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Australian Government
Department of Industry, Innovation and Science

Anti-Dumping Commission

Anti-Dumping Commission
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Mr. Paul O'Connor
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CONSUMER PINEAPPLE EXPORTED FROM THE PHILIPPINES AND THAILAND AND FSI PINEAPPLE EXPORTED FROM THAILAND

Dear Mr. O'Connor

I write with regard to the notice published under section 269ZZI of the *Customs Act 1901 (the Act)* on the Anti-Dumping Review Panel (ADRP) website on 18 November 2016. This notice advises of your intention to review the decisions (the Reviewable Decisions) by the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (Parliamentary Secretary) to publish notices under subsection 269ZHG(1)(b) of the Act in relation to consumer pineapple exported to Australia from the Republic of the Philippines (the Philippines) and the Kingdom of Thailand (Thailand) and food service and industrial (FSI) pineapple exported to Australia from Thailand.

The Reviewable Decisions were published on the Anti-Dumping Commission (the Commission) website on 13 September 2016 (Anti-Dumping Notice Nos. 2016/81, 2016/82 and 2016/84 refer).

I understand that a conference was held between yourself and Commission staff on 29 November 2016. In addition to the matters discussed at that conference, further consideration has been given to the applications. The following submission at Appendix A is provided for your consideration, along with various attachments listed at Appendix B.

I and the Commission remain at your disposal to assist in this matter.

Yours sincerely

Dale Seymour
Commissioner
Anti-Dumping Commission

16 December 2016

APPENDIX A

I make the following submission in response to the grounds set out in the public notice under section 269ZZI of the Act published on the ADRP website on 18 November 2016, in respect of the Reviewable Decisions of the Parliamentary Secretary and my associated recommendations in *Anti-Dumping Commission Report Nos. 333 and 334* (REP 333 and REP 334).

Kuiburi Fruit Canning Co., Ltd (Kuiburi)

Kuiburi raise the following grounds for review:

1. The decision to apply a rate of profit to a constructed normal value was incorrect;
2. The acceptance of a profit rate applicable to another market to arrive at an unsuppressed selling price (USP) and non-injurious price (NIP) is flawed;
3. The recurrence of material injury from dumped goods fails to recognise the fact that the average selling price of Kuiburi sales to Australia increased approximately 25% in 2015 over 2014; and
4. The decision to recommend the continuation of measures for 20 years.

I address each of these grounds below.

Ground 1

In its application, Kuiburi claim that the Commission incorrectly determined certain domestic sales of like goods not to be in the ordinary course of trade (OCOT).

The basis of Kuiburi's claim is that the Commission incorrectly calculated the weighted average cost to make and sell (WACTMS) of like goods for the purposes of determining whether the like goods were likely to have recovered the cost of such goods within a reasonable period for the purposes of subsection 269TAAD(1)(b) of the Act.

The WACTMS calculated by the Commission differs from the WACTMS calculated by Kuiburi because:

- the Commission calculated the WACTMS for each model based on a pivot table in Kuiburi's domestic sales spreadsheet. The pivot table sums the total cost to make and sell (CTMS) for each domestic sale over the inquiry period and calculates a WACTMS for each model based on the total sales volume for each model over the inquiry period; whereas
- Kuiburi calculated the WACTMS for each model in its domestic CTMS spreadsheet using the following formula:

$$\frac{Total\ cost\ to\ make\ over\ inquiry\ period}{Total\ production\ volume\ over\ inquiry\ period} + \frac{Total\ selling,general\ and\ administrative\ expenses\ allocated\ over\ inquiry\ period}{Total\ sales\ volume\ over\ inquiry\ period}$$

Kuiburi quote a passage of the *Dumping and Subsidy Manual* (the Manual) to support its claims that the Commission did not follow its stated procedures. Kuiburi's quote stops short of the example provided in the Manual on pages 32 and 33. As outlined to you at a conference dated 29 November 2016, the Commission's calculation of the WACTMS is consistent with the calculation used in the example from the Manual. Therefore, I do not agree that the Commission's calculation was inconsistent with its stated procedures.

