



Not confidential

To Director, Operations 2 - Australian Anti-Dumping Commission
From Vivian Wang, Andrew Korbel
Date 26 February 2016
Subject **Resumed Anti-Dumping Investigation – PV Modules or Panels from China**

As you know, we act for the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (**CCCME**).

The Anti-Dumping Review Panel (**Panel**) issued a decision on 8 January 2016 revoking the Commissioner's termination of the investigation in Case 239. We understand that in accordance with section 269ZZT(2) of the *Customs Act 1901* (**Act**), the investigation will be resumed following the publication of a new Statement of Essential Facts (**SEF**) under section 269TDAA of the Act.

The Commission has invited interested parties to make submissions regarding the Panel's decision to revoke the Commissioner's termination. The Commission has requested that any such submissions address any issues relevant to the publication of the new SEF in light of:

- grounds relied on by the Panel to revoke the Commissioner's termination of the investigation; and
- issues identified by the Panel as requiring further consideration.

We are instructed to make the following submissions to the Commission on behalf of CCCME in response to that invitation.

1 Correct conclusion of negligible injury caused by dumping

- 1.1 The Panel appears to have revoked the Commission's decision to terminate the investigation primarily because section 269TDA(13) of the Act "*requires a positive state of satisfaction that the injury caused by dumping is negligible*" (see paragraph 63 of the Panel's Report dated 22 December 2015), and the Panel considered that the analysis undertaken by the Commission did not support such "*positive satisfaction*".
- 1.2 In our submission, the Panel was certainly not saying that the decision by the Commission to terminate the investigation was necessarily incorrect, but only that the Commission's reported analysis did not provide sufficient support for the Commission's decision in the mind of the Panel.
- 1.3 One of the Panel's concerns seems to have been that the Commission did not overtly consider the fact that Tindo did apparently make some sales despite its

Resumed Anti-Dumping Investigation – PV Modules or Panels from China

- price being undercut by Chinese exporters. We submit that while the Commission ought to respond to that issue, that it ought not to lead to any different conclusion.
- 1.4 In the competitive Australian market for solar panels, where the core product is the same, the most significant distinguishing factor for customers is of course likely to be price. As figure 10 of the Commission's Termination Report no. 239 demonstrates, if the prices of Chinese exporters' goods had been increased to what the Commission found was their undumped price, the exporters' prices would still have been very significantly lower than Tindo's prices (even for its DC modules).
- 1.5 In those circumstances, the natural conclusion is that Tindo would have gained either no additional sales or only a very small number of additional sales. It is open to the Commission to conclude that potential customers of Tindo who were unconcerned about price had already purchased from Tindo – and that those who were concerned about price would not have made a different purchasing decision had the exporters' prices been at an undumped level.
- 1.6 If (at best) only a relatively small number of additional customers would have bought from Tindo if there were no dumping, then that supports the Commission's original conclusion that the injury caused by dumping was negligible.
- 1.7 That conclusion might be bolstered further if (after re-assessment of dumping margins by the Commission) the Commission concludes that there are some Chinese exporters dumping at lower margins than others. If that is the case, the more likely outcome of undumped prices would have been that customers influenced by price differentials would have gravitated to the exporters with the lowest undumped prices, rather than to the more expensive products of Tindo.
- 1.8 That is particularly the case given the size and marketing capacities of the Chinese exporters – some of them global giants in the solar panel market – compared to Tindo.
- 1.9 In our submission, the Commission was right to reach the conclusion that it did, and to terminate the investigation. That the injury suffered by Tindo as a result of dumping was negligible was a conclusion properly drawn by the Commission – and one that should be drawn again – even if, in light of the Panel's Report, further explanation is necessary when that conclusion is again reached.
- 1.10 While section 269TDA(13) does require the Commission to be positively satisfied that imports at dumped prices are causing only "*negligible injury*" for the investigation to be terminated, anti-dumping measures of course may be imposed only if the Minister is positively satisfied that imports at dumped prices are causing "*material injury*" (see section 269TG(1) and (2) of the Act).
- 1.11 Equally importantly, on the basis of the facts found by the Commission, it is very difficult to see how the Commission could conclude that any injury caused to Tindo by dumped exports from China was "material". The proper conclusion to be drawn by the Commission is that any such injury was "*immaterial, insubstantial or insignificant*", and therefore, in accordance with the Ministerial Direction on "*material injury*", not material.

