



**Australian Government**

**Anti-Dumping Review Panel**

# **ADRP REPORT No. 29**

Certain crystalline silicon photovoltaic  
modules or panels exported from the  
People's Republic of China

22 December 2015

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## Introduction

1. Tindo Manufacturing Pty Ltd (Tindo) has applied for review of the decision by the Commissioner of the Anti-Dumping Commission (ADC) pursuant to s.269TDA(13) of the *Customs Act 1901* (the Act) to terminate an investigation into certain crystalline silicon photovoltaic modules or panels exported from the People's Republic of China. The decision by the ADC was a termination decision as defined by s.269ZZN of the Act and hence is reviewable by the Anti-Dumping Review Panel (the Review Panel).
2. The termination decision was made by the ADC on 6 October 2015 and was notified to Tindo by public notice of the same date.<sup>1</sup> The application for review was received by the Review Panel on 5 November 2015, within the prescribed time for such an application. The application for review was not rejected under s.269ZZQA of the Act.
3. Pursuant to s.269ZZT of the Act, the Review Panel is required within 60 days after the receipt of the application to make a decision on the application for review by affirming the reviewable decision or revoking the reviewable decision.
4. The then Senior Member of the Review Panel specified in a written direction pursuant to s.269ZYA that the Review Panel for this review was to be constituted by me.

## Background

5. Tindo commenced operating in July 2012. It is the sole manufacturer in Australia of certain crystalline silicon photovoltaic modules or panels (PV modules or panels). These products are also sometimes referred to as solar panels.
6. On 4 February 2014, Tindo lodged an application under s.269TB(1) of the Act requesting that the Minister publish a dumping duty notice in respect of PV modules or panels exported from the People's Republic of China (China). The application by Tindo was not rejected and on 14 May 2014 an investigation was initiated by the ADC.<sup>2</sup> The investigation period for the investigation was from 1 July 2012 to 31 December 2013. The injury analysis period was from 1 January 2010 to 31 December 2013.
7. After a number of extensions of time were granted, the Statement of Essential Facts (SEF) was published on 7 April 2015.<sup>3</sup> The SEF reported the finding of the ADC that:

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<sup>1</sup> Anti-Dumping Notice No. 2015/118

<sup>2</sup> Anti-Dumping Notice (ADN) 2014/38

<sup>3</sup> SEF 239

- PV modules or panels exported from China during the period 1 July 2012 to 31 December 2013 (the investigation period) were exported at dumped prices; but
  - the injury to the Australian industry or the hindrance to the establishment of an Australian industry that has been, or may be, caused by those exports is negligible.
8. The SEF also reported that, based on the above findings and subject to any submissions received in response to the SEF, the ADC proposed to terminate the investigation under s.269TDA(13) of the Act. Submissions were received in response to the SEF. On 6 October 2015 the ADC proceeded to terminate the investigation by public notice. The reasons for the decision were set out in Termination Report 239 (the Termination Report).

## Conduct of the Review

9. In accordance with s.269ZZT(1) of the Act, the Review Panel must make a decision on the application by either affirming the reviewable decision or revoking the reviewable decision. In making that decision, the Review Panel must have regard only to information that was before the ADC when the ADC made the reviewable decision.<sup>4</sup>
10. 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). I have also had regard to the Termination Report, and information relevant to the review which was referenced in the Termination Report. This latter information included the SEF.
11. The ADC provided copies of confidential documents which were used by the ADC in preparing the SEF and the Termination Report. Some assistance was sought by the Review Panel and received from the ADC in understanding spreadsheets which were prepared by the ADC and which formed the basis for findings in the SEF and the Termination Report. The ADC also assisted the Review Panel by confirming certain information provided in the application for review was not information which was before the ADC when the reviewable decision was made.
12. As required by s.269ZZW and s.269ZZX, a copy of the application for review was made public. The correspondence with the ADC was not made publicly available.

