

For Publication

Investigations 3
Anti-Dumping Commission
GPO Box 2013
Canberra ACT 2601

17 January 2022

investigations3@adcommission.gov.au

Dear Case Manager

Investigation – Dumping and Subsidisation: Clear Float Glass exported to Australia from Malaysia and the United Arab Emirates – Case No. 582

We act for Guardian Zoujaj International Float Glass Co. LLC (**Guardian RAK**) and refer to the Anti-Dumping Commission (**ADC**) investigation into certain clear float glass (**CFG**) products exported to Australia from Malaysia and the United Arab Emirates (**UAE**) following an application lodged by Oceania Glass Pty Ltd (**Applicant**).

1. Overview

1.1 On 14 December 2021, the ADC published Statement of Essential Facts No. 582 (**SEF**) which relevantly proposed to recommend that the Minister impose a margin of 14.5% on CFG exported by our client. The Commissioner also published a preliminary affirmative determination on the same day.

1.2 Guardian RAK submits that, on a proper view of the evidence before the ADC:

- (a) the Applicant has not demonstrated that it suffered either *material* injury nor material injury *caused* by dumped imports of CFG from the UAE; and
- (b) even if the Applicant has suffered injury in the past, the ADC should not be satisfied that that injury will be ongoing having regard to the unrepresentative nature of the investigation period and the radically changed conditions between that period and now.

1.3 Guardian RAK accordingly urges the ADC to:

- (a) recommend that the Minister impose no dumping duty in respect of CFG exported by Guardian RAK from the UAE; and
- (b) the preliminary affirmative determination made on 14 December 2021 be immediately ceased.

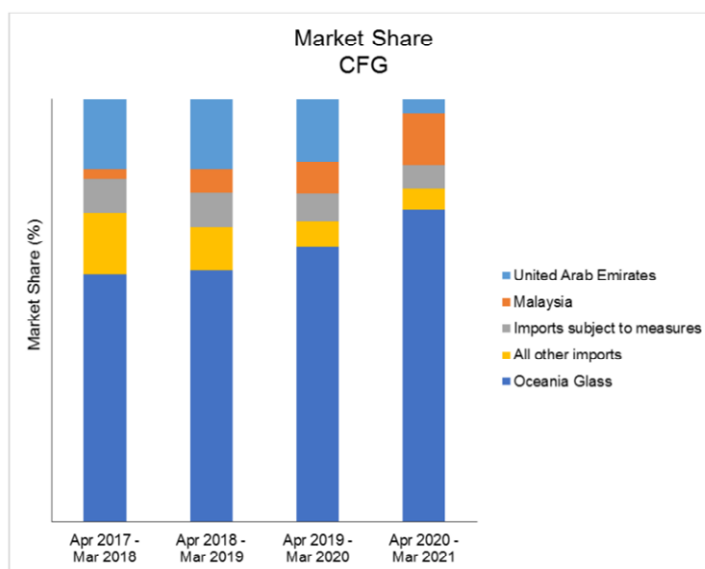
2. No causal link between dumping and injury

2.1 The Applicant claimed that it suffered multiple forms of material injury caused by dumped imports of CFG from Malaysia and the UAE. Ultimately, the ADC rejected many of these claims, and was instead only preliminarily satisfied that the Applicant suffered material injury in the form of: (a) price suppression; (b) reduced profit and profitability; and (c) reduced ROI (SEF at [9.1]).

2.2 The substance of the ADC's reasoning is that:

- (a) the Applicant has adopted an import price-parity model;
- (b) imports from the UAE at dumped prices undercut the Applicant's proposed pricing; and
- (c) therefore, the Applicant suffered injury in the form of price suppression as it was unable to increase its prices as desired.

2.3 There are a number of difficulties with this causation analysis. In assessing these difficulties, it is instructive to reproduce the following market share graphic found at SEF p. 56:



2.4 *First*, if the Applicant has adopted an import price-parity model, that is a commercial decision which it has chosen and which has delivered it significant commercial benefits in the form of an ever-growing market share for at least 4 years (see above). The Applicant cannot simultaneously choose to lower and suppress its prices in order to increase its market share, and then complain that it has suffered material injury as a result of that pricing strategy.

2.5 *Second*, the graphic records that the market share of Malaysian exporters has significantly increased and, during the investigation period, the market share from those exporters was significantly larger than any other exporting nation including the UAE. Consequently, any competitive pricing pressure would be significantly stronger from Malaysian exporters rather than the UAE - a point further developed at 2.7 below.

