



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2010-001

Greenhouse Bell Peppers

*Finding issued
Tuesday, October 19, 2010*

*Reasons issued
Wednesday, November 3, 2010*

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IN THE MATTER OF an inquiry, pursuant to section 42 of the *Special Import Measures Act*, respecting:

**THE DUMPING OF GREENHOUSE BELL PEPPERS ORIGINATING IN OR
EXPORTED FROM THE NETHERLANDS**

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of greenhouse bell peppers originating in or exported from the Netherlands has caused injury or retardation or is threatening to cause injury to the domestic industry.

Further to the issuance by the President of the Canada Border Services Agency of a final determination dated September 20, 2010, that the aforementioned goods have been dumped and pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods has not caused injury but is threatening to cause injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	September 20 to 23, 2010
Tribunal Members:	Serge Fréchette, Presiding Member Diane Vincent, Member Pasquale Michael Saroli, Member
Research Director:	Rose Ritcey
Research Manager:	Mark Howell
Senior Research Officer:	Paula Enright
Research Officer:	Martine Gagnon
Senior Statistical Research Officer:	Julie Charlebois
Statistical Research Officers:	Marie-Josée Monette Dominique Thibault Stéphane Racette
Statistical Research Support Officer:	Mark Sullivan
Counsel for the Tribunal:	Eric Wildhaber
Manager, Registrar Office:	Michel Parent
Registrar Officer:	Sarah MacMillan
Registrar Support Officer:	Ekaterina Pavlova

PARTICIPANTS:**Domestic Grower Associations**

Ontario Greenhouse Vegetable Growers

British Columbia Vegetable Marketing
Commission**Importers/Exporters/Others**

Frugi Venta

Counsel/RepresentativesC.J. Michael Flavell, Q.C.
Geoffrey C. Kubrick
Martin G. Masse
Corinne Brûlé
J. Peter Jarosz

Thomas Demma

Counsel/RepresentativesDarrel H. Pearson
Jesse I. Goldman
Beryl Wang

Les Entrepôts Fruigor Inc.

Richard S. Gottlieb
Vincent Routhier

Delegation of the European Union to Canada

H.E. Matthias Brinkmann

Delmondi Import Export Inc.

Antoine Chahrouri

WITNESSES:

Leonard P. Roozen

Chair

Ontario Greenhouse Vegetable Growers

George J. Gilvesy

General Manager

Ontario Greenhouse Vegetable Growers

Peter Quiring

President

Nature Fresh Farms

Jim Veri

Veri Fine Brand

Marcel van der Pluijm

Greenery Produce B.V.

Arjan Levarht

Sales/Purchase

J.M. Levarht & Zonen B.V.

Remco Beekman

Export Manager

Van Rijn

Peter Verbaas

Staff Executive

Frugi Venta

Frédéric Subtil

Les Entrepôts Fruigor Inc.

Dan Branson

Senior Category Manager—Tomatoes and Peppers,
Produce Business Unit

Loblaws Companies Limited

Please address all communications to:

The Secretary

Canadian International Trade Tribunal

Standard Life Centre

333 Laurier Avenue West

15th Floor

Ottawa, Ontario

K1A 0G7

Telephone: 613-993-3595

Fax: 613-990-2439

E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. The Canadian International Trade Tribunal (the Tribunal), pursuant to section 42 of the *Special Import Measures Act*,¹ has conducted an inquiry to determine whether the dumping of greenhouse bell peppers originating in or exported from the Netherlands (the subject goods) has caused injury or retardation or is threatening to cause injury to the domestic industry.
2. On March 22, 2010, the President of the Canada Border Services Agency (CBSA), following a complaint filed by the Ontario Greenhouse Vegetable Growers (OGVG), which was subsequently supported by the British Columbia Vegetable Marketing Commission (BCVMC), initiated an investigation into whether the subject goods had been dumped.
3. On March 23, 2010, pursuant to subsection 34(2) of *SIMA*, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury or retardation or was threatening to cause injury. On May 21, 2010, the Tribunal, having found that there was evidence that disclosed a reasonable indication that the dumping of the subject goods had caused injury, made a preliminary determination pursuant to subsection 37.1(1).
4. On June 21, 2010, the CBSA issued a preliminary determination that the subject goods had been dumped, that the margin of dumping was not insignificant and that the volume of dumped goods was not negligible.
5. On June 22, 2010, the Tribunal issued a notice of commencement of inquiry.² The Tribunal's period of inquiry (POI) covered the period from January 1, 2007, to March 31, 2010.
6. As part of its inquiry, the Tribunal requested domestic growers, grower associations, marketers and agencies,³ importers and foreign growers of greenhouse bell peppers to complete questionnaires. The Tribunal also requested purchasers of greenhouse bell peppers in Canada to complete questionnaires on market characteristics. From the replies to the questionnaires and other information on the record, the Tribunal's staff prepared public and protected staff reports.
7. In its notice of commencement of inquiry, the Tribunal invited parties to file evidence and submissions on whether field bell peppers constituted like goods in relation to the subject goods. OGVG, Frugi Venta, an association of exporters of the subject goods and the Delegation of the European Union to Canada (EU Delegation) filed submissions on this issue. On July 22, 2010, after having considered the evidence on the record and the arguments made by parties, the Tribunal determined that field bell peppers were not like goods in relation to the subject goods.⁴
8. On September 17, 2010, OGVG requested that the Tribunal advise the CBSA, pursuant to section 46 of *SIMA*, with respect to greenhouse bell peppers originating in or exported from Belgium.
9. On September 20, 2010, the CBSA issued its final determination of dumping.

1. R.S.C. 1985, c. S-15 [*SIMA*].

2. C. Gaz. 2010.I.1812.

3. Marketers and agencies are responsible for the marketing of greenhouse bell peppers grown in Ontario and British Columbia.

4. See section on "Like Goods" below.

10. A hearing with public and *in camera* testimony was held in Ottawa, Ontario, from September 20 to 23, 2010.
11. OGVG and the BCVMC filed written submissions, provided evidence and made arguments in support of a finding of injury or, alternatively, a finding of threat of injury. OGVG was represented by counsel and presented witnesses at the hearing.
12. Frugi Venta and Les Entrepôts Fruigor Inc. (Fruigor), importers of the subject goods, filed written submissions, provided evidence and made arguments opposing a finding of injury or threat of injury. Frugi Venta and Fruigor were both represented by counsel and presented witnesses at the hearing.
13. Delmondi Import Export Inc. and the EU Delegation opposed a finding of injury but did not file submissions on the matter of injury or present witnesses at the hearing.
14. Mr. Dan Branson, Senior Category Manager—Tomatoes and Peppers, Produce Business Unit, Loblaw Companies Limited (Loblaw), appeared as a Tribunal witness at the hearing.
15. The record of this inquiry consists of all Tribunal exhibits, including the record of the preliminary injury inquiry (PI-2009-005), replies to questionnaires, public and protected versions of the staff report, requests for information and replies thereto, documents with respect to the product exclusion process, witness statements, all other exhibits filed by parties and the Tribunal throughout the inquiry, and the transcript of the hearing.
16. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed the required declaration and confidentiality undertaking with the Tribunal in respect of confidential information.
17. In its notice of commencement of inquiry, the Tribunal referred to the procedures for filing requests for specific product exclusions. The only request received was made by Frugi Venta in respect of organic greenhouse bell peppers. OGVG opposed Frugi Venta's product exclusion request.
18. The Tribunal issued its finding on October 19, 2010.

RESULTS OF THE CBSA'S INVESTIGATION

19. On June 21, 2010, the CBSA determined that 100 percent of the subject goods released into Canada from January 1 to December 31, 2009, had been dumped at an estimated weighted average margin of dumping of 95 percent, when expressed as a percentage of the export price. The CBSA concluded that the overall margin of dumping was not insignificant.⁵
20. On September 20, 2010, the CBSA made a final determination that 99.4 percent of the subject goods released into Canada from January 1 to December 31, 2009, had been dumped at an estimated weighted average margin of dumping of 193 percent, when expressed as a percentage of the export price. The CBSA concluded that the overall margin of dumping was not insignificant.⁶

5. Tribunal Exhibit NQ-2010-001-01A, Vol. 1, Administrative Record at 32-33.

6. Tribunal Exhibit NQ-2010-001-04A, Vol. 1, Administrative Record at 70.16; Tribunal Exhibit NQ-2010-001-04B, Administrative Record, Vol. 1 at 70.29.

PRODUCT

Product Definition

21. The goods subject to this inquiry are defined as follows:
greenhouse bell peppers originating in or exported from the Netherlands.

Additional Product Information

22. Greenhouse bell peppers are greenhouse-grown bell peppers of the family *Solanaceae* and the species *Capsicum annuum* L. A greenhouse is an enclosed structure with a controllable dynamic system, managed for intensive production of high-quality, fresh market produce. Greenhouse production allows for crop production under very diverse conditions. By controlling a number of variables, such as air temperature, root zone temperature, vapour pressure deficit, fertilizer feed, carbon dioxide enrichment, selection of growing media and plant maintenance, the greenhouse growers aim to obtain maximum performance from the crop over the production season. High fruit quality and yield of coloured bell peppers are difficult to obtain in open field environments. Therefore, they are usually grown in protected environments, such as high passively ventilated greenhouses. Greenhouse peppers are grown from specialized cultivars.

23. Young, unripe bell peppers are bright green. As they mature, according to the cultivar, they turn the following colours, among others: yellow, orange, red, purple, brown, white and lilac. In Canada, the majority of commercial production of greenhouse bell peppers is sold as red peppers, followed by yellow and orange peppers.

24. Bell peppers vary in size, from approximately 3 1/2 to 5 1/2 inches long and from 2 1/2 to 4 inches wide.

Production Process

25. Greenhouse bell pepper production is based on a full-year cycle. In Canada, transplants go into the production greenhouse in approximately mid- to late December at six weeks of age. The first harvest of fruit generally begins in March and continues until the following December.

26. The greenhouses are empty for only two or three weeks during the year to allow for the removal of the old crop and the thorough cleaning of the greenhouse and to set up the greenhouse for the new crop. An entire year's crop is grown from the same set of plants. Normally, it takes approximately 20 weeks (four months) from seeding the crop to first pick. Throughout the harvesting season, pepper fruits ripen in flushes or waves of production at different nodes on the plant (on average 5-6 "settings" per production year). Each setting, at which the stock grows a flower and the flower produces a pepper, represents an opportunity for harvest. A setting is usually produced every 5-6 weeks.

DOMESTIC GROWERS

27. The Tribunal sent a domestic growers' questionnaire to 40 domestic growers of greenhouse bell peppers in Ontario and British Columbia, where nearly all of Canadian production is grown.