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<sup>4</sup> S.269ZZT(4)

## Grounds for Review

13. In the introduction to its submission on why the reviewable decision was not the correct or preferable decision, Tindo lists the factors which it claims influenced the ADC's decision. These are:

- the size of the dumping margins found relative to the difference in prices actually obtained for the dumped imports compared to the Australian industry;
- the availability of exports from China which, if not dumped, would have still been at prices significantly below Tindo's cost of production;
- the price sensitivity and preference of the downstream market for direct current (DC) rather than alternating current (AC) models; and
- Tindo's primary product offering being AC PV modules or panels, which were marketed as premium models and were priced significantly higher than the imported DC PV models or panels during the investigation period.

14. Tindo also claims that the ADC was influenced by further factors namely:

- Tindo's poor timing in entering the Australian market at a time of decreasing demand;
- the market's apparent preference for cheaper DC solar modules or panels; and
- Tindo's poor marketing efforts.

15. Tindo's submission then states that it will address each of the identified grounds raised in the Termination Report and demonstrate why the ADC's decision was not the correct or preferable decision. The submission by Tindo provides, in summary, the following reasons:

- the ADC had not properly understood its product and it was incorrect that its primary product offering was AC PV modules or panels;
- the ADC's finding that the Chinese exports at undumped prices would still have undercut Tindo's cost of production did not take full account of the items included, that is, it was not a fair comparison;
- the ADC incorrectly concluded that Tindo's entry into the market was poorly timed;

- the comparison made by the ADC between Tindo's selling prices and the Chinese exports was flawed as it was done at the wholesale level when Tindo's sales were predominantly to end users;
- the ADC incorrectly found that injury to Tindo was in part caused by the market preference for DC solar panels;
- the ADC was incorrect in finding that Tindo did not aggressively market its product;
- Tindo did, contrary to the finding by the ADC, suffer volume injury;
- other than dumping, there is no reasonable explanation from the ADC as to why Tindo's wholesale business suffered injury;
- the ADC's approach to the differential pricing between Tindo and the dumped imports was not logical and did not take into account the price premium Tindo and the leading Chinese brand were able to obtain or that without dumping Tindo's value for money proposition would have improved; and
- the available evidence showed that Tindo was experiencing material injury from dumping and it was not negligible.

16. Some of the above reasons overlap and I am not sure that all of the factors identified by Tindo were in fact part of the reasons for the reviewable decision. However, I address each of these reasons below.

## Consideration of Grounds

### ADC misunderstood Tindo's product offering

17. Tindo claims that the ADC was confused as to the relative difference between DC and AC solar panels and that this confusion led to the ADC incorrectly concluding that Tindo's primary product offering was AC PV modules or panels. Tindo points out that all solar panels manufactured by Tindo are DC solar panels and that Tindo offers its DC panels with or without an attached inverter.
18. The difference in an AC solar panel and a DC solar panel as shown in the diagram in the Tindo submission is that an AC solar panel is a DC solar panel with an attached inverter. The Termination Report describes the different types of modules or panels as AC or DC and explains the differences at section 3.2 of the Termination Report. When reviewing the production processes for Tindo's modules or panels the ADC concluded that:

“Tindo produces both AC and DC PV modules or panels using the above manufacturing processes. The only difference is that the AC PV modules or panels are ready to be plugged into the grid by the use of an on-board micro-inverter, while the DC PV module or panels needs to be connected to a separate inverter that converts the energy generated to AC power as detailed in section 3.2 of this report.”<sup>5</sup>

19. It does not seem to me that there is any significant difference in the description of the DC and AC products between that given by Tindo in its application and that which was used by the ADC in the Termination Report. Based on the description of the products in the Termination Report, I do not agree that the ADC has confused the difference. The ADC used the term AC PV module or panel to describe a DC solar panel with an attached inverter. There does not appear to be any error in this and it seems that Tindo does the same in its application.
20. Tindo claims that the conclusion by the ADC that Tindo’s primary product offering was AC PV modules or panels was incorrect. However, Tindo’s submission is that most of its customers opted to have a micro inverter factory fitted to the solar panel. It appears to me that this is confirming that the majority of Tindo’s sales are of the AC product, that is, the DC solar panel with the inverter attached. I am unable to discern any error in the ADC’s approach.

