Commission Implementing Regulation (EU) 2015/1403 of 18 August 2015 withdrawing the acceptance of the undertaking for one exporting producer under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures

COMMISSION IMPLEMENTING REGULATION (EU) 2015/1403

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('the Treaty'),

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[(1)] ('the basic anti-dumping Regulation'), and in particular Article 8 thereof,

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community[(2)] ('the basic anti-subsidy Regulation'), and in particular Article 13 thereof,

Informing the Member States,

Whereas:

A. UNDERTAKING AND OTHER EXISTING MEASURES

(1) By Regulation (EU) No 513/2013[(3)], the European Commission ('the Commission') imposed a provisional anti-dumping duty on imports into the European Union ('the Union') of crystalline silicon photovoltaic modules ('modules') and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China ('the PRC').

(2) A group of exporting producers gave a mandate to the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('CCCME') to submit a price undertaking on their behalf to the Commission, which they did. It is clear from the terms of that price undertaking that it constitutes a bundle of individual price undertakings for each exporting producer, which is, for reasons of practicality of administration, coordinated by the CCCME.

(3) By Decision 2013/423/EU[4], the Commission accepted that price undertaking with regard to the provisional anti-dumping duty. By Regulation (EU) No 748/2013[5], the Commission amended Regulation (EU) No 513/2013 to introduce the technical changes necessary due to the acceptance of the undertaking with regard to the provisional anti-dumping duty.

(4) By Implementing Regulation (EU) No 1238/2013[6], the Council imposed a definitive anti-dumping duty on imports into the Union of modules and cells originating in or consigned from the PRC ('the products concerned'). By Implementing Regulation (EU) No 1239/2013[7], the Council also imposed a definitive countervailing duty on imports into the Union of the product concerned.

(5) Following the notification of an amended version of the price undertaking by a group of exporting producers ('the exporting producers') together with the CCCME, the Commission confirmed by Implementing Decision 2013/707/EU[8] the acceptance of the price undertaking as amended ('the undertaking') for the period of application of definitive measures. The Annex to this Decision lists the exporting producers for whom the undertaking was accepted, including ZNSHINE PV-TECH CO. LTD together with its related company in the Union jointly covered by the TARIC additional code B923 ('ZNSHINE').

(6) By Implementing Decision 2014/657/EU[9] the Commission accepted a proposal by the group of the exporting producers together with the CCCME for clarifications concerning the implementation of the undertaking for the product concerned covered by the undertaking, that is modules and cells originating in or consigned from the PRC, currently falling within CN codes ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) produced by the exporting producers ('product covered'). The anti-dumping and countervailing duties referred to in recital (4) above, together with the undertaking, are jointly referred to as 'measures'.

(7) By Implementing Regulation (EU) 2015/866[10] the Commission withdrew the acceptance of the undertaking for three exporting producers.

B. TERMS OF THE UNDERTAKING

(8) The exporting producers agreed, inter alia, not to sell the product covered to the first independent customer in the Union below a certain minimum import price ('the MIP') within the associated annual level of imports to the Union ('annual level') laid down in the undertaking. In addition, the exporting producers undertook to ensure that all sales within the annual level are covered by a commercial invoice issued by the respective exporting producer and an export undertaking certificate issued by the CCCME containing the information described in the undertaking.

(9) The undertaking sets out, in a non-exhaustive list, the breaches of the undertaking. That list includes:

— making misleading declarations regarding the origin of the product concerned,

— changing the pattern of trade to the Union when there is insufficient due cause or economic justification other than the imposition of the measures.

The exporting producer is liable for the breach of any of its related parties which are defined in the undertaking.

(10) The undertaking also obliges the exporting producers to provide the Commission on a quarterly basis with detailed information on all their export sales to and resales in the Union ('the quarterly reports'). This implies that the data submitted in these quarterly reports must be complete and correct and the reported transactions fully comply with the terms of the undertaking.

(11) For the purpose of ensuring compliance with the undertaking, the exporting producers also undertook to provide all information considered necessary by the Commission.

C. MONITORING OF THE EXPORTING PRODUCERS

(12) While monitoring compliance with the undertaking, the Commission verified information submitted by the exporting producers that was relevant to the undertaking. The Commission also requested assistance from the Member States on the basis of Articles 8(9) and 14(7) of the basic anti-dumping Regulation and Articles 13(9) and 24(7) of the basic anti-subsidy Regulation.

(13) The findings listed in recitals (14) to (17) address the problems identified for ZNSHINE which oblige the Commission to withdraw acceptance of the undertaking for this exporting producer.

D. GROUNDS TO WITHDRAW THE ACCEPTANCE OF THE UNDERTAKING

(14) Customs authorities in two Member States requested the payment of anti-dumping and countervailing duties for certain number of solar module import transactions. The solar modules were initially declared to be of non-Chinese origin, hence not subject to the measures. However, the customs authorities established that the solar modules were produced by ZNSHINE and were shipped to the Union via a third country.

(15) Based on information available to the Commission, the companies involved in the above activities were related parties of ZNSHINE. Therefore, ZNSHINE breached the undertaking terms referred to in recital (9).