28. The following 20 Ontario growers replied to the questionnaire: 1095713 Ontario Ltd./Mambo Produce, 1137144 Ontario Limited/Apollo Farm, 1573903 Ont. Ltd./Cedarline Greenhouses, Brunato Farms Ltd., Dejavu Raw Energy Farms Inc., DiCiocco Farms Eastside Inc., Enniskillen Pepper Co. Ltd., Greenhill Produce (Thamesville) Ltd., Howard Huy Greenhouses Limited, Kapital Produce Limited, Knotek Brothers Inc., Nature Fresh Farms Inc., OrangeLine Farms Limited, Peppertree Greenhouse Ltd., Platinum Produce Company, Southshore Greenhouses Inc., Sunquest Farms Limited, Suntastic Hothouse Inc., Twin Peaks Hydroponic Inc. and Veri Hydroponics Inc..

29. Windset Greenhouses North Limited Partnership was the only grower in British Columbia to reply to the questionnaire.

30. The marketing of greenhouse bell peppers grown in Ontario and British Columbia is only done through marketers and agencies licensed by OGVG and the BCVMC respectively.

OGVG

31. OGVG was formed in 1967 and represents more than 230 member growers that grow greenhouse tomatoes, cucumbers and bell peppers in Ontario. In 2009, OGVG represented 41 greenhouse bell pepper growers.

32. Under Regulation 417 of the *Farm Products Marketing Act*,⁷ OGVG has the power to establish regulations that provide for the control and regulation of production and marketing of greenhouse vegetables grown in Ontario. These powers extend over matters such as licensing, fees, pricing and contracting, together with dispute resolution with respect to both the production and marketing of greenhouse vegetables in Ontario. OGVG also lobbies for and conducts research on behalf of Ontario greenhouse vegetable growers. In addition, OGVG promotes greenhouse vegetables through various media and trade shows.

33. In 2009, there were 43 licensed marketers in Ontario, not all of whom marketed greenhouse bell peppers in that year.

BCVMC

34. The British Columbia Vegetable Scheme is a regulation established by Order in Council on March 21, 1980, pursuant to the *Natural Products Marketing (BC) Act*.⁸ It empowers the BCVMC, by statute and regulation, to promote, control and regulate, in any respect, the production, transportation, packing, storage and marketing of vegetables grown in British Columbia, including greenhouse bell peppers.

35. The BCVMC licenses and registers all producers of regulated products.⁹ Its activities include evaluating the performance of the various segments of the vegetable marketing industry, settling disputes between growers and sales agencies, and reviewing, enforcing, changing or making regulations for the orderly marketing of B.C. vegetables.

7. R.S.O. 1990, c. F.9.

8. R.S.B.C. 1996, c. 330.

9. The number of growers of greenhouse bell peppers in British Columbia was provided in the confidential case brief submitted by the BCVMC. Manufacturer's Exhibit B-02 (protected) at para. 8, Administrative Record, Vol. 12.

36. The marketing of greenhouse bell peppers is performed by agencies that operate with sub-delegated authority from the BCVMC. Six agencies in British Columbia market greenhouse bell peppers.

MARKETERS

37. The Tribunal requested 33 marketers and agencies responsible for marketing domestically grown greenhouse bell peppers to complete a marketers' and agencies' questionnaire. It received 7 replies from marketers in Ontario and 2 replies from agencies in British Columbia. Several of these firms were also importers of subject and non-subject goods, and the questionnaire collected information on these imports.

IMPORTERS

38. The Tribunal requested eight importers of greenhouse bell peppers to complete an importers' questionnaire and received four useable replies.

PURCHASERS

39. The Tribunal requested 24 companies identified as purchasers of greenhouse bell peppers to complete the purchasers' questionnaire on market characteristics. It received 12 replies to this questionnaire.

FOREIGN GROWERS AND EXPORTERS

40. The Tribunal requested 25 foreign growers and exporters of greenhouse bell peppers to complete the foreign producers' questionnaire and received 1 reply. An additional 5 firms indicated that they were not growers of the subject goods.

DISTRIBUTION CHANNELS AND PRICING

41. Marketers and agencies do not take title to domestically grown greenhouse bell peppers.¹⁰ Rather, they market them by negotiating prices with customers and arranging for transportation and packaging, as necessary. The marketer or agency is paid directly by the purchaser and, after deducting its costs and commission, returns the balance to the grower. This is sometimes referred to as farm-gate value to the grower. In certain cases, the marketers and growers are affiliated with one another.

42. Sales of both domestic and imported greenhouse bell peppers for consumption in Canada are made primarily to retailers, but also to the foodservice industry, wholesalers and terminal markets.

ANALYSIS

43. Subsection 42(1) of the *SIMA* requires the Tribunal to inquire into whether the dumping of the subject goods has caused injury or retardation or is threatening to cause injury, with "injury" being defined, in subsection 2(1), as "... material injury to a domestic industry". In this regard, "domestic industry" is defined in subsection 2(1) by reference to the domestic production of "like goods".

44. Accordingly, the Tribunal must first determine what constitutes "like goods". Once that determination has been made, the Tribunal must determine what constitutes the "domestic industry" for purposes of its injury analysis. The Tribunal can then assess whether the dumping of the subject goods has

10. As will be discussed later, marketers in Ontario and agencies in British Columbia control the marketing of the vast majority of the domestic production of greenhouse bell peppers.

caused injury to the domestic industry. Should the Tribunal arrive at a finding of no injury, it will determine whether there exists a threat of injury to the domestic industry.¹¹ Because a domestic industry has already been established, the Tribunal need not consider the question of retardation.¹²

45. In conducting its injury analysis, the Tribunal will also examine other factors alleged to have had an impact on the domestic industry to ensure that any injury caused by such factors is not attributed to the effects of the dumping of the subject goods.

Like Goods and Classes of Goods

46. Given that the Tribunal must determine whether the dumping of the subject goods has caused, or is threatening to cause, injury to the domestic producers of like goods, the Tribunal must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is more than one class of subject goods.

47. Subsection 2(1) of *SIMA* defines “like goods”, in relation to other goods, as follows:

...

(a) goods that are identical in all respects to the other goods, or

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

48. When goods are not identical in all respects to the other goods, the Tribunal typically considers a number of factors to determine likeness, such as the physical characteristics of the goods (e.g. their composition and appearance), their market characteristics (such as substitutability, pricing, distribution channels and end uses) and whether the goods fulfill the same customer needs.¹³

49. In its preliminary injury inquiry, the Tribunal found that greenhouse bell peppers produced by the domestic industry constitute like goods in relation to the subject goods and that there is only one class of subject goods. However, the Tribunal gave notice that, as a preliminary matter in its final injury inquiry, it would seek submissions from the parties on the issue of whether like goods should be confined to those produced by the greenhouse method.¹⁴

50. Accordingly, in its notice of commencement of inquiry dated June 22, 2010, the Tribunal invited parties to file evidence and arguments on whether field bell peppers constituted like goods in relation to the subject goods, with parties being asked to address certain specific factors relating to the issue of likeness in their submissions. Parties were requested to file submissions with the Tribunal by July 7, 2010, and replies by July 14, 2010. In this regard, the Tribunal circulated the nine responses to its purchasers’ questionnaire, which had been received by that date, in order to afford parties the opportunity to make reference to these responses in their reply submissions.

11. Injury and threat of injury are distinct findings; the Tribunal is not required to make a finding relating to threat of injury pursuant to subsection 43(1) of *SIMA* unless it first makes a finding of no injury.

12. Subsection 2(1) of *SIMA* defines “retardation” as “... material retardation of the establishment of a domestic industry”.

13. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at 8; *Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at 7; *Mattress Innerspring Units* (24 November 2009), NQ-2009-002 (CITT) at 6.

14. *Greenhouse Bell Peppers* (21 May 2010), PI-2009-005 (CITT) at paras. 11-15.

51. Submissions were received from OGVG, Frugi Venta and the EU Delegation. OGVG and Frugi Venta submitted replies. For its part, OGVG submitted that greenhouse bell peppers and field bell peppers were not like goods, while Frugi Venta and the EU Delegation submitted that they were like goods.

52. OGVG claimed that greenhouse bell peppers and field bell peppers were not like goods on the basis of a series of differing product and market characteristics.

53. In terms of differing product characteristics, OGVG submitted that field bell peppers and greenhouse bell peppers are different subspecies of *Capsicum annum L.* Greenhouse bell peppers are specialized cultivars bred to produce a more uniform size of fruit with thicker walls and a longer shelf life. Greenhouse bell pepper plants are indeterminate and grow to approximately 15 feet in height, while field bell pepper bushes are determinate and reach only a few feet in height. Field bell peppers are known to scar due to exposure to the elements, whereas greenhouse bell peppers, because they are grown in controlled environments, do not scar. Greenhouse bell peppers are virtually free of pesticides and herbicides, whereas pesticides and herbicides are commonly used on field bell peppers. The cost of seeds and seedlings is substantially higher for greenhouse bell pepper cultivars than for field bell pepper cultivars. Similarly, the costs of propagation (growth to a seedling for planting) and the cost of planting and tending the plants are also significantly higher for greenhouse bell peppers than for field bell peppers.

54. In terms of differing market characteristics, OGVG submitted that the growing and marketing of greenhouse bell peppers in Ontario are regulated under the *Farm Products Marketing Act*,¹⁵ whereas field bell peppers are not subject to such legislation. OGVG pointed to differences in growing season and plant output, colour variety offerings, grading (size and appearance), packaging and especially price between greenhouse bell peppers and field bell peppers, noting that greenhouse bell peppers command a significant price premium over field bell peppers.

55. Frugi Venta, on the other hand, submitted that field bell peppers and greenhouse bell peppers constituted like goods in relation to one another. It argued that field bell peppers and greenhouse bell peppers share all the same physical characteristics (including size, colour, skin and internal content) and approximately the same growing season. Frugi Venta acknowledged that field bell peppers tend to be priced lower than greenhouse bell peppers, but claimed that the price of one influences that of the other. Frugi Venta submitted that field bell peppers and greenhouse bell peppers are sold through the same channels of distribution, are presented side by side in supermarkets and, therefore, compete against one another in fulfilling the same customer needs.

56. The EU Delegation submitted that greenhouse bell peppers and field bell peppers are identical in all respects, with purported differences in taste between the two being an insufficient reason for finding that they are not like goods. The EU Delegation noted that both products are treated the same way for tariff classification purposes in its jurisdiction.

57. On July 22, 2010, the Tribunal informed the parties that it would confine its inquiry to greenhouse bell peppers, having determined, after considering the evidence on the record, including the nine responses to its purchasers' questionnaire and the arguments of parties, that field bell peppers produced in Canada are not like goods in relation to the subject goods. The reasons for that finding are set out below.

15. R.S.O. 1990, c. F.9.

58. The Tribunal is of the view that greenhouse bell peppers and field bell peppers are not “identical in all respects” within the intended meaning of that phrase in paragraph (a) of the definition of “like goods” in subsection 2(1) of *SIMA*.¹⁶ Furthermore, in its consideration of paragraph (b) of the definition of “like goods” in subsection 2(1), the Tribunal finds that greenhouse bell peppers and field bell peppers differ in several fundamental respects, such that it is unable to conclude that the uses and other characteristics of one “closely resemble those of the other goods”. Put simply, the Tribunal cannot subscribe to Frugi Venta’s position that “a pepper is a pepper”.