## Fair Comparison

21. In its submission, Tindo claims that it is critical when contrasting offers of dumped Chinese PV solar modules or panels that account is taken as to whether:
- a fair comparison is being made between the locally manufactured PV solar module or panel and the imported product; and
  - the cost of the inverter is individually identified so that the “bare” price of the PV solar module or panel can be made.
22. Tindo contends that the ADC finding that had the Chinese exports not been dumped, they would still have undercut Tindo’s cost of production should be rejected as the ADC did not take full account of the items included. In other words, the comparison made by the ADC with Tindo’s product did not take into account that the Tindo product included the attached inverter whereas the imported product was the PV solar panel excluding the inverter.
23. The finding made by the ADC with which Tindo takes issue is based on the pricing analysis conducted by the ADC as described in section 8.4.2 of the Termination

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<sup>5</sup> TER 239 section 4.2, page 19

Report. The conclusion by the ADC was that even if there was no dumping, Tindo would still have had to reduce its prices by a significant amount to attract customers. Based on its analysis, the ADC found that undumped prices would have had an advantage over Tindo's DC PV modules or panels prices by approximately 38%. The ADC also found that the remaining price differential would not have resulted in a shift towards Tindo's products during the investigation period.<sup>6</sup>

24. Was the pricing analysis done on a fair comparison of the locally manufactured product with the imported product? The ADC acknowledged the difficulty with conducting a pricing analysis which compares the imported product with that sold by Tindo given that Tindo predominantly sold poly crystalline AC PV modules or panels and imports were predominantly DC models. As a result, the analysis was conducted comparing Tindo's sales of DC models with sales of imported DC PV modules or panels. To this extent, the comparison would seem to be fair in that the impact of the inverter cost has been excluded.

### Poorly timed entry into market

25. In the summary of its findings on causation at section 8.1 of the Termination Report, the ADC stated that it considered that Tindo's performance had been adversely affected by, among other things, the timing of its entry into the PV modules or panels market. According to the ADC, this entry occurred when the market had reached its peak and was in decline.

26. It is Tindo's contention that contrary to what the ADC found, the market for PV solar modules or panels was trending upwards over the prescribed injury period. Tindo relies on the data in Figure 11 in the Termination Report to show that market demand in the PV module or panel industry was trending upward over the prescribed injury period.

27. Tindo relies on this data to claim that it did not enter a declining market but rather a rapidly growing market. Tindo also relies on a graph in Figure 4 of its submission. However, there is no reference to the material before the ADC on which this graph is based. The ADC has confirmed that it is not information which was before the ADC when the reviewable decision was made. It is therefore not information to which I can have regard.

28. The difficulty which I have with the submission by Tindo on this issue is that it does not address the point which the ADC makes with regard to the market. The ADC is pointing to the decline in the market in 2012/2013. While the material relied upon by Tindo demonstrates that the market substantially increased from 2010 to 2012, it did, as the ADC points out, decline in 2012/2013. It is the fact that Tindo commenced

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<sup>6</sup> TER 239 Section 8.1, page 58



business in 2012, the year the market started to decline which is the point the ADC is making. The increase during the previous years does not affect the validity of this point.

29. Tindo also takes issue with the statements made by the ADC in the Termination Report regarding the Feed in Tariff (FIT) incentives offered by various states and territories. The Termination Report refers to these incentives declining or being reduced to zero. Tindo claims that the ADC made an error with the timing for the end of the South Australian FIT. I do not believe that the issue of when the South Australian FIT incentive ended is that relevant. The point is that the PV solar modules or panels market declined after Tindo commenced business. The ADC relies on this as one of the causes of the injury suffered by Tindo. The reason for the decline is not that relevant.
30. Of course while the decline in the market is a cause of the injury suffered by Tindo, it does not mean that dumping was not also causing injury. In fact injury from dumping could be exacerbated by a declining market. In addition, dumping does not have to be the sole cause of the injury for anti-dumping measures to be taken. The issue then is whether or not the decline in the market together with the other causes identified by the ADC were the cause of the injury suffered by Tindo such that any injury caused by the dumping was negligible.

