Australian Government
Anti-Dumping Commission

R E P O R T

CUSTOMS ACT 1901 - PART XVB

ANTI-DUMPING COMMISSION
REPORT TO THE REVIEW PANEL No. 231

REINVESTIGATION OF CERTAIN FINDINGS IN REPORT No. 196

FOOD SERVICE AND INDUSTRIAL PINEAPPLES

EXPORTED TO AUSTRALIA FROM THAILAND

11 December 2013

CONTENTS

1 SUMMARY AND RECOMMENDATIONS

This report provides the results of the reinvestigation by the Commissioner of the Anti-Dumping Commission (the Commission) of certain findings in International Trade Remedies Report No. 196 (REP 196), which resulted in the finding that variable factors should be re-ascertained for all exporters of food service and industrial (FSI) pineapple.

1.1 Findings

The delegate of the Commissioner, in accordance with s.269ZZL(3) of the *Customs Act 1901* (Act), affirms the findings subject to the reinvestigation. The reasons for this decision are set out in this report.

1.2 The reinvestigation

Division 9 of Part XVB of the Act sets out procedures for review by the Anti-Dumping Review Panel (Review Panel) of certain decisions made by the Minister or the Commissioner.

1.2.1 The role of the Review Panel and the Anti-Dumping Commission

Interested parties can apply to the Review Panel to review certain decisions in relation to anti-dumping and countervailing matters. If an application for review is not rejected, the Review Panel must make a report to the Minister on the application either[1]:

- recommending that the Minister affirm the reviewable decision; or
- recommending that the Minister revoke the reviewable decision and substitute a specified new decision.

If the Review Panel has not rejected an application for review, before making a recommendation under s. 269ZZK(1) of the Act, the Review Panel may, by written notice, require the Commissioner to[2]:

- reinvestigate a specific finding or findings that formed the basis of the reviewable decision; and
- report the result of the reinvestigation to the Review Panel within the specified period.

1.2.2 What must be reinvestigated

On 29 October 2013, the Review Panel required the Commissioner to reinvestigate certain findings made in REP196. The notice provided by the Review Panel to the Commissioner is as follows:

> *"I am requesting that you undertake a reinvestigation of the calculation of profit in the determination of profit made pursuant to*

[1] Under s.269ZZK(1) of the Act
[2] Under s.269ZZL(1) of the Act

s269TAC(2)(c)(ii) and Regulation 181A(2) of the Customs Regulations {1926}. Could this be made in respect of products described in paragraph 15 of the Statement accompanying the application for Review as [redacted]*?*

Specifically could the recalculation be undertaken using the weighted average profit obtained in respect of the other [redacted] *product identified, namely* [redacted]*, in sales to third countries. REP 196 identifies Germany as being one such country. Paragraph 33 of the statement refers to Dole providing information regarding export sales data to countries other than Germany. It is a matter for your officers to decide the countries in respect of which data is used in undertaking the recalculation.*

Because s269TAC(2)(c)(ii) assumes that the goods instead of being exported had been sold on the Thai domestic market it [sic] not necessary for the administrative, selling and general costs to [sic] recalculated.

Regulation 181A(4) will also need to be taken into account when undertaking the recalculation."

2 BACKGROUND

2.1 Original Investigation – Investigation 196

On 19 December 2012, the Australian Customs and Border Protection Service (ACBPS) (now the Anti-Dumping Commission) initiated a review of the variable factors relevant to the anti-dumping measures applicable to food service and industrial (FSI) pineapple exported to Australia from Thailand by Tipco Foods Public Company Limited.

On 29 January 2013, ACBPS extended the review of the variable factors of the anti-dumping measures applying to FSI pineapple to all exporters from Thailand, after receiving a request from the Minister to do so.

ACBPS examined information relating to the variable factors, being the export prices, normal values and non-injurious prices during the period 1 October 2011 to 30 September 2012 to determine if the variable factors relevant to the taking of the anti-dumping measures had changed.

Report No 196 (REP 196) set out the facts on which the delegate of the CEO of ACBPS based his recommendations to the then Minister for Home Affairs in relation to the review of the variable factors of the anti-dumping measures applicable to FSI pineapple exported to Australia from Thailand.

In August 2013, Dole Thailand Limited (DTL) submitted an "Application for Review of a Decision of the Minister following a Review Inquiry" to the Anti-Dumping Review Panel (Review Panel).

2.2 The reinvestigation framework

In conducting a review, the Review Panel may only have regard to relevant information and any conclusions based on relevant information.[3] Relevant information is from the original investigation and comprises the application, submissions to the original investigation, Statement of Essential Facts No. 196 (SEF 196), submissions to SEF 196, REP 196 and any other matters considered relevant by the Commission in the course of the investigation. Conclusions based on relevant information are conclusions based on the relevant information contained in the applications to the Review Panel and submissions received by the Review Panel within 30 days of notification of the review.

The Commission examined the documents from the original investigation (relevant information) and applications and submissions to the Review Panel received within the specified timeframes (conclusions based on relevant information) for the purposes of conducting the reinvestigation.