2 Other issues

Particular market situation

- 2.1 The Commission formed the view, at a late stage in the investigation, that a “*particular market situation*” existed in relation to the supply of PV modules or panels, because it formed the view that the Government of China significantly influenced the supply and demand of those goods, including by influence in respect of all raw materials used in the production of the goods. Consequently, the Commission decided to use a substitute benchmark price when formulating a constructed normal value for PV modules and panels.
- 2.2 It appears, however, that the Commission has not compared the benchmark prices used in the constructed normal value with the cost to make of Tindo’s panels, or the raw materials used by Tindo in its production of panels. Given that all of the raw materials used in the production of Tindo’s solar panels were imported, it appears to us that that step ought to have been taken by the Commission before making adjustments to the normal values of exporters on the basis of the benchmark price.
- 2.3 In other words, while the Commission has identified what it considers to be the influence of the Government of China on exporters’ costs and domestic sale prices, it does not follow that Chinese domestic sales are not suitable for determining a normal value when the Australian industry may itself receive the benefit of some of those prices. While the CCCME does not agree with the Commission’s approach to assessment of the existence of a “*particular market situation*”, it submits that, even on the Commission’s approach, further analysis ought to have been undertaken before normal values were constructed in the manner undertaken by the Commission.

Investigation period

- 2.4 The investigation period was 1 July 2012 to 31 December 2013 and the injury period was 1 January 2010 (two years before Tindo started business) to 31 December 2013.
- 2.5 Given that it is now February 2016 and the Commission is unlikely to publish a revised Statement of Essential Facts for some time, if the Commission is not minded to terminate the investigation, it ought to consider whether it needs to understand more about the operation of Tindo in the current market before making a recommendation to the Parliamentary Secretary.
- 2.6 In that regard, we note that mention is made in the Commission’s Termination Report about Tindo’s “sales” of its products. However, a brochure published by Tindo appears to indicate that Tindo may not “sell” solar panels to its customers. Instead, it provides them for “free” and the customer “sells” the electricity so generated to Tindo, who presumably re-sells it to the Grid, and in 15 years’ time title to the solar panels passes to the customer: see the Tindo Energy Agreement on page 6 of Tindo’s brochure: http://www.tindosolar.com.au/wp/wp-content/uploads/2014/09/Tindo_A4brochure_email2.pdf.

Resumed Anti-Dumping Investigation – PV Modules or Panels from China

- 2.7 In light of that model, a matter for the Commission to consider may be that if there is no “price”, how is dumping relevant? Further, Tindo undertakes to maintain the panels for the 15 year life. How ought that cost be dealt with in the Commission’s analysis? We note that, apparently Tindo received \$30 million from the Australian Government to assist it in supplying 5,000 panels in South Australia on this basis.

Tindo’s business plan

- 2.8 Finally, despite what Tindo itself says, it seems apparent that one of the primary causes of Tindo’s injury was its business plan, which (i) focussed on selling AC panels (which were less popular in the market), (ii) failed to forecast the decline in the Australian market due to the phasing out of feed-in tariffs, and (iii) underestimated the capacity of Chinese exporters (leaving aside any dumping) to reduce their prices as the market became even more competitive.
- 2.9 Australia’s anti-dumping regime does not exist to provide tariff protection in the form of anti-dumping measures to Australian businesses that find themselves in such a situation – and indeed the imposition of measure in such a situation is most unlikely to resolve the issues that the business is facing.

3 Conclusion

- 3.1 In our submission, the Commission’s ultimate conclusion in the investigation – that the injury suffered by Tindo was negligible, and, therefore, that the investigation should be terminated – was clearly correct.
- 3.2 Taking into account all of the matters already considered by the Commission, together with the further analysis (or reasoning) sought by the Panel, and the matters raised in this and other submissions being put to the Commission, the Commission ought to foreshadow in its forthcoming SEF that it proposes to draw the same conclusion and, once again, to terminate this investigation.
- 3.3 We also submit that even if the Commission were to conclude (which we think it should not) that there were some limited benefit to Tindo in imposing anti-dumping measures, the overall detriment that would be caused to the wider Australian solar industry (and consumers) by the imposition of those measures should cause the Commission to recommend against their imposition, regardless of whether it terminates the investigation.
- 3.4 Given the length of time since the investigation commenced, it is clearly in the interests of all parties that the resumed investigation be brought to an end as quickly as possible.

East & Concord Partners and Corrs Chambers Westgarth

Vivian Wang

Partner

+86 10 6510 7050

vivian_wang@east-concord.com

Andrew Korbel

Partner

(02) 9210 6537

andrew.korbel@corrs.com.au