MinterEllison

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Senior Member
Anti-Dumping Review Panel Secretariat
GPO Box 2013
Canberra City ACT 2601

Dear Senior Member

Submission in relation to Review 2021/144 – Consumer Pineapple exported from the Republic of the Philippines and the Kingdom of Thailand to Australia

Introduction

We represent the associated entities of Dole Asia Holdings (**DAH**), Dole Thailand Limited (**DTL**) and Dole Philippines Inc (**DPI**) in relation to the above review. DAH has been an exporter to Australia of consumer pineapple produced in the Philippines by DPI. Under the definitions set out in s269ZX(c) and (d) of the Customs Act 1901 (**Act**), each entity is an interested party in relation to the reviewable decision(s).

We wish to make two primary submissions:

1. The application by GC for review of the Minister's decisions published on 6 October 2021 not to secure the continuation of the anti-dumping measures applying to consumer pineapple exported to Australia from the Philippines and Thailand is not a valid application for the purposes of subdivision B of Division 9 of Part XVB of the Act.
2. Even if the application is valid we submit that the available evidence provides overwhelming support for the view that each of the above decisions of the Minister are the correct and preferable decisions.

The Application

Requirements for the conduct of inquiries into the continuation of anti-dumping measures are set out in Division 6A of the Act. Section 269T of the Act relevantly defines *anti-dumping measures* in respect of goods as … *the publication of a dumping duty notice …in relation to such goods*. The section also defines a dumping duty notice as *a notice published by the Minister under subsection 269TG(1) or (2)* of the Act.

Anti-dumping measures are set out in the original dumping duty notice which, pursuant to s269TG, declares that the notice applies to particular goods or kind of goods exported from specified countries, the countries of export of the goods and sets out the variable factors applying to the goods. Subsequent variations to the terms of original notices as a result of the various types of review provided for in Divisions 5 – 6A of Part XVB of the Act do not involve the replacement of an unrevoked original notice, only the extension of its expiry date. Thus a key element in an application for review of a reviewable decision for the purpose of s269ZZA(d) is the identification of the original notice that has been continued or allowed to expire as the case may be.

In the present matter the Applicant, in section 6 of part B of the Application has identified the goods the subject of the reviewable decision as consumer pineapple but has failed to identify any countries of export. It can be inferred, nevertheless, from other sections of the application and the statement of grounds that the applicant is seeking a review of measures applying to consumer pineapple exported from the Philippines and Thailand. However, there has never been a dumping duty notice containing anti-dumping measures that applies jointly to exports of consumer pineapple from the Philippines and Thailand. The relevant notices were separate dumping duty notices published five years apart in *Gazette No. GN41* on 17 October 2001 and *Gazette No. S185* on 10 October 2006. The former contained the anti-dumping measures to be applied to consumer pineapple exported from Thailand and the latter contained the measures to be applied to the same product exported from the Philippines.

While the reviewable decision published in ADN 2021/117 does in some instances resort erroneously to singular terms, it is clear from the references in the decision to the two reports (571/572) by the Commission and the acknowledgement of the different specified expiry days applying to the two sets of measures that the Minister was making two separate declarations under s269ZHG(1) concerning the expiry of two separate anti-dumping measures. This also accords with the approach of the Commission in footnote 1 at p.5 of REP 571/572 where the existence of two relevant dumping duty notices is acknowledged. Unfortunately, rather than identifying the Gazette Notices referred to above, the Commission's citation of two anti-dumping notices reveals its mistaken belief that a notice published by the Minister under s269ZHG(1) of the Act is a *dumping duty notice*.

The plurality of measures in the present case gives rise to two reviewable decisions. We submit that there is nothing in the terms of s269ZZA to authorize the making of a single application to the Panel in respect of more than one reviewable decision. Indeed the Senior Member of the Panel, pursuant to s269ZY of the Act, has specified in section 5 of Part B of the approved form of application that *a separate application must be completed* for each reviewable decision.

As the applications in this matter do not comply with the requirements of subdivision B of Division 9 of Part XVB of the Act and in particular do not satisfy the requirement of s269ZZE(b), we request that the Panel revoke its decision to accept GC's application.

It should also be noted that by addressing the effects of exports from the two countries jointly the Application has not engaged with the **'statutory test'** relevant to the Panel's assessment of the reviewable decisions, That test is set out in s269ZHF(2) of the Act as follows:

> *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 or subsidisation and the material injury that the anti-dumping measure is intended to prevent.*

The terms of the statutory test do not authorise the aggregation of the effects of exports from the two countries that are the subject of separate anti-dumping measures. Two separate tests are required. Are dumped exports from Thailand likely to cause future material injury to GC and are dumped exports from the Philippines likely to cause future material injury to GC?

On this ground also the Application should be rejected and the reviewable decision affirmed.

The Reviewable Decisions

We now turn to consideration of the merits of the reviewable decisions on the basis that, contrary to the above submissions, there is a valid application for the Panel to review.

Thailand

On one ground alone we submit that the reviewable decision allowing the dumping duty notice of 17 October 2001 applying to consumer pineapple from Thailand to expire should be affirmed by the Panel. The Commission has found that …*sales of Thai consumer pineapple represented 1% or less of the total Australian sales in each year since 2017*[1]

The Applicant has not submitted any evidence or argument to support its application relating to exports from Thailand and any suggestion that such volumes have caused material injury is untenable. Consequently there is no possibility of recurrence as required by the statutory test. Consequently, we submit that the relevant reviewable decision must be affirmed.