## Level of Trade

31. An important finding by the ADC was that even if the Chinese imports were not at dumped prices, the gap between Tindo's price and the price of the imported product meant that the imports remained at a significant price advantage over the investigation period.<sup>7</sup> Tindo takes issue with the analysis underlying this finding on the basis that the comparison was done at the wrong level of trade. This is because Tindo's sales, particularly towards the end of the investigation period were predominantly to end-users whereas the comparison was done at the wholesale level.
32. The material before the ADC and referenced in the Termination Report support Tindo's contention that its business was predominantly to end users for most of the investigation period.<sup>8</sup> Tindo points to an extract from the SEF which it claims suggests that Tindo's offering to end users would have been the same price or cheaper than a solar system using imported Chinese PV solar modules or panels, if the imports had not been at dumped prices.

33. The extract from the SEF upon which Tindo relies is the following:

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<sup>7</sup> TER 239 section 8.7, pages 68-69

<sup>8</sup> TER 239 section 7.5.1, page 53; confidential spreadsheet supporting Figure 10 in section 8.4.2, page 61

“The Commission used Tindo’s installation costs to calculate the weighted average net installed price (AUD per watt) of poly-crystalline DC PV modules and added that cost to the selling price of the imported PV modules or panels. Two of the five major importers sell poly-crystalline DC PV modules to end-users inclusive of installation. Those two importers collectively accounted for approximately 5 per cent of imports of poly-crystalline DC PV modules exported from China during the investigation period. Prices of those imports undercut Tindo’s installed price by between 11 per cent and 28 per cent. The weighted average price undercutting by those two importers during the investigation period is around 20 per cent.”<sup>9</sup>

34. The Termination Report does not provide the same information. It does refer to a comparison using Tindo’s installed prices as against the “package price” provided by some importers which included installation costs.<sup>10</sup> Presumably, the “package price” included the cost of an inverter, although this is not clear. The results of this comparison do not appear to have been used in the analysis which is the basis for the graph in Figure 10 of the Termination Report. I have had access to the confidential material which was used for the analysis in the SEF and it supports the statement in the SEF quoted above and relied upon by Tindo. Apparently, the ADC was not able to use the same analysis due to certain adjustments or assumptions which had to be made. The Termination Report does not however adequately explain why an analysis at the end-user level of trade could not be done.

35. A different methodology was used for the pricing analysis in the Termination Report to that used in the SEF. The Termination Report states that the ADC revised its pricing analysis by comparing the imported poly-crystalline DC PV modules or panels to Tindo’s quarterly net selling price, at a comparable level of trade.<sup>11</sup> As Tindo notes, the level of trade used by the ADC was the wholesale level, at least for the analysis reflected in Figure 10. This analysis appears to be the basis for the conclusion reached in the Termination Report that even if there was no dumping, the Chinese exports would still have significantly undercut the Tindo product. It is this conclusion which largely led to the conclusion by the ADC that any injury to Tindo’s business by the dumped exports was negligible.

36. Tindo contends that because the pricing analysis was done at the wrong level of trade, the conclusion reached by the ADC regarding the price advantage of the imported DC models was misleading and not correct. Based on the SEF finding of a 20% undercutting of the installed Chinese PV solar modules or panels, the removal of a 21.1% dumping margin would make Tindo’s offering to end users competitive. If Tindo was correct in this argument, then it would cut across the finding by the ADC

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<sup>9</sup> SEF 239 section 8.4.2, page 55

<sup>10</sup> TER 239 section 8.4.2, page 60

<sup>11</sup> As above

that it was satisfied that the injury to Tindo caused by the dumped Chinese exports was negligible.