59. In this regard, the Tribunal acknowledges certain commonalities between the products in terms of end uses and general appearance. However, upon anything more than superficial appraisal, the evidence that the two goods are distinct products is compelling.

60. The differences between the two products go well beyond production methods. Indeed, this becomes apparent from the very outset, with greenhouse bell peppers and field bell peppers being grown from different seeds, with seeds for greenhouse bell peppers being much more expensive than seeds for field bell peppers.¹⁷

61. The Tribunal notes that the characteristics of these products rarely intersect. In Canada, field bell peppers are harvested over a much shorter time period than greenhouse bell peppers, with the former generally being harvested from August to September, and the latter being harvested from March to late November or early December.¹⁸ Furthermore, greenhouse bell peppers are considered a higher-end product than field bell peppers and typically attract a more discerning consumer who is willing to pay a price premium for the perceived difference in taste and aesthetic qualities (e.g. texture, relative uniformity of size and shape, and the multiplicity of colour varieties) of greenhouse bell peppers.¹⁹

Domestic Industry

62. Subsection 2(1) of *SIMA* defines “domestic industry” as follows:

... the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, “domestic industry” may be interpreted as meaning the rest of those domestic producers.

16. The Tribunal is of the view that it is unlikely that Parliament would have intended minor differences of an insignificant nature to be sufficient to render goods non-identical. Indeed, to suggest otherwise could lead to unreasonable results, including the overly narrow description of the like goods and the frustration of the remedial effect of anti-dumping and countervailing measures under *SIMA*. In this regard, the Tribunal is of the view that goods will be “identical in all respects” to one another when they are identical in all characteristics of a significant nature. That issue is a question of fact to be determined on a case-by-case basis. In this instance, and for the same reasons given in the core of the text with respect to whether their uses and other characteristics “closely resemble” each other, the Tribunal has come to the view that greenhouse bell peppers and field bell peppers are not “identical in all respects” within the intended meaning of that phrase in *SIMA*.

17. Tribunal Exhibit NQ-2010-001-31.01 at para. 6, Administrative Record, Vol. 1.3.

18. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 106; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 334; Grower’s Exhibit NQ-2010-001-A-01 at para. 4, Administrative Record, Vol. 11.

19. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 39-40, 106-109; Tribunal Exhibit NQ-2010-001-33.02A at paras. 2-3, Administrative Record, Vol. 1.3.

63. The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods. As indicated in the definition of “domestic industry” in subsection 2(1) of *SIMA*, where a domestic producer is related to an exporter or importer of dumped goods, or is an importer of such goods, that producer may be excluded from the “domestic industry”.

64. The Tribunal’s record contains evidence of the existence of affiliations between certain domestic growers and exporters of the subject goods, and evidence that certain domestic growers, through their ownership relationships with marketers, are themselves involved in the importation of the subject goods.²⁰ No party argued, however, that the removal of such growers from the scope of the domestic industry was warranted. Accordingly, the Tribunal sees no reason to disturb the finding that it made in its preliminary injury inquiry to the effect that injury can be assessed against the major proportion of domestic production that OGVG represents in and of itself.²¹

INJURY

65. The Tribunal will now determine whether the dumping of the subject goods has caused injury to the domestic industry, taking into account the factors prescribed by subsection 37.1(1) of the *Regulations*.

66. This inquiry presented several issues for the Tribunal’s assessment of injury. First, because of the unpredictability of the greenhouse bell pepper market and production levels, which could vary during the growing season, the Tribunal found it necessary to collect and assess data over several different time periods, i.e. weekly, monthly, quarterly and annually.

67. Second, because domestic growers are not responsible for directly selling the like goods, the Tribunal had to collect information on the domestic industry separately from each of the following sources: growers’ associations, individual domestic growers, and marketers and agencies. The respondents to the domestic growers’ questionnaire accounted for more than 40 percent of the domestic production of like goods in 2009. The Tribunal relied on these responses in its assessment of the financial results of the domestic industry, as well as other indicia of performance, such as capacity and employment. As for total domestic production volumes and acreage devoted to growing the like goods, the Tribunal relied on data published by Statistics Canada.

68. In its examination of pricing, the Tribunal relied primarily on the responses to the importers’ questionnaire and marketers’ and agencies’ questionnaire. The respondents to the marketers’ and agencies’ questionnaire were responsible for the disposition of nearly one third of the like goods produced in 2009. Collectively, the respondents to the importers’ questionnaire and marketers’ and agencies’ questionnaire accounted for the large majority of imports of greenhouse bell peppers identified in trade data prepared by Statistics Canada, particularly with respect to the subject goods.

20. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 63-64; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 288; Grower’s Exhibit NQ-2010-001-B-02 (protected) at para. 13, Administrative Record, Vol. 12; collective responses to the marketers’ and agencies’ questionnaire are found under Tribunal Exhibit NQ-2010-001-26, Administrative Record, Vol. 5.3, and Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the domestic growers’ questionnaire are found under Tribunal Exhibit NQ-2010-001-11, Administrative Record, Vol. 3, and Tribunal Exhibit NQ-2010-001-12 (protected), Administrative Record, Vol. 4.

21. *Greenhouse Bell Peppers* (21 May 2010), PI-2009-005 (CITT) at para. 17. As will be discussed later, the data on the record of this inquiry show that Ontario represents the majority of domestic production of like goods.

69. The Tribunal also made use of data on monthly import volumes of greenhouse bell peppers compiled by the Department of Agriculture and Agri-Food (Agriculture Canada).

70. Lastly, the Tribunal notes that the POI includes the two interim periods of January 1 to March 31, 2009, and the corresponding period in 2010. However, these periods were generally not meaningful to the Tribunal's assessment of injury because they fell outside the main growing season for both the subject goods and the like goods, as discussed below. Accordingly, the Tribunal will refer to these interim periods only where relevant.

71. Although there are gaps in some data series and not all the data are identical in all respects, the Tribunal is of the view that the totality of the evidence on the record represents the best information available and provides a sufficient and reliable factual basis for its assessment of injury.

Background

72. As background to its assessment of injury, the Tribunal must consider certain characteristics of greenhouse bell pepper production, the structure of the domestic industry and conditions in the domestic market.

Greenhouse Bell Pepper Production

73. Because greenhouse bell peppers are an agricultural crop, output is dependent on climatic conditions and can be significantly affected by changes in temperature, light and humidity.²²

74. As previously noted, greenhouse bell peppers ripen in a series of six-week settings across a growing season. Accordingly, there are expected seasonal, inter-setting and intra-setting variations in the supply of greenhouse bell peppers. The output of greenhouse bell peppers tends to vary within each setting, with greater volumes occurring at the mid-point of the setting and lower volumes occurring at the beginning and end of each setting. Output is low between settings. The output of greenhouse bell peppers also varies over the course of a growing season, with lower volumes at the beginning of the season when light levels are lower, larger volumes in the middle of the season and declining volumes toward the end of the season when the plants become less productive.²³

75. Greenhouse bell peppers are perishable and, generally, cannot be stored for more than 10 to 21 days without the use of newer technologies (which are not yet commonly used).²⁴

76. Different regions of the world have different growing seasons for greenhouse bell peppers. The growing seasons in Canada and the Netherlands are generally similar, with harvesting usually beginning in March and continuing until late November or early December.²⁵ The Canadian growing season is slightly

22. Tribunal Exhibit NQ-2010-001-01A, Administrative Record, Vol. 1 at 27; Exporter's Exhibit NQ-2010-001-C-01 at paras. 13-14, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 153, 181-82; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 280, 282; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 502, 588.

23. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 34-35, 70-72, 177; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 415; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 503, 567-68, 588-89; *Transcript of In Camera Hearing*, Vol. 1, 20 September 2010, at 23-24.

24. Grower's Exhibit NQ-2010-001-A-04 at para. 29, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 308.

25. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 207-208, 215; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 318.

longer than the Dutch season.²⁶ There is evidence that different regions in Mexico have different growing seasons which, collectively, extend that country's growing season throughout the entire year.²⁷ However, as will be discussed below, imports of greenhouse bell peppers from Mexico predominately appear in the domestic market in a manner that is largely countercyclical to the Canadian and Dutch seasons. The growing season in Spain is from October to March and in Israel, from December to April.²⁸

Structure of the Domestic Industry

77. According to data published by Statistics Canada, in 2009, Ontario represented 62 percent of total domestic production and 61 percent of total acreage, while British Columbia accounted for 35 percent of total production and 36 percent of total acreage. Alberta accounted for most of the remaining production and acreage.²⁹

78. As mentioned earlier, only marketers licensed by OGVG are able to market greenhouse bell peppers grown in Ontario. Growers in Ontario must also be licensed by OGVG.³⁰ A grower may market its crop through one or more marketers and, similarly, marketers can market crops for any number of growers.³¹ In addition, a certain number of growers and marketers in Ontario are affiliated in some other manner or another.³² As will be discussed below, certain marketers are significant importers of the subject goods.

79. In British Columbia, only agencies licensed by the BCVMC have the authority to market greenhouse bell peppers grown in the province. Growers with less than a certain minimum number of acres are able to market their crops directly.³³ The questionnaire response received from one of the two responding agencies in British Columbia suggests that it is owned co-operatively by growers.³⁴ Neither agency reported imports of the subject goods during the POI.³⁵

80. The Tribunal observes that at least half of the production of the like goods is exported to the United States.³⁶ It is the marketers and agencies that are responsible for marketing the like goods to purchasers in export markets.

26. Grower's Exhibit NQ-2010-001-A-04 at para. 27, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 207-208; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 318.

27. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 24; Exporter's Exhibit NQ-2010-001-C-01 at para. 22, Administrative Record, Vol. 13.

28. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 24, 29; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 424, 426, 470, 532; *Transcript of In Camera Hearing*, Vol. 2, 21 September 2010, at 50; Grower's Exhibit NQ-2010-001-B-01 at A2, A4, A6, Administrative Record, Vol. 11; Exporter's Exhibit NQ-2010-001-C-01 at paras. 22-24, Administrative Record, Vol. 13.

29. Tribunal Exhibit NQ-2010-001-45.03, Administrative Record, Vol. 1 at 114.

30. *Greenhouse Vegetables - Marketing*, R.R.O. 1990, Reg. 417.

31. Tribunal Exhibit NQ-2010-001-14.02D, Administrative Record, Vol. 3.1 at 366, 371; *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 42.

32. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 37-45, 66-67, 244-45.

33. Grower's Exhibit NQ-2010-001-B-01 at para. 9, Administrative Record, Vol. 11.

34. Tribunal Exhibit NQ-2010-001-26.09, Administrative Record, Vol. 5.3 at 151-52.

35. Tribunal Exhibit NQ-2010-001-26.09, Administrative Record, Vol. 5.3 at 150; Tribunal Exhibit NQ-2010-001-26.05, Administrative Record, Vol. 5.3 at 84.

36. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 45; Tribunal Exhibit NQ-2010-001-45.02, Administrative Record, Vol. 1 at 94; *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 21; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 273.

Conditions in the Domestic Market for Greenhouse Bell Peppers

81. Imports of greenhouse bell peppers from different countries appear in the Canadian market during their respective growing seasons.

82. According to monthly import data compiled by Agriculture Canada, on average, over the three full years of the POI, imports of the subject goods accounted for 65 percent of total imports of greenhouse bell peppers during the six-month period from May to October. In June and July, imports of the subject goods accounted for more than 80 percent of total imports. Imports of the subject goods were present in smaller volumes at the beginning and end of the season, i.e. April and November, and were present in very small volumes in other months.³⁷

83. For the months of November to April, when the subject goods were not apparent in large volumes, Mexico was the most important source of imports of greenhouse bell peppers. On average, over the three full years of the POI, Mexico accounted for nearly three quarters of total imports of greenhouse bell peppers during these months.³⁸ The Tribunal notes that imports of greenhouse bell peppers from Mexico were also present in the domestic market in May, September and October in varying volumes in each of the three years of the POI. Imports from Mexico were minimal during the months of June, July and August.

84. Over the three full years of the POI, 96 percent of the imports of the subject goods entered Canada through ports of entry in Ontario and Quebec. There were very limited imports in the other provinces, except in 2009 when approximately 7 percent of the imports of the subject goods in that year entered through British Columbia.³⁹

85. Accordingly, the data on monthly import volumes compiled by Agriculture Canada indicate that, in Eastern Canada, the subject goods were essentially the only competitors to the like goods in June, July and August in each year of the POI. However, in May, September and October, imports of greenhouse bell peppers from Mexico were also a factor in the market.

86. The evidence on the record suggests that, in Western Canada, the like goods faced virtually no competition from the subject goods during the Canadian growing season, except in 2009. Mexico appears to be the major source of imported greenhouse bell peppers in British Columbia.⁴⁰

Volume of Imports of Dumped Goods

87. Pursuant to paragraph 37.1(1)(a) of the *Regulations*, the Tribunal will consider the volume of the dumped goods and, in particular, whether there has been a significant increase in the volume, either in absolute terms or relative to the production or consumption of the like goods.

88. OGVG argued that the evidence before the Tribunal demonstrates that there was a significant increase in imports of the subject goods during the POI. OGVG submitted that the impact of the subject goods on the domestic industry was much greater than their share of annual imports of greenhouse bell peppers would indicate. It argued that the more appropriate measure of the significance of imports of the subject goods is their share of imports from May to October, the six-month period in which they are the dominant source of imports.

37. Grower's Exhibit NQ-2010-001-B-01 at A1, A3, Administrative Record, Vol. 11.

38. Grower's Exhibit NQ-2010-001-B-01 at A1, A2, Administrative Record, Vol. 11.

39. Grower's Exhibit NQ-2010-001-B-01 at A1, A3, Administrative Record, Vol. 11.

40. Grower's Exhibit NQ-2010-001-B-01 at A1, A2, Administrative Record, Vol. 11.

89. Frugi Venta did not dispute the fact that the Dutch growing season corresponds closely to that of Canada. However, according to Frugi Venta, imports of the subject goods were present in the domestic market to fill the gaps in domestic supply that invariably arise over the course of a season. Frugi Venta submitted that, no matter how well growers manage their greenhouses, there will be periods of short supply due to the nature of the pepper plant growth pattern.

90. Fruigor noted that, according to the responses to the purchasers' questionnaire, only purchases of the like goods and the Mexican greenhouse bell peppers had increased from 2008 to 2009. Fruigor submitted that proof of a presence of the subject goods in British Columbia was almost nonexistent.

91. The data in the staff report show that, in absolute terms, the volume of imports of the subject greenhouse bell peppers grew steadily during the POI, increasing by 10 percent from 2007 to 2008 and by 19 percent from 2008 and 2009, for an overall increase of 31 percent over the three years.⁴¹ From these data, the Tribunal concludes that there has been a significant increase in the volume of imports of the subject goods over the POI.

92. The Tribunal is also required to consider whether the volume of imports of the subject goods increased relative to the domestic production of the like goods or the consumption of the like goods. The ratio of imports of the subject goods to domestic production of the like goods was steady at 6 percent from 2007 to 2009.⁴² The ratio of imports of the subject goods to domestic sales of the like goods was steady at 12 percent from 2007 to 2009.⁴³

93. The Tribunal is of the view that the stability of these ratios could be consistent with the claim that the subject goods were imported to fill what are in effect "structural" shortages (or gaps) in domestic supply. The Tribunal heard that this may occur when a marketer has a contract or order to fulfill for a retailer and is short on domestic supply.⁴⁴ As well, a marketer may set a sales volume goal for itself in a given year, on the basis of previous sales volumes, and the split between domestic and imported goods would depend on the domestic production in a given year.⁴⁵ Witnesses for the domestic industry acknowledged that the supply of like goods vacillates depending on such factors as the timing of plantings and regional climatic conditions.⁴⁶

94. Responses to the importers' questionnaire and marketers' and agencies' questionnaire indicate that marketers imported a substantial volume of the subject goods during the POI. Indeed, these responses indicate that, in 2009, the majority of reported imports of the subject goods were made by marketers affiliated with domestic growers.⁴⁷ This corroborates testimony at the hearing that a number of large marketers that import the subject goods share common ownership with domestic growers.⁴⁸

41. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 46.

42. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 45, 46.

43. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 46, 50.

44. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 267-68, 271-72, 281-82, 299, 416; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 448-49, 535-37, 546-47.

45. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 404-405.

46. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 50-51, 69-70, 153, 181-82.

47. Collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the importers' questionnaire are found under Tribunal Exhibit NQ-2010-001-18 (protected), Administrative Record, Vol. 6.

48. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 67-68.

95. The Tribunal observes that seasonal, inter-setting and intra-setting shortages are inevitable because of the intrinsic nature of greenhouse bell pepper production. However, as will be discussed later, the Tribunal is not convinced that the subject goods were imported solely for the purpose of filling gaps in domestic supply.

96. The Tribunal notes that the data presented in the staff report indicate that, on an annual basis, imports of greenhouse bell peppers from Mexico were the largest source of imports, accounting for more than 60 percent of total imports in each full year of the POI. Imports of the subject goods were the second largest source of imports, accounting for at least 15 percent of total imports in each year of the POI.⁴⁹ The Tribunal concurs however with OGVG that the more relevant consideration is the effect of the subject goods on the like goods in those months when the subject goods comprise the majority of imports in the domestic market, i.e. May to October of each year. The Tribunal will examine this issue when it assesses the effects of the dumped imports on the prices of the like goods.

97. The Tribunal agrees that the evidence on the record indicates that imports of the subject goods were highly concentrated in Eastern Canada. In this regard, the Tribunal notes that the testimony of a witness for Frugi Venta corroborates the import data from Agriculture Canada discussed above.⁵⁰

98. Frugi Venta claimed that the majority of the imports of the subject goods in 2009 were orange peppers, which are generally less available than red peppers, which were “pulled” into the domestic market by a shortage of like orange peppers. OGVG rejected this claim and submitted that there was ample domestic production of orange peppers. On the basis of the evidence on the record, including the testimony of the OGVG witnesses and the Tribunal’s own witness, the Tribunal is not convinced that there was an atypical shortage of orange peppers in 2009.⁵¹

99. In light of the above, the Tribunal finds that there was a significant increase in the volume of the dumped goods in absolute terms, but not relative to the consumption or production of like goods.

Effects of Dumped Imports on Prices

100. Pursuant to paragraph 37.1(1)(b) of the *Regulations*, the Tribunal must consider the effects of the dumped goods on the price of like goods and, in particular, whether the dumped goods have significantly undercut or depressed the price of like goods, or suppressed the price of like goods by preventing the price increases for those goods that would otherwise likely have occurred.

101. OGVG submitted that its complaint is primarily about price. It argued that the selling prices of the subject goods declined over the POI and undercut and depressed the selling prices of the like goods. OGVG submitted that, although the prices of the subject goods exceeded those of the like goods in 2007 and 2008, they were the lowest in the domestic market in 2009. OGVG also submitted that the data on sales to common accounts show evidence of undercutting, but that such undercutting may be masked by fluctuations in the volume and prices of the subject goods within given quarters. According to OGVG, the fact that the prices of the like goods recovered in 2010 following the imposition of provisional duties is evidence of the negative price effects that the subject goods had had in the market.

49. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 46.

50. Grower’s Exhibit NQ-2010-001-B-01 at A3, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 390.

51. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 23, 258; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 548-49, 553-54.

102. Frugi Venta argued that the low prices of the subject goods in 2009 were due to a “perfect storm” of factors unrelated to dumping. According to Frugi Venta, a unique set of market circumstances had resulted in Dutch overproduction that year, and Dutch prices were exceptionally below cost. Frugi Venta contended that supply conditions had returned to normal in 2010 and that prices in the Netherlands had recovered.

103. Frugi Venta submitted that Dutch exporters are price takers in the domestic market and must price according to the prevailing market price, which, in turn, is influenced by imports of Mexican, Spanish and Israeli greenhouse bell peppers that are already in the domestic market when the harvest of Dutch peppers begins. It argued that the marketers’ decision to import the subject goods is not based on Dutch pricing, but rather on a need to meet their customers’ needs, whether in Canada or the United States.

104. Frugi Venta argued that it is unrealistic for domestic growers to expect to maintain 2008 prices, which were at a three-year high for the POI. It further noted that the prices of the subject goods declined between 2007 and 2008, while prices of like goods increased, which demonstrated a lack of synchronization between the subject goods and the like goods during this period. Frugi Venta indicated that, overall, the prices of like goods increased over the POI.

105. Fruigor submitted that the staff report shows that pricing is one of the least important factors for purchasers of greenhouse bell peppers. It submitted that the prices of greenhouse bell peppers fluctuate from one season to the next due to a variety of factors, including the weather and growing conditions on one continent versus those on another. According to Fruigor, the decline in the prices of the subject goods between 2007 and 2009 was due to a bumper crop in 2009 and, therefore, this trend cannot be used to predict future pricing. Fruigor also submitted that the data on sales to common accounts do not show price undercutting by the subject goods.

General

106. The evidence on the record allows the Tribunal to make several observations about the pricing dynamics at play in the sale of the like goods and imported greenhouse bell peppers.

107. The Tribunal agrees that price is not the only or most important factor considered by purchasers when purchasing the subject goods or like goods.

