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BY EMAIL – ADRP@industry.gov.au

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

Dear Senior Member

Submission in relation to Review 2021/145 – Application by Golden Circle Limited (GC) - Food Service and Industrial (FSI) 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 FSI Pineapple produced in Thailand by DTL and DAH has also been an exporter to Australia of FSI 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 decisions.

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 not to secure the continuation of the anti-dumping measures applying to FSI pineapple exported to Australia from Thailand and the Philippines 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 Part XVB 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 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 FSI 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 FSI pineapple exported from Thailand and the Philippines. However, there has never been a dumping duty notice containing anti-dumping measures that apply jointly to exports of FSI pineapple from Thailand and the Philippines. The relevant notices were separate dumping duty notices published five years apart in *Gazette No. GN41* on 17 October 2001 and *Gazette No. S201* on 13 November 2006. The former contained the anti-dumping measures to be applied to FSI 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 2021/118 does in some instances resort erroneously to singular terms, it is clear from the references in the decision to the two reports (573/574) 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 573/574 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.

GC expresses its first ground for review as …*Will future exports of food service and industrial pineapple likely cause, or threaten, a recurrence of material injury?* The question is posed in terms that do not differentiate between various sources of supply including countries of export. Rather the GC analysis presumes that the aggregated effect of imports from all sources is the relevant consideration. That is not the statutory test.

The five categories of FSI pineapple exported to or produced in Australia are:

A. dumped exports from the Philippines;
B. dumped exports from Thailand;
C. exports from Thailand not subject to measures and
D. exports from third countries.
E. GC imports & production

Figure 2 of REP 573/574 illustrates that over a four year period GC's category E market share has remained constant at about 15%[1], the market share of categories C & D has similarly stabilised at about 80% and the remainder is attributable to category B at about 5% and a miniscule amount to category A. These figures do not support any conclusion that exports from either the Philippines or Thailand in the four year period have caused or are causing material injury and consequently the question of a recurrence of such injury does not arise.

Even if recurrence is a relevant issue in the context of the 15 and 20 year histories of these matters, in our view in applying the statutory test it is inconceivable that a decision maker could be satisfied that category A & B exports separately would be likely to cause material injury in the absence of any evidence that there is any likelihood of a reduction in the market dominance of category C & D exports.

If the expiry of the dumping duty notices is maintained, future material injury, if any, likely to be suffered by the Applicant will be attributable solely to Category C & D exports.

We now consider the likely separate impacts of the expiry of the dumping duty notices applying to the Philippines and Thailand respectively.

Philippines

DPI's market share in the period from 2017 to 2020 has never exceeded one-tenth of 1% and over the same period the market share of total dumped exports from the Philippines has declined from around 40% to about 3%. That share has been taken over in part by exports from Thailand that are not subject to measures while the Commission also found that exports from all countries except the Philippines have steadily increased[2].

At the same time prices for the minuscule amount of FSI from the Philippines have risen substantially and the Commission found that they were approaching or higher than GC's prices[3]

It is obvious from these figures that dumped exports from the Philippines have not caused and are not causing material injury and so again there are no grounds for concluding that future

[1] REP 573/574 - p.19
[2] ibid. 573/574 – p.42
[3] ibid. 573/574 – p.46

material injury caused by exports is likely. We submit therefore that the reviewable decision in relation to the Philippines be affirmed and the expiry of the dumping duty notice of 13 November 2006 be maintained.

Thailand

The Commission found that the volume of dumped exports from Thailand, excluding those imported by GC itself, amounted to only about 4% of the Australian market[4] Again no evidence has been provided by GC demonstrating how such a small volume of exports has caused or is causing material injury and consequently a scenario involving recurrence is without foundation. Furthermore, it is clear from the Commission's analysis that material injury, if any, to GC has been caused by the rapid growth over the past four years of FSI exports not subject to measures from Thailand and exports from countries not covered by the dumping duty notice. GC has not in that period applied for the initiation of an inquiry under Part XVB into FSI exports from those sources even though they are amongst the lowest price products.

The Application offers no explanation as to why the expiry of measures would be likely to lead to exports from Thailand of goods subject to the pre-existing measures displacing the entrenched sources of supply from exempt Thai exporters and from other countries.

We conclude that the Applicant has produced neither evidence nor argument to overturn the proposition that the reviewable decision concerning FSI pineapple was the correct and preferable decision.

Other Matters

Production Output

GC claims in the current Application to have demonstrated that …*it was building production volumes again to utilise its under-utilised production capacity*[5]. However the 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*[6]. 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[7] which is understood to be fetching close to twice the price being paid to growers of fruit for processing.

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*[8]. 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.

[4] REP 573/574 – p.42
[5] Application – p.5
[6] REP 334 – p.24
[7] https://www.planthealthaustralia.com.au/industries/pineapples/
[8] Application – p.6

Uncooperative Exporters

The Applicant has complained that the Commission failed to draw any adverse inference from the fact that no exporters of FSI pineapple from the Philippines responded to the very demanding Exporter Questionnaire and consequential verification processes. There was, of course, no basis for drawing such an inference. Full participation in an anti-dumping inquiry requires a very substantial investment of time, expense and resources, especially when those resources are fully involved in a parallel inquiry into consumer pineapple. For both DPI and DTL it was clear that as they had minimal trade interest in the FSI inquiry there was no way that onerous full participation could be justified.

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 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

On behalf of our clients we request that the Panel recommend to the Minister that the reviewable decisions be affirmed.

Yours faithfully
MinterEllison

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