2.6 *Third*, the ADC's price under-cutting analysis (SEF at [9.7.1]) made the following findings:

- (a) *"Malaysia increased in the second half of the investigation period to prices that were no longer undercutting Oceania Glass";*
- (b) *"the UAE generally decreased over the investigation period, leading to the emergence of undercutting or an increase in undercutting";* and
- (c) *"Indonesia either decreased, leading to the emergence of undercutting or remained at sustained levels of undercutting".*

- 2.7 The finding in (a) is significant as it implies that Malaysian prices (which were not dumped) undercut those of the Applicant for the entirety of the first half of the investigation period, and price undercutting only stopped at some point in the second half of the investigation period. Put differently, given that the Applicant had adopted an import price-parity model, it lowered its prices to match the Malaysian price for CFG for that whole period *irrespective of UAE pricing*. Accordingly, the ADC cannot be satisfied that dumping by the UAE was the *cause* of any price suppression or other material injury in the first half of the investigation period.
- 2.8 Insofar as the second half of the investigation period is concerned, findings (b) and (c) become significant in that, exports from *both* the UAE and Indonesia are said to have undercut those of the Applicant. If pricing from Indonesia was comparable to, or lower, than that of the UAE, then it must follow that the UAE's pricing was not the *cause* of the Applicant suffering price suppression.
- 2.9 The ADC's analysis, however, does not meaningfully engage with these issues, which severely weakens its causation analysis and finding of material injury. For example, at SEF pp. 71 and 72, the following is recorded:

Although Oceania Glass had the advantage of being the only domestic supplier, it was unable to raise its prices due to the presence of dumped exports from the UAE.

As outlined in section 9.5, the commission considers that the magnitude of dumping by the exporters from the UAE provides them with the ability to offer the goods to importers in Australia at prices that were lower than would otherwise have been the case. In circumstances where Oceania Glass uses an import price parity model to determine its prices, coupled with the ability of customers to readily switch sources of supply, exporters from the UAE have an increased competitive advantage.

- 2.10 The evidence before the ADC does not support those conclusions; instead, the evidence suggests that even if the UAE sold CFG at dumped prices, price pressure and price parity from *other* exporters (e.g. Malaysia, who were found not to be dumping, and Indonesia, which was not part of this investigation) would still exist and have led to the same result.
- 2.11 The ADC's attempt to deal with these difficulties at SEF [9.10.1] are, with respect, cursory and fallacious. Insofar as Malaysia is concerned, the ADC stated the following:

The commission observed that prices of the goods exported from Malaysia generally undercut those of the Australian industry in first half of the investigation period and increased to levels that were no longer undercutting in the second half.

The commission considers that the level of undercutting present in the first half of the investigation period has placed pressure on Oceania Glass to either maintain or lower its prices to competing customers. The commission considers that this supports the claims made by Oceania Glass in its application.

To assess the level of influence of the goods exported from Malaysia on those exported from the UAE, the commission examined customers which imported the goods from both countries. The commission identified that out of approximately 25 customers which imported the goods from the UAE, the UAE and Malaysia only competed for 5. The commission considers that this indicates that the effects of exports from both countries are largely separate from each other.

