



**Australian Government**  
**Anti-Dumping Review Panel**

# **ADRP REPORT No. 44**

Clear Float Glass exported from the  
People's Republic of China, the Republic  
of Indonesia and the Kingdom of Thailand

December 2016

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## Introduction

1. Guardian Industries Corp Ltd (Guardian) has applied pursuant to s.269ZZC of the *Customs Act 1901* (the Act) for review of a decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to secure the continuation of the anti-dumping measures applicable to clear float glass (CFG) exported from the People's Republic of China (China), the Republic of Indonesia and the Kingdom of Thailand (Thailand).
2. The application for review was accepted and notice of the proposed review as required by s.269ZZI was published on 11 October 2016. As Senior Member of the Review Panel, I directed in writing pursuant to s.269ZYA that the Review Panel for the purpose of this review be constituted by me.

## Background to the application

3. CSR Viridian Ltd (Viridian) is the sole manufacturer of CFG in Australia. On 1 February 2016, Viridian lodged an application under s.269ZHB of the Act for a continuation of the anti-dumping measures imposed on exports of CFG from China, Indonesia and Thailand. These measures had originally been imposed on 17 October 2011. The application was accepted by the Anti-Dumping Commissioner of the Anti-Dumping Commission (ADC) and a continuation inquiry was initiated on 22 February 2016.<sup>1</sup> The inquiry period for the investigation was 1 January 2015 to 31 December 2015.
4. The Statement of Essential Facts (SEF) was published by the ADC on 28 June 2016 and the final report to the Parliamentary Secretary was made by the ADC on 12 August 2016 (the ADC Report)<sup>2</sup>. The ADC recommended to the Parliamentary Secretary that the Parliamentary Secretary take steps to secure the continuation of the anti-dumping measures applicable to CFG exported from China, Indonesia and Thailand. The Parliamentary Secretary accepted the recommendation and on 6 September 2016 declared under s.269ZHG(1)(b) that he had decided to secure the continuation of the anti-dumping measures currently applying to CFG exported from China, Indonesia and Thailand.<sup>3</sup> Notice of

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<sup>1</sup> ADN No. 2016/19

<sup>2</sup> ADC Final Report No. 335

<sup>3</sup> ADN No. 2016/85

the Parliamentary Secretary's decision was published on 8 September 2016.

5. Guardian is affected by the decision of the Parliamentary Secretary as it is a manufacturer of CFG exported from Thailand.

## Conduct of the Review

6. In accordance with s.269ZZK(1) of the Act, the Review Panel must recommend that the Parliamentary Secretary either affirm the decision under review or revoke it and substitute a new specified decision. In undertaking the review, s.269ZZ requires the Review Panel to determine a matter required to be determined by the Minister (in this case the Parliamentary Secretary) in like manner as if it was the Minister having regard to the considerations to which the Minister would be required to have regard if the Minister was determining the matter.
7. In carrying out its function the Review Panel is not to have regard to any information other than to "relevant information" as that expression is defined in s.269ZZK(6). For the purpose of the review, the relevant information is that to which the ADC had, or was required to have, regard when making the findings set out in the report to the Minister<sup>4</sup>. In addition to relevant information, the Review Panel may have regard to conclusions based on relevant information that is contained in the application for review and any submissions received under s.269ZZJ<sup>5</sup>.
8. If a conference is held under s.269ZZHA of the Act, then the Review Panel may have regard to further information obtained at the conference to the extent that it relates to the relevant information and to conclusions reached at the conference based on that relevant information. A conference was held with representatives of the ADC for the purpose of obtaining further information in relation to a confidential attachment to the ADC Report. A non-confidential summary of the conference was placed on the public record.
9. Unless otherwise indicated, in conducting this review, I have had regard to the application (including documents submitted with the application or referenced in the application) and the submissions received pursuant to s.269ZZJ, insofar as they contained conclusions based on relevant information. I have had regard to the ADC Report, and information relevant to the review which was referenced in the ADC Report. This latter

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<sup>4</sup> S.269ZZK(6)(ca)

<sup>5</sup> S.269ZZK(4)

information included submissions made to the ADC by interested parties. I have also had regard to information obtained at the conference held pursuant to s.269ZZHA which related to a confidential attachment to the ADC Report.

10. The ADC also provided relevant documents containing confidential information. These documents and the correspondence with the ADC concerning them were not made publicly available.
11. Submissions were received within the 30 days required by s.269ZZJ of the Act from Xinyi Ultrathin Glass (Dongguan) Co., Ltd (Xinyi) and the ADC. A submission was received from Guardian but it was after the 30 day time period and so regard was not had to it.

## Grounds for Review

12. The grounds relied upon by Guardian challenge a number of key findings by the ADC. Guardian contends that these findings were not the correct or preferable findings. The findings are:
  - the ADC's finding that dumping by Thai exporters is likely to continue or recur;
  - the ADC's finding that Viridian is threatened with material injury should the measures be allowed to expire;
  - the ADC's finding that future injury to Viridian could be attributed to Thai dumping; and
  - the ADC's finding that Viridian does not directly or indirectly import large quantities of low-cost CFG from Xinyi or some other Asian exporter.
13. Two other grounds are relied upon by Guardian, namely that:
  - the ADC misapplied s.269ZHF(2) of the Act; and
  - the ADC failed to properly calculate a non-injurious price (NIP).