37. It is not possible, from the material before me, to understand whether or not a reliable analysis can be done comparing the prices of the imported Chinese products with the Australian products at the end-user level. There is some material which indicates that the price advantage which the Chinese product has at the wholesale level is not as great at the installed end-user level which includes the price of an inverter. However, the ADC seems to have discounted this material in the Termination Report.
38. Given the preponderance of Tindo's sales at the end-user level and that it is not possible to install DC solar panels without an inverter, it seems to me a reliable analysis of the installed end-user market is required to be satisfied that the injury to the Australian industry was negligible.

### Market's preference for low priced DC Chinese product

39. Tindo takes issue with the comments made by the ADC in the SEF and the Termination Report to the effect that there was a market preference for cheaper DC PV solar modules or panels. Examples of these comments are found in section 8 of the Termination Report as for example:

“The Commission considers that Tindo's performance has been adversely affected by: ...

- the price sensitivity and preference of the market for cheaper, DC models of PV modules or panels which represented only a small proportion of Tindo's offer to the market.”

40. Another example of this comment by the ADC is also in section 8.1 when the ADC is referring to the lost wholesale sales suffered by Tindo. The ADC finds that “these lost sales were due to the preference of end users for the lower priced DC models”.
41. Tindo makes two points about these comments. First, that the only reason that the market chose Chinese DC PV solar panels over Tindo's was that they were cheaper and, according to Tindo, they were cheaper because they were dumped. Secondly, the comments incorrectly imply that Tindo did not substantially offer DC PV solar panels to the market. To the contrary, Tindo argues that it did offer DC PV solar panels to the market and did not exclusively market AC PV solar panels.
42. Another comment of the ADC with which Tindo takes issue is that at section 8.5.4 of the Termination Report that the ADC considered that “the imposition of a dumping duty at the levels found would not have significantly influenced consumers to switch to Tindo's AC modules or panels during the investigation period”. Tindo claims that

this implies that Tindo was expecting customers to switch from Chinese DC to Tindo AC modules. Given the cost and value difference, Tindo did not expect customers to switch from Chinese DC solar panels to Tindo AC modules. It did however expect customers to switch from Chinese DC to Australian DC solar panels.

43. Tindo also points to a further example of the comment at section 8.7 of the Termination Report dealing with the wholesale market and the finding by the ADC that in so far as the wholesale market was concerned, “the decline in sales has been primarily caused by the preference of the end users for lower priced DC models”. With regard to this comment, Tindo claims that it incorrectly implies that Tindo refused to offer DC solar panels and it does not address why wholesale customers suddenly stopped buying Tindo solar panels.
44. Again, Tindo makes the point that it did offer both DC panels with or without attached micro inverters for the bulk of the investigation period to both wholesale and end-user markets. The reason why Tindo’s wholesale customers stopped buying panels is that they wanted cheaper panels than Tindo was able to provide. Tindo also claims that end users chose to buy Chinese DC solar panels because they were cheaper and dumped, not because it failed to offer DC panels to the market.
45. Tindo’s submission provides certain information regarding the market for micro inverters but does not reference this to material before the ADC at the time the reviewable decision was made. The ADC has confirmed that it was not material before the ADC at the time of the reviewable decision. Accordingly, it is not material to which I can have regard.
46. There are many references in the Termination Report to Tindo’s DC PV modules or panels. The pricing analysis which is reflected in Figure 10 was conducted on Tindo DC models as well as its AC models. However, it is clear from the material that AC models were the largest part of Tindo’s business. The ADC does state in its conclusion in section 8.7 that the market’s preference for DC rather than AC models was the primary cause for the injury in the form of price depression, price suppression and losses of profit and profitability. However, the ADC does proceed to find that the gap between Tindo’s price (regardless of AC or DC) and the price of imported DC models has meant that imports remain at a significant price advantage over the investigation period.
47. When the findings and conclusion reached by the ADC are read as a whole, it is clear that the ADC accepted that the Tindo business included selling DC models as well as AC but that the ADC found that as the price of the Chinese imported DC models was so far below the Tindo product, the Tindo product could not compete. The issue though is whether or not, as Tindo alleges, the price advantage was from dumping or, as the ADC found, the contribution of dumping to this price advantage was negligible. I note that no reason is given in the Termination Report for the

market preference for the Chinese imported DC PV modules or panels other than price.

