sale of the general category of goods in the domestic market of the country of export; or

(b) by identifying the weighted average of the actual amounts realized by other exporters or producers from the sale of like goods in the domestic market of the country of export; or,

(c),by using any other reasonable method and having regard to all relevant information’.

Customs noted that FSI and consumer pineapple

‘...share a physical and production likeness and can, in some circumstances, be substitutable. While this is not satisfactory for the determination of like goods, [Customs] is satisfied that FSI pineapple falls within the same general category of the goods.’⁷

42. Regulation 181A(3)(c) necessarily gives the Minister a broad discretion. It is not unreasonable, in the absence of being able to utilize any of the other listed methodologies in the regulation, that a comparison be made to the profit margin attained for ‘the same general category of goods’. The latter is not, as is the case with the expression ‘like goods’, a term defined in the Act or the Customs Regulations. Given one of the principal distinctions between FSI and consumer pineapple is the size of the container in which the product is contained it is apt to categorise FSI and consumer pineapple in the manner described in REP195A.

Recommendation Summary

43. I recommend that the Minister:

- (i) revoke the reviewable decision in as far as it relates to continuing anti-dumping measures for Thai consumer pineapple entering Australia. If you accept that recommendation that finishes the matter.
- (ii) however if you do not accept that recommendation then in as far as the reviewable decision relates to the fixing of variable factors I recommend that you affirm the decision under review.

⁶ REP 195A paragraph 4.4.2 at p15

⁷ ibid at p15

44. If the recommendation to revoke the anti-dumping measures is not accepted then I recommend pursuant to s269ZZK(1)(a) of the Act that you affirm the reviewable decision in respect of the fixing of the variable factors.

A handwritten signature in black ink, appearing to read 'Graham McDonald', written in a cursive style.

Graham McDonald

Anti-Dumping Review Panel

20 December 2013