## Consideration of Grounds

### Continuation of Dumping

14. The submission by Guardian claims that there were four reasons given by the ADC for the finding that dumping is likely to continue. These four reasons were:
- that Guardian had dumped minute volumes of CFG over the investigation period (the first reason);
  - that Guardian had an Oceania Territory Manager (the second reason);
  - excess Chinese production capacity; and
  - that Guardian could arguably adjust its production portfolio as it is a global business (the fourth reason).
15. In its submission, the ADC stated that the findings with regard to Chinese production capacity had no relevance to the ADC's finding that dumping by Thai exporters is likely to continue. Having read the relevant section of the ADC Report, I agree with the ADC's submission and therefore will not deal further with the submission by Guardian in that respect. I address the arguments made by Guardian with respect to the first, second and fourth reasons.

#### *The first reason*

16. Guardian's submission argues that despite the finding that dumping had continued during the inquiry period, the proportion of total Australian CFG imports that were exported from China, Indonesia and Thailand had declined since 2009, and the decline is particularly apparent when Xinyi's exports were excluded. Xinyi's exports were not subject to measures.
17. I am not sure what relevance the decline in exports of CFG from China and Indonesia has to the issue of whether or not anti-dumping measures should be continued against exports by Guardian from Thailand. The fact that Guardian's exports have declined was considered by the ADC to be the result of the imposition of the anti-dumping measures. This seems to be a reasonable explanation. A decline in exports following the imposition of measures would not of itself support a finding that dumping was not likely to continue if the measures were not continued.
18. Guardian also points to the small volumes of exports from Thailand, and in particular Guardian, over the past five years. The submission by Guardian relies on such volumes, which Guardian describes as minute, to suggest that future dumping by Thai exporters would be negligible at most. This

does not logically follow. If Thai exports of CFG have been reduced following the imposition of anti-dumping measures this does not mean that they would necessarily continue at that level if the anti-dumping measures were no longer in place.

19. The small volume of Thai exports is also relied upon by Guardian as part of its argument that the ADC misconstrued s.269ZHF(2) of the Act. I deal with further with this argument below. However, I do not agree that small volumes of exports while measures are in place necessarily means that the measures should be allowed to expire.
20. Guardian's submission also relies on certain evidence it provided to the ADC during the continuation inquiry to show that it is unlikely to dump CFG in the future. This evidence is summarised by the ADC at section 8.3.6 of the ADC Report. It appears that the ADC did not accept all of the claims made by Guardian. In particular, contrary to the claim that Guardian had not dumped CFG during the inquiry period, the ADC found that Guardian had exported CFG to Australia at dumped prices during the inquiry period.
21. The ADC does however seem to have accepted that Guardian did not, at the time of the inquiry, intend to supply the Australian market with any substantial volumes. The point made by the ADC in the ADC Report is that this does not mean that CFG exported to Australia will not be at dumped prices, particularly given that the insubstantial volumes currently being exported are at dumped prices.
22. I agree with the ADC that the evidence that Guardian did not at the time of the inquiry intend to export substantial volumes of CFG to Australia does not mean that its exports will not be at dumped prices. The likely volume of such exports may however be relevant to the issue of whether or not material injury would be likely to recur as a result of the dumped exports.

### *The second reason*

23. Guardian takes issue with the applicability to it of the statement in the ADC Report that exporters from China, Indonesia and Thailand have maintained export pathways and distribution channels into the Australian market since the anti-dumping measures were imposed. Its argument is that it had no distribution links other than a single Oceania Territory Manager. This, and its lack of entrenched export pathways, Guardian claims makes it significantly less likely that it will dump CFG.
24. I do not agree with the criticism made by Guardian. The fact that there is a sales representative of Guardian in the region is a factor. It may not alone

be persuasive but it is a legitimate factor to consider when considering whether or not Guardian is likely to continue to export CFG at dumped prices to Australia.

25. Additional arguments are put by Guardian. These are that:
- if the ADC's reasoning was accepted it would mean that exporters had to remove all distribution channels before opposing continuation;
  - Viridian did not have sufficient production capacity to supply the Australian market; and
  - as Guardian sells goods other than CFG, there is a natural explanation for the employment of the Oceania Territory Manager and it is merely conjecture and supposition to infer that this employment makes future dumping of CFG probable.
26. These arguments do not detract from the relevance of the presence of a sales representative in the region as a factor to be taken into account in a continuation inquiry. The lack of capacity of the Australian industry could arguably be a reason why exports of CFG could increase. However, a lack of capacity was not a finding by the ADC. While Guardian did export other goods to Australia during the inquiry period, it also exported CFG and did so at dumped prices.