108. In this regard, the Tribunal’s witness testified that “[p]rice is always important, but it is not really the most important thing. We are going to look at the quality and specification and that the people we are dealing with can consistently deliver what they promise.”⁵² Moreover, the Tribunal’s witness testified that, Loblaw, which is one of the largest purchasers of greenhouse bell peppers, prefers to sell Canadian product.⁵³ The Tribunal further notes that 8 of 11 respondents to its purchasers’ questionnaire indicated that they or their customers were “always” or “usually” interested in greenhouse bell peppers “grown in Canada”.⁵⁴

109. The evidence on the record indicates that price, while not the most important factor, is nonetheless a factor in the purchasing decision. In this regard, the Tribunal notes that none of the 11 respondents to its purchasers questionnaire indicated that “lowest price” was a factor which was “not important” in their decision. The Tribunal also notes that only one purchaser, responding to a question on how often the

52. *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 542.

53. *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 528-29.

54. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 33.

lowest-priced product wins a bid or sale, indicated that it “never” did so, with the remaining 10 purchasers indicating that the lowest-priced product “usually” or “sometimes” wins.⁵⁵ The Tribunal also heard that any price premium paid by purchasers for the like goods is relatively small.⁵⁶

110. The Tribunal accepts that there is a good level of price transparency in the marketplace, particularly for current and near-term prices of the subject goods, and to a lesser extent for prices of the like goods.

111. In this regard, the Tribunal heard that marketers looking to sell the like goods have access to current pricing information on imported greenhouse bell peppers. As well, information on the pricing and availability of imported goods is often shared at weekly OGVG “market call” meetings.⁵⁷ In the Tribunal’s view, the fact that many marketers are related to growers also contributes to the level of transparency of market prices. The Tribunal’s witness testified that retailers are aware of prevailing market prices for the like goods and imported greenhouse bell peppers.⁵⁸ On the other hand, importers and wholesalers may not necessarily have access to information on prices of the like goods. Fruigor, for example, submitted that it does not establish the selling prices of the subject goods on the basis of knowledge of prices of the like goods because some marketers refuse to send it price quotes.⁵⁹

112. The Tribunal examined the evidence on the record with regard to pricing in its consideration of the claim that the subject goods were being imported primarily for the purpose of backfilling shortages in domestic supply. In particular, the Tribunal separately examined the annual and 2009 monthly data on imports and sales of imports submitted in responses to the marketers’ and agencies questionnaire and importers’ questionnaire, the latter being submitted by importers that were not licensed marketers of the like goods.

113. The annual data show that the importers were achieving more consistently positive margins on their sales of the subject goods than were the marketers.

114. An examination of the monthly data for 2009 shows that, in several instances, marketers were selling the subject goods at a loss, while importers were not incurring such losses. Additionally, the margins varied greatly among reporting marketers, suggesting that, at certain times, individual marketers may be importing to meet volume commitments at retail accounts, while, in other periods, they may be importing to maximize profits. Indeed, the Tribunal’s witness testified that, in Loblaw’s experience, it is important for the marketers to maintain a stable, long-term supply relationship with retailers.⁶⁰

115. The Tribunal is of the view that this difference in pricing behaviour between marketers and importers supports the claim that certain marketers were importing the subject goods to fill gaps and selling those imports at a pre-negotiated price, sometimes at a loss. Importers, on the other hand, appear to have been purchasing the subject goods with a view to their resale at more stable and profitable margins.

55. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 32, 37.

56. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 117-18, 211-12, 223, 255.

57. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 253-54.

58. *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 541.

59. Tribunal Exhibit NQ-2010-001-17.02, Administrative Record, Vol. 5 at 39.

60. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 412; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 533, 546-47, 571-74; collective responses to the marketers’ and agencies’ questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the importers’ questionnaire are found under Tribunal Exhibit NQ-2010-001-18 (protected), Administrative Record, Vol. 6.

116. However, although a portion of the imports of the subject goods appear to have been for the purpose of backfilling gaps in domestic supply, there is also evidence on the record indicating that there may have been broader strategies in play between certain affiliated growers and marketers, which involved serving the market with both the subject goods and like goods. Indeed, the Tribunal notes that the volumes and associated margins for imports of the subject goods by at least one major marketer suggest that these imports were not motivated strictly by benign gap-filling requirements, but rather were part of a broader competitive marketing strategy.⁶¹

Price Undercutting and Price Depression

117. The Tribunal will now consider whether the prices of the subject goods have undercut and/or depressed the prices of the like goods. The Tribunal will conduct its examination by considering pricing data on an annual and monthly basis, the evidence on sales to common accounts and the account-specific allegations submitted by the domestic industry.

Annual Prices

118. The Tribunal observes that the average unit import value of the subject goods declined by 22 percent over the POI, from \$3.47/kg in 2007 to \$2.69/kg in 2009.⁶² This decline in average unit import value translated into a decline in the average unit selling price of the subject goods, from \$3.82/kg in 2007 to \$3.08/kg in 2009. This represents declines of 8 percent from 2007 to 2008 and 13 percent from 2008 to 2009.

119. The Tribunal notes that the average unit selling price of the like goods increased by 9 percent from 2007 to 2008, even as the average unit selling price of the subject goods decreased. However, in 2009, the average unit selling price of the like goods decreased, falling by 5 percent compared to 2008, while the selling price of the subject goods decreased by 13 percent over the same period.

120. The average unit selling price of the subject goods was greater than the average unit selling price of the like goods in 2007 and 2008, but undercut the latter by approximately 5 percent in 2009.⁶³

121. The Tribunal also compared the average unit import value of the subject goods to the average unit net revenues reported by respondents to the domestic growers' questionnaire.⁶⁴ The Tribunal considers such a comparison appropriate in the context of this inquiry, as a marketer is often faced with the option of importing the subject goods at a certain cost for resale at a profit or selling the like goods to earn a commission. In 2007 and 2008, the landed unit value of imports, i.e. the value at the border, was higher than the growers' net revenue, which is consistent with the market data that show that the average unit selling value of the subject goods exceeded that of the like goods in both 2007 and 2008.

122. In 2009, however, the landed unit value of the subject goods was lower than the domestic growers' net revenue on sales of like goods. This is consistent with evidence that the unit selling prices of the subject goods undercut those of the like goods in 2009. Additionally, the domestic growers' net revenue per kilogram declined in 2009, which the Tribunal attributes in part to the declining landed unit value of the subject goods.

61. Collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the importers' questionnaire are found under Tribunal Exhibit NQ-2010-001-18 (protected), Administrative Record, Vol. 6.

62. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 48.

63. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 56-57.

64. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 48; *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 139.

123. On the basis of the foregoing, the Tribunal concludes that the subject goods did not undercut the prices of like goods in 2007 or 2008, but did undercut the prices of like goods in 2009.

Monthly Prices

124. Given the significant volatility in the greenhouse bell pepper market, the Tribunal is of the view that annual data need to be complemented with monthly pricing data to better capture the market forces at play, particularly in 2009, when the average pricing of the subject goods fell below the annual average pricing of the like goods. Accordingly, as a further step in its analysis, the Tribunal, in an effort to better understand the results observed in the annual data (i.e. the absence of price undercutting and price depression in 2007 and 2008, and the apparent presence of such adverse price effects in 2009), also examined the data on monthly prices.

125. As discussed above, the evidence shows that the Canadian and Dutch growing seasons for greenhouse bell peppers generally coincide and that the majority of the subject goods and like goods are sold in the Canadian market during the six-month period of May to October of each year. As such, the Tribunal considers that the monthly pricing data collected in replies to the importers' questionnaire and marketers' and agencies questionnaire are probative as to the price effects of the subject goods on the like goods during this important period of the year. In this regard, the Tribunal examined monthly pricing data for May to October of 2007, 2008, and 2009 and made a number of observations, which are set out below.⁶⁵

126. First, the Tribunal observes that it is to be expected that the monthly prices of greenhouse bell peppers, as perishable agricultural products, will fluctuate over the course of a season, as output varies according to the plant's growth pattern, as described above. All other things being equal, prices for greenhouse bell peppers in the domestic market are likely to decline over the course of the season and in the lead up to the peak summer months of June, July and August, as supply typically becomes more abundant.⁶⁶ Accordingly, the Tribunal did not consider the fact of declining prices for the like goods over a season as being, in and of itself, necessarily conclusive of adverse price effects having been caused by imports of the subject goods, which makes its assessment of the monthly pricing data all the more relevant.

127. In 2007, the monthly average unit selling prices of the subject goods were consistently higher than the average unit selling prices of like goods and, consequently, do not appear to have had a negative impact on the selling prices of the like goods.

128. In 2008, the monthly average unit selling prices of the subject goods undercut those of the like goods in June, July and September. In this regard, the Tribunal notes that the selling price of the like goods declined from May to June 2008, as did the selling price of the subject goods. However, the volume of sales of the like goods increased from May to June 2008, when sales volumes peaked.

129. The selling price of the like goods increased from June to July 2008, despite being undercut by the selling price of the subject goods in both months. Indeed, the July 2008 price of the like goods was the second highest during the period of May to October 2008. Additionally, the volume of the subject goods sold in July 2008 was higher than in any other month in 2008.

65. Collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the importers' questionnaire are found under Tribunal Exhibit NQ-2010-001-18 (protected), Administrative Record, Vol. 6.

66. *Transcript of In Camera Hearing*, Vol. 1, 20 September 2010, at 25-26, 49; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 415; Tribunal Exhibit NQ-2010-001-17.02, Administrative Record, Vol. 5 at 39; Tribunal Exhibit NQ-2010-001-26.07, Administrative Record, Vol. 5.3 at 115.

130. The monthly average unit selling prices of the like goods remained essentially flat between August and September 2008, even though the prices of the subject goods decreased and there was price undercutting by the subject goods in September. The price of the subject goods increased in October 2008, while the price of like goods declined. Therefore, there appears to be no direct relationship between the prices of the subject goods and like goods during these months.

131. Considering (i) the ability of the domestic industry to increase its selling price in July 2008 (a key month for domestic growers) while facing price undercutting from, and a substantial increase in the sales volume of, the subject goods, (ii) the lack of direct relationship between the prices of the subject and the like goods that was observed from August to October of 2008, and (iii) the substantial volume of sales of the like goods in June 2008, the Tribunal concludes that, while price undercutting may have occurred in particular months in 2008, the adverse effect on the price of the like goods was not significant.

132. In 2009, the monthly average unit selling price of the subject goods undercut the monthly average unit selling price of the like goods in each month of the six months examined by the Tribunal.

133. With respect to May 2009, the Tribunal notes that there were still sizeable volumes of imports of greenhouse bell peppers from Mexico in the market, at prices that undercut the prices of both the subject goods and the like goods. For this reason, the Tribunal is not convinced that the prices of the subject goods had an adverse effect on the prices of like goods in May 2009.

134. However, commencing in June 2009, sales of Mexican greenhouse bell peppers fell sharply, while sales of the subject goods increased substantially. Between May and June 2009, the selling price of the subject goods declined by approximately 15 percent, the largest month-over-month change in price during the period of May to October 2009. Concurrently, the price of the like goods decreased by 11 percent. The Tribunal notes that the volume of sales of the like goods decreased marginally from May to June 2009, while the volume of sales of the subject goods increased significantly, attaining their highest level for the 2009 season in the month of June.

