



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2012-004

Unitized Wall Modules

*Determination issued
Friday, September 14, 2012*

*Reasons issued
Monday, October 1, 2012*

*Corrigendum issued
Tuesday, October 2, 2012*

TABLE OF CONTENTS

DETERMINATION WITH RESPECT TO THE PRELIMINARY INJURY INQUIRY	i
CORRIGENDUM.....	ii
STATEMENT OF REASONS	1
BACKGROUND.....	1
CBSA'S DECISION TO INITIATE INVESTIGATIONS	1
SUBMISSIONS ON INJURY AND THREAT OF INJURY.....	2
Complainants	2
Parties Opposed to the Complaint	3
ANALYSIS	3
Legislative Framework.....	3
Like Goods and Classes of Goods.....	4
Domestic Industry.....	4
State of the Domestic Industry.....	5
Volume of Dumped and Subsidized Goods	6
Effect on the Price of Like Goods	6
Project-specific Allegations and Causation	7
Materiality	9
Threat of Injury	9
Summary	10
CONCLUSION.....	11

IN THE MATTER OF a preliminary injury inquiry, pursuant to subsection 34(2) of the *Special Import Measures Act*, respecting:

UNITIZED WALL MODULES FROM THE PEOPLE'S REPUBLIC OF CHINA

DETERMINATION WITH RESPECT TO THE PRELIMINARY INJURY INQUIRY

The Canadian International Trade Tribunal, pursuant to the provisions of subsection 34(2) of the *Special Import Measures Act*, has conducted a preliminary injury inquiry into whether the evidence discloses a reasonable indication that the dumping and subsidizing of unitized wall modules, with or without infill, including fully assembled frames, with or without fasteners, trims, cover caps, window operators, gaskets, load transfer bars, sunshades and anchor assemblies, originating in or exported from the People's Republic of China (the subject goods) has caused injury or retardation or are threatening to cause injury.

This preliminary injury inquiry follows the notification, on July 16, 2012, that the President of the Canada Border Services Agency had initiated investigations into the alleged injurious dumping and subsidizing of the subject goods.

Pursuant to paragraph 35(1)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby concludes that the evidence does not disclose a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or retardation or are threatening to cause injury. Therefore, pursuant to paragraph 35(3)(a) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby terminates the preliminary injury inquiry with respect to the subject goods.

Jason W. Downey

Jason W. Downey
Presiding Member

Stephen A. Leach

Stephen A. Leach
Member

Serge Fréchette

Serge Fréchette
Member

Gillian Burnett

Gillian Burnett
Acting Secretary

The statement of reasons will be issued within 15 days.

IN THE MATTER OF a preliminary injury inquiry, pursuant to subsection 34(2) of the *Special Import Measures Act*, respecting:

UNITIZED WALL MODULES FROM THE PEOPLE'S REPUBLIC OF CHINA

DETERMINATION WITH RESPECT TO THE PRELIMINARY INJURY INQUIRY

CORRIGENDUM

Footnote 32 of the Statement of Reasons should read as follows:

The sole exception is referred to in Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 136-42, Administrative Record, Vol. 2; Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 129-37. The Tribunal notes that this project is different from the project which would have been lost under the first approach.

By order of the Tribunal,

Dominique Laporte
Domenique Laporte
Secretary

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PARTICIPANTS:

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Ferguson Neudorf Glass Inc.
Flynn Canada Ltd.
Inland Glass & Aluminum Ltd.
Oldcastle Building Envelope
Sota Glazing Inc.
Starline Architectural Windows Ltd.
Toro Aluminum