I consider that both methods of calculating the WACTMS are reasonable and would ordinarily bring about similar amounts and result in similar dumping margins. However, in this instance, the difference in the two calculations has a material impact on Kuiburi's dumping margin.

Having considered which of the two methods is correct and preferable, the Commission considers that the WACTMS should have been calculated as the amount in Kuiburi's application for review for the following reasons:

- the Commission's practice is to calculate the quarterly CTMS of each model in this manner for the purpose of assessing whether domestic sales are profitable and therefore in the ordinary course of trade. This is how the quarterly CTMS was calculated for Kuiburi. Therefore, it follows that the WACTMS should be consistent with this calculation;
- Kuiburi sold a substantial volume of like goods in a quarter where the production volume was the lowest and the unit CTMS was highest, therefore by weighting the CTMS for the inquiry period in the Commission's original calculations based on sales volumes this had the unintended effect of increasing the WACTMS; and
- this method best reflects the provisions of the Act, the Regulations and generally accepted accounting practices.

A revised dumping margin and ascertained normal value in relation to Kuiburi are at Confidential Attachment 1 should you require them.

<u>Ground 2</u>

Kuiburi disagree with an amount of profit applied in calculating the USP for FSI pineapple in respect of REP 334. The amount of profit in question was based on Golden Circle Limited's (Golden Circle) profitability of consumer pineapple, which I consider to be a similar product to FSI pineapple.

I addressed a submission by Kuiburi and outlined my reasoning for the inclusion of this amount of profit in REP 334 at Heading 9.2.1 which states:

> *"…in the context of determining a reasonable amount for profit, a profit rate from the Australian industry's similar category of goods may be used, provided that the data for the similar category of goods is verified. The Commission considers the consumer pineapple category to be similar category of goods as FSI pineapple. Information in relation to FSI pineapple was verified. Furthermore, the Commission considers that the return made by Golden Circle in consumer pineapple was reasonable."*

This is the Commission's practice as set out on page 130 of the Manual in relation to constructing an USP.

In its application, Kuiburi state that:

> *"Applying the profit from a high volume market to a low volume market could, respectfully in Kuiburi's opinion, not be substantiated as normally the FSI's profit achieved is less than the consumer's profit because the use purpose is different. This point is also highlighted by the Commission's decision to separate the original review into two categories (consumer and FSI)."*

The Commission's decision to separate the original investigation into separate goods is outlined in *Trade Measures Branch Report No. 41* (REP 41) provided to you previously. During the original investigation, Customs sought submissions as to whether consumer pineapple and FSI pineapple should be considered separate goods. In REP 41 the then CEO of Customs found that consumer pineapple and FSI pineapple were not "like goods" to each other due to various differences, including differences in end use and limited substitutability. In REP 41 consumer pineapple and FSI pineapple were treated as separate goods and a separate injury analysis was undertaken for each product and their respective market. REP 41 ultimately recommended that measures be imposed on this differentiated basis. Customs' analysis at the time was based on whether consumer pineapple and FSI pineapple were "like goods" to each other, as defined in subsection 269T(1) of the Act and whether the effect of those goods on the Australian industry should be assessed using the Australian market as a whole or separate segments of the market.

The reason to consider consumer pineapple and FSI pineapple as separate goods in REP 41 was not based on differing levels of profitability in the Australian consumer and FSI pineapple markets.

Although consumer pineapple and FSI pineapple were not considered to be like goods in the original investigation, it does not necessarily follow that those goods are not similar goods or do not have similar levels of profitability.

I am of the view that the amount of profit applied in the USP for FSI pineapple was reasonable and the most appropriate in the circumstances. Even if no profit was included in the USP for FSI pineapple, there would be no impact on the amount of interim dumping duty payable in respect of Kuiburi's exports. According to the Commission's calculations, absent an amount of profit, the NIP would not be the operative measure and the fixed component of interim dumping duty would remain equal to the full margins of dumping as was the finding in REP 334 at Heading 9.2.2.