135. While the sales volume of the subject goods began to recede in July 2009 from the June 2009 peak volume, the selling price of the subject goods continued to decline.

136. In August 2009, the selling price of the subject goods remained essentially unchanged compared to July, while the selling price of the like goods continued to decline.

137. During September and October 2009, the sales volumes of the subject goods were approximately 50 percent lower than in August and were low compared to sales volumes of the like goods. While the selling prices of the subject goods were lower than in August, the price remained steady from September into October. Similar to the price of the subject goods, the price of like goods declined in September, but then remained steady into October.

138. On the basis of its examination of the monthly pricing data for 2009, the Tribunal concludes that, while the prices of the subject goods and the like goods were related in some instances, the evidence does not disclose that they were entirely tied to one another.⁶⁷ In some months, a decline in the selling price of the subject goods was met with a decline in the selling price of the like goods. In other months, however, there

67. The Tribunal notes that pricing patterns were variable among individual importers and marketers from May to August 2009. Collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3; collective responses to the importers' questionnaire are found under Tribunal Exhibit NQ-2010-001-18 (protected), Administrative Record, Vol. 6.

appears to have been less of a relationship between the prices of the subject goods and those of the like goods. On balance, the Tribunal finds that, while there were instances of price undercutting and price depression in certain months of 2009, the adverse effects of the selling prices of the subject goods on the prices of the like goods over the POI were neither pervasive nor significant.

139. The Tribunal also notes that the results for 2009 at the aggregate level are essentially corroborated by a disaggregated month-to-month comparison of the prices of the subject goods and the like goods broken out by individual marketer.⁶⁸

Sales to Common Accounts

140. The data on sales to common accounts⁶⁹ show that undercutting by the subject goods occurred in a number of instances, but do not show a consistent pattern of undercutting over the POI. Instead, the results for common accounts vary from quarter to quarter, with the subject goods having the lower selling price in some quarters and the like goods having the lower selling price in others.

141. The Tribunal notes that, even though the data on sales to common accounts do not show consistent price undercutting or depression, they do provide an indication of how certain marketers use the subject goods and the like goods together to service accounts.⁷⁰

Account-specific Allegations

142. With respect to the account-specific allegations of lost sales and price depression submitted by the domestic industry,⁷¹ the Tribunal would have preferred additional evidence to substantiate those claims. For example, OGVG could have chosen to provide grower-specific information but, for the most part, did not do so.

143. In view of the above, the Tribunal ascribed little weight to these allegations.

Price Suppression

144. The domestic industry did not make any allegations of price suppression in this inquiry. The Tribunal observes that, for respondents to the domestic growers' questionnaire, the average unit cost of goods sold declined over the POI.⁷² Therefore, price suppression is not a consideration in this inquiry.

Conclusion

145. On the basis of the foregoing, the Tribunal finds that the prices of the subject goods undercut those of like goods during certain periods of the POI and resulted in isolated occurrences of price depression. However, the Tribunal is of the view that these occurrences were confined to a few months in the summer

68. Grower's Exhibit NQ-2010-001-A-02 (protected), Attachment 1, Administrative Record, Vol. 12; collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3.

69. *Staff Report* (protected), Tribunal Exhibit NQ-2010-001-07, Administrative Record, Vol. 2.1 at 59-70.

70. *Staff Report* (protected), Tribunal Exhibit NQ-2010-001-07, Administrative Record, Vol. 2.1 at 59-70.

71. Grower's Exhibit NQ-2010-001-A-08 (protected) at 1-11, Administrative Record, Vol. 12; Tribunal Exhibit NQ-2010-001-15.02 (protected), Administrative Record, Vol. 4.1 at 57-65; Grower's Exhibit NQ-2010-001-A-07 (protected) at para. 11, Administrative Record, Vol. 12.

72. *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 139.

of 2009, with such price depression not having been systematic or significant over the POI. Therefore, the Tribunal concludes that the evidence does not indicate that the subject goods had a significant adverse effect on the prices of the like goods.

Impact of the Dumped Imports on the Domestic Industry

146. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped goods on the domestic industry.

147. OGVG submitted that sales of the subject goods had a negative impact on the domestic industry's total revenues, net income and return on investment. As a result of having to reduce prices in 2009 to compete with the subject goods, the domestic industry claimed that it lost significant additional revenue. OGVG noted that the magnitude of the margin of dumping was substantial, particularly in light of the perishable nature of the subject goods.

148. Both parties opposed argued that imports of the subject goods had not caused injury to the domestic growers.

149. Frugi Venta submitted that the domestic industry had managed to increase its production and sales, and reduce its costs and losses during the POI, resulting in improved financial performance. It noted that the domestic industry experienced its best financial results of the POI in 2008, despite the lower prices of the subject goods in that year compared to 2007. Frugi Venta submitted that Dutch growers were not trying to gain domestic market share, but rather meet demand in Canada. Frugi Venta argued that the margin of dumping is not relevant in this case because the calculation of the normal value by the CBSA does not take into consideration that the prices of an agricultural product typically decline over a season and that, therefore, even in good years, some sales will be below cost.

150. Fruigor submitted that the indicia of performance do not demonstrate injury to growers in Ontario and that, in fact, the domestic industry was performing well.

Production, Capacity and Capacity Utilization

151. According to data from Statistics Canada, the domestic industry increased its production of the like goods by 25 percent during the POI. The greatest increase occurred from 2007 to 2008, when domestic production rose by 17 percent. This was followed by an additional increase of 8 percent from 2008 to 2009.⁷³

152. The domestic industry's production capacity also increased during the POI. According to data from Statistics Canada, the number of greenhouse acres devoted to the like goods increased by 10 percent from 2007 to 2008 and by a further 3 percent between 2008 and 2009, for a net increase of 13 percent over the three years.⁷⁴ The Tribunal also heard testimony that the domestic industry had further increased its capacity by an additional 2 percent from 2009 to 2010.⁷⁵

73. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 45.

74. Tribunal Exhibit NQ-2010-001-45.03, Administrative Record, Vol. 1 at 114, 148.

75. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 147, 148.

153. Responses to the domestic growers' questionnaire show that capacity utilization for the responding domestic growers remained relatively stable at around 93 percent during the POI.⁷⁶

154. In light of the above, the Tribunal finds that domestic production, capacity and capacity utilization were not negatively affected by the subject goods. To the contrary, the Tribunal observes that the domestic industry increased both production and capacity during the POI, despite the yearly increases in the volume of imports of the subject goods.

Sales from Domestic Production and Market Share

155. The volume of sales from domestic production rose in each year of the POI, increasing by 11 percent from 2007 to 2008 and by 15 percent from 2008 to 2009, for an overall increase of 27 percent over the three years. The volume of sales of the subject goods also increased during the POI, but to a lesser extent. The volume of sales of the subject goods increased by 19 percent from 2007 to 2009, with the vast majority of that increase occurring from 2007 to 2008, when sales grew by 15 percent.⁷⁷

156. The total market for greenhouse bell peppers grew steadily during the POI, increasing by 19 percent from 2007 to 2008 and by an additional 10 percent from 2008 to 2009, for an overall increase of 31 percent over the three years.⁷⁸ Despite the increase in the volume of sales of the subject goods, the Tribunal notes that the market share of the subject goods remained stable at 7 percent throughout the POI. In particular, the Tribunal observes that the subject goods did not increase their share of the domestic market in 2009, despite the lower prices for the subject goods in that year. The Tribunal also notes that the market share of the like goods remained relatively stable throughout the POI, at 62 percent in 2007, 58 percent in 2008 and 61 percent in 2009.⁷⁹

157. In the Tribunals' view, the stability of the market shares for the subject and the like goods within the growing domestic market suggests that Dutch exporters were engaged, at least in part, in the backfilling of gaps in domestic supply.

158. In light of the above, the Tribunal finds that the domestic industry did not lose sales volume during the POI. Indeed, the evidence indicates that the domestic industry was able to increase sales volume, while maintaining its share of the expanding Canadian market.

76. *Staff Report* (public), revised 9 September 2010, Tribunal Exhibit NQ-2010-001-06B, Administrative Record, Vol. 1.1 at 132.

77. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 50-51.

78. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 50-51.

79. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 52.

Financial Results

159. For the growers that responded to the domestic growers' questionnaire,⁸⁰ total gross margin increased by 44 percent from 2007 to 2008, primarily as a result of a significant increase in net revenues. Concurrently, there was a marked increase in total net income, which recovered from a negative to a positive position. The Tribunal observes that the best financial results of the POI were obtained in 2008. However, in 2009, total gross margin declined by 17 percent and total net income declined by 55 percent, largely the result of decreased net revenues and increased cost of goods sold.⁸¹

160. Examining the financial results on a per-kilogram basis, the Tribunal notes that the unit cost of goods sold decreased marginally from 2008 to 2009, as the increased total cost of goods sold was spread over a greater volume of the like goods. However, due to the decline in the unit net returns to growers, there was a 56 percent decrease in unit net income in 2009, compared to 2008.⁸²

161. In comparison with the financial results for the like goods, the Tribunal notes that the growers responding to the domestic growers' questionnaire performed better with respect to their other greenhouse operations.⁸³

162. In view of the foregoing, it is clear that the domestic industry experienced a worsening of its financial situation in 2009. The issue, as will be discussed later, is whether the extent of the deterioration was sufficient to constitute material injury.

Other Indicators

163. The Tribunal notes that paragraph 37.1(1)(c) of *Regulations* prescribes that the Tribunal consider certain other factors, in addition to those discussed above, in its assessment of the impact of the dumped goods on the domestic industry. These factors include any actual or potential decline in productivity or return on investments, any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, and the magnitude of the margin of dumping in respect of the dumped goods.

80. The domestic growers' questionnaire did not request separate information on financial results for sales of the like goods in the domestic and export markets. The Tribunal notes that the evidence on the record shows that prices for greenhouse bell peppers were generally higher in the United States than in Canada. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 56, 58; *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 261. Therefore, the financial results presented in the staff report may under-represent, in absolute terms, the losses sustained by the domestic industry on domestic sales of the like goods. However, the Tribunal considers that the trends in total financial results are nonetheless indicative of the trends that would have applied to domestic sales of the like goods. In this regard, the Tribunal refers to OGVG's protected aid to argument in which the direction of the year-to-year changes in total gross margin and net income is the same as shown in the staff report. Protected aid to argument filed by OGVG, Administrative Record, Vol. 18 at 9.

81. *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 139.

82. *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 139.

83. *Staff Report* (public), revised 9 September 2010, Tribunal Exhibit NQ-2010-001-06B, Administrative Record, Vol. 1.1 at 125; *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 140.

