MinterEllison LAWYERS

For Public Record

SUBMISSION ON BEHALF OF DOLE THAILAND LIMITED TO THE ANTI-DUMPING REVIEW PANEL CONCERNING A REVIEW OF A MINISTERIAL DECISION IN RELATION TO THE EXPORT OF FSI PINEAPPLE FROM THE KINGDOM OF THAILAND

Introduction

1. Dole Thailand Limited (**DTL**) is an interested party concerned with the production in Thailand and the exportation to and importation into Australia of FSI Pineapple and an applicant in this matter.

2. We refer to the original statement **(Statement)** by DTL contained in Appendix A to an Application of 31 August 2013 to the Review Panel in relation to the above matter. The purpose of this submission made pursuant to s 269ZZJ of the *Customs Act 1901 (Cth)* (**Act**)is to bring to the attention of the Review Panel a recent decision of the Federal Court of Australia (**Act**) and to clarify and elaborate on the issue of the element of profit to be included in a constructed normal value.

3. Before addressing those matters, however, we draw the Review Panel's attention to the following corrections to the Statement:
   - second last line of paragraph 18 – Category 1 should read Category 2;
   - footnote 9 – p.9 should read p.14;
   - last line of paragraph 32 of the Statement – 'the domestic markets' should read 'export markets'.

Recent Federal Court Decision

4. On 30 August 2013 Nicholas J handed down his decision in *PanAsia Aluminium(China) Limited v Attorney General of the Commonwealth* [2013] FCA 870. One of the issues in that case was whether, in circumstances where the goods under consideration consisted of products with different finishes, dumping measures could be imposed on a differentiated basis.[1] Nicholas J held that while the existence of dumping could be ascertained under s 269TACB of the Act by reference to the comparison of export prices and normal values

[1] *PanAsia Aluminium(China) Limited v Attorney General of the Commonwealth* [2013] FCA 870 – paragraphs 120 - 156

for individual finishes, dumping measures imposed under s 269TG in relation to a particular exporter must be expressed as a single dumping margin.

5. The decision vindicates the approach taken in relation to DTL of establishing the existence of dumping by undertaking comparisons at the individual product level and then expressing on a consolidated basis the measure to be imposed. However the decision is clearly inimical to the request to the Review Panel by the other applicant in this matter to recommend the application of measures on a product specific basis.

Profit – s 269TAC(2)(c)(ii)

6. At paragraph 31 of the Statement, referring to the Commission's consideration of profit to be added in calculating constructed normal values, we quoted the following passage from the Report:

> ACBPS is satisfied that there are two categories of FSI pineapple products sold by Dole Group on the domestic market that are not directly comparable due to quality differences and alternative methodologies to costing the products. In this circumstance, it is not appropriate to apply the weighted average profit of all sales of FSI pineapple in the ordinary course of trade to the constructed normal values. Instead, the weighted average of sales of the relevant category of products has been applied. This ensures that the amount for profit applied to the constructed normal values represents an amount that can be achieved by Dole Group on the domestic market[2].

7. It seems clear that the 'two categories' referred to by the Commission are Groups 1, 2 and 3 on the one hand and Group 4[3], represented by [redacted], on the other and that the Commission concluded that it was 'not appropriate' to establish an amount of profit by reference to sales of the first mentioned category. We agree with that conclusion. However, after first ignoring the verified, reliable data on profits achieved on export sales of [redacted], the Commission then sought to identify a domestic sale of [redacted] with the 'appropriate' sales criteria set out in the final paragraph of section 4.4.3 of the Report. The Commission's stated criteria are domestic sales (no authority cited) of the same category of goods made in the ordinary course of trade but, apart from belonging to the same category as [redacted], the domestic [redacted] sales profile does not match the criteria. The Commission has clearly and correctly acknowledged that the [redacted] domestic sale was a single sale in exceptional circumstances and that it was not a sale made in the ordinary course of trade[4] as required by the terms of the hypothetical sale specified in s 269TAC(2)(c)(ii).

[2] Report: p.20
[3] Statement: paragraph 15
[4] ibid., p.19

8. In these circumstances the only reasonable and fair method of calculating the profit element of a constructed normal value is to apply the profit achieved in those sales of [redacted] that were made in the ordinary course of trade. The Commission's response, however, was to disown its own policy in the following terms:

> Irrespective of the policy position outlined above, ACBPS is not satisfied that the profit from third country sales made in the ordinary course of trade can be applied in this instance, for the same reasons that these sales cannot be relied on for comparison pursuant to s. 269TAC(2)(d).[5]

9. The sole expression of these 'reasons' (sic) is as follows:

> For these two products, [redacted] ACBPS is not satisfied that normal value can be determined pursuant to s. 269TAC(2)(d). ACBPS is not satisfied that the exports of DTL to the country submitted for comparison is similar to that exported to Australia for the purpose of s 269TAC(5C).[6]

The flaws in these unexplained assertions have already been demonstrated in our client's earlier Statement[7] and furthermore they are directed at the issue of choosing the appropriate method of ascertaining normal value and are not relevant to the question of identifying the element of profit in sales made in the ordinary course of trade for the purpose of assessing a constructed normal value. What is relevant is the identification of a comparable product and the relevant sales and cost data pertaining to that product which, when compared, permit the calculation of the profit achieved in those sales.