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STATEMENT OF REASONS

BACKGROUND

1. On July 16, 2012, following a complaint filed on May 24, 2012, by Allan Window Technologies, Ferguson Neudorf Glass Inc., Flynn Canada Ltd., Inland Glass & Aluminum Ltd., Oldcastle Building Envelope, Sota Glazing Inc., Starline Architectural Windows Ltd. and Toro Aluminum (the complainants), the President of the Canada Border Services Agency (CBSA) initiated investigations into the alleged injurious dumping and subsidizing of unitized wall modules, with or without infill, including fully assembled frames, with or without fasteners, trims, cover caps, window operators, gaskets, load transfer bars, sunshades and anchor assemblies, originating in or exported from the People's Republic of China (China) (the subject goods).
2. On July 17, 2012, the Canadian International Trade Tribunal (the Tribunal) issued a notice of commencement of preliminary injury inquiry.¹
3. Sixteen additional producers of unitized wall modules provided letters in support of the complaint.² A seventeenth producer is identified in the complaint as also supporting the complaint.³
4. The complaint is opposed by Jangho Curtain Wall Canada Co., Ltd. (Jangho Canada), an importer, Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. (Yuanda), an exporter, and Yuanda Canada Enterprises Ltd. (Yuanda Canada), an importer.
5. On September 14, 2012, pursuant to paragraph 35(1)(b) of the *Special Import Measures Act*,⁴ the Tribunal concluded that the evidence did not disclose a reasonable indication that the dumping and subsidizing of the subject goods had caused injury or retardation or were threatening to cause injury.

CBSA'S DECISION TO INITIATE INVESTIGATIONS

6. In accordance with subsection 31(1) of *SIMA*, the CBSA decided that there was evidence that the subject goods had been dumped and subsidized, as well as evidence that disclosed a reasonable indication that the dumping and subsidizing had caused injury or were threatening to cause injury. Accordingly, the CBSA initiated investigations on July 16, 2012.
7. The CBSA's period of investigation (POI) with respect to the alleged dumping was from January 1, 2010, to March 31, 2012. The CBSA estimated that 100 percent of the subject goods imported into Canada during the POI had been dumped, with an estimated margin of dumping of 12 percent, expressed as a percentage of the export price of the subject goods.⁵

1. C. Gaz. 2012.I.2184.

2. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 31-33; Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 7; Tribunal Exhibit PI-2012-004-02.01A, Administrative Record, Vol. 1A at 201-216.

3. Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 7; Tribunal Exhibit PI-2012-004-03.01 (protected) at para. 45, Administrative Record, Vol. 2. Basic Structures Engineering did not provide a letter of support.

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

5. Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 15-16.

8. With respect to the alleged subsidizing, the CBSA estimated that 100 percent of the subject goods imported into Canada during the POI had been subsidized, with an estimated amount of subsidy equal to 14 percent, expressed as a percentage of the export price of the subject goods.⁶

9. Further, the CBSA was of the opinion that the estimated margin of dumping and estimated amount of subsidy were not insignificant and that the estimated volumes of dumped and subsidized goods were not negligible.⁷

SUBMISSIONS ON INJURY AND THREAT OF INJURY

Complainants

10. The complainants submitted that there was sufficient evidence to support the continuation of the investigations into whether the alleged dumping and subsidizing of the subject goods had caused injury and were threatening to cause injury.

11. The complainants submitted that stick system envelopes, or facades, and fixed-point glass products were not “like goods” in relation to the subject goods and that the various styles of unitized wall modules comprised a single class of goods.

12. In support of their claims, the complainants purported to provide evidence alleging lost sales, a decline of market share, price suppression and price erosion, reduced profitability, a decline in production capacity, capacity utilization and employment, and delays in making capital investments.

13. The complainants submitted that the unique nature of each set of customized unitized wall modules makes average prices of limited use for the purpose of price comparison. Notwithstanding, they claimed that the loss of a sale by one domestic producer may become a benchmark that causes price suppression or price depression to other domestic producers.

14. According to the complainants, the Tribunal should take into account that there is a significant lag time between the order and delivery of unitized wall modules, meaning the loss of a sale may not show up in recent performance indicators, and that financial projections are therefore relevant when dealing with these types of goods.