## Tindo's marketing

48. In its submission, Tindo refers to the comment at section 8.6.4 of the Termination Report that Tindo did not appear to aggressively market its product as compared to its competitors. In response to this Tindo claims that it was extremely successful at marketing, public relations and government relations.

49. I cannot tell from the material to what extent Tindo did or did not market its products aggressively compared to its competitors. However, the findings in the Termination Report strongly indicate that it is price which is the predominant factor in the injury suffered by the Australian industry. While the imported product may have been marketed more aggressively, it is unlikely that this was a major factor. It would not of itself lead to a finding the injury caused by the dumping was negligible.

## Volume Injury

50. Tindo claims that the ADC was wrong to conclude that the dumping did not cause volume injury to Tindo's business. It contends that once the Chinese solar companies started dumping solar panels, its wholesale market collapsed. Tindo was forced to restructure and sell solar panels to the end user.

51. The ADC found that overall the sales volume of Tindo's business grew since its establishment in July 2012. However, the ADC also acknowledged that the volume of wholesale sales of PV modules or panels had declined in the investigation period.<sup>12</sup> The ADC examined the cause of the decline as part of its assessment of whether or not the dumped exports had hindered the establishment of an Australian industry. The ADC found that the dumped imports had not caused volume injury in terms of loss of sales volumes and they had not hindered Tindo's ability to achieve higher sales volumes than it did during the investigation period.

52. The reasons given by the ADC for the finding with respect to loss of sales volume injury were, in effect, that:

- Tindo commenced operating when the market had started to decline and therefore the assumptions and forecasts were not up to date at the time it commenced business;
- Tindo's focus on AC PV modules or panels which were more expensive and attractive to a limited group of customers; and

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<sup>12</sup> TER 239 sections 7.5.1 and 8.5.1, pages 52-53 and 63

- while not in line with its forecasts, Tindo was able to grow its overall sales volumes over its first 18 months of operation.

53. The ADC also relied on the result of the price analysis which was conducted for the price effects injury assessment. Importantly, the ADC found that “the imposition of a dumping duty at the levels found would not have significantly influenced consumers to switch to Tindo’s AC modules or panels during the investigation period.”<sup>13</sup> Tindo, in another part of its submission, points out that this statement does not take into account that it also offered DC modules or panels.

54. The ADC’s conclusion on volume injury is that “dumping has not caused volume injury, in terms of loss of sales volumes, to the Australian industry and nor did it hinder Tindo’s ability to achieve higher sales volumes than it did during the investigation period.”<sup>14</sup>

55. The difficulty which I have with this conclusion is that it does not appear to take into account the extent to which a reduced price advantage for the Chinese imports may have influenced some customers to switch to Tindo’s DC product or even the AC product, given the price premium which it is acknowledged that product had. The conclusion does not have regard to any price premium or other advantage an Australian product may have over its imported product.

56. While it is clear from the analysis which the ADC performed that there would still be a significant price advantage for the imported product without dumping, I do not understand how there can be a conclusion that there would not have been any reduction in the injury suffered by the Australian industry. The fact that the industry would still have suffered injury as a result of competition from the cheaper imported product does not mean that the injury would have been to the same extent as was suffered with dumping.

57. For the conclusion to be reached that the injury would not have been ameliorated to some extent by the imposition of dumping measures, I would expect to see more analysis, not just quantitative but also qualitative. It is clear from the material that Tindo was making sales and even increasing its volume of sales, despite the competition from the imported products. It appears that the Australian products have some ability to claim a price premium. If there was a reduced price advantage for the imported Chinese product, it is possible Tindo could have obtained more sales than it did during the investigation period. This would have been an advantage to it in terms of increased revenue and reduced losses. Without an analysis which explained why the ADC could so conclusively rule out this possibility, I do not understand how the ADC could have been satisfied that the injury caused by the dumping was negligible.