10. There is no dispute that [redacted] is the appropriate comparable product. There is no dispute that our client has presented all the cost and sales data applying to the manufacture and sale of that product and that the data has been verified and accepted by the Commission. The Commission's team that verified the data stated that they were *...reasonably satisfied that third country sales data* [provided by DTL] *would be reliable if required for the purposes of the review inquiry*[8]. Obviously this satisfaction extended not only to the overall transactions but to the elements that formed part of those transactions, including associated costs and realised profits that are the benchmarks by which sales made in the ordinary course of trade are identified under s 269TAAD. It only remains to add that the sales and cost data submitted to the Commission by DTL was not limited to sales to Germany.

11. The arbitrariness of the Commission's dismissal of this data in the Report without persuasive explanation, or indeed any explanation, is compounded by the fact that contrary to its own policy and the wording of relevant statutory and regulatory

[5] ibid., p. 20
[6] ibid., p.19
[7] Statement: paragraphs 23-27
[8] Exporter Visit Report – Dole Thailand Limited, March 2013 – p.23

provisions, it then moved to calculate profit by reference to the one-off sale that it had already conceded ...*was made in unusual circumstances and not made in the ordinary course of trade*.[9] The profit attributed by the Commission to that sale is [redacted]%, an unsourced and unexplained margin that does not reflect the difference between the sales price achieved in the one-off sale of [redacted] in the [redacted] quarter of 2012 and the cost to make and sell that product in the same quarter. In a footnote to the profit margin in the relevant dumping calculation spreadsheet[10] it is claimed to be 'the average profit on all domestic sales', a claim obviously incompatible with the statements contained in the passage in the Report that is quoted in paragraph 4 above. As observed earlier in the Statement[11] the profit margin applied by the Commission is about 400% greater than that actually achieved in sales of [redacted] in the ordinary course of trade during the investigation period.

12. To the extent, if any[12], to which the Minister has ascertained a normal value for Group 4 products, the profit element included in that calculation must be set aside on the grounds that it does not conform with:

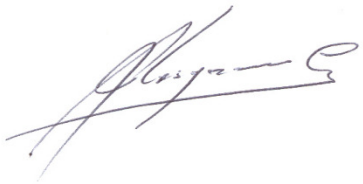
- the Commission's own formulation of the appropriate standard;
- the terms of the hypothesis set out in s.269TAC(2)(c)(ii); or
- the specific terms of Regulation 181A(2).[13]

It is clear from the Report that the Commission consistently misconstrued the terms of that Regulation, not only in relation to DTL but also in relation to other Thai exporters. For example, in relation to the Natural Fruit Co the Commission stated that ...[g]*iven there are no true domestic sales of like goods sold by Natural, reg 181A(2) cannot be applied* [14]...and made near identical statements about SAICO and Tipco. The regulation, however, simply does not specify that the relevant sales must be 'domestic' sales, only that they must be made in the ordinary course of trade and the terms of the regulation accurately reflect the requirements of Article 2.2.2 of the Anti-Dumping Agreement.

13. We submit that, if the normal value of Group 4 products is to be ascertained by reference to s 269TAC(2)(c), the correct decision is to assess the profit element of the normal value calculation by reference to the weighted average profit on sales of [redacted] that were

[9] Report: p.19
[10] Worksheet labelled *'Constructed NV for* [redacted]' forwarded by email dated 26 July 2013 from the Commission to Minter Ellison
[11] Statement: paragraph 39
[12] ibid., paragraphs 19-20
[13] ibid., paragraph 35
[14] Report, p.23

made in the ordinary course of trade. Our client's calculation of that profit forwarded to the Commission on 7 May 2013 and based on previously submitted and accepted data was [redacted]%. Applying that margin to agreed production costs for [redacted] and agreed selling costs for [redacted] (and subject to agreed 'due allowance' adjustments) results in a normal value for that product of [redacted]. This outcome is closely comparable to a normal value of [redacted] based on sales to a third country ([redacted]) which suggests that alternative normal value criteria in s 269TAC, when properly computed, will yield comparable results consistent with the objective of a 'normal' normal value. By contrast the Commission's flawed methodology yields a very 'abnormal' normal value for [redacted] of [redacted].and implies that DTL should be selling the product to Australia at a premium of almost [redacted]% compared to its selling prices of a near identical product to other comparable countries. Such a trade restrictive outcome would involve a travesty of Australian law, WTO jurisprudence and common sense.



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