#### *Fourth Reason*

27. Guardian strongly objects to two statements made in the ADC Report which it claims were made in support of the fourth reason. It claims the statements are irrelevant, speculative and could not assist in demonstrating that Guardian is likely to dump CFG in the future. The statements were:
- “Arguably, Guardian could adjust its production portfolio to take advantage of the comparative proximity of its Thailand plant to Australia to replace CFG exported from other parts of the global business if it was considered commercially advantageous to do so.”
- “The Commission has observed that whilst exports from Guardian's Thailand operations have significantly reduced, exports from Guardian's global business to Australia have significantly increased since the imposition of measures”.
28. As a preliminary point, I note that the above statements were made at section 8.3.4 of the ADC Report when the ADC was dealing with the fact that Guardian had little if any excess production capacity at the time of the inquiry. The statements made by the ADC have to be considered in this



context. Also, Guardian's submission does not quote all of the second statement which includes a reference to Confidential Attachment 4.

29. The statements by the ADC are making the obvious point that the limited excess capacity does not mean that Guardian could not change its production mix if it was commercially advantageous to do so and which it in fact did when measures were introduced. This is the importance of the reference to Confidential Attachment 4.
30. There are four specific arguments made by Guardian against the ADC's statements. The first is that there was an inconsistency in the approach by the ADC in that the New Zealand market was not considered relevant to the Australian market but the ADC did have regard to the status of Guardian as a "global business" and its ability to export CFG from different countries.
31. I do not see any consistency with the ADC approach. Guardian raised the state of the New Zealand market and the ability of Viridian to export to New Zealand in a submission on material injury. There is no inconsistency in rejecting such a submission when considering factors relevant to material injury but noting, when considering whether or not dumping was likely to occur, that Guardian is part of a global business which supplies Australia from countries not subject to measures.
32. The second argument is that in making the statement "exports from Guardian's global business to Australia have significantly increased since the imposition of measures", the ADC was treating Guardian's alleged imports from countries outside the scope of the inquiry as a basis for continuing the measures in respect of Thai exports. This is a simplification of the approach by the ADC. The fact that the global business, of which Guardian was part, switched the source of exports of CFG to Australia, after measures were imposed, and increased those exports, was only part of the facts found by the ADC as relevant to whether or not, if the measures expired, there would be a recurrence or continuation of dumping.
33. The third argument attacks the reasoning in the ADC Report that "whilst Guardian may not currently intend to supply the Australian market with any substantial volumes, it does not necessarily follow that dumping will not recur".<sup>6</sup> Guardian argues that if its evidence showed that it is unlikely but not impossible that Guardian will dump CFG, the ADC ought to have

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<sup>6</sup> ADC Report 335, section 8.3.6, page 50

found that dumping is not likely and recommend that measures expire accordingly. However, the evidence was that Guardian had exported CFG to Australia during the inquiry period at dumped prices and the ADC did not find that the evidence showed that it was unlikely but not impossible that Guardian would dump CFG. To the contrary.

34. Guardian also argues that the ADC had essentially required Guardian to prove that it would not dump CFG when the ADC should have considered whether it is likely that Guardian would dump CFG. I do not agree that the ADC was changing the burden of proof. The comment made by the ADC quoted above was made in the context of the ADC's consideration of Guardian's submission that it was unlikely, if not entirely remote, that it would dump goods due to its own domestic strategies. The ADC did not accept this because Guardian had been found to have dumped CFG exported to Australia during the investigation period.
35. The final argument is based on the language used in the first quote above such as the word "arguably" and that Guardian "could adjust its production portfolio". Guardian's submission is that this makes the statement speculative and hypothetical rather than being a positive finding based on real evidence. Further, it argues that the statement cannot assist in reaching the ultimate finding that Thai exporters are likely to dump CFG. It only supports a chance not a likelihood of dumping.
36. The exercise to be undertaken by the ADC when making a recommendation under s.269ZHF does require the ADC to deal in a hypothetical. The ADC must consider what will happen in the future should a certain event, the expiry of the measures, occur.
37. I agree with Guardian's submission that despite the hypothetical exercise required by s.269ZHF, the recommendation by the ADC has to be based on facts. In this case, this is what occurred. The ADC based the finding regarding the likely continuation of dumping on the fact that Guardian had continued to export CFG at dumped prices during the inquiry period, the fact that it had maintained an export pathway and the relative ease, and potential commercial incentive to switch the source of exports.
38. Guardian argues that the above facts fall far short of establishing that Thai exporters are likely to dump CFG in the sense that there is a more than a fifty per cent chance. I do not agree. Past conduct is probably the most reliable indication of future conduct. The continuation of dumping, if only in small volumes, is a good indication that dumping is very likely to continue and the other factors are a reasonable basis for the ADC being satisfied that the expiry of the measures would be likely to lead to the continued dumping of CFG exported from Thailand by Guardian.