<u>Ground 3</u>

Kuriburi in its application claims that[1]:

[1] I note that similar claims were put forward by Dole Philippines Inc. (DPI), therefore the section of the submission applies equally to both claims.

> *"The fact that Kuiburi's average selling price of it's [sic] sales to Australia increased by approx. 25% in 2015 over 2014 should be an indication that sales by Kuiburi were not the cause of any injury suffered by the Australian industry."*

Kuiburi refers to its selling price increase as fact, but I do not have any evidence to support Kuiburi's price in 2014.

Kuiburi's application refers only to injury suffered by the Australian industry, presumably in the inquiry period.[2] However, in recommending whether the measures ought to expire, I must conduct a prospective examination of the injury that would or would likely occur should the measures expire. The injury suffered by the Australian industry during the inquiry period is only one of the considerations relevant to this examination. The Commissioner addresses many factors in considering whether injury would or would likely continue or recur and recommendations are made based on the totality of evidence available. Further, even if Kuiburi's claims were substantiated, the intended consequence of imposing anti-dumping measures is to remove the injurious effect of dumping and it would not be appropriate to recommend that the measures expire simply because they are having their intended effect.

Ground 4

In addressing the recommendation to continue the measures, Kuiburi claim that:

> *"Pursuant to subsection 269ZHE(2) the Commissioner must be satisfied the expiration of measures would lead to a continuation of material injury."*

It would appear that Kuiburi are referring to subsection 269ZHF(2) of the Act. Subsection 269ZHF(2) of the Act states:

> *"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 recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent."* (emphasis added)

Among other things, dumped exports continued in substantial volumes since the last continuation inquiry in 2011 and during the inquiry period exports of dumped goods substantially undercut the Australian industry's selling prices. Based on such findings I was satisfied that, as outlined in REP 334 at Heading 7.5, if the measures were to expire, FSI pineapple from the Philippines and Thailand would likely be exported at increased levels of price undercutting that would lead to the continuation or recurrence of material injury to the Australian industry that the measures are intended to prevent.

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[2] I also note that Kuiburi's claims relate only to its Australian selling prices, without any reference to changes in the normal value.

Kuiburi claim certain factors such as the need for Golden Circle to import raw materials contributed to its increased costs. As I outlined in REP 334, Golden Circle's decision to import raw material was considered to be a rational commercial decision in response to a short-term shortage of raw materials in Australia. I do not consider those factors, in and of themselves, detract from the overall finding.

Prime Products Industrial Co., Ltd (PPI)

PPI claim that the Commission erred in ascertaining its export price and that "*…the Commission's determination of export price is critically flawed and undoubtedly unreasonable, and as such neither correct or preferable."*

As explained in REP 333, PPI did not export to Australia during the inquiry period. Therefore, the Commission was unable to determine PPI's export price under subsection 269TAB(1) of the Act. As the Commission considered that sufficient information was not available to enable PPI's export price to be ascertained under the subsections preceding subsection 269TAB(3), the Commission calculated PPI's export price in accordance with subsection 269TAB(3) of the Act based on all relevant information.

PPI's claims that in determining the export price, the Commission has departed from its 'past practice' in assessing the most relevant information for the purposes of subsection 269TAB(3) of the Act. PPI cites the Manual and past final reports to support its claim that its export price should be set equal to its normal value.

Firstly, in determining an export price under subsection 269TAB(3) of the Act, the Minister must, as required by the Act, have regard to the all relevant available information. This is a case by case assessment. Subsection 269TAB(3) of the Act confers some discretion on the Minister and does not require the Minister to calculate export price with regard to the normal value.

