Australian Government
Anti-Dumping Commission

Anti-Dumping Commission
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Mrs Joan Fitzhenry
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By e-mail: ADRP@industry.gov.au

Dear Mrs Fitzhenry,

CLEAR FLOAT GLASS EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA, REPUBLIC OF INDONESIA AND THE KINGDOM OF THAILAND

I write with regard to the notice under section 269ZZI of the *Customs Act 1901* published on 11 October 2016 advising your intention to review the decision of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to publish a notice under subsection 269ZHG(1) of the *Customs Act 1901* (the Reviewable Decision). The Reviewable Decision was published on the Anti-Dumping Commission (Commission) website on 8 September 2016, referred to in Anti-Dumping Notice No. 2016/85.

I understand that by 17 October 2016 the Commission had provided you with the Statement of Essential Facts (SEF) 335, the confidential versions of the submissions made by interested parties, the Final Report (REP) 335, and any other relevant information (as defined in subsection 269ZZK(6) of the *Customs Act 1901*).

I have considered the application for review of the Reviewable Decision and have decided to make some comments on the various grounds raised therein. Please find attached my comments (***Attachment A*** refers), which I submit for your consideration.

The Commission remains at your disposal to assist you in this matter, and would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely,

Dale Seymour
Commissioner
Anti-Dumping Commission

10 November 2016

Attachment A

I make the following submissions in response to the grounds set out in the notice published on 11 October 2016. These grounds are with respect to the consideration by the Anti-Dumping Review Panel (ADRP) of the Reviewable Decision of the Parliamentary Secretary and reported in REP 335.

a) The Commission's finding that dumping by Thai exporters is likely to continue or recur

The applicant, Guardian Industries Corp Ltd (Guardian), contends that the Commission "varies between characterising the future dumping and material injury as a recurrence and characterising it as a continuance."

Subsection 269ZHF(2) of the *Customs Act 1901* (the Act)[1] indicates that I must be satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent. In other words, both the dumping and injury might legitimately be described in either of these terms, depending on the context.

The Commission notes that REP 335 tends to use "continue" in respect of dumping. This is because dumping has been found to have occurred during the inquiry period, and in this context dumping would be considered to "continue" (in the sense that the dumping would carry on) if the measures are not continued. The Commission further notes that REP 335 tends to use "recur" in reference to injury caused by dumping (that is, the injury that the anti-dumping measures were intended to prevent) if the measures are not continued.

The Commission notes the applicant's criticism regarding the Commission's analysis of submissions. REP 335 outlines the Commission's consideration of all submissions received. The analysis is not confined to section 8.3 of REP 335, but can also be found in sections 6.4, 8.5 and 8.6 of the same.

The applicant sets out what it considers were the four reasons relied upon in REP 335 for finding that dumping from Thailand is likely to continue, and the applicant's views on the flaws in the Commission's reasoning (sections 5.2 to 5.19 in its application refer).

The Commission considers that the applicant's summation does not accurately characterise the reasoning set out in REP 335. The Commission makes the following observations in relation to its reasoning in REP 335:

- The volume of exports from Guardian during the inquiry period is small, however the Commission considered that this was a result of the imposition of the anti-dumping measures. The Commission did not agree with Guardian that these volumes would continue to be small if the measures were not continued.[2]
- The Commission considers that the evidence demonstrates that Guardian continues to supply the Australian market (either from Thailand or from other parts of the global business). Although not addressed explicitly in REP 335, the Commission considered that the Oceania Territory Manager, operating in Australia on behalf of Guardian, showed that Guardian maintains an interest in exporting to the Australian market (and

[1] All legislative references are to the *Customs Act 1901*, unless otherwise stated.

[2] Section 8.3.4 of REP 335 refers.

continued to do so, as indicated by the ongoing export of dumped goods during the inquiry period), and therefore Guardian maintains an export pathway. Dumping through this pathway already occurs; as such, the Commission considers that, in the absence of the measures, these exports would be likely to continue at similar prices and in increasing volumes. The Commission observes that Guardian does not dispute the existence of the pathway, but appears instead to argue that the presence of a single employee fulfilling the relevant Territory Manager role indicates that the export pathway is not "entrenched". The Commission did not use this term in REP 335; in any event, the Commission considers that the degree to which the pathway is maintained is irrelevant – there is either an export pathway, or there is not.