## Likelihood of Material Injury

39. The first argument made by Guardian in its submission on this issue is that its import volumes during the inquiry period were so small they could not possibly have had a detectable suppressive or depressive price effect. Given that the measures were put in place to prevent injury from dumped imports, it is not surprising that this would be the effect. This is not determinative of what would happen if the measures were allowed to expire.
40. Guardian also argues that the ADC was required to analyse the alleged suppressive effect of Guardian's prices separately and that s.269TAE(2C)(d) of the Act required this. S.269TAE(2C)(d), which appears in Division 1 of the Act, requires that when considering the exportation of goods to Australia from different countries of export, the Minister should consider the cumulative effect of those exportations only if the Minister is satisfied that, among other things, the volume of goods, exported to Australia from the country of export and dumped is not negligible.
41. S.269TAE(2C) does not expressly state that it applies to a report and recommendation by the ADC under s.269ZHF after a continuation inquiry, or to the consideration of that report and recommendation by the Minister under s.269ZHG. On its express terms it applies in an original dumping or countervailing investigation.
42. Division 6A which contains s.269ZHF and s.269ZHG needs to be read in the context of the whole of Part XVB of the Act. Otherwise, it would not be possible to understand the references to dumping and material injury in Division 6A. It is therefore necessary to have regard to earlier divisions in Part XVB, particularly Division 1 and Division 3, to understand Division 6A. However, this does not necessarily mean that specific sections in Division 1 apply to the exercise to be conducted under Division 6A.
43. In *Minister of State for Home Affairs v Siam Polyethylene Co. Ltd* [2010] FCAFC 86, their Honours stated that the application of s.269TAE to s.269ZHF and s.269ZHG was not to be assumed<sup>7</sup>. When specifically referring to s.269TAE(2C), their Honours stated:
- “For the purposes of applying s 269TG and imposing anti-dumping measures at the outset, the identification of those considerations set forth in s 269TAE(2B) and (2C) may be more appropriate than when

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<sup>7</sup> Per Graham and Flick JJ at para 106

making a recommendation as to whether existing anti-dumping measures should be continued pursuant to s 269ZHF(2). A consideration of those matters set forth in s 269TAE(2B) and (2C) may be more appropriate at the outset than at that point of time when anti-dumping measures have been in place for some time.”<sup>8</sup>

44. I appreciate that their Honours in the *Siam Polyethylene* case considered their comments on the application of s.269TAE to s.269ZHF to be tentative and it was not necessary for them to be more conclusive. However, it is difficult to understand how s.269TAE(2C) could apply in a Division 6A inquiry given that there are anti-dumping measures in place which would be likely to have affected the volume of dumped exports.
45. The nature of the inquiry under Division 6A of the Act is very different to that conducted under Division 2 and Division 3 when the Minister is considering imposing the anti-dumping measures. In the latter case, the inquiry focuses on the exports which have occurred during the inquiry period to determine whether or not there has been dumping which has caused material injury to the Australian industry. Such an exercise cannot be conducted in a continuation inquiry because there have been measures in place to prevent the injurious dumping of the exports.
46. While what has occurred with exports and the Australian market during the inquiry period is relevant to a continuation inquiry, it cannot be determinative. It is relevant to the extent it indicates what is likely to happen if the measures expire. For this reason, there is not the same need for the restriction on the consideration of exports from different countries as there is in an original dumping investigation.
47. The second attack on the ADC’s finding with regard to material injury is that there were inconsistencies with the undercutting analysis between the SEF and the ADC Report, although the ADC used the same methodology. In its submission, the ADC advised that it did re-examine the data after Guardian expressed certain concerns with the analysis and that the text in the ADC Report was more precisely constructed to avoid possible ambiguity in the SEF.
48. I have reviewed the relevant sections of the SEF and the ADC Report. There appear to be two substantive differences. These are that the SEF found that

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<sup>8</sup> As above at para 107

- “10 mm prices were undercut by one exporter in Q1 and Q4 and were undercut by all exporters subject to measures in Q2 and Q3” whereas the ADC Report found that “10mm were undercut by imports of the goods subject to the measures from a single exporter in the first and fourth quarters, and were undercut by imports from two exporters in the second and third quarters”; and
  - “12 mm were undercut from Q2 to Q4 by all imports of the goods subject to measures” whereas the ADC Report found that “12mm were undercut by imports of the goods subject to measures from at least one exporter in every quarter”.
49. The differences appear to be more than could be explained by ambiguity in the SEF. Nevertheless, it is difficult to see how the difference changed the analysis substantively, particularly with respect to Guardian as it did not export 10mm and 12mm CFG. The price undertaking analysis was based on data which was used to perform the calculations in Confidential Attachment 6. Having reviewed that information, it does not support Guardian’s submission on material injury.
50. There is a limit on the ability of the Review Panel to investigate itself the accuracy of data relied upon by the ADC given the statutory framework for the review and the limits it places on the review. The information in Confidential Attachment 6 supports the statements made in the ADC Report to the extent it is relevant to the analysis of Guardian’s exports during the inquiry period.
51. The third argument against the ADC’s finding with respect to material injury is that the ADC did not consider the extent to which the injury by way of price suppression or depression was explicable by Viridian’s price premium. Guardian’s submission contends that because the ADC did not quantify the price premium, its calculations and analysis effectively proceeded on the basis that Viridian had no price premium.
52. A price premium was unable to be calculated as importers failed to co-operate with the inquiry and the ADC therefore lacked the necessary data to calculate a premium. Guardian claims that in the absence of satisfactory data the price premium of 8% found in the original investigation should have been adopted.
53. In support of its argument that Viridian’s price premium should have been taken into account, Guardian refers to the WTO Panel Report *European*

*Communities – Anti-Dumping Measure on Farmed Salmon from Norway*<sup>9</sup>. Guardian submits that the ADC's failure to account for Viridian's price premium vitiates its findings as to the likelihood of price suppression or price depression.