[3] s. 269ZZK(4) of the Act

3 FSI PINEAPPLES – DETERMINATION OF PROFIT FROM THIRD COUNTRY SALES

3.1 Summary of the reinvestigation findings

The Commission affirms the findings relating to the determination of profit for the constructed normal value for [redacted] products. The Commission is of the view that it was proper for ACBPS to determine profit based on domestic sales of like goods by the exporter pursuant to section 269TAC(2)(c)(ii) and Regulation 181A(2).

3.2 The reinvestigation

3.2.1 Calculation of profit based on domestic sales in the ordinary course of trade

As indicated in REP 196, the ACBPS considered that:

> *"… the correct or preferable interpretation of reg 181A(2) gives precedence to the actual profit achieved on domestic sales of like goods rather than the amount for profit worked out by reference to profit made on third country sales of like goods in the ordinary course of trade…In circumstances where there are domestic sales in the ordinary course of trade, the amount for profit when constructing the normal value should be taken from data relating to actual domestic sales."*

It is useful to set out the Commission's understanding of the legal requirements concerning profit in a constructed normal value.

Section 269TAC(2)(c) provides:

> *"(c) except where paragraph (d) applies, the sum of:*
>
> *(i) such amount as the Minister determines to be the cost of production or manufacture of the goods in the country of export; and*
>
> *(ii) on the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export—such amounts as the Minister determines would be the administrative, selling and general costs associated with the sale and the profit on that sale; or…"*

Section 269TAC requires that in constructing a normal value it must proceed on the assumption that the goods are being sold for home consumption in the ordinary course of trade. This means not only should the SG&A expenses relate to actual or assumed domestic sales, but so must the profit.

The principle method for working out the profit is set out in Regulation 181A(2):

> "*(2) For subregulation (1), the Minister must, if reasonably possible, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade."*

Regulation 181A reflects the language set out in Article 2.2.2 of the WTO Anti-Dumping Agreement, which has been the subject of WTO Dispute Panel and Appellate Body interpretation. In 'European Communities – Anti-Dumping duties on imports of cotton-type bed linen from India', the Panel stated:

> *"The chapeau and paragraphs (i) and (ii) of Article 2.2.2 thus outline specific methods available to the investigating authorities to arrive at the amounts for SG&A and for profits to be used in the calculation of constructed normal value, and paragraph (iii) allows for the use of any other reasonable method. The chapeau of Article 2.2.2 requires the use of the profit margin from like product sales in the ordinary course of trade in the home market in calculating constructed normal value. When the amount cannot be determined on this basis, a Member may resort to an approach set out in paragraphs (i)-(iii)."* (emphasis added)

The Appellate Body in 'European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil' explained:

> *"In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the "actual data pertaining to production and sales in the ordinary course of trade". If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method."*

The alternative methods of working out profit provided for in the WTO Anti-Dumping Agreement are set out in Regulation 181A(3):

> *"(3) If the Minister is unable to work out the amount by using the data mentioned in subregulation (2), the Minister must work out the amount:*
>
> *(a) by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export; or*
>
> *(b) by identifying the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export; or*
>
> *(c) subject to subregulation (4), by using any other reasonable method and having regard to all relevant information."*

Importantly, Reg 181A(3) states:

> *"If the Minister is unable to work out the amount by using the data mentioned in subregulation (2), the Minister must work out the amount…"* (emphasis added)

Having regard to the construct of the legislation and associated regulations, together with the WTO Anti-Dumping Agreement and the jurisprudence on the interpretation of Article 2.2.2, the Commission continues to hold the view that subsection 269TAC(2)(c)(ii) sets out a requirement for the use of data on domestic goods based on:

> *"…the assumption that the goods, instead of being exported had been sold for home consumption…"*

In this case, it was possible, pursuant to Regulation 181A(2), to work out an amount of profit using data relating to the production and sale of like goods by the exporter in the ordinary course of trade. Specifically, the ACBPS calculated the weighted average profit of like goods sold in the domestic market that was made in the ordinary course of trade. As all relevant domestic sales of like goods were profitable, all sales were included in the weighted average profit calculation.

Confidential Attachment 1 provides the detailed calculation of profit undertaken by ACBPS.

Given the completeness and appropriateness of the profit calculation for [redacted] products, the ACBPS was not required to look further to third country sales.

3.2.2 Application of a weighted average profit incorporating sales to third countries

The Commission notes the finding in REP 196 that sales to third countries were not comparable for the purpose of section 269TAC(2)(d). Specifically, the volume of export sales to any of the third countries, including Germany, was not similar to the volumes exported to Australia as required under section 269TAC(5C)(a).

Notwithstanding the above, the ACBPS only received detailed third country sales data after the verification visit and the ACBPS did not test the accuracy or completeness of the data. In relation to export sales to Germany, the Commission notes that sales appear only to have occurred in two quarters of the review period.

Therefore, the Commission does not consider it appropriate to incorporate third country sales, including export sales to Germany, in the profit calculation.

3.3 Conclusion

After taking into consideration the determination of profit for [redacted] products in this matter, the Commission affirms, pursuant to section 269ZDA(1A) of the Act, the calculations performed and findings made in REP 196 regarding the appropriate profit for the purposes of section 269TAC(2)(c)(ii).