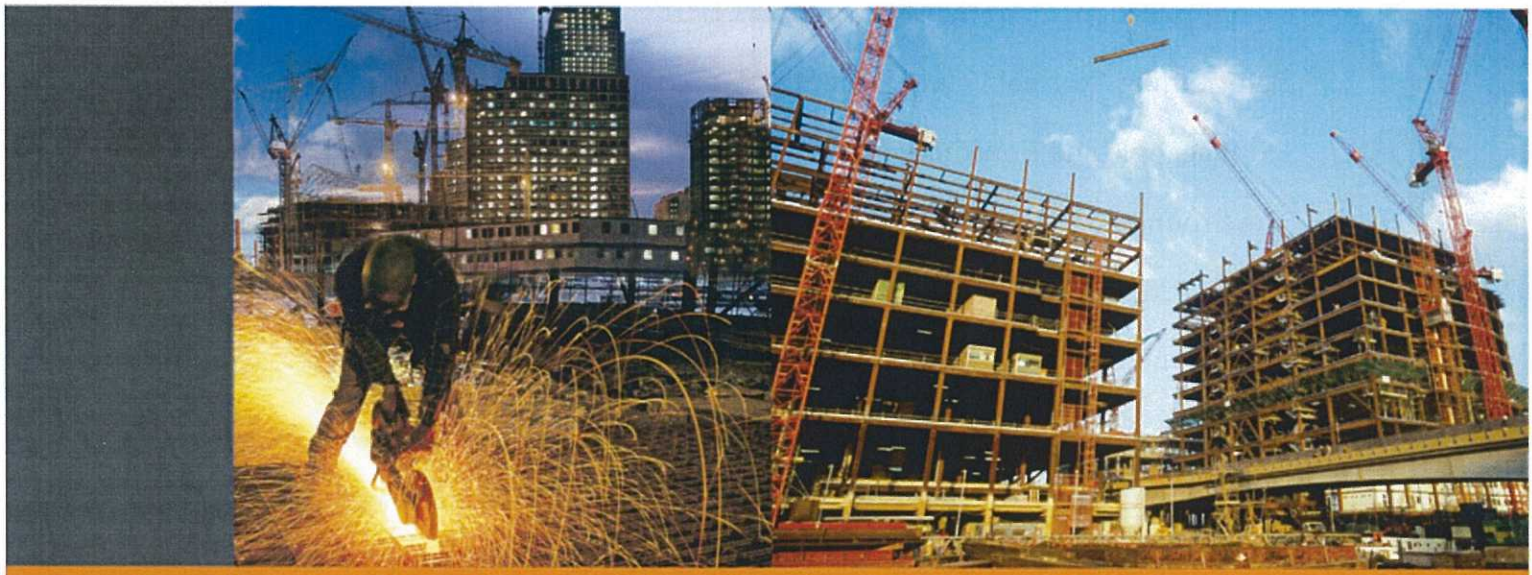
Australian Government

Anti-Dumping Review Panel

REPORT OF THE ANTI-DUMPING REVIEW PANEL



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FOOD SERVICE INDUSTRIAL PINEAPPLE EXPORTED FROM THE KINGDOM OF THAILAND

Application by Dole Thailand Limited for Review of Variable Factors

Contents

THE APPLICATION.

1. Dole Thailand Limited (Dole or the applicant) is applying, pursuant to s269ZZA(1)(c) of the Customs Act [1901] (the Act[13]), for the review of a Ministerial decision made pursuant to s269ZDB(1) dated 26 July 2013 fixing different variable factors attaching to the export from Thailand to Australia of Food and Service Industry (FSI) pineapple. Dole produces FSI pineapple in Thailand which it exports to Australia. FSI pineapple consists of pineapple products (slices, chunks, cubes, tidbits, pieces) in containers exceeding one litre. FSI pineapple is distinguished from consumer pineapple which is the same general product in containers less than one litre.

2. The application for review was accepted and the Senior Member of the review panel, pursuant to s269ZYA, directed in writing that I be constituted to undertake the review. As is required by s269ZZI, public notification of the review was published on 30 August 2013. Minter Ellison (Minters) a law firm acting on behalf of the applicant lodged a statement (the statement) with the review application setting out the grounds on which review is sought and made a submission (the submission) dated 27 September 2013. The review panel is to make a report to the Minister recommending the reviewable decision be either affirmed or revoked and if the latter recommend a substituted decision (s269ZZK(1)). In this case the recommendation is to revoke the decision under review and substitute a new decision.