54. The ADC submission makes the point that the ADC did not presume that Viridian obtained no price premium but rather was unable to quantify that premium and expressed doubt about the methodology used in the original investigation. The submission also notes that the price undercutting analysis in the ADC Report was not precise but concluded that the analysis was indicative of trends and price relativities. As a result, the degree of price undercutting was not quantified but the ADC acknowledged that it did exist and some part of the price undercutting would be accounted for by the premium.
55. I agree with Guardian's submission that, as a general rule, in calculating the degree of price undercutting in a material injury analysis, any price premium enjoyed by the Australian industry should be taken into account. This principle is confirmed by the comments made in the WTO Panel Report relied upon by Guardian. However, the comments in that case and the principle involved, concern the analysis to be undertaken for a finding of significant price undercutting for the purpose of Article 3.2 of the WTO Anti-Dumping Agreement.
56. The ADC did not quantify the degree of undercutting in its analysis of the likelihood of material injury continuing or recurring. There was no finding of significant undercutting. Rather, the ADC found that "there is clearly close price competition between the Australian industry and imported goods and the degree of price undercutting would be increased if the existing anti-dumping measures had not been applied"<sup>10</sup>.
57. Given the limited conclusion reached by the ADC in its analysis of the price undercutting in the Australian CFG market during the inquiry period, I do not consider that the ADC was required to calculate or quantify the amount of the price premium obtained by Viridian.
58. The fourth argument made by Guardian with respect to the finding of the likelihood of material injury was the ADC's approach to volume effects. Guardian claims that whereas the ADC used a projection of underlying trends with respect to the price effects analysis, it did not use a projection

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<sup>9</sup> DS 337

<sup>10</sup> ADC Report No 335, section 8.4.2.1, page 53.



of volume trends to determine the likelihood of injury in respect of volume effects and instead the ADC used conjecture to suggest that, should measures expire, exporters would increase volumes of CFG exports.

59. Guardian argues that the approach by the ADC was inconsistent with its approach to price effects, speculative and contrary to the evidence. Guardian also submits that the ADC failed to comply with s.269TAE(2AA) of the Act. I note that s.269TAE(2AA) applies to a determination of material injury for the purposes of sections 269TG, 269TJ, 269TH or 269TK. It does not necessarily apply to a report under s.269ZHF or a declaration by the Minister under s.269ZHG.
60. The ADC's finding with respect to volume effects was that exports from Thailand and other countries subject to measures would be likely to increase due to the close proximity of these countries to Australia. The ADC Report also relied on the distribution links, the fact that exporters had remained active in the Australian market and the price advantage that would arise if the anti-dumping measures expire. This seems to be a reasonable basis to find that if the measures expired there was likely to be an increase in the exports of CFG from Thailand and other countries subject to the current measures at the expense of higher priced Australian goods and higher priced CFG from other countries.
61. As noted above, the exercise being conducted in a report under s.269ZHF is a hypothetical one. While it should be based on an analysis of facts found to exist during the inquiry period, it also requires the ADC to consider what is likely to occur in the future on the happening of a certain event, namely the expiry of the measures. In this case, I consider that the approach taken by the ADC was reasonable.

### Attributability of material injury to exports

62. Guardian's submission contends that s.269TAE(2A) of the Act requires the ADC in an assessment of the threat of material injury to exclude injury threatened by a factor other than the exportation of the goods. Further, Guardian claims that it made submissions that the injury Viridian is likely to suffer was not legally attributable to exports of CFG and that:
- Viridian alienates customers and potential customers through its restrictive trade practices and customer service failures;
  - Australia has a comparative disadvantage in primary glass production;
  - Viridian runs an inefficient business with an unprofitably high cost to make and sell; and

- Viridian's public statements disclose no concern for injury caused by dumping but reveal that Viridian's business is and will be by its own admission, beleagued by injuries not attributable to exports.
63. With respect to the reference to S.269TAE(2A), that subsection does not necessarily apply to the function being performed by the ADC in a report under s.269ZHF. S.269TAE(2A) is expressed to apply when a determination is being made for the purpose of s.269TG and certain other sections of the Act. There is no reference in s.269TAE(2A) to it being applicable to a report under s.269ZHF. That does not mean however that the issue of the cause of any projected material injury to the Australian industry is not relevant to a continuation inquiry and that the factors listed in s.269TAE(2A) should not be considered if relevant. As their Honours stated in *Siam Polyethylene*:
- “The relevance of the examination required by s 269TAE(2A) and (2B) may well depend upon the particular facts and circumstances under inquiry.”<sup>11</sup>
64. When making a report to the Minister for the purpose of s.269ZHF, the ADC has to be satisfied, in making a recommendation to the Minister to secure the continuation of the anti-dumping measures, that the expiration of the measures would lead or be likely to lead to not only dumping but “the material injury that the anti-dumping measure is intended to prevent”. This requires a consideration by the ADC of whether or not a continuation or recurrence of dumping would cause material injury. Such an exercise would need to ensure that any material injury which was projected to occur was likely to be caused by the continuing or recurring dumping and not other factors.
65. Guardian's submission refers to the conclusion made by the ADC at section 8.7 of the ADC Report that:
- “The Commissioner has identified no evidence that would suggest that Viridian is more likely to experience material injury as a result of other factors.”
66. Guardian argues that, contrary to the statement in the ADC Report, it provided evidence to the ADC during the inquiry which supported its view that to the extent that Viridian was likely to suffer injury, that injury was not attributable to exports of CFG. Guardian contends that the ADC either did not consider the evidence or wrongly rejected it. Further the ADC

