

Shining a Light on Solar Panels: Government Promotion of Renewable Energy Leads to Trade Disputes and Trade Remedies

In June 2015, the Canada Border Services Agency (the "**CBSA**") made final determinations that solar panels originating in, or exported from, China and used for solar electrical power generation (the "**Chinese Panels**"), were sold ("dumped") into Canada at lower than fair market prices and were subsidized by government in China. In July 2015, the Canadian International Trade Tribunal (the "**CITT**") concluded that the dumping and subsidizing of Chinese Panels had not caused injury, but were threatening to cause injury to Canadian producers of solar panels.

As a result of this decision, CBSA will impose anti-dumping and countervailing measures on future imports of Chinese Panels into Canada. One silver lining for the Chinese Panel importers from whom CBSA collected provisional duties (before the CITT's decision) is that duties already paid will be refunded. A threat of injury finding only permits the assessment of anti-dumping and countervailing duties after the CITT decision.

Ironically, solar panel producers in Ontario were found to have benefitted from unfair trade practices under the World Trade Organization (the "**WTO**") rules. At the WTO, Japan challenged the Government of Ontario's imposition of Ontario content requirements (the "**Ontario Content Level Requirements**") on solar and wind power electricity generators to qualify for guaranteed electricity prices offered under Ontario's Feed-In-Tariff ("**FIT**") Programme.

The WTO's Dispute Settlement Body (the "**DSB**") Panel found that the Ontario Content Level Requirements violated Canada's obligations to adhere to the principle of "national treatment" under the WTO's *General Agreement on Tariffs and Trade, 1994* (the "**GATT 1994**") and *Agreement on Trade-Related Investment Measures* (the "**TRIMS**"). The principle of national treatment requires that Canada allow foreign competitors from other WTO member countries no less favourable treatment than extended to domestic business in Canada. That is, there should be no discriminatory treatment by Canada (and its sub-national governments) against foreign business competition.

On appeal, the WTO's Appellate Body agreed with the DSB Panel's key findings that the Ontario Content Level Requirements violated Canada's obligation of treating foreign produced solar panels no less favourably than domestically produced solar panels under the GATT 1994 and TRIMS. Similar findings were made in respect of wind-generation infrastructure. The Ontario Government was given a reasonable time-period within which to bring itself into compliance with the DSB Panel report, as modified by the Appellate Body's decision. On June 5, 2014, Canada informed the DSB that the Government of Ontario had complied with the DSB recommendations and rulings by eliminating or significantly lowering the Ontario Content Level Requirements.

Although Ontario Content Level Requirements have been eliminated in the third phase of the FIT Programme, the unfair trade practices that favoured local production in the earlier phases fostered the development and growth of the Ontario solar panel industry. Once the solar panel market was opened to foreign competition, the domestic industry responded with their own trade remedies actions against Chinese producers and exporters.

Removing the trade barrier created by the Ontario Content Level Requirements would aim to put the foreign solar panel producers on an equal footing with the domestic industry. From one perspective, opening the market to foreign solar panels should lower the price of

the panels and reduce the costs of producing electricity from solar energy. From another perspective, the Canadian solar panel producers might not be able to survive an onslaught of cheap Chinese Panels without anti-dumping and countervailing measures imposed at the border. These trade measures protect the domestic industry against the threat of injurious price erosion that would be caused by cheap imports of Chinese Panels. In the high stakes trade war over alternative energy production sourcing, stakeholders have sought to take advantage of various trade remedy levers available to them. As the battle over the Canadian solar panel market continues, it will be interesting to see how these international trade rules and Canadian trade measures will shape the Canadian market in the coming years.

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[a cautionary note](#)

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