- In relation to Guardian's conclusion at section 5.10 of its application, the Commission does not consider that the presence and / or use of an export pathway will by itself, necessarily be evidence that dumping will continue or recur.
- The Commission made no finding with regard to Guardian's claim (at section 5.11 of its application) that CSR Viridian does not have sufficient production capacity to supply the Australian market. The Commission notes that Viridian strongly objected to this claim each time it was made. In any event, the Commission does not consider that this claim has any relevance to assessing whether Guardian would continue to dump CFG if the measures were not continued.
- The Commission's findings with regard to Chinese production capacity had no relevance to the Commission's findings that dumping by Thai exporters is likely to continue. The Commission's reasoning in section 8.3.4 of REP 335 differentiates between excess production capacity in China and Guardian's limited, if any, excess production capacity. The Commission's view was that Guardian could switch its production mix within Thailand and / or adjust its broader supply strategy (given the global production capabilities of the broader Guardian group, which already supplies a large volume of CFG to the Australian market) if it was considered commercially advantageous to do so. The Commission considered that it was likely that not continuing the anti-dumping measures would provide such a commercial advantage.
- With regard to the matters raised under section 5.18 of the application, the Commission observes the following:
    - Guardian claims that there is an inconsistency between the Commission's treatment of its submission regarding CSR Viridian's ability to supply the New Zealand market (EPR 014) and the Commission's assessment of Guardian's global business and its ability to export CFG from different countries. With respect, the claims concerning New Zealand (which tend to focus on injury caused to CSR Viridian) are tangential at best to the central point being argued by Guardian in its application (which deal with whether dumping is likely to recur).
    - With regard to EPR 014:
        - the evidence gathered by the Commission does not support the claims made in section 5.3 of that submission;
        - the points made in section 5.4 of that submission were largely echoed in the Commission's analysis of the market (excluding New Zealand, which is not "the market" relevant to the goods); and
        - the conclusions drawn by Guardian in section 5.5 of that submission seem to suggest that the anti-dumping measures should not be

continued unless doing so would result in an increase in CSR Viridian's production volumes. Guardian argued that the continuation of the measures would merely result in an increase in exports from other sources (which, the Commission notes, occurred following the original investigation).

- For completeness, the Commission notes that the supply of CFG to New Zealand was also raised by the Government of Indonesia in its submission (032) and again by Guardian in response to that submission (036), but neither offers any additional evidence which would refute the data obtained by the Commission with regard to imports of CFG.

- The Commission's analysis of the market more broadly (that is, inclusive of imports of CFG from suppliers not subject to measures) must consider whether future injury may nevertheless be caused by factors other than dumping. The ability of other suppliers to supply CFG at prices which would undercut the goods subject to measures is one factor to consider (as was done by the Commission at section 8.4.2.3 (Figure 13, Figure 14). The Commission considers that the broader thesis of REP 335 sets out this reasoning. Guardian ignores the fact that other suppliers of CFG were also examined (not simply those from the global Guardian business). The fact that the global business is a source of other imports is not – of itself – a basis for continuing the measures in respect of Thai exports.

The Commission observes that Guardian refers to particular items of evidence to indicate that the methodology and conclusions of REP 335 must be flawed. The Commission has taken a holistic view of all of the evidence in undertaking its inquiry and I have done so in reaching my conclusions; no item of evidence ought to be viewed in isolation. I remain satisfied that the totality of the evidence supports the conclusion that, if the anti-dumping measures in relation to exports from Thailand expired, this would be likely to lead to a continuation of the dumping that the anti-dumping measure is intended to prevent.

b) The Commission's finding that CSR Viridian Ltd is threatened with material injury should measures be allowed to expire

Applicability of section 269TAE

Section 8.6.1 of REP 335 outlines the Commission's view that the applicability of section 269TAE when assessing the likelihood of material injury continuing or recurring for the purposes of a continuation inquiry is not readily apparent, although some factors in section 269TAE may be relevant and were in fact considered in REP 335.