Secondly, I do not consider that the examples cited by PPI support its claims. The final reports cited at footnote 5 of PPI's application were:

1. REP 139 – Review of certain hot dip galvanised welded circular hollow sections – September 2008, section 6.1, pages 13-14;
2. REP 180 - Accelerated Review LLDPE Thailand - November 2011, section 3.2, page 7;
3. REP 191 - Accelerated Review Consumer Pineapple by Kuiburi Fruit Canning Co Ltd – September 2012, section 3.4, page 9;
4. REP 196 - Review of consumer pineapple exported from Thailand; section 4.4.2; page 14;
5. REP 196 - Review of consumer pineapple exported from Thailand; section 4.6.3; page 20;
6. REP 196 - Review of FSI pineapple exported from Thailand; section 4.7.3; page 26; section 3.4, page 15;
7. REP 214 – Accelerated Review Aluminium Extrusions – Guangdong Jinxiecheng – September 2013;
8. REP 250 - Accelerated review of prepared or preserved tomatoes from Italy; section 3.1; page 8;

9. REP 259 – Accelerated Review for Aluminium Extrusions – Zhaoqing – October 2014, section 3.3, page 12; and
10. REP 274 - Accelerated review for zinc coated (galvanised) steel – Zongcheng – January 2015.

I could not locate items 4 and 5 above. Those references may in fact be to REP 195A. I also note that REP 180 and REP 191 are not available on the Commission's electronic public record. As such, I provided copies of REP 180 and REP 191 to you.

In all of the final reports listed above, for certain exporters, the export price was set equal to the normal value. However, importantly, there are distinguishing factors to note in each of the final reports:

- REP 180, REP 191, REP 214, REP 250, REP 259 and REP 274 were all in relation to accelerated reviews. Accelerated reviews by their very nature are expedited and must be conducted in a shortened timeframe of 100 days. The most up to date relevant information available for the purposes of an accelerated review is usually limited to information submitted by the applicant. In comparison, a review, continuation inquiry or investigation has a legislated timeframe of 155 days (which can be extended) and can involve multiple exporters, meaning that more relevant information is generally available; and
- I would also note that the extract from the Manual and quoted by PPI in its application is also in the context of accelerated reviews and is caveated by the Commission's policy that, in determining an export price for entities that have not exported to Australia, the Commission will "assess the normal value of the goods". I.e. the Commission will only set the export price as equal to the normal value if the normal value is a reasonable approximation of the export price. In all of the cases mentioned by PPI, the normal value for the relevant exporters were calculated under subsection 269TAC(1) or subsection 269TAC(2) of the Act. I.e. for each of the exporters there was reliable information to calculate the normal value of the exporter based on its own information. As you will see from Heading 8.4.2 at page 46 of REP 333 and *Anti-Dumping Commission Report No. 296*, provided to you previously, I have assessed the normal value in relation to PPI on two occasions. On both occasions, I was unable to determine a normal value for PPI based on its own information.

Therefore, for the purposes of REP 333, I determined the normal value for PPI under subsection 269TAC(6) of the Act having regard to all relevant information.

Specifically I used the weighted average normal value determined for DPI, as there were no other cooperating exporters from Thailand. This approach is set out in Chapter 13.3 of the Manual which provides that regard will be had to information including that gathered from other countries the subject of the same investigation in establishing normal values under subsection 269TAC(6) of the Act. As outlined in REP 333, the information gathered from the Philippines was relevant to PPI because the Philippines and Thailand are both large producers of canned pineapple products and are predominately export focused countries. Both countries were subject to similar weather events and are geographically nearby.

In circumstances where the normal value is calculated under subsection 269TAC(6) of the Act, the Commission is unlikely to set the export price as equal to the normal value, where the Commission considers that other information (e.g. ABF import statistics) are more relevant to the export price.

In relation to the normal value calculated under subsection 269TAC(6) of the Act, PPI claim that it:

> *"…has not been provided sufficient information by the Commission to properly understand that basis of the normal value ascertained for Dole Philippines, in particular the like good domestic models and the Australian exported models."*

I refer you to page 4 of the exporter visit report for DPI which provides a table outlining the products sold by DPI domestically in the Philippines.