(16) The Commission also identified that ZNSHINE provided in its quarterly reports misleading information concerning the date of a significant number of commercial invoices during a substantial period of time. The correct invoice date is essential for establishing whether MIP is respected since it is subject to a periodic adaptation mechanism. Based on the information submitted by ZNSHINE, the Commission established that the commercial invoice presented for customs clearance to the Union in the above cases was issued on a different date than the one used to obtain the export undertaking certificate from the CCCME. There was a considerable time lapse between the dates of the respective invoices. ZNSHINE claimed that the

difference between the invoice dates was due to a technical error made by inexperienced personnel. The Commission cannot accept such a justification.

(17) The Commission analysed the implication of this inconsistency in ZNSHINE's quarterly reports and concluded that ZNSHINE breached the reporting obligation under the undertaking.

E. ASSESSMENT OF PRACTICABILITY OF THE OVERALL UNDERTAKING

(18) The undertaking stipulates that a breach by an individual exporting producer does not automatically lead to the withdrawal of the acceptance of the undertaking for all exporting producers. In such a case, the Commission shall assess the impact of that particular breach on the practicability of the undertaking with the effect for all exporting producers and the CCCME.

(19) The Commission has accordingly assessed the impact of the breaches by ZNSHINE on the practicability of the undertaking with the effect for all exporting producers and the CCCME.

(20) The responsibility for the breaches lies alone with the exporting producer in question; the monitoring has not revealed any systematic breaches by a major number of exporting producers or the CCCME.

(21) The Commission therefore concludes that the overall functioning of the undertaking is not affected and that there are no grounds for withdrawal of the acceptance of the undertaking for all exporting producers and the CCCME.

F. WRITTEN SUBMISSIONS AND HEARINGS

(22) Interested parties were granted the opportunity to be heard and to comment pursuant to Article 8(9) of the basic anti-dumping Regulation and Article 13(9) of the basic anti-subsidy Regulation. ZNSHINE and one interested party submitted comments.

(i) *Comments by ZNSHINE*

(23) ZNSHINE claimed that one of the companies involved in the activities detailed in recitals (14) and (15) is not its related party as it is merely a customer of ZNSHINE in a third country. The available information that the Commission quoted describes ZNSHINE's business relationship with this customer. However, this business relationship is not legally recognised in any way. In addition, ZNSHINE claimed that it cannot control to whom this customer sells the products.

(24) The Commission rejects these arguments as ZNSHINE did not submit any evidence supporting these claims, for example information on the ownership of their alleged customer which would rebut the available information referred to in recital (15). In addition, even if the company in question is an independent customer, quod non, ZNSHINE failed to take any precaution to prevent the modules being sold to the Union by this customer and thus would breach another clause of the undertaking.

(25) ZNSHINE also claimed that the Commission did not provide sufficient information on the identity of the Union importer. Therefore, ZNSHINE was not

in a position to comment on the factual accuracy. ZNSHINE also claimed that the Union importer cannot be considered its related party, unless ZNSHINE and the Union importer are officers or directors of one another's business. A third party being officer or director of both companies may not alter this condition.

(26) The Commission rejects this argument. Firstly, the Commission may not disclose the identity of the Union importer due to confidentiality reasons. Secondly, in line with established practice of the Commission[(11)], Article 143(1)(a) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[(12)] (IPCCC), which is the basis for defining related parties in the undertaking, is interpreted as involving also situations where two legal persons have common officers or directors. This is the situation at present. In addition, the situation at stake falls also under Article 143(1)(f) IPCCC. The term 'controlled' used in this provision means that the third person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter. This interpretation follows from the Text of Interpretative Note to Article 15 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) which is the basis for the definition of related parties in Article 143(1) IPCCC. Given the level of involvement of the common officer or director in the companies at stake it is clear that this person is legally or operationally in a position to exercise restraint or direction over the two companies concerned.

(27) ZNSHINE also argued that they acted in accordance with the terms of the undertaking when consulting the Commission upon the detection of the reporting errors. These errors were due to inexperience personnel acting in good faith which the Dutch judicial authorities confirmed. In addition, ZNSHINE claimed that the reporting error did not lead to the breach of the MIP.

(28) The Commission rejects these arguments. Firstly, ZNSHINE cited one sentence from a judgment but failed to provide the entire judgment to the Commission. Secondly, the Commission provided information on the reporting obligations at several occasions, including the period when the reporting error occurred. ZNSHINE did not contact the Commission until the issue was spotted by national customs authorities. Finally, the argument that the reporting error did not lead to the breach of the MIP has no relevance for the assessment concerning the breach of the reporting obligation.

(29) Therefore, the Commission upholds the assessment of the breaches of ZNSHINE's undertaking. In fact, ZNSHINE has not contested that the transhipped solar modules were produced by itself.

(ii) *Comments by the other interested party*

(30) One interested party requested that for this company the withdrawal should have retroactive effect as the breaches of the undertaking in which ZNSHINE engaged were serious. The interested party further requested that such retroactive withdrawal be applied to future similar cases.