In section 6.6 of its application to the ADRP, Guardian notes that "the ADC is required to consider Thailand separately in respect of material injury by virtue of s 269TAE(2C)(d) of the Act". Subsection 269TAE(2C)(d) provides one factor that the Minister must be satisfied of before cumulating injury from one country with injury from other countries for the purposes of an investigation. Specifically, subsection 269TAE(2C)(d) requires the volume of dumped exports to Australia from the country to be above prescribed negligible levels. For reasons similar to those provided in REP 335, it is not readily apparent that subsection 269TAE(2C)(d) is relevant to a continuation inquiry.

Subsection 269TAE(2C)(d) is expressed as applying where a determination is being made for the purposes of section 269TG or 269TH (neither of which is a determination that can be made at the conclusion of a continuation inquiry). In addition, the export volume thresholds that are prescribed for the purposes of an investigation are an example of a

factor in section 269TAE that is not relevant for the purposes of a continuation inquiry. These thresholds relate to volumes of exports before anti-dumping measures have been imposed, but the volume of exports to Australia from a particular exporter may have changed as a result of the measures being in place. This fact alone should not prevent the Minister from being able to consider the cumulative effect of exportations from different countries in the context of a continuation inquiry, where it is otherwise appropriate to do so. For these reasons, while some factors in section 269TAE may be relevant to a continuation inquiry, it is not clear how this particular prerequisite for cumulating injury for the purposes of an investigation is a required consideration or is directly relevant in the context of a continuation inquiry.

Undercutting analysis

Guardian's criticism of the undercutting analysis (section 8.4.2.1 of REP 335) is that there is a difference between the findings in the SEF and REP 335 despite the use of the same methodology. Guardian's submission (Document 034, at 5.11) highlighted concerns with the analysis which caused the Commission to re-examine the data and how the outcomes of the analysis were reported. The Commission considered that the text in the SEF relating to its undercutting analysis may have been ambiguous, and therefore the text in REP 335 was more precisely constructed to try and avoid that previous ambiguity.

Guardian's claims with regard to the alleged price premium were raised in submissions and were addressed in REP 335 at section 5.3.2. Guardian's view is that the failure of the importers to cooperate with the inquiry is due to their apprehension that they would face commercial recriminations from CSR Viridian (section 6.12 of the application refers). Guardian argues that the Commission ought to have used its compulsive powers to remediate the situation. The Commission notes that the sole submission from an importer (Australian Independent Glass, Document 042), received at a late stage in the inquiry, was critical of CSR Viridian. However, neither Guardian nor Australian Independent Glass have offered any evidence to support these assertions. Accordingly, as the Commission must base its assessment on positive evidence and the facts before it, the Commission has disregarded these claims.

The Commission did not presume that CSR Viridian obtained a 0 per cent premium; the Commission found that it was unable to be quantified, and expressed doubt about the methodology used in the original investigation.[3] Section 8.4.2.1 does not claim that the analysis is precise, but does conclude that it is indicative of trends and price relativities; as a result, it does not quantify the degree of price undercutting but acknowledges that it exists and some part of the undercutting would be accounted for by the premium (footnote 49 refers).

Guardian's claim that the price premium of 8 per cent from the original investigation is most appropriate is contradicted by CSR Viridian in submissions; neither party is able to provide any evidence to support their respective positions, and no material has been obtained from importers which would give the Commission an opportunity to compare prices directly. This does not vitiate the Commission's finding that CSR Viridian's prices would come under pressure if the anti-dumping measures were not continued.

Guardian expresses concerns about footnote 49 in REP 335, suggesting that the Commission has misunderstood the relevance of establishing the price premium. The Commission observes that the latter part of the footnote was expressing the view that whatever premium is currently being obtained would not increase in the absence of the

[3] Section 5.3.2 of REP 335 refers.

dumping measures. The Commission's view is that regardless of whether the premium is 0 per cent, 8 per cent or some other amount, it would be reasonable to expect that this is the maximum that CSR Viridian is able to obtain in the market, and that increasing pressure on prices (which would occur if the measures were not continued) would inevitably put pressure on the premium.