3. The 'variable factors' consist of three values each of which is defined in the Act –the export price, the normal value and the non injurious price-which are used to determine whether dumping has occurred. The application is limited to issues concerning the determination of the 'normal value' of FSI pineapple, in particular, in respect of one category of the FSI pineapple product. The relevant statutory provisions are set out later in these reasons.

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

5. Subject to one exception not relevant to this review, FSI pineapple exported from Thailand to Australia has been subject to anti dumping measures (the measures) since 2001. The measures are unaffected by the conclusion of a free trade agreement between Australia and Thailand in 2005. The measures have been applied generally to Thai exporters of FSI pineapple to Australia.

6. Anti dumping measures expire after five years unless renewed. The Minister renewed the measures, on the application of Golden Circle, following reports made by Customs that they be continued, for five year periods commencing in 2006 and 2011. On each occasion different variable factors were fixed.

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[13] All references to sections in these reasons are to sections of the Act

7. S 269ZA permits an 'affected party' to apply for a review of a Ministerial decision one year after the publication of the decision. An affected party is a term relevantly defined in s269T to include a person directly concerned in the exportation to Australia of goods or like goods to which the measures relate. On 10 December 2012 Tipco Foods Public Company Limited (Tipco), an affected party, applied for a review of the anti dumping measures applied to the FSI pineapple exported by it from Thailand to Australia. Following a request by the Minister, made under s269ZC(5), notification was published on 29 January 2013 that the variable factors review had been extended to all Thai exporters of FSI pineapple. Interested parties, of which Dole is one, provided information as part of the review.

8. The International Trade Remedies Branch of the Australian Customs and Border Protection Service [14] (Customs) conducted an investigation, undertook a verification visit to the Thai producers/exporters and, as is required by s269ZD published a Statement of Essential Facts (SEF 196) on 8 May 2013. Parties had until 29 May 2013 to respond to SEF 196 before a report was made to the Minister for a decision. Dole, along with other other Thai based FSI exporters, provided a submission to SEF196. Additionally Golden Circle made a submission.

9. Based on the report of Customs (REP196) the Minister, on 26 July 2013, decided pursuant to s269ZDB (1)(a) to fix different variable factors. The application to the Review Panel seeks review of the Minister's decision.

10. The Review Panel held discussion with Customs and sought some further information from the applicant as well as requesting a reinvestigation of the calculation of profit as an element of normal value. That reinvestigation was undertaken and the Panel notified of the outcome in a document dated 11 December 2013. In the end because of the recommendation made to the Minister the reinvestigation has, except incidently, not had to be considered.

DETERMINING 'NORMAL VALUE' UNDER THE ACT

11. Before considering the grounds it is convenient to set out the main relevant applicable provisions of the Act and the Customs Regulations (Reg/s). S269TAC relevantly defines how normal value is to be determined depending on the circumstances as follows:

S269TAC

(1) Subject to this section, for the purposes of this Part, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.
(1A) ....

[14] now the Anti-Dumping Commission

(2) Subject to this section, where the Minister:
(a) is satisfied that:
(i) because of the absence, or low volume, of sales of like goods in the market of the country of export that would be relevant for the purpose of determining a price under subsection (1); or
(ii) because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1);
the normal value of goods exported to Australia cannot be ascertained under subsection (1); or
(b) is satisfied, in a case where like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1);
the normal value of the goods for the purposes of this Part is: (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
(d) if the Minister directs that this paragraph applies—the price determined by the Minister to be the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation from the country of export to a third country determined by the Minister to be an appropriate third country, other than any amount determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of any such transactions.

S269TAC
5C Without limiting the generality of matters that may be taken into account by the minister in determining whether a third country is an appropriate third country for purposes of paragraph (2)(d)...,the Minister may have regard to the following matters:
(a) whether the volume of trade from the country of export referred to in paragraph(2)(d)...is similar to the volume of trade from the country of export to Australia; and
(b) whether the nature of the trade in goods concerned between the country of export referred to in paragraph(2)(d)... is similar to the nature of trade between the country of export and Australia.

'Like goods' is defined in s269T as follows:

"like goods" in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not

alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.'