Philippines

We wish to make submissions on the following grounds advanced by the applicant to support a claim that the reviewable decision in respect of the Philippines is not the correct or preferable decisions

- The Australian market for consumer pineapple is not segmented;
- Future exports of consumer pineapple will likely cause, or threaten, a recurrence of material injury

Segmentation

GC acknowledges, or does not dispute, that:

- there are three market segments for consumer pineapple;
- it supplies a premium product;
- it obtains substantial price premiums in the market;
- it has increased its prices steadily since 2016;
- it enjoys brand loyalty as the producer of an Australian made product;
- it has elected to sell only to the premium segment due to raw material constraints;
- it has elected to import consumer pineapple to counter raw material shortages;
- it has not been able or willing to furnish the Commission with competitive pricing information.

Despite these factors the Applicant continues to insist, without reference to any relevant evidence, that its pricing is suppressed because of dumped exports from the Philippines. In our view the following conclusion of the Commission, based on extensive analysis, is clearly to be preferred on the subject of segmentation:

> To reiterate, the commission considers that Golden Circle's 'Australian' product operates in its own segment within the consumer pineapple market. The commission has not identified evidence during the course of this inquiry to indicate that imported consumer pineapple, sourced from the subject countries or other countries, competes in this segment[2].

Pricing and Volume

While the Applicant continues to oppose the Commission's conclusions on segmentation it has not produced any cogent rebuttals to the key findings of the Commission that supported its recommendation to the Minister not to secure the continuation of the anti-dumping measures.

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[1] REP 571/572 – p.21
[2] ibid. 571/572 – p.58

The Commission did not find any contemporaneous evidence that the lower prices of imported consumer pineapple subject to measures influenced the pricing of GC's premium product and its detailed consideration of price negotiations between GC and major supermarkets confirmed that selling prices of imported pineapple played no part in the price negotiations[3]. The applicant's response has been to refer to outdated pricing information from previous continuation inquiries without any consideration of the changes in the market such as the applicant's decision to vacate the private label market. It has also alleged that it was unable to provide evidence because of confidentiality constraints but there are pricing survey services readily available to interested parties on subscription. We understand that a presentation of one such survey is being submitted to the Panel by Dole's Australian distributor and that it confirms the pricing analysis and conclusions of the Commission.

The Commission's finding that import pricing did not influence GC's selling prices applied to exports from both the Philippines and Indonesia and consequently the claim[4] by the Applicant that export volumes from the Philippines were the more damaging is not relevant. Even if it were, however, the Commission's pricing analysis[5] clearly shows that consumer pineapple from Indonesia was selling at significantly lower prices throughout the investigation period.

Some of the constraints on GC's production volumes have been identified by the Commission and acknowledged by the Applicant. In response GC claims in the current Application to have demonstrated that …*it was building production volumes again to utilise its under-utilised production capacity*[6]. However this claim merely echoes the assertion of the Applicant over five years ago that GC *… plans to increase its production output of consumer and FSI pineapple in 2016 and beyond, having agreed to work with growers to source an increased intake of fresh pineapples*[7]. No evidence has been produced to demonstrate that any such plans have progressed to increase processing capacity. In fact it is the lack of progress that is evidenced by GC's sourcing from Thailand and industry estimates of the Australian fresh pineapple market now accounting for about 70% of locally grown fruit[8] which is understood to be fetching close to twice the price being paid to growers of fruit for processing.

In summary, neither the local industry's selling prices nor its static sales volumes can be attributed to the pricing or volumes of consumer pineapple exported from the Philippines.

Error of Law

A further review ground advanced by the GC in its Application to the Panel is that …[T]*he 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*[9]. We submit that there is no such error. Considering whether there is a threat of material injury may involve an assessment limited to whether there is a 'possibility' of such injury. The statutory test requires more – it is a 'likelihood' that must be established to the satisfaction of the Minister.

Philippine Government Representations

GC has inferred from the fact that the Government of the Philippines made a submission in support of the reviewable decision that the country's canned pineapple industry is seeking to

[3] REP 571/572 – p.56
[4] Application – p.10
[5] REP 571/572 – p.20.
[6] Application – p.5
[7] REP 334 – p.24
[8] https://www.planthealthaustralia.com.au/industries/pineapples/
[9] Application – p.6

increase supply to Australia. The inference cannot be justified and borders on the mischievous.

In relation to trade measures investigations conducted by the Commission and comparable authorities in other countries, the representations of governments of exporting countries are focussed on ensuring the investigations are conducted, and decisions are made, in accordance with the terms of the relevant WTO agreements. The Australian Government routinely makes such representations in the course of investigations involving Australian exports.

We are also instructed that at no stage has there been any contact between Dole and the Philippine Government on the group's marketing plans, if any, relating to Australia or any other market

Conclusion

In applying the statutory test in this matter, we submit that a careful reading of REP 571/572 leads inevitably to the conclusions that the expiry of the measures was unlikely to lead to a continuation of material injury and that the Minister's reviewable decision was the correct and preferable decision.

Yours faithfully
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