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<sup>11</sup> Minister of State for Home Affairs v Siam Polyethylene Co Ltd [2010] FCAFC 86 per Graham and Flick JJ at para 106



impermissibly attributed injury to import volumes regardless of whether or not those volumes were volumes of dumped goods.

67. The ADC's submission is that the conclusion quoted by Guardian should be read as concluding that the matters contended for by Guardian, which were addressed in section 6.5 of the ADC Report, were not supported by the evidence or were not the preferred interpretation of the facts. Part 6 of the ADC Report does refer to the claims made by Guardian regarding other causes of injury to Viridian and section 6.5 does appear to be addressing those claims, although not in detail.
68. One of Guardian's points is in respect of its contention that Viridian's loss of market share is attributable to its limited primary production capacity. Guardian contends that the ADC accepted Viridian's contention that since its downstream customers find it difficult to compete for the supply of apartment or office building projects, the ADC should focus on housing construction trends rather than other construction trends. There is no reason, Guardian argues, to confine the ADC's consideration to the new housing market.
69. Guardian's argument regarding the ADC's focus on new housing activity relies on a quote at section 6.5.1 of the ADC Report. The ADC refers to an earlier graph and notes that "the value of new housing activity has been flat since 2011 and increased in 2014 and 2015". The ADC Report goes on to note that Viridian's sales had been consistent with this pattern except for 2015. Guardian queries the source of the data relied upon by the ADC. However, the quote relied upon by Guardian is only part of the overall consideration by the ADC of the likelihood of material injury caused by future dumping. The quote must be considered in the context of the further comments and analysis in the ADC Report.
70. A second point made by Guardian is with respect to the ADC's response to its contention that it was large quantities of low priced imports from Xinyi, rather than Guardian, that are the source of potential price suppression or depression. The ADC's response referred to its analysis at section 8.4.2.3 of the ADC Report. This analysis showed that goods not subject to measures are not priced as low as goods subject to measures. Guardian argues that this does not consider whether or not Xinyi's imports in particular have a depressive or suppressive effect.
71. The ADC's submission on this point, refers to Confidential Attachment 1 and Confidential Attachment 8 to the ADC Report as the basis for the analysis but also acknowledges the limited evidence available due to the non-cooperation of the importers of CFG with the inquiry.

72. I am unable to see any basis for the contention by Guardian that imports from Xinyi would be the cause of future price suppression or depression. The material relied upon by the ADC provides a basis for the conclusions reached in section 8.4 of the ADC Report regarding the price competition and the likely source of that competition in the future should the measures not be continued.
73. The next argument by Guardian is with respect to its claim that Viridian's annual reports demonstrate that the primary threats to Viridian's business are not attributable to imports. Guardian relies on two quotes from the ADC Report which it alleges when read together show that the ADC concluded that since Guardian's evidence does not necessarily bind the ADC to make the finding in support of which it was advanced, the evidence does not exist.
74. The ADC submission states that the information in the annual reports could not be used to draw conclusions as to Viridian's attitude towards the impact of dumping on its CFG business. Further, the ADC did not conclude that the evidence did not exist but that it was not persuasive of Guardian's contention.
75. I have reviewed the submissions made by Guardian to the ADC during the inquiry regarding the comments in Viridian's Annual Reports. It is difficult to give much weight to the comments in the Annual Reports. In particular, I note that the Annual Reports covered a time when the measures were in place so it is not surprising that injury from dumping did not feature.
76. While statements by Viridian about its business and its expected future performance are to be considered along with other evidence, they are not particularly persuasive as to Guardian's contention that Viridian's business will suffer from injury caused by other than exports. The statements do not detract from the analysis in section 8.4 of the ADC Report of the likely cause of material injury to Viridian's business from dumping if the measures are not continued.
77. Finally, Guardian takes issue with the comment in the ADC Report that downstream markets are outside the scope of the inquiry. This comment was seemingly made in response to the claim by Guardian regarding Viridian's alienation of downstream customers by its trading agencies.<sup>12</sup> Guardian contends that Viridian's downstream business was relevant by virtue of s.269TAE(2A)(d). Further, Guardian notes an inconsistency with

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<sup>12</sup> ADC Report 335, section 6.4.1, page 34

the ADC's approach in that the ADC had regard for downstream markets when considering demand for CFG.