S 269TAC(5B) provides that calculation of profit if under S269TAC(2)(c)(ii) is to be made in accordance with the Customs Regulations (the Regulations/Reg/s). While some of the grounds relate to the interpretation of Reg 181A, under which 'profit' is to be calculated when a constructed normal value is determined under s269TAC(2)(c)(ii), because of the decision reached it transpires not to be necessary to cite the regulation.

FSI PINEAPPLE AND HOW CUSTOMS CALCULATED NORMAL VALUE.

12. In SEF 196 Customs identified two categories of FSI pineapple produced by Dole. In turn the categories are divided into groups of products. Within the groups the various products are further identified by their product identification numbers (PID). The first category, consisting of groups 1,2 and 3 (with respective domestic PIDs of [redacted], [redacted] and [redacted]), is constituted by low volume /high cost/high margin premium products which are sold into both the domestic and export markets. Dole does not contest the assessment made of the normal value, made pursuant to s269TAC(1), for the first category of product.

13. The second category, consisting of Group 4 products, is a budget category constituted by pineapple pieces designed for the pizza market and is described as a high volume/low cost/low margin product. Group 4 products are made from the offcuts after the premium cuts, used in the production of category one products, have been taken and are constituted by PIDs [redacted] and [redacted]. PIDs [redacted] and [redacted] are identical except the former is constituted in heavy syrup and the latter in a lighter syrup. PID [redacted] is constituted in the same syrup as PID [redacted] differing only in the cut utilized-PID [redacted] is blunt end segmented whereas PID [redacted] is point end segmented. PID [redacted] is sold into a variety of export markets including Australia. PID [redacted] is sold exclusively into Australia. Except for a one-off domestic sale, Customs accepted PID [redacted] is sold into export markets other than Australia. In REP196 Customs accepted that the one off domestic sale was made ' in unusual circumstances and [was] not made in the ordinary course of trade'.[15] Accordingly information from that sale was disregarded in the calculations undertaken. The three products constituting Category 2 are export products only with no relevant domestic sales.

14. In the absence of any domestic sales for category two FSI pineapple products, Customs used s269TAC(2)(c)(ii) to construct a normal value. The section requires profit to be calculated as part of determining a constructed normal value. S269TAC(5B) requires profit to be worked out as provided for in the Regulations. Reg 181A (2) was used by Customs to calculate the profit. Customs used domestic sales from two of the three category one FSI pineapple products - PID [redacted] and PID [redacted] to calculate the profit to be applied to the category 2 product. A third category one product (PID [redacted]) was excluded form

[15] REP 196 at P19.

the calculations as sales were not considered to have been made in the ordinary course of trade.

15. It is the methodology utilized by Customs to determine normal value in respect of the Category two Group 4 products which is the subject of this review application. There are two principal grounds. One challenges whether Customs use of the constructed value methodology in s269TAC(2) was the correct or preferred way in which to calculated normal value. It was submitted that the alternative methodology provided in s269TAC(2)(d) –which provides if the Minister directs that the provision is to apply, that normal value can be determined by reference to the price paid in sales of like goods to an appropriate third country. The other principal ground relates to the manner in which Customs determined the profit element as part of calculating the constructed normal value under s269TAC(2)(ii). It is convenient to set out all of the grounds on which review is sought and the approach the panel has taken in proceeding to make its recommendation.

THE GROUNDS.

16. The following grounds are submitted as being either the incorrect and/or non preferred elements in the decision under review:

(i) the 'Dole group' rather than the applicant was identified as the exporter,

(ii) there was no finding by the Minister that he was satisfied that he could not ascertain the normal value of Group 4 FSI pineapple under s269TAC(1),

(iii) the Minister failed to consider whether normal value of the Group 4 FSI pineapple should be ascertained under s269TAC(2)(d) ie by reference to the price paid for like goods sold in the ordinary course of trade in arms length transaction from Thailand to a country determined by the Minister to be an appropriate third country,

(iv) the Minister failed to direct that the normal value of Group 4 FSI pineapple should be ascertained under s269TAC(2)(d) and Customs failed to recommend, as it did for other exporters, that that the normal value should be ascertained under s269TAC(2)(c) (sic),

(v) the Minister's acceptance of a finding that for purposes of calculating an amount of profit under s269TAC(2)(c)(ii) on a hypothetical sale of group 4 goods on the Thai domestic market, the average level of profit achieved by the applicant in domestic sales of Group 1, 2 and 3 products was the appropriate measure,

(vi) even if the Minister's acceptance referred to in (v) was correct, the calculated amount of profit is wrong because of the incorrect identification of the 'exporter' for purposes of regulation 181A(2),

(vii) the Minister failed to take account of the requirement that an ascertained normal value should be 'normal',

(viii) the Minister's determinations that normal values for other Thai exporters (being Kuiburi Fruit Canning Company Ltd, Natural Fruit Company Ltd, Siam Agro-Food Industry Public Company Ltd and Tipco) should be ascertained under s269TAC(2)(c) when sales in the ordinary course of trade in Thailand by the applicant (an 'other seller') was available for the ascertainment of those normal values under s269TAC(1).