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<sup>13</sup> TER 239 section 8.5.4, page 65

<sup>14</sup> As above, page 66



## Tindo's Business Plan

58. In its submission, Tindo takes issue with the references made by the ADC to Tindo's business plan, which was prepared by Ernst & Young. In particular, it refers to the comment in section 8.4.4 of the Termination Report that it was "apparent that the estimates of the import selling prices were greatly overstated". Tindo agrees with the ADC that:

- the actual selling price of imported panels was initially correct in the Ernst & Young Business Plan; and
- the Ernst & Young Business Plan did not predict a sudden drop in the price of Chinese solar panels.

59. It is Tindo's contention that once there was dumping of Chinese exports, its wholesale customers stopped buying panels and it was forced to change its business plan and sell panels to end users. Tindo argues that the collapse of its wholesale business was due to dumping. It also argues that it was unreasonable for the ADC to have expected Tindo and its business advisors to have predicted the dumping in its business plan and unreasonable of the ADC to refer to an out of date business plan, which Tindo contends, can only mean that the ADC has misunderstood the Tindo business model.

60. The reason the ADC had regard to Tindo's business plan is because, as Tindo only commenced operating in mid-2012, there was no prior historical information with which to compare Tindo's performance during the investigation period. I do not consider it was unreasonable for the ADC to take this approach or that it meant that the ADC had misunderstood Tindo's business model.

61. The reliance placed on the business plan by the ADC is that it showed that the plan and Tindo's marketing was directed towards AC PV modules or panels, although Tindo did produce and sell some DC PV modules or panels. This then leads to the conclusion which is key to the decision to terminate, namely:

"Noting the size of the difference in prices for the imported goods, Tindo's prices and the dumping margins found during the investigation period, the Commission is not satisfied that, in the absence of dumping, Tindo would have been able to reduce its selling prices of AC PV modules to the extent required to ensure Tindo's prices were competitive with DC PV modules exported from China, even after allowing for the premium that would be expected for an AC model over a DC model."

62. This conclusion then leads to the ADC being satisfied that "any price injury suffered by Tindo that was caused by dumping is negligible" and similarly with any hindrance to the establishment of Tindo's business.

63. There are two problems with the conclusion reached by the ADC that it was not satisfied that Tindo would have been able to reduce its prices to the extent required to make its products competitive. The first is that a decision under s.269TDA(13) requires a positive state of satisfaction that the injury being caused by dumping is negligible.<sup>15</sup> While the Termination Report states that the ADC is satisfied that the injury is negligible, this is based on not being satisfied that Tindo would have been able to reduce its prices to the extent required. I do not understand how not being satisfied about Tindo's ability to reduce its prices can lead to the required degree of positive satisfaction which s.269TDA(13) requires.
64. The second problem with the conclusion is that it seems to ignore the possibility that an increase in the price of the dumped imports sufficient to remove the dumping margin may have provided some amelioration of the injury being suffered by the Australian industry. It is not necessary to impose dumping measures that all injury be removed by such measures. Dumping does not have to be the sole cause of injury to the Australian industry.<sup>16</sup>
65. On the material available, I am not able to understand how the ADC was able to rule out the possibility that the removal of the dumping margin would not have reduced the injury to the Australian injury. There is no regard had to the possibility that an increase in the price of the imported Chinese products to the extent of the dumping margins may have allowed some increase in the price of Tindo's products or an increase in sales. While given the price advantage the imported Chinese products had, this may still have meant that Tindo suffered injury. The extent of that injury however may have been reduced and this reduction may not have been negligible.

## Qualitative Features

66. Tindo's submission takes issue with the conclusion reached by the ADC on the basis of its finding regarding the pricing differential between Tindo's products and the imported dumped products. Tindo argues that the conclusion that no one would buy Tindo's product because its price premium was too high is not logical. This is because on the basis of the ADC's logic no one would have been buying its product during the investigation period because of the price premium being too large.
67. Tindo claims that it did make sales and if it were not for the dumped Chinese product, the gap between its product and the Chinese panels would have narrowed and allowed Tindo to grow its business as its value for money proposition would have improved by 21.1%.