Volume effects

Finally, the Commission does not consider that there is any reason why the analysis of likely price effects and volume effects ought to rely on the same methodology. All interested parties indicated that price is the key determinant for purchasing decisions, and therefore the direct comparison of prices gives an indication of potential sources of supply and their apparent competitiveness. Demand (as noted in section 5.4 of REP 335) generally aligns to construction activity and the downstream demand for other products that use CFG as an input; Figure 1 in the same section demonstrates that the trend in construction activity has been relatively consistent since 2013. As outlined in REP 335, whether a customer purchases the goods from countries subject to measures, from the Australian industry or from other suppliers is largely determined by price. If the price of goods currently subject to measures becomes more competitive relative to the price obtained by the Australian industry, the *share* of the market held by imports is likely to grow regardless of whether the *size* of the market were to grow, shrink or remain stable overall.

c) The Commission's finding that future injury to CSR Viridian Ltd could be attributed to Thai dumping

Contrary to Guardian's assertion, section 6.4.1 of REP 335 sets out the claims made by Guardian concerning the other causes of injury experienced by CSR Viridian during the inquiry period. The following sections of REP 335 set out the claims made by other interested parties (including noting Viridian's submissions in response), and the Commission's analysis of the various claims is set out in section 6.5. The text from REP 335 cited in Guardian's application to the ADRP, 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" comes after a summary of the various matters examined elsewhere in Chapter 8 of REP 335, and should be read as concluding that the matters contended for by Guardian (and addressed in section 6.5) were not supported by the evidence or were not the preferred interpretation of the facts.

The Commission's conclusions at section 8.4.3 of REP 335 relate to the effect that an increased volume of CFG from the countries currently subject to measures would have on CSR Viridian's volume and market share if the measures are not continued. The previous comparison of prices (and the finding that price is the key driver of purchasing decisions) indicate that the apparent price advantage enjoyed by the countries subject to measures (Figure 13, Figure 14 in REP 335 refer) would lead to an increase in volumes from those sources if the measures were not continued. I found that those volumes would be likely to be dumped.

With respect to subsection 269TAE(2A), it is my view, for the reasons outlined above and in REP 335, that the applicability of that provision when assessing the likelihood of material injury continuing or recurring for the purposes of a continuation inquiry is not readily apparent. However, I am of the view that consideration of whether material injury is likely to continue or recur as a result of factors other than the continuation or recurrence of

dumping is relevant to my analysis under subsection 269ZHF(2). My consideration of other factors is outlined in section 6.5 of REP 335.

With respect to Guardian's allegations concerning the suppressive or depressive effects of Xinyi Ultrathin (Donguan) Co. Ltd (Xinyi) prices, the goods exported by Xinyi are not subject to measures. I am satisfied that the Commission's analysis addresses this issue. *Confidential Attachment 1* and *Confidential Attachment 8* to REP 335 indicate why I am satisfied in this regard. In any event, as no importers have cooperated with the inquiry, there is no further evidence available which would enable the Commission to examine the effect of Xinyi's prices (or the prices being obtained by importers of CFG from any other source) in the Australian market during the relevant period.

CSR Viridian's annual reports provide data and commentary at an aggregate level – the Commission does not consider that this information can be used to draw conclusions as to CSR Viridian's attitude towards the impact of dumping on its CFG business. The Commission has not, contrary to Guardian's assertion, concluded that the evidence "does not exist", but that the evidence advanced is not persuasive in support of Guardian's contention.

The Commission's comment in section 6.5.2 of REP 335 that "downstream markets are outside the scope of this inquiry" was made in the context of assessing the economic condition of CSR Viridian with respect to the goods under consideration (i.e. CFG). Guardian made a number of claims regarding practices in the downstream market in this respect (Document 014, 022 refer) but no evidence was advanced in support of these claims. To provide further context in relation to the text in section 6.5.2 of REP 355, the Commission considers that the economic performance of CSR Viridian's related customers (i.e. the downstream market) is not relevant. The Commission agrees that subsection 269TAE(2A)(d) conceives an examination of trade practices and competition between producers of like goods, but for the reasons outlined above and in REP 335, the applicability of subsection 269TAE(2A)(d) when assessing the likelihood of material injury continuing or recurring for the purposes of a continuation inquiry is not readily apparent.

d) The Commission's finding that CSR Viridian Ltd does not directly or indirectly import large quantities of low cost CFG from Xinyi or some other Asian exporter

The Commission considers that its analysis of the ABF import database (*Confidential Attachment 1* and *Confidential Attachment 2* to REP 335 refer) demonstrates the reasons for the Commission's conclusion that there is no strategic relationship between Xinyi and CSR Viridian, as alleged by Guardian. The submission from Xinyi (Document 041) puts forward the same view.