17. Before proceeding further it is necessary to address a request made on behalf of the applicant that all of the listed grounds be considered. A difficulty arises in providing the Minister with alternative recommendations which have, or may have, different outcomes in cases where more than one recommendation to substitute a new decision may be involved. For instance in the instant case if ground 4 was to be upheld that may result in a different normal value being recommended than if ground 6 is upheld. The application itself recognizes different outcomes depending on which grounds may be upheld. S269ZZK(1)(b) requires that in cases of where a revocation recommendation is made that a 'specified' substituted decision is also to be recommended. It is not the case that a number of alternative decisions from which the Minister may choose can be recommended.

18. It is not the function of the panel to choose which ground is the most appropriate to address in circumstances where an applicant, or an applicant's representative, does not nominate an order in which it is desired that grounds be considered. To resolve this issue I have proceeded to examine the grounds in the order in which they were submitted. For the reason stated it proved not to be appropriate once a ground which resulted in a recommendation that the reviewable decision be revoked and a new specified decision substituted to consider the remaining grounds.

19. In the concluding paragraph of the statement it is submitted that the information supplied on behalf of the applicant should be applied by the Minister to determine normal values for other Thai exporters of FSI pineapple to Australia. There is no legislative authority for the Panel to make such a recommendation.

First Ground

20. The first ground concerns the decision in REP196 as to which entity is the exporter of the FSI pineapple product. While Dole is the producer of FSI pineapple the product when exported is sold to a related company, Dole Packaged Foods Asia (DPFA), which on sells the FSI pineapple into Australia. DPFA is a company registered in Bermuda. Thai domestic sales of Dole produced FSI pineapple are undertaken by another affiliate company, Thai American Food Co.

21. In SEF 196 Customs drew no distinction between Dole and its affiliate DPFA and treated sales by the latter as if sales by Dole. In REP 196 Customs changed its approach stating that given the close structural and commercial relationship between the two companies it was appropriate to treat them as one and 'collapse' the corporate structure. It is not claimed the changes in the identification of the exporter affects the calculation of the export price of the goods to Australia. It is however submitted that the change affects the calculation of profit for purposes of calculating the normal value and was made to '..prop up the dumping margin set out in the SEF' [16]. This aspect would need to be considered if ground 6 is required to be addressed.

The Second Ground.

22. The second ground asserts that there is no express finding by the Minister that he was satisfied that he could not ascertain a normal value under s269TAC(1). It is clear that s269TAC(1) provides that if such a finding can be made that is how normal value is to be determined. It is only if normal value cannot be so determined that s269TAC(2) comes into operation. While he may do so, it is not a legislative requirement that the Minister expressly make a finding of satisfaction that he cannot ascertain the value of the goods under s269TAC(1). The fact that the Minister has not done so clearly implies that he could not be so satisfied. This is acknowledged in paragraphs 18 and 19 of the statement. To uphold this ground would give precedence to form over substance. In my view this ground cannot succeed.

The Third and Fourth Grounds.

23. The third and fourth grounds can be considered together. In the absence of an ability to determine normal value under s269TAC(1) then, subject to the preconditions in paragraphs 2(a) and (b) being fulfilled, paragraphs (c) and (d) provide alternative methodologies for calculating normal value. It is accepted that the preconditions have been fulfilled. Ground 3 concerns which subparagraph of s269TAC(2) is to be preferred for use in calculating the normal value of exported FSI pineapple.