164. The evidence on the record shows that the total number of direct employees fell by 3 percent from 2008 to 2009, but still increased by 13 percent over the entire POI. Despite the reduced number of employees in 2009, total wages paid and average productivity increased in that year.⁸⁴

165. There is little evidence on the record concerning return on investment. The domestic industry submitted that greenhouse production requires a significant capital investment and that domestic growers have incurred significant financing costs in this respect.⁸⁵ Further, the Tribunal observes that several domestic growers claimed to have experienced negative effects with respect to return on investments and cash flow.⁸⁶ However, the evidence on the record indicates that financial expenses decreased by 8 percent over the POI.⁸⁷ This should have had the effect of increasing the domestic growers' net income.

166. The Tribunal does not find that any of these other indicators show substantial negative effects caused by the subject goods.

167. Frugi Venta admitted that the subject goods had been dumped in 2009, but made submissions on the appropriateness of the methodology used by the CBSA.⁸⁸ It is not within the Tribunal's jurisdiction to comment on the methodologies used by the CBSA to calculate margins of dumping. The Tribunal notes, however, that the margin of dumping found by the CBSA is significant.⁸⁹ In any event, as discussed above, the evidence does not indicate that the subject goods had a significant effect on the prices of the like goods or on the indicia of industry performance during the POI.

Conclusion

168. In conclusion, the Tribunal observes that, despite a significant increase in the volume of imports of the subject goods during the POI, the domestic industry generally performed well and was able to increase production, capacity, sales volume, net income, gross margin, employment, wages and productivity, in addition to maintaining its rate of capacity utilization and market share over the POI. The only negative results during the POI were lower net returns, gross margin and net income observed in 2009.

Causation and Materiality

169. OGVG submitted that the subject goods had caused injury to the domestic industry.

170. Frugi Venta argued that any injury to the domestic industry was self-inflicted because it had increased production without trying to increase per capita consumption of greenhouse bell peppers. Frugi Venta noted that Loblaw, a major retailer of greenhouse bell peppers, projected only modest annual growth

84. *Staff Report* (public), revised 9 September 2010, Tribunal Exhibit NQ-2010-001-06B, Administrative Record, Vol. 1.1 at 130, 131.

85. Grower's Exhibit NQ-2010-001-A-01 at para. 19, Administrative Record, Vol. 11; Tribunal Exhibit NQ-2010-001-12.01 (protected), Administrative Record, Vol. 4 at 13.

86. Tribunal Exhibit NQ-2010-001-11.23, Administrative Record, Vol. 3 at 249; Tribunal Exhibit NQ-2010-001-12.01 (protected), Administrative Record, Vol. 4 at 13; Tribunal Exhibit NQ-2010-001-12.03 (protected), Administrative Record, Vol. 4 at 164, 165.

87. *Staff Report* (public), revised 17 September 2010, Tribunal Exhibit NQ-2010-001-06C, Administrative Record, Vol. 1.1 at 139.

88. Grower's Exhibit NQ-2010-001-A-09 at 7, Administrative Record, Vol. 11; Exporter's Exhibit NQ-2010-001-C-01 at para. 54, Administrative Record, Vol. 13; *Transcript of Public Argument*, Vol. 1, 23 September 2010, at 681-83.

89. Tribunal Exhibit NQ-2010-001-04A, Administrative Record, Vol. 1 at 70.16.

of 1 to 3 percent in sales of greenhouse bell peppers.⁹⁰ Consequently, according to Frugi Venta, the increase in the supply of the like goods over the POI had invariably resulted in lower prices. Frugi Venta also argued that the relationships among growers and marketers had contributed to any injury experienced by the domestic industry.

171. Frugi Venta submitted that any injury experienced by the domestic industry due to the exceptional conditions of 2009 did not warrant a finding of injury. It argued that agricultural products have good years and bad years and that domestic growers must be able to withstand the inherent financial risks in this type of industry. In this regard, Frugi Venta referred to the Tribunal's reasoning in a previous inquiry.⁹¹

172. The Tribunal's examination of the indicia of industry performance provides a mixed picture that is ultimately indicative of some degree of adverse effects that can reasonably be attributed to the price-undercutting and price-depressive effects of the subject goods in the summer of 2009. However, the Tribunal is of the view that the effects of the dumping of the subject goods on the domestic industry were not sufficiently adverse to constitute material injury over the POI within the meaning of *SIMA*.

173. Having determined that the dumping of the subject goods has not caused injury, the Tribunal need not address the above submissions on other factors responsible for injury.

THREAT OF INJURY

174. Having found that the dumping of the subject goods has not caused injury, the Tribunal must now consider whether the dumping of the subject goods is threatening to cause injury. Subsection 37.1(2) of the *Regulations* prescribes factors to be taken into account for the purposes of the Tribunal's analysis concerning threat of injury. Subsection 2(1.5) of *SIMA* provides that a finding of threat of injury cannot be made unless the circumstances in which the dumping of the goods would cause injury are clearly foreseen and imminent.

175. In conducting its analysis of threat of injury, the Tribunal typically considers a time frame of up to 24 months beyond the date of its finding. In the circumstances of this case, the Tribunal considers it appropriate to focus on the next two growing seasons for the domestic industry, that is, the 2011 and 2012 seasons.

176. OGVG submitted that there is substantial excess capacity in the Netherlands and noted that capacity had increased in 2010, despite the significant overproduction which occurred in 2009. OGVG argued that the circumstances which gave rise to the "perfect storm" in 2009 continue to exist. According to OGVG, the dramatic month-to-month fluctuations in import volumes indicate that the subject goods do not participate in the domestic market in an orderly manner. In addition, OGVG submitted that ongoing inspection requirements for shipments to the United States will increase the importance of the Canadian market for

90. Tribunal Exhibit NQ-2010-001-17.05, Administrative Record, Vol. 5 at 84.

91. In *Fresh Cauliflower* (4 January 1993), NQ-92-003 (CITT) at 18-19, the Tribunal stated the following: "In fact, prices did improve in 1992, which supports the evidence of that grower to the effect that there are good and bad years in the horticultural product industry. It appears to the Tribunal that the risk involved in cauliflower production requires growers to be in a position to withstand the temporary negative financial impact of price swings which inevitably occur from time to time. . . . In light of the evidence, it is the view of the Tribunal that 1991 was an unusual year in terms of price levels and should not be regarded as indicative of the longer term price trends for cauliflower."

Dutch growers. Further, OGVG submitted that domestic growers are facing increased costs for labour and natural gas, as well as higher interest rates, and will be threatened with injury if the ongoing price effects of the dumped subject goods prevents them from increasing, or at least maintaining, their prices.

177. Frugi Venta submitted that, because the conditions prevailing in 2009 were unique, there was no basis upon which to extrapolate a threat of material injury. In this regard, it argued that production levels in the Netherlands in 2010 had fallen to normal levels and that further increases in capacity were unlikely. Frugi Venta disagreed that shipments of the subject goods into the United States faced additional inspection requirements, adding that the U.S. market for the subject goods remained more attractive than the Canadian market because of the higher prices prevailing in that market.

178. Fruigor submitted that Canada was a marginal market for Dutch growers and that there was no basis to conclude that imports of the subject goods would increase in the foreseeable future. Fruigor argued that the domestic market was growing and submitted that domestic production was expanding to meet that demand. It noted that there were no trade measures in place against the subject goods in other jurisdictions.

179. The Tribunal first examined whether there is a likelihood of a substantial increase in the volume of imports of the subject goods in Canada in the next two growing seasons.

180. In this regard, the Tribunal observes that the volume of imports of the subject goods increased steadily year over year throughout the POI for a net increase of 31 percent between 2007 and 2009.⁹² Even though the subject goods did not capture market share at the expense of the domestic industry during the POI, the Tribunal considers that this rate of increase is significant. In the Tribunal's view, this trend is indicative of a likelihood of a substantial increase in imports of the subject goods in the future.

181. Regardless of whether the Tribunal accepts Frugi Venta's submission that no further increases in Dutch capacity are likely, it is uncontested that the Netherlands is already one of the world's largest growers of greenhouse bell peppers. The Tribunal observes that the number of hectares devoted to the production of the subject goods increased steadily during the POI, growing by 5 percent from 2007 to 2008 and by 6 percent from 2008 to 2009, for an overall increase of 12 percent from 2007 to 2009. A witness for Frugi Venta testified that capacity had increased by a further 5 percent in 2010.⁹³ The Tribunal finds it significant that Dutch capacity increased in 2010, despite the exceptional production volumes and low prices obtained in the "perfect storm" conditions of 2009. The increase in the number of hectares devoted to greenhouse bell peppers in 2010 suggests either that construction of new greenhouses had begun in 2008 or that growers had decided to switch to greenhouse bell peppers from other existing greenhouse crops.⁹⁴

182. The evidence clearly indicates that the Netherlands is overwhelmingly export-oriented, with approximately 90 percent of its output of greenhouse bell peppers destined for export in each year of the POI.⁹⁵ The Tribunal finds compelling circumstances in the fact that Dutch exporters have well-established distribution networks for the subject goods in Canada. In this regard, the Tribunal notes that the testimony of witnesses for Frugi Venta suggests longstanding relationships with domestic purchasers.⁹⁶

92. *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 46, 52.

93. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 319-20; Exporter's Exhibit NQ-2010-001-C-09, Administrative Record, Vol. 13 at 11.

94. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 406-407.

95. Exporter's Exhibit NQ-2010-001-C-09 at 11, 13, Administrative Record, Vol. 13.

96. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 273-74, 276, 287-90, 361-62; *Transcript of In Camera Hearing*, Vol. 1, 20 September 2010, at 65-66, 76-77; Exporter's Exhibit NQ-2010-001-C-01 at paras. 57, 129; Administrative Record, Vol. 13.

183. On the basis of the foregoing, the Tribunal is of the view that the general trend in respect of increasing volumes of imports of subject goods observed during the POI is likely to continue in the near to medium term in the absence of antidumping duties.

184. Considering (i) the propensity of Dutch producers to sell every single pepper,⁹⁷ arising from the perishability of the subject goods, and their need to clear out the greenhouses in preparation for the next seasonal planting, (ii) the significant recent expansions of Dutch greenhouse capacity, (iii) the Dutch pricing formulae, which yielded acknowledged dumped prices, and (iv) the magnitude of the margins of dumping, as found by the CBSA, the Tribunal is of the further view that, in the absence of anti-dumping duties, the subject goods will continue to enter Canada at dumped prices.

185. The Tribunal observes that there are no other trade measures against the subject goods in other jurisdictions. However, some of the most important export destinations for the subject goods are either other countries within the European Union, such as Germany and the United Kingdom, or countries that do not grow greenhouse bell peppers, such as the United States.

186. The Tribunal recalls its analysis of annual and month-to-month pricing trends in which the Tribunal observed a decreasing trend in the pricing of subject goods over the POI. In particular, the Tribunal recalls that, in 2009, the prices of the subject goods undercut the prices of the like goods in every month from May to October.