- 2.12 The fact that UAE and Malaysia only competed for five customer accounts does not logically support the conclusion that "*the effects of exports from both countries are largely separate*". In adopting an import price-parity model, the Applicant is required to select a *single price* for its products that best achieves import price-parity (in the view of the Applicant). It does not (and cannot) select different prices for different customers depending on whether the particular customer in question has pre-existing connections with different exporters. It follows that the degree of competition between Malaysia and the UAE is irrelevant to the Applicant's price-setting exercise; instead, the existence of those prices have a market-wide effect regardless of that inter-competition.
- 2.13 That conclusion also follows from the ADC's finding that there is a high degree of price competitiveness in the market (SEF at p. 67), as well as the ADC's finding in the above paragraphs that Malaysian pricing "*has placed pressure on Oceania Glass to either maintain or lower its prices to competing customers*".
- 2.14 The ADC's analysis in respect of the Indonesian exporters suffers from the same logical issues.
- 2.15 As a result of the above, Guardian RAK submits that the ADC cannot and should not be satisfied that goods dumped by Guardian RAK have *caused* material injury to the Applicant. The ADC should accordingly adopt the course proposed at paragraph 1.3 above.
3. **No evidence of future dumping or future injury**
- 3.1 Further, the ADC should adopt Guardian RAK's proposed course as the ADC cannot be satisfied on the evidence that any injury will be *ongoing* having regard to the unrepresentative nature of the investigation period and the radically changed conditions between that period and now.
- 3.2 In assessing this submission, it should be noted that the ADC's investigation period was 1 April 2020 and 31 March 2021 (SEF at [2.1]). On 3 June 2021, Guardian RAK made submissions regarding the inappropriateness of this investigation period, given its coincidence with the period of extreme and unprecedented disruption to global commercial production and trade due to the COVID-19 pandemic.
- 3.3 In those submissions, Guardian RAK noted that the purpose of any anti-dumping measure is to counter the effect of injurious dumping and, except in certain defined circumstances (see s 269TN of the *Customs Act 1901* (Cth)), measures are forward-looking rather than retrospective. It was further noted that there is a logical disconnect between the prospective imposition of measures, which ordinarily last for five years, on the basis of an examination of factors during an investigation period which does not represent any kind of status quo or normal trade and operating conditions.
- 3.4 Although the ADC did not accept that the investigation period should be changed, it stated (SEF at [2.1.1]) that this would not cause unfairness to Guardian RAK because, before publishing a notice, "*the Minister must be satisfied that the amount of the export price of like goods that may be exported to Australia **in the future** (i.e. after the investigation period) may be less than the normal value of the goods*". Put differently, the ADC expressly recognized Guardian RAK's ability to make submissions regarding matters post-investigation.
- 3.5 The evidence before the ADC is that average FOB price of CFG from the UAE has increased after the investigation period (SEF at p. 81). This trend has continued and the ADC can access governmental databases to confirm this fact. Indeed we urge the ADC to do so and corroborate this fact as it will show that the export price has increased by more than 25%

since the end of the investigation period. This is due, no doubt, to the different economic situation now and the disrupted period of world trade during the investigation period.

3.6 In circumstances where the ADC was only preliminarily satisfied that the Applicant had suffered injury in the form of price suppression (and consequential impacts on profit), this trend will eliminate the issue and permit the Applicant to raise its prices as desired. In this respect, Guardian RAK notes that:

- (a) the ADC found that the average rate at which the Applicant's prices were undercut by foreign imports was 11.64% (this figure being the average of the data which appears in Tab 14 - SEF at p. 67); and
- (b) since the end of the investigation period, the Applicant has raised the price of the goods under consideration by at least [REDACTED].

3.7 In support of the proposition in sub-paragraph (b) above, the price increases by the Applicant for the goods under consideration, [REDACTED]. It should be noted that:

- (a) the first price increase [REDACTED], occurred *the day immediately following* the conclusion of the investigation period - that timing is not coincidental and puts in doubt that veracity of the claim that the Applicant adopts an import pricing policy. Rather, it bespeaks of the Applicant being the price setter; and
- (b) the [REDACTED] figure referred to above is the combined effect of the [REDACTED] price increases and whilst Guardian RAK is not aware of the size of the [REDACTED] price increase, given the content of the relevant communication it must logically follow that the total price % increase is higher than the quoted figure.

3.8 Accordingly, Guardian RAK submits that, first, the Applicant's price increases belie any finding about price suppression and, second, changes in market forces have already ameliorated the injury which the ADC seemingly appears to be satisfied about (even before considering whether that injury was caused by dumping). It would be punitive and contrary to the purposes of the anti-dumping regime to make a *forward looking* dumping determination and give the Applicant an additional advantage over UAE exporters given this evidence.

4. Conclusion

4.1 For the above reasons, Guardian RAK submits that:

- (a) the Applicant has not suffered material injury *caused* by dumped imports of CFG from the UAE; and
- (b) even if the Applicant has suffered injury, there is no evidence that that injury will be ongoing having regard to the unrepresentative nature of the investigation period.

4.2 Guardian RAK accordingly urges the ADC to recommend that the Minister impose no dumping duty in respect of CFG exported by Guardian RAK from the UAE and terminate the investigation.

Yours sincerely



Zac Chami, Partner
+61 2 9353 4744
zchami@claytonutz.com

George Pasas, Lawyer
+61 2 9353 5620
gpasas@claytonutz.com

Our ref: 11276/20182/81012916

Annexure A - Applicant's price increases

[Redacted in the 'for publication' version of this submission].