24. The introductory words of paragraph (c) - 'except where paragraph (d) applies...'- have been interpreted by the former Trade Measures Review Officer in the Formulated Glysophate decision[17], as follows:

> *67'... s 269TAC(2)(c) expressly states that it can only be applied where paragraph (d) does not apply, namely where the Minister has not directed that paragraph (d) applies. In order for the Minister to properly consider whether he should make such a direction it would be necessary for Customs to consider the appropriateness of calculating the normal value in accordance with s 269TAC(2)(d) as opposed to s 269TAC(2)(c).*

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[16] Paragraph 10 of the Statement in support of the review application dated 26 August 2013

[17] http//www.tmro.gov.au/site/2012_6.asp.

68. In this investigation, Customs simply applied its preferred method of the two options for calculating normal value, s 269TAC(2)(c). Customs did not give any substantive consideration to whether s 269TAC(2)(d) might be more appropriate.

69. In my opinion, it is satisfactory for Customs to ordinarily proceed with calculating a normal value under s 269TAC(2)(c) in accordance with its general preference to use that provision, unless there are circumstances which give rise to a reasonable suggestion that s 269TAC(2)(d) might provide a more appropriate method of assessing normal value. In such circumstances, it is necessary for Customs to give substantive consideration to whether s 269TAC(2)(d) is a more appropriate method, which would require some level of detailed consideration of third country export data.'

The TMRO restated this above in the Hollow Structural Sections decision.[18]

25. There is no legislative direction that s269TAC(2)(d) is to take precedence over paragraph(c). Where a hierarchical approach to alternative methodologies for undertaking calculations is to be taken express legislative provision makes this clear eg as in s269TAC(1). The fact that paragraph (c) precedes paragraph (d) does not give it precedence. Either alternative may be used, paragraph (d) only applying if directed by the Minister. While there is no legislative imperative requiring the Minister to consider the application of paragraph (d), I agree with the decision of the TMRO that when a submission raises the issue then it is incumbent that 'substantive consideration' be given to placing information before the Minister to permit him/her to properly consider whether to direct that paragraph (d) be invoked. While it is the case that the Minister has an unfettered discretion as to whether or not to implement the provision, he/she can only consider the exercise of the power to direct if provided with sufficient relevant factual information and policy advice.

26. In the instant case the information provided to the Minister in REP 196 with respect to the applicability of s269TAC(2)(d) is very brief namely -

> *'...[Customs] is not satisfied that normal value can be determined pursuant to s269TAC(2)(d). [Customs] is not satisfied that the exports of [Dole] to the country submitted for comparison is similar to that exported to Australia for purposes of s269TAC(5C).*[19]

This above contains no factual background or reference to policy advice to support the conclusion expressed.

27. REP196 contains no recommendation that the Minister should consider directing the applicability of s269TAC(2)(d). Unsurprisingly, given the absence of detailed advice, there is no evidence in his reported decision that the Minister gave consideration to the use of the provision.

28. If s269TAC(2)(d) had been applied it is submitted on behalf of Dole, it would more accurately have reflected the original target of trade measures

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[18] www.gov.au /notices/dumping/reports_212.asp

[19] REP 196 paragraph4.4.3 at p 19

legislation as it addresses discriminatory pricing between different markets and is to be preferred over the method provided in paragraph (2)(c)(ii) which involves the application of an hypothesis resulting in artificiality.

29. Ground four maintains that if s269TAC(2)(d) had been considered then the representative prices of an identical product (PID [redacted]) with an identical cost profile, with broadly comparable high overall volumes and with similar consignment sizes supported sales of FSI pineapple to Germany would provide a more appropriate point of comparison.

30. The reinvestigation report, while addressing other issues, commented on the lack of similarity in sales volume of the subject FSI pineapple product made to Germany. The report expressed concerns that information about the sales to third countries was only received after the verification visit and consequently the accuracy and completeness of the data could not be confirmed. It was also noted that the sales information relied on in respect of sales to Germany occurred in only two of the quarters of the 12 month review period[20]. On the other hand the response provided by Minters to Customs of 28 May 2013 to SEF 196, details information about the sales to Germany as having been provided to Customs and I could not find any query raised as to its accuracy or further enquiry to clarify any shortcomings[21]. In fact, as is pointed out in the submission, Customs in the Export Visit Report undertaken to verify data, stated that Customs were 'reasonably satisfied' that the third country sales data provided by the applicant was reliable. This does not accord with Customs' advice in the reinvestigation report that the data could not be checked. Despite the misgivings expressed by Customs in the reinvestigation report on this topic, in the absence of anything which raises specific concerns, I am satisfied to conclude that the data provided by or on behalf of the applicant on comparative country sales is sufficiently reliable to be used.