PPI claim that the Commission should not have rejected import statistics by an exporter not subject to measures, being TPC Thailand, in preference to export prices from other uncooperative exporters from Thailand. I addressed similar claims at page 46 of REP 333. In summary, I considered that TPC Thailand's export price was not the most relevant information for the purposes of determining PPI's normal value under subsection 269TAC(6) of the Act, because as part of the inquiry, the Commission did not examine TPC's exports. In fact, the Commission has not examined TPC's exports for a number of years given that they are not subject to the measures. In addition, I consider the import statistics in relation to uncooperative exporters to be more accurate because the Commission is able to filter the import statistics to include only goods to which anti-dumping measures have been taken which increases the likelihood that the import statistics relate only to the goods under consideration.

Dole Philippines Incorporated (DPI)

DPI claim that the Commission erred in rejecting adjustments to its normal value. DPI state that:

> *"The area of contention is the Commission's refusal to make any adjustments to normal value on account of differences in selling, marketing and trade promotion expenses applying to domestic and export sales."*

To support its claims, DPI refers to findings in relation to the 2011 continuation inquiry:

> *"Of course in the previous inquiry a contrary conclusion was reached and again in relation to marketing costs these are clearly identified in the CTMS worksheets, and accepted by the Commission, as expenses directly linked to the relevant sales."*

Whilst past verification visit findings may be relevant to the current continuation inquiry, I am bound to make recommendations in relation to the current continuation inquiry based on sufficient evidence. Therefore, I will consider whether there is sufficient evidence of any claimed adjustments and their effect on price comparability before recommending any adjustment to normal value under section 269TAC of the

Act. In relation to the claimed adjustments by DPI, I have provided you with the following documents:

- DPI's exporter questionnaire response, in which the claimed adjustments are not mentioned or explained;
- a letter provided by DPI at the beginning of the Commission's verification visit listing certain adjustments it was seeking;
- the verification visit team's work plan; and
- confidential correspondence between the Commission and DPI.

I also note that the only submission made by DPI regarding adjustments is at page 2 of document no. 20 on electronic public record no. 333.

> *"That preliminary finding is incorrect in that it substantially overstates the normal value of the goods by failing to make adjustments for a number of matters that impact on a fair comparison of domestic and export prices. When those adjustments are made it will be clear that in 2015 there was no dumping by DPI."*

The documents provided show that DPI were informed of the Commission's view that sufficient evidence had not been provided to justify the claimed adjustments. DPI's application for review does not appear to have provided further information to address that view.

In relation to selling expenses, DPI claims that it was previously granted a selling expenses adjustment in 2011 and that Dole Thailand was granted an adjustment for selling expenses in REP 333. I have provided you with a confidential version of the DPI's 2011 visit report so that you can ascertain what the adjustment made for DPI in 2011 relates to. In relation to Dole Thailand and REP 333, I have provided confidential correspondence with the Commission to explain what that adjustment relates to. The two adjustments are not related.

In relation to advertising and sales promotions, I reiterate that the Manual and REP 334 sets out the Commission's policy and approach to these adjustments.

> *As in the case of administration and bad debts, advertising expenses often relate more to the general cost of business and generally are not grounds for adjustment. However, where the connection to the sale is established and evidence is suitable, adjustment may be allowed in certain circumstances such as where:*
>
> - *the exporter pays advertising costs on behalf of its customer;*
> - *the exporter reimburses the importer for advertising costs;*
> - *advertising and sales promotion expenses are exclusive to the goods in question.* (emphasis added)

APPENDIX B

LIST OF ATTACHMENTS

Confidential Attachment 1	Kuiburi revised dumping margin and ascertained normal value
Attachment 2	REP 41
Attachment 3	REP 180
Attachment 4	REP 191
Confidential Attachment 5	REP 296
Confidential Attachment 6	DPI confidential exporter questionnaire response
Confidential Attachment 7	Letter from DPI re adjustments
Confidential Attachment 8	Confidential correspondence between DPI and ADC re adjustments
Confidential Attachment 9	DPI verification work plan
Confidential Attachment 10	DPI exporter visit report from 2011
Confidential Attachment 11	Dole Thailand selling cost adjustment explanation
Confidential Attachment 12	DPI selling and promotional expenses source documents
Confidential Attachment 13	DPI selling and promotional expenses source documents