187. For 2010, the evidence on the record suggests that growers' returns (in euros per kilogram) in the Netherlands have strengthened significantly in comparison with 2009.⁹⁸ This would support the argument that 2009 was indeed an unusual year characterized by excess production and low prices. With this in mind, the Tribunal made a comparison of an estimate of 2010 weekly delivered prices of the subject goods with the farm-gate based returns to Ontario growers.⁹⁹

188. In all but one of the weeks examined in 2010, the estimated delivered price of Dutch peppers undercut domestic prices by percentages that were greater than the actual percentage difference (i.e. 9 percent) in 2009 between the average unit import value of the subject goods and average net revenues reported by respondents to the domestic growers' questionnaire. This indicates a clear propensity on the part of Dutch growers to undercut prices.

97. A witness for Frugi Venta testified as follows: "Every single box, same as within Canada, same as all over the world, if you have higher production due to certain reasons, every single box will be sold." *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 317.

98. Exporter's Exhibit NQ-2010-001-C-04 (protected) at 26, Administrative Record, Vol. 14.

99. The Tribunal began with 2010 weekly returns (weeks 18 to 31, i.e. the beginning of May to the end of July) to Dutch growers for red peppers, expressed in euros. It then added an estimate of air freight, as provided in the submissions from Frugi Venta. Next, the Tribunal added an estimate of profit for the Dutch exporter. It based this estimate on information submitted during the preliminary injury inquiry and on the commissions charged by marketers. The Tribunal then converted the resultant values to Canadian dollars. The Tribunal compared these estimates to the average of 2010 weekly net returns for two growers, as submitted by OGVG. The Tribunal notes that one of these growers considered itself the largest in Ontario. Grower's Exhibit NQ-2010-001-A-13 (protected) at 6, Administrative Record, Vol. 12; Grower's Exhibit NQ-2010-001-A-15 (protected) at 3, Administrative Record, Vol. 12; Exporter's Exhibit NQ-2010-001-C-04 (protected) at 26; Administrative Record, Vol. 14; *Staff Report* (public), Tribunal Exhibit NQ-2010-001-06, Administrative Record, Vol. 1.1 at 85; Preliminary Injury Inquiry No. PI-2009-005, Administrative Record, Vol. 2 at 83, 84; Grower's Exhibit NQ-2010-001-A-07 (protected) at para. 7, Administrative Record, Vol. 12; *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 203-204.

189. This comparison suggests that the increased returns to Dutch growers would have nevertheless resulted in delivered prices that would have significantly undercut domestic prices, having regard to the spread between the two prices, had the provisional duties not been in place. In this regard, the Tribunal finds that the former prices, but for the application of provisional duties, would have been consistently and significantly lower than the latter.

190. The Tribunal considers these trends to be indicative of the subject goods entering the domestic market at prices which, without the imposition of provisional duties, would have had a depressive effect on the prices of the like goods. As indicated previously, there is no indication that the Dutch propensity to dump will disappear. It is therefore the Tribunal's view that the renewed presence of dumped subject goods in the Canadian market is likely to transform the insignificant price depression that occurred during isolated instances of the POI into significant price depression over the next two growing seasons.

191. In this regard, the Tribunal recalls the evidence on the record that at least one marketer appears to have imported the subject goods during the POI at volumes, values and operating margins which were more consistent with a broader competitive strategy than benign gap-filling.¹⁰⁰ This is in addition to the evidence that indicates that importers also import subject goods as part of their competitive strategy. The Tribunal believes that a large part of their imports will continue to be done in this way, with a corresponding influence over the price of like goods.

192. Looking to the future, the Tribunal is of view that, in the absence of anti-dumping duties, there will be increased pressure on other marketers to respond to Dutch lead prices, i.e. lower prices, or risk losing business. In this regard, the Tribunal recalls that, although purchasers identified quality and other non-price factors as very important factors in their purchasing decisions, they indicated that price was nonetheless a consideration. The Tribunal notes that a recurrent theme emerging from the evidence in these proceedings is the intensity of the competitive behaviour in servicing retail customers. As the witness for Loblaw testified, they "... can't be significantly out-priced" by competitors.¹⁰¹

193. For all the foregoing reasons, the Tribunal is of the view that, even with the strengthening of Dutch prices in 2010, the instances in 2009 where the evidence suggests that the dumping of the subject goods had adverse effects on the price of the like goods, are likely to continue and become more pervasive in the future, creating a foreseeable and imminent threat of material injury to the domestic industry.

194. The Tribunal considered the argument that the domestic industry, by having significantly increased production during the POI, was itself responsible for the threat of injury that it faced. In this regard, the Tribunal notes that domestic production rose by 25 percent from 2007 to 2009, with a corresponding increase in domestic sales volume from that production. On the supply side, the effect of the increase in domestic production was likely to decrease price; this supply-induced price effect was exacerbated by the fact that the like goods are a perishable commodity that must be disposed of on the market at whatever price can be obtained. Consequently, the Tribunal agrees that, by failing to stimulate an increase in per capita consumption, the threat of injury due to lower price levels in the domestic market is, at least in part, self-inflicted.

195. However, the threat indicia outlined above, each of which is outside the direct control of individual domestic growers, indicate that the dumping of the subject goods is, in itself, threatening to cause material injury.

100. Collective responses to the marketers' and agencies' questionnaire are found under Tribunal Exhibit NQ-2010-001-27 (protected), Administrative Record, Vol. 6.3.

101. *Transcript of Public Hearing*, Vol. 1, 20 September 2010, at 118-19, 211-13; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 539, 546-47; Grower's Exhibit NQ-2010-001-A-07 (protected) at para. 11, Administrative Record, Vol. 12.

196. In summary, on the basis of its assessment of the prescribed factors, the Tribunal finds that the clearly foreseen and imminent circumstances in this matter are such that the dumping of the subject goods is found to be threatening to cause injury to the domestic industry. Accordingly, the Tribunal finds that the dumping of the subject goods is threatening to cause injury to the domestic industry.

EXCLUSIONS

197. As indicated above, the Tribunal received a request by Frugi Venta in respect of organic greenhouse bell peppers. It claimed that the domestic industry does not produce organic greenhouse bell peppers and submitted that organic greenhouse bell peppers are not substitutable for non-organic greenhouse bell peppers, as the two products meet different standards. Frugi Venta pointed to differences in consumer tastes and demand, marketing, price and production methods between the two products.¹⁰²

198. OGVG opposed Frugi Venta's product exclusion request on the basis that there are Canadian growers that produce or are capable of producing organic greenhouse bell peppers. In addition, OGVG submitted that the product for which Frugi Venta is seeking an exclusion is indistinguishable from the like goods and that purported differences in consumer taste, production methods and price had not been properly established by Frugi Venta in its request.¹⁰³

199. It is well established that the Tribunal has the discretion to grant exclusions from a finding pursuant to subsection 43(1) of *SIMA* and has done so on numerous occasions when requesters were able to demonstrate that such exclusions would not cause injury or threat of injury to the domestic industry.¹⁰⁴ In this regard, the Tribunal considers whether the domestic industry normally produces, actively supplies or is capable of producing the particular products or substitutable or competing goods.¹⁰⁵

200. The Tribunal is of the view that the domestic industry has provided sufficient evidence to demonstrate that it produces, or is capable of producing, organic greenhouse bell peppers.¹⁰⁶ In addition, the Tribunal is concerned that organic greenhouse bell peppers from the Netherlands and the like goods are sufficiently substitutable so as not to warrant a product exclusion. Accordingly, the request is denied.

REQUEST FOR A REFERENCE TO THE PRESIDENT OF THE CBSA

201. On September 17, 2010, OGVG made submissions¹⁰⁷ in which it requested that the Tribunal advise the CBSA under section 46 of *SIMA*¹⁰⁸ that there was evidence that greenhouse bell peppers from Belgium have been or are being dumped and that the evidence discloses a reasonable indication that the dumping has

102. Tribunal Exhibit NQ-2010-001-39.01 (protected), Administrative Record, Vol. 1.4 at 4-5; Tribunal Exhibit NQ-2010-001-43.01, Administrative Record, Vol. 1.4 at 131; Tribunal Exhibit NQ-2010-001-40.01 (protected) Administrative Record, Vol. 2.4 at 2; Tribunal Exhibit NQ-2010-001-44.01 (protected) Administrative Record, Vol. 2.4 at 7.

103. Tribunal Exhibit NQ-2010-001-41.01, Administrative Record, Vol. 1.4 at 102-103.

104. *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 340.

105. *Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.

106. Tribunal Exhibit NQ-2010-001-41.01, Administrative Record, Vol. 1.4 at 102, 104-108; *Transcript of Public Hearing*, Vol. 3, 22 September 2010, at 579; *Transcript of In Camera Hearing*, Vol. 3, 22 September 2010, at 82, 83.

107. Tribunal Exhibit NQ-2010-001-47, Administrative Record, Vol. 1 at 226.

108. Section 46 of *SIMA* reads as follows: "Where, during an inquiry referred to in section 42 respecting the dumping or subsidizing of goods to which a preliminary determination under this Act applies, the Tribunal is of the opinion that (a) there is evidence that goods the uses and other characteristics of which closely resemble the uses and other characteristics of goods to which the preliminary determination applies have been or are being dumped or subsidized, and (b) the evidence discloses a reasonable indication that the dumping or subsidizing referred to in paragraph (a) has caused injury or retardation or is threatening to cause injury, the Tribunal, by notice in writing setting out the description of the goods first mentioned in paragraph (a), shall so advise the President."

caused injury or retardation or is threatening to cause injury. The Tribunal heard from the parties on OGVG's request during oral argument. According to OGVG's submissions, such goods are purportedly similar to the subject goods. Frugi Venta and Fruigor objected to the request.

202. The Tribunal is not of the opinion that there is evidence of dumping of greenhouse bell peppers from Belgium. While the evidence indicates that the prices of the Belgian greenhouse bell peppers are low, low prices are not, in and of themselves, necessarily indicative of dumping. Dumping occurs when the export price is less than the normal value of the goods.¹⁰⁹ The Tribunal sees no evidence that this is the case in respect of Belgian greenhouse bell peppers. On the contrary, the evidence suggests that Belgian greenhouse bell peppers are acquired by exporters under an auction system, which can be designed (e.g. via sealed first-price system, minimum reserve price) to yield prices at or above normal value.¹¹⁰ Moreover, other factors such as lower quality could account for low prices. There is however little information on how the quality of Belgian greenhouse bell peppers compares with that of Dutch and Canadian greenhouse bell peppers. In short, the Tribunal is not satisfied that the conditions for advising the CBSA under section 46 of *SIMA* have been met. Therefore, the OGVG request is denied.

CONCLUSION

203. Pursuant to subsection 43(1) of *SIMA*, the Tribunal hereby finds that the dumping of the subject goods has not caused injury but is threatening to cause injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michael Saroli
Pasquale Michael Saroli
Member

109. Subsection 2(1) of *SIMA* defines “dumped” as follows: “‘dumped’, in relation to any goods, means that the normal value of the goods exceeds the export price thereof”.

110. *Transcript of Public Hearing*, Vol. 2, 21 September 2010, at 392, 393.