31. In REP196 Customs was not satisfied that exports to the third country nominated by the applicant (Germany) were '..similar to that exported to Australia'.[22] Customs confirmed in my discussions with them that it was the trade volumes which were nominated as being of concern and this was further confirmed by information contained in the Reinvestigation Report[23]. REP196 does not address any concerns that the nature of trade between Thailand and Germany and Thailand and Australia are other than similar and I accept that they are for purposes of S269TAC(5C)(b).

32. Of three possible countries Germany was nominated on behalf of the applicant as being the most suitable for comparison. The following points are made in the Statement:

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[20] Reinvestigation report 11 December 2013 at paragraph 3.2.2
[21] penultimate sentence in part 3A of the response
[22] ibid at p19
[23] Reinvestigation Report at 3.2,2

' The appropriate comparison submitted by [Dole] was sales to Germany at representative prices of an identical product, with identical cost profile, in broadly comparable high overall volumes (Australia .....kgs v Germany .....kgs) and similar consignment sizes. In addition there are no differences in the nature of trade in the goods between the two countries. In both cases sales can be compared at the fob level and it is difficult to imagine any significant differences between sales to different countries of shipping containers full of canned pineapple.'[24]

(The volumes of the respective sales to Germany and Australia are confidential commercial information, and have been deleted from the above quote.)

In the absence of any concern being expressed by Customs except in respect of similarity in the volumes of trade I accept it is this issue which resulted in Customs considering S269TAC(2)(d) not being suitable to be used.

33. The Customs published Dumping and Subsidies Manual (the Manual) sets out the principles and practices normally applied to anti dumping measures. While not yet publicly announced in the Manual, Customs informed me when discussing this issue that 'similar' is taken to equate to +/_ 10% and that the differential in the instant case, approaching 20%, results in the volumes not being 'similar'. For that reason, although this is not articulated in either SEF 196 or REP196, Customs considered it was inappropriate to use paragraph 2(d).

34. In the absence of a definition of what is to be considered 'similar' in the Act the ordinary meaning should be applied. The Concise Oxford Dictionary definition includes 'like, alike, having mutual resemblance or resemblance to, of the same kind...'. It is a word of some flexibility necessarily dependent on context. In the context of trade while variations in the volumes sold can result in price differences making comparisons inappropriate, where large volumes are concerned, as in the instant case, this is unlikely to result in commercially significant price differences.

35. While a trade volume disparity of approaching 20% may be at the high end of what may be categorised in this context as constituting similar volumes, it is not so disparate as to result in the provision not being utilized. On the totality of the information before me and standing in the place of the Minister I am satisfied to accept that there is a similarity in the trade volumes.

36. For the above reasons it is appropriate for the Minister to consider the application of paragraph 2(d). It is next necessary to consider whether the balance of the matters in the paragraph can be met. The paragraph requires that sake of the goods to Germany that be made 'in the ordinary course of trade in arms length transactions'. There is nothing which suggests that the sales were made other than in arms length transactions and in the ordinary course of trade and I accept that they were so made.

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[24] statement paragraph 24

37. There being substantive information which would permit the Minister to make a decision, the issue then becomes whether he should direct paragraph 2(d) be applied. to apply. It is now necessary to consider whether, in the circumstances of this case, the application of paragraph 2(d) is to be preferred to the application of paragraph 2(c). In order to reach this decision issues connected with reaching a decision using paragraph 2(c) need to be considered.

38. S268TAC(2) involves two steps. The first under paragraph (2)(c)(i) requires the Minister to determine the cost of production of the goods in the country of export. This is not disputed and I accept the amount determined by Customs. The second, in paragraph2(c)(ii), requires the Minister to assume that instead of the goods being exported they had been sold for home consumption in the country if export in this case Thailand. The Minister is to decide the amounts by determining amounts which 'would be the administrative, selling and general costs associated with the sale and the profit on that sale'. As earlier stated in these reasons it is only the determination of the profit which is in dispute.

39. S269TAC(5B) mandates that profit is to be calculated as provided for in the Regulations. Reg 181A relevantly sets out the factors that the Minister is obliged to take account for the purpose of working out the amount of profit to include. Reg181A(2) which is in the following terms, requires the Minister to work out the amount in the manner prescribed if the conditions in the regulation are met:

> '2 ..*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.*'

It is only if the Minister is unable to work out the amount using the information stated that he can refer to three alternative methods set out in paragraph (3) of the regulation. Both Customs and the applicant relied on paragraph (2) to calculate the amount of profit to be included. They did so by adopting different approaches which in turn resulted in differing profit calculations.

