CLAYTON UTZ

For Publication

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Mr George Katsoulis
Anti-Dumping Commission
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Dear Mr Katsoulis

Guardian Industries Corp Ltd (Guardian)
Clear Float Glass exported from China, Indonesia and Thailand (Continuation Inquiry No. 335)

We refer to the submission made by CSR Viridian Ltd (**Applicant**) to the above-captioned Australian Anti-Dumping Commission (**ADC**) investigation published on 20 June 2016 at EPR 335 No. 028. The Applicant's submission mischaracterises the operation of the *Customs Act 1901* (Cth) (**Act**) and contains false and misleading information on our client's import volumes.

1. **Construction of the Act**

1.1 In previous submissions, Guardian explained that s 269ZHF(2) of the Act prevents the Anti-Dumping Commissioner (**Commissioner**) from recommending that measures continue where dumping or material injury '*that the anti-dumping measure is intended to prevent*' is not likely to continue or recur. Having said this, it is notable that the High Court has articulated the position that past events provide a reliable basis for determining the probability of their recurrence.[1] In the face of this, as our client's import volumes are well below the negligibility threshold provided in s 269TDA(4) of the Act, any prospective dumping or injury by our client is unlikely to be '*dumping…and the material injury that the anti-dumping measure* ***is intended to prevent***' (emphasis added) for the purposes of s 269ZHF(2). Our client has relied on *Siam Polyethylene Co Ltd v Minister of State for Home Affairs (No 2)* [2009] FCA 838 (***Siam Polyethylene***) to support its construction of the Act.

1.2 In response, the Applicant has submitted that:

> *The Siam case referenced in the first email (EPR 025) was limited to the material injury provisions in Division 2 in the Act (Divisions 1, 2 and 3 deal with the preliminary and procedural matters leading to a Ministerial decision to publish or not to publish a dumping duty notice or a countervailing duty notice or to accept an undertaking instead of publishing such a notice.) It was considered that those material injury tests were also applicable in a continuation inquiry. There is no support in Siam to apply the negligible test in s.269TDA (which enacts Article 5.8 of the Anti-Dumping Agreement.) to the current continuation inquiry.*

1.3 The Federal Court's conclusion in *Siam Polyethylene* was that s 269ZHF(2) picks up s 269TAE(2) of the Act. By parity of reasoning and in the same way, and contrary to the Applicant's submission, s 269ZHF(2) picks up s 269TDA.

1.4 *Siam Polyethylene* was not confined to Division 2 of Part XVB of the Act. The Federal Court of Australia held that the provisions as to material injury in s 269TAE(2) of the Act (which is in Division 1 of Part XVB) affected the meaning of '*material injury*' in s 269ZHF(2) (which is in Division 6A of Part XVB).

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[1] *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574.

1.5 A consequence of the Court's construction of s 269TAE(2) is that s 269TDA also bears on the Commissioner's powers under s 269ZHF. Section 269TAE(2) of the Act is expressly confined to consideration of an initial anti-dumping application under Division 3 of Part XVB, with the words '*[i]n determining, for the purposes of section 269TG or 269TJ, whether material injury to an Australian industry has been or is being caused or is threatened or would or might have been caused…*'. Despite these words of limitation, the Court held at [47]:

> *Since s 269TG(2) authorised the use of the measures where there was a threat of material injury to an Australian industry caused by dumping, the character of the likelihood in s 269ZHF(2) will take its meaning from the purpose for which the original imposition of dumping duty under s 269TG(2) was imposed.*

1.6 The effect of this construction of s 269ZHF(2) is that a provision that affects the exercise of a power under s 269TG must also affect the exercise of a power under s 269ZHF. Section 269TAE is a provision that clearly affects the exercise of a power under s 269TG. Division 6A of Part XVB does not establish an independent or free-standing process for a continuation inquiry. The ADC naturally and correctly relies on considerations from elsewhere in Part XVB in respect of normal values, export prices, like goods, duty assessment and other matters that are relevant both to a continuation inquiry and to an initial investigation. Indeed, the conclusion of the Federal Court applies *a fortiori* to s 269TDA, because unlike s 269TAE, the application of s 269TDA is not expressly limited to ss 269TG and 269TJ, or any other section.

1.7 The Federal Court's construction of Part XVB of the Act necessarily implies that s 269TDA restricts the Commissioner's power under s 269ZHF. The Applicant's proposed construction of s 269TDA is contrary to the Federal Court's view as to the operation of Part XVB of the Act.