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<sup>15</sup> Inglewood Olive Processors Ltd v CEO of Customs [2005] FCAFC 101

<sup>16</sup> ICI Australian Operations Pty Ltd v Fraser (1992) 34 FCR 564



68. I am not able on the material to determine whether or not Tindo's claims in this regard are valid. As noted above, there is not the kind of analysis in the Termination Report of the market to confirm with the requisite degree of satisfaction whether or not Tindo could have improved its business if the effects of dumping were removed.
69. While the ADC found that the market was price sensitive and there was a preference in the market for lower priced product, the evidence would also indicate that there was a group of customers who did prefer the higher priced Australian AC PV modules or panels. This was acknowledged by the ADC.<sup>17</sup> As Tindo was able to also sell the DC product, there must also have been customers who were prepared to pay more for that product over the imported cheaper Chinese product.
70. I do not understand how the possibility could be ruled out that, if the price gap between the imported Chinese product and Tindo's was reduced, there could be an increase in the number of customers prepared to buy Tindo's product or that it may have been able to raise its price, given that some customers were prepared to pay a premium.

## Causal Link

71. Tindo claims that the ADC has not provided an assessment of how the injury caused by the dumping was negligible and that it has ignored examples provided by Tindo showing a direct link between the dumping and the material injury. Tindo also claims that the other injury factors identified by the ADC, namely a depressed market and Tindo's lack of marketing skills have been refuted.
72. I do not consider that the ADC found that there was a lack of marketing skills which contributed to Tindo's injury. It is the marketing strategy of focussing on the market for AC PV modules or panels which the ADC identifies as a contributing factor. I also do not consider that Tindo's submission has refuted the finding that there were other factors which caused injury to its business during the investigation period. The findings by the ADC that there were factors other than dumping that contributed to the injury seem reasonable. Competition from cheaper imported products and a declining market with the phase out of FIT incentives would seem to have played their part.
73. I cannot in a review such as this analyse the examples which were given by Tindo of the price undercutting by the Chinese imports and the resultant injury suffered by Tindo. It is clear from the Termination Report that the ADC accepted that there had been substantial price undercutting by the Chinese imports and that injury had resulted to Tindo from this competition.

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<sup>17</sup> TER 239 section 8.5.4, page 65

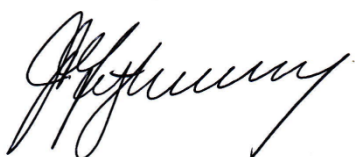
74. The reason given by the ADC why dumping had not been the cause of this price undercutting is that those imports would still have had a significant price advantage even in the absence of dumping. Competition between imported products from foreign producers and Australian producers of like goods is a factor to which regard must be had in determining whether material injury is being caused to an Australian industry. Any injury from such competition must not be attributed to the dumped exports.<sup>18</sup>

75. However, I do not consider that the ADC has carried out the non-attribution exercise in a way that allows a finding to be made that the injury caused by the dumped export was negligible. The conclusion based on the pricing analysis simply assumes that because there would still be a price advantage with the dumped exports, any injury from those exports must have been negligible. I am not satisfied that there can be such a conclusion, at least without more analysis. As indicated above, such analysis should at least include further examination of the competition in the end-user market and an examination of the possibility that a reduction in the price gap between the imported Chinese products and Tindo's products may have reduced the extent of the injury being suffered.

## Recommendations/Conclusion

76. For the reasons given above, I consider that the decision to terminate the investigation was not the correct or preferable decision. In coming to this conclusion, I am not making any finding that the Australian industry has suffered material injury from dumping. That issue will be a matter for the ADC to decide in making a report to the Minister.

77. Pursuant to s.269ZZT(1) of the Act, my decision on the application is to revoke the reviewable decision. Accordingly, I revoke the decision of the ADC on 6 October 2015 to terminate the investigation into PV modules or panels from China.



Joan Fitzhenry  
Acting Senior Member  
Anti-Dumping Review Panel  
22 December 2015

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<sup>18</sup> Section 269TAE(2A) of the Customs Act