40. In REP196 Customs made the calculation by reference to the profit made from the sale of those category 1 goods determined to be sold in the ordinary course of trade and sold in the Thai domestic market. Customs followed this course because it held the view that:

> *'[Customs] considers that the correct or preferable interpretation of reg181A(2) gives precedence to the actual profit achieved on domestic sales of like goods rather than the amount of profit worked out by reference to profit made on third country sales of like goods in the ordinary course of trade'*[25]

[25] REP196 paragraph 4.4.3 at p 20

41. On behalf of the applicant it was submitted that this methodology is erroneous on several grounds. In view of the recommendation I have determined to make that the Minister apply s269TAC(2)(d). I do not propose to address those grounds. However it is desirable that the reason for preferring that course rather than the use of the constructed price methodology be explained.

42. In REP 196 Customs was able to determine normal values for all but the one product, the product which is the subject of this review, using s269TAC(1). It could do so because the applicant had suitable comparable FSI pineapple products sold in sufficient volumes in the ordinary course of trade into the Thai domestic market. As is contemplated by the use of the methodology set out in s269TAC(1) – the price paid for like goods sold in the ordinary course of trade for home consumption - provides the surest method for determining a normal value.

43. Wherever possible reference to actual sales, particularly as here when that has been the course followed for other like products, provides a more certain method for determining normal value than can be achieved by calculating a price based on a figure calculated on the basis of assumed sales. In this case there are additional difficulties associated with differing approaches as to the calculation of profit under Reg181A which enhance the security which is to be had by reference to the greater certainty as to price arising from the use of paragraph(d) to that provided by using paragraph (c)(ii).

44. Since the evidence in this case confirms profitable sales of what is a directly comparable product to Germany –a country in respect of which, as I have found, there is similarity both in the nature and volumes of the traded goods (as considered desirable in s269TAC(5C))-the use of s269TAC(2)(d) is clearly the preferred method by which to proceed.

45. In view of the above conclusion for the reasons earlier stated I do not consider it either necessary or desirable to address the remaining grounds relied on in the application for review.

46. At my request the Commission assisted by recalculating the normal value for Dole FSI pineapple products in accordance with the recommendation. That calculation, which contains sensitive commercial information, is found in confidential attachments to this report. It involved two steps. First, new normal values were calculated using s.269TAC(2)(d) for the Category two products by reference to the export sales to Germany, including making appropriate adjustments under s.269TAC(8). Second, those new normal values for Category two products were used together with the previously determined (and uncontested) normal values for the Category one products during the review period to determine a new normal value for the FSI pineapple exported by Dole to Australia.

47. It is that normal value that I recommend the Minister fix as being the ascertained normal value for FSI pineapple exported by Dole to Australia. That

is the only change recommended to the reviewable decision. The practical result would be a reduction in the interim dumping duty payable by Dole.

RECOMMENDATION

48. Pursuant to s269ZZK(1) of the Act I recommend that the Minister revoke the reviewable decision and substitute, with effect from 26 July 2013, a new specified decision that varies the dumping duty notice by fixing a different ascertained normal value for exports by Dole of FSI pineapple from Thailand. That different normal value is in Confidential Attachment 1.

49. In order to ascertain that different normal value I recommend that:

(a) the Minister be satisfied that the normal value of goods described as Category two goods cannot be ascertained under s269TAC(1);
(b) the Minister direct that s269TAC(2)(d) applies in determining the normal value of those goods;
(c) the Minister determines that Germany to be an appropriate third country and that the sales to Germany were made in arms length transactions in the ordinary course of trade;
(d) that adjustments be made in accordance with s269TAC(8) for timing differences for some of the sales and for credit terms related to sales to Australia; and
(e) the resulting new normal values for Category two goods be used together with the previously determined normal values for Category one goods during the review period to determine the normal value. .

ATTACHMENTS

Confidential Attachment 1	Dole Variable Factors
Confidential Attachment 2	S.269TAC(2)(d) Normal value calculation for Category two
Confidential Attachment 3	Calculation of dumping margin and variable factors

Reviewer: Graham McDonald

Anti-Dumping Review Panel Member

Date: 16 January 2014