2. **The relevance of the Anti-Dumping Agreement**

2.1 The Applicant further submitted:

> *In US-Corrosion Steel Sunset Review the Panel considered whether the* de minimis *references to both dumping margins and dumping volumes in Article 5.8 were applicable to sunset reviews and found that they did not apply:*
>
> > *"In particular, the text of paragraph 8 of Article 5 refers expressly to the termination of an investigation in the event of* de minimis *dumping margins. There is, therefore, no textual indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5*"
>
> *Import volumes may reflect the effect of the measures. The termination provisions in s.269TDA are not relevant to a continuation inquiry.*

2.2 The WTO Panel decision has no precedential value in Australia. That Panel decision was only concerned with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (**Anti-Dumping Agreement**) and not with Australian legislation. It did not consider the qualification prescribed in s 269ZHF(2) '*that the measures* ***are intended to prevent***' (emphasis added). That qualification does not appear in the corresponding provision as to continuation inquiries, Article 11, of the Anti-Dumping Agreement.

2.3 Contrary to the Applicant's submission, s 269TDA of the Act does not enact Art 5.8 of the Anti-Dumping Agreement. The Act makes certain limited references to the Anti-Dumping Agreement. In those circumstances, there is only a very limited scope for recourse to the Anti-Dumping Agreement as an aid to interpreting the Act: *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52.

3. **Factors relevant to a continuation inquiry**

3.1 The Applicant also contended that:

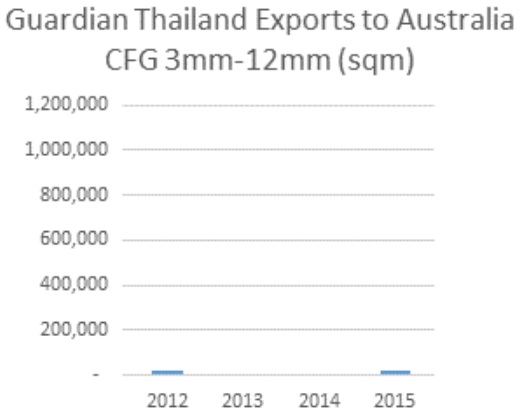
> *An exporter is not disadvantaged in a continuation inquiry compared with an original investigation. If after measures are imposed an exporter decides to reduce exports then that is quite different from an investigation being terminated because of a negligible volume of dumped goods. A decision by an exporter to reduce exports is not part of the consideration in assessing what is a negligible volume of dumped goods in an investigation. That assessment is done on facts relating to the dumping period of investigation. If an exporter wants to review the quantum of and need for measures then there are provisions in the Act to facilitate this.*

3.2 The Applicant's statement that an exporter is at no disadvantage in a continuation inquiry compared with an original investigation contradicts its argument concerning s 269TDA of the Act.

3.3 The Applicant's reference to the process for review of anti-dumping measures in Division 5 of Part XVB is unhelpful. If measures are allowed to expire, the Applicant can apply for new measures to be imposed and a fast-tracked preliminary affirmative determination can be made 60 days thereafter. The ADC should be cautious and reluctant to continue measures because, if the Applicant's views are then vindicated, the real prejudice to the Applicant is much smaller than the prejudice to our client from wrongly continued measures.

4. **Misrepresentation as to Guardian's import volumes**

4.1 The Applicant wrongly asserts that our client's import volumes exceed 3%. Our client particularly objects to this assertion. It is misleading. The Applicant's chart is wrong by several orders of magnitude. Based on data from the Department of Immigration and Border Protection, our client's true import volumes are as below:



4.2 While the Applicant's chart shows Thai import volumes comprising 10–15% of total Australian imports since 2006, in reality, Thai import volumes are a small fraction of 1% of total import volumes. The Applicant's chart appears to include goods other than the goods under consideration, namely, 2mm clear float glass. This forms part of a pattern of conduct by the Applicant of supplying wrong information.

4.3 The Applicant's submissions also say:

In the visit report Guardian argued to use the import volumes in 2010 as "the volume mix in 2015 was not representative". The percentage volumes imported from Thailand prior to the measures being imposed in October 2011 are significantly higher than in the subsequent periods. Is the exporter suggesting that in the absence of measures import volumes would return to the level in 2010?

4.4 The Applicant has completely misconceived paragraph 3.2.1 of the Guardian visit report. Our client's contention in that paragraph related to the composition of its imports and had nothing to do with total import volumes.

5. **Imports from the United Arab Emirates**

5.1 The Applicant submitted, outside the terms of this inquiry, that:

This chart also shows CFG imports from the UAE where Guardian has a plant producing CFG and which is exported to Australia (see Viridian's email, 18 May 2016).

5.2 Where the Applicant's chart records ostensible import volumes from the United Arab Emirates, it includes imports from at least one exporter other than our client.

5.3 More significantly, however, information regarding countries not covered by the inquiry is irrelevant and must be expunged from the record. Additionally, we note that no email from the Applicant to the ADC of 18 May 2016 appears on the Electronic Public Record. Accordingly no weight should be accorded to that email.

Yours sincerely

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