78. The ADC submits that the comment in the ADC Report was made in the context of assessing the economic condition of Viridian and that the economic performance of Viridian's related customers was not relevant. Further, no evidence was advanced by Guardian in support of its claims regarding practices in the downstream market.
79. As noted above, the factors listed in s.269TAE(2A) may or may not be relevant to a report under s.269ZHF. When assessing the likelihood of material injury to the Australian industry, it could be relevant to consider factors related to downstream demand which could be impacting on the industry. In some circumstances practices by a related customer could also be relevant if such practices were likely to be the cause of the projected material injury and not dumped exports. However, I note that the ADC found no evidence to support the claims made by Guardian regarding the downstream market.
80. I do not see how the claims made by Guardian impact the analysis in section 8.4 of the ADC Report regarding the likelihood of material injury being caused to the Australian industry should the measures not be continued. That analysis is based on the price competition in the market and the likely changes to prices and the source of exports which the ADC projects will happen if the measures are removed.

## Xinyi

81. Guardian makes a number of complaints with regard to the ADC's response to the claims made by interested parties during the inquiry concerning Xinyi. The claims were to the effect that Xinyi's exports were voluminous, they had nearly doubled since anti-dumping measures were imposed, it was the lowest priced exporter and it had a strategic partnership with Viridian by which Viridian imported Xinyi's goods. As, a result it is claimed by Guardian that anti-dumping measures would be futile so long as Xinyi was not subject to the measures.
82. It is important to note that this review is of the decision of the Parliamentary Secretary to secure the continuation of the anti-dumping measures in place at the time of the inquiry. Any issues raised by an applicant for review can only be relevant if they are persuasive that the reviewable decision is not the correct or preferable decision.
83. The issue of whether or not Viridian had a strategic partnership with Xinyi or directly or indirectly imported CFG from Xinyi would only be relevant if it

was probative of whether or not dumping would continue or recur if the measures expired and that there would be material injury as a result. Nothing in the submissions made by Guardian on this issue affects the analysis and conclusions on which the ADC's recommendation to the Parliamentary Secretary was based. In any event, I note that the ADC found no evidence to support the claim, Xinyi in its submission strongly denied it and to some extent the submission by Guardian on this issue is itself speculative.

84. The claim that Xinyi's exports were voluminous and that its exports were the lowest priced could be relevant to the material injury analysis. If there was evidence to support this claim then it would go to the issue of what was likely to be the cause of the projected material injury to the Australian industry. Again, the evidence before the ADC did not support the claim and I have dealt with this issue above when addressing the claims with respect to material injury.

### Construction of s.269ZHF

85. Guardian submits that the ADC misapplied or misconstrued s.269ZHF(2) in two important aspects. The first is that the ADC recommended that the measures be continued when he was only satisfied that it was possible that dumping and material injury would continue or recur if the measures should expire. The second related to the application of s.269TDA and the interpretation of the words in s.269ZHF(2) which refer to material injury "that the anti-dumping measure is intended to prevent".
86. The first argument relies on language used in the ADC Report which it is argued shows that the ADC was only ever satisfied, and could only have been satisfied, that it was possible that dumping and material injury would continue or recur if the measure should expire. This would be contrary to the requirement in s.269ZHF(2) which is that it is likely in the sense of more than a 50% chance.
87. The ADC accepted Guardian's submission regarding the meaning of "likely" in s.269ZHF(2). For the reasons given above, I believe there was a reasonable basis for the ADC reaching the conclusion required by s.269ZHF(2) that the expiration of the measures would be likely to lead to a continuation or recurrence of the dumping and the material injury which the measures were intended to prevent.
88. The submission by Guardian makes the error of identifying certain words or phrases without considering the context in which that language is used or the overall findings made in the ADC Report. When regard is had to that context and findings, I consider that the ADC did reach the required

level of satisfaction as to the likelihood of future dumping and material injury and that there was a basis upon which he could do so.

89. The second argument by Guardian is that the reference in s.269ZHF(2) to the material injury “that the anti-dumping measure is intended to prevent” means that future dumping or material injury which is negligible cannot be the basis for a recommendation that the Minister take steps to secure the continuation of the measures.
90. The basis for this argument is that the quoted words preclude the ADC from recommending that measures be continued where the dumping or material injury is only likely to be of a kind in respect of which no anti-dumping measures could initially have been imposed. As s.269TDA of the Act requires the ADC to terminate an initial dumping investigation where the volume of dumping or material injury is negligible, future negligible dumping or material injury cannot be dumping or material injury “that the anti-dumping measure is intended to prevent”.
91. In response to Guardian’s submissions at the time of the inquiry, the ADC noted that the applicability of s.269TDA to a continuation inquiry is not readily apparent and that the ADC is not prevented from recommending that the measures be continued where the volume of exports is negligible as defined in s.269TDA(4). The ADC Report also stated that in certain circumstances it may be open to the ADC to consider low volumes of exports if they were relevant to determining whether the expiration of the measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury which the measures are intended to prevent.<sup>13</sup>
92. The submissions by Guardian during the inquiry relied on the decision of Justice Rares in *Siam Polyethylene Co. Ltd v Minister of State for Home Affairs (No. 2)*<sup>14</sup>. In the ADC Report it was noted that the Full Federal Court had cast doubt over the analysis in Rares J.’s judgment. In response, Guardian refers to the comments of the Full Court as dicta and that the judgment in *Siam Polyethylene* represents the true state of the law.
93. I am not sure that it is necessary to come to a view as to whether or not the decision of Justice Rares is the state of the law as his Honour’s decision did not deal with the application of s.269TDA to a

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<sup>13</sup> ADC Report 335, section 8.6.2, page 59

<sup>14</sup> [2009] FCA 838

recommendation by the ADC under s.269ZHF and the restriction on the ADC in s.269ZHF(2). I am also not sure that there is an issue between the ADC and Guardian which requires that the question of the application of s.269TDA to an inquiry under Division 6A be resolved.