The Commission identified no evidence that CSR Viridian purchased CFG from importers that may have obtained CFG from Xinyi (or from any other supplier).

e) The Commission misapplied subsection 269ZHF(2) of the Act

Section 8.6.2 of REP 335 outlines the Commission's view that section 269TDA, and the thresholds for termination that are contained in section 269TDA, do not apply to a continuation inquiry.

In its application to the ADRP, Guardian submits that section 269TDA is relevant for the purposes of a continuation inquiry because the Commissioner could not recommend that measures be continued if the Commissioner could not be satisfied that future dumping

from Thailand would not be negligible. For the reasons outlined in section 8.6.2 of REP 335, I do not consider that I was required to have regard to the thresholds for negligibility outlined in section 269TDA for the purposes of the continuation inquiry. In particular, the thresholds for termination in section 269TDA relate to exports that occurred before anti-dumping measures were imposed. While the volume of exports to Australia from a particular exporter may have declined in volume as a result of the measures being in place, it is not clear how the negligibility thresholds in section 269TDA are then relevant for the purposes of a continuation inquiry.

In its application to the ADRP, Guardian also submits that section 269TDA is not expressly limited to sections 269TG and 269TJ in the same manner as section 269TAE. In section 8.6.2 of REP 335, the Commission noted that while section 269TDA is not expressed as being limited by sections 269TG or 269TJ, there are a number of other limitations in the text of section 269TDA that make it clear that section 269TDA is intended to apply only in the context of an investigation. In particular, section 269TDA is titled "Termination of Investigations", each relevant subsection in section 269TDA relates to an application for a dumping or countervailing duty notice and each relevant subsection in section 269TDA refers to an investigation for the purposes of the application. It should also be noted that sections 269TG and 269TJ are in Division 3 of Part XVB (which relates to consideration of anti-dumping matters by the Minister) and section 269TDA is in Division 2 of Part XVB (which relates to consideration of anti-dumping matters by the Commissioner).

In its application to the ADRP, Guardian further submits that "it would be surprising if subsection 269ZHF(2) incorporated elements of Div 3 and not Div 2 of Part XVB since 269TAE of the Act incorporates by express reference the provisions in section 269TDA concerning negligibility". In section 8.6.2 of REP 335, the Commission outlines its view, by reference to the Full Federal Court's decision in *Minister of State for Home Affairs v Siam Polyethylene Co Ltd [2010] FCAFC 86*, that the functions and powers in the Act should be interpreted according to their own express terms (and the constraints of those express terms), rather than being constrained by other provisions of the Act. As such, it is not clear why subsection 269ZHF(2) necessarily incorporates elements of Division 3 of Part XVB. However, even if subsection 269ZHF(2) does incorporate elements of Division 3 of Part XVB, it does not follow that subsection 269ZHF(2) should also incorporate elements of Division 2 of Part XVB. Further, as noted by Guardian, certain elements of section 269TAE of the Act incorporate by express reference the provisions in section 269TDA concerning negligibility and there is no such express incorporation of section 269TDA, or Division 2 of Part XVB more generally, in section 269ZHF(2). For these reasons I am of the view that the application section 269TDA is neither a requirement nor a relevant consideration for the purposes of a continuation inquiry.

f) The Commission failed to properly calculate a non-injurious price

The Commission explained its approach to calculating the non-injurious price (NIP) in Chapter 10 of REP 335; as noted at section 10.3, there is a hierarchy associated with the calculation of the unsuppressed selling price from which the NIP is derived. As outlined previously, in the absence of cooperation from importers this option (establishing the USP by reference to the selling prices of un-dumped imports) is unavailable.

It is not clear how the Commission's alleged errors in terms of assessing material injury (sections 5.21 and 7 of Guardian's application to the ADRP refer) have a vitiating effect on its approach to calculating the NIP.