94. The crux of Guardian's submission is that as a result of the ADC's misinterpretation of s.269ZHF, the ADC Report does not exclude the possibility that Thai CFG exporters would be likely to cause dumping and material injury if the measures expired but that the dumping or the material injury would only be negligible. Given the evidence before the ADC, Guardian argues that it is probable that the ADC was only ever satisfied that Guardian's future dumping or material injury would be negligible. Guardian submits that given the ADC's construction of the Act, the ADC believed that this would suffice to allow the ADC to recommend that measures be continued.
95. I do not believe that the ADC Report does support the submission by Guardian on this point. It is not clear that the ADC considered that a recommendation could be made to the Minister to secure the continuation of the measures even if the projected likely future dumping or material injury would be negligible. It seems to me that when the ADC Report states that the ADC is not prevented from recommending that measures be continued where the volumes of exports is negligible as defined by s.269TDA(4), the report is referring to the volume of exports identified during the inquiry.
96. The position of the ADC appears to be that the fact that the volume of dumped exports during the inquiry period is negligible is not determinative of whether or not the ADC can recommend that the measures be continued. This has to be the case. Given that an inquiry under Division 6A takes place when anti-dumping measures are in place, it could be expected that any dumped volumes covered by those measures might be negligible. This would not necessarily mean that those volumes would remain at those levels if the measures expired.
97. It is not clear that Guardian is in fact submitting that a finding of a negligible volume of dumped exports during the inquiry period means that a recommendation for the continuation of the measures cannot be made. Guardian's submission not only refers to the finding that it had only dumped minute quantities of CFG, but goes on to state:  
"All the evidence showed that the prospect of Guardian dumping larger quantities of CFG in Australia in the future was remote."
98. If the evidence before the ADC did in fact show that there was only a remote likelihood that there would be other than negligible volumes of



dumped exports from Thailand in the future, then I agree with Guardian's submission that the ADC would be prevented from making a recommendation to the Minister to secure the continuation of measures against such exports. This is not necessarily because of s.269TDA but rather the terms of s.269ZHF(2) which require that there be dumping and the material injury which the measures are designed to prevent.

99. As noted above, I agree that the projected future dumping has to be the cause of the material injury and it is highly unlikely that if the ADC was satisfied that any future volumes of dumped goods were only going to be negligible, there could be the requisite level of satisfaction that such dumping would be the cause of any future material injury.
100. There is though no basis for the statement in Guardian's submissions that all the evidence showed that the prospect of Guardian dumping larger quantities of CFG in Australia in the future was remote. The ADC took the view that it was likely that exports from Thailand would increase if the anti-dumping measures expired and, as I found above, this was a reasonable view given the evidence.

## Non-injurious Price

101. Guardian submits that the use of a constructed unsuppressed selling price (USP) rather than a conventionally constructed USP to determine the NIP has resulted in an inflated NIP. This is because Viridian is a high cost producer. Guardian argues that the NIP should have been based on the selling prices of un-dumped goods.
102. The ADC Report sets out the approach which is taken to the calculation of the USP. This involves the following hierarchy:
- industry selling prices at a time unaffected by dumping;
  - constructed industry prices – industry CTMS<sup>15</sup> plus profit; or
  - selling prices of un-dumped imports.
103. As no relevant industry selling prices unaffected by dumping could be identified, the ADC Report states that a constructed method for calculating the USP was used. Further, it was reasonable to use Viridian's data from the inquiry period as this data had been verified and reflected the most recent period. In response to Guardian's submission that the selling prices

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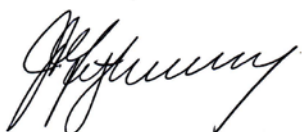
<sup>15</sup> Cost to make and sell

of un-dumped imports should have been used, the ADC Report noted that there was no evidence of the actual selling prices of un-dumped imports.<sup>16</sup>

104. Guardian's submission also claims that the calculation of the NIP was vitiated by errors in the assessment of material injury. I have dealt with the claims regarding the assessment of material injury above.
105. In the circumstances and given the non-cooperation of the importers, I do not see any error with the approach taken by the ADC to the calculation of the USP, and consequently the NIP, which would make the reviewable decision not the correct or preferable decision.

## Recommendations/Conclusion

106. I do not consider that the grounds relied upon by the Applicant establish that the decision of the Parliamentary Secretary was not the correct or the preferable decision.
107. Pursuant to s.269ZZK of the Act, I recommend that the Parliamentary Secretary affirm the reviewable decision.



Joan Fitzhenry  
Senior Member  
Anti-Dumping Review Panel

8 December 2016

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<sup>16</sup> ADC Report 335, section 10.4, page 69, footnote 67