15. The complainants argued that there is substantive evidence of a reasonable indication of causality between the dumping and subsidizing and injury to the domestic producers. Further, they argued that, although other factors may have contributed to reduced domestic production and sales over the POI, this does not negate the causal link between the dumping and subsidizing of the subject goods and the injury to the domestic producers. Similarly, according to the complainants, the existence of imports from the United States does not negate the injury due to dumping and subsidizing.

16. In terms of threat of injury, the complainants submitted that the demand for unitized wall modules will at best increase somewhat in 2012 and decline in 2013, which will exacerbate past injury to the domestic industry. In addition, the complainants submitted that the domestic industry’s costs will continue to increase, even if prices of unitized wall modules decline in 2012, and will continue to do so unless imports of the subject goods are constrained.

6. Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 20, 22.

7. *Ibid.* at 16, 22.

Parties Opposed to the Complaint

17. Yuanda and Yuanda Canada submitted that “stick” products and fixed-point products are “like goods” in relation to the subject goods. As well, Yuanda, Yuanda Canada and Jangho Canada submitted that there were two classes of goods: curtain wall and window wall.

18. Yuanda and Yuanda Canada submitted that the evidence before the Tribunal did not disclose a reasonable indication that the dumping or subsidizing of the subject goods had caused injury or was threatening to cause injury. They added that the complainants failed to provide accurate volumes and market share, as they omitted to show imports from the United States and, furthermore, made no reference to exports in the domestic sales data provided. In addition, Yuanda and Yuanda Canada submitted that the dumping and subsidizing margins estimated by the CBSA would not cover the gap between the domestic prices and the Chinese prices, resulting in a lack of evidence of injury due to dumping and subsidizing.

19. Yuanda and Yuanda Canada submitted that the complaint, as well as the CBSA, did not take into consideration other factors, such as the economic downturn and the contraction in demand, and that those other factors would have been the cause of the injury to the domestic industry.

20. Jangho Canada also submitted that there was no evidence before the Tribunal that disclosed a reasonable indication that the dumping or subsidizing of the subject goods had caused injury or was threatening to cause injury. It added that, unlike the CBSA, the domestic producers did not provide any information with regard to the significant import competition from the United States, which casts doubt as to the accuracy of the evidence provided by the complainants. Jangho Canada noted that the complainants’ case rests on their own limited evidence of lost sales and submitted that this evidence contains significant deficiencies.

ANALYSIS

Legislative Framework

21. The Tribunal’s mandate in a preliminary injury inquiry is set out in subsection 34(2) of *SIMA*, which requires the Tribunal to determine “. . . whether the evidence discloses a reasonable indication that the dumping or subsidizing of the [subject] goods has caused injury or retardation or is threatening to cause injury.”

22. In the present case, it is alleged that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury; retardation is not alleged.

23. Subsection 2(1) of *SIMA* defines “injury” as “material injury to a domestic industry”. The expression “domestic industry” means “. . . 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” The expression “like goods”, in relation to dumped or subsidized goods, means goods that are identical in all respects to the dumped or subsidized goods or, in the absence of any such goods, goods the uses and other characteristics of which closely resemble those of the dumped or subsidized goods.

24. Subsection 2(1.5) of *SIMA* provides that “. . . the dumping or subsidizing of goods shall not be found to be threatening to cause injury or to cause a threat of injury unless the circumstances in which the dumping or subsidizing of goods would cause injury are clearly foreseen and imminent.”

25. The expression “reasonable indication” is not defined in *SIMA*, but it is understood to mean that the evidence need not be “. . . conclusive, or probative on a balance of probabilities”⁸ Rather, the evidence must sufficiently support the allegations to warrant investigation.⁹

26. In making its preliminary determination, the Tribunal takes into account the injury and threat of injury factors that are prescribed in section 37.1 of the *Special Import Measures Regulations*,¹⁰ including the import volumes of the dumped and subsidized goods, the effects of the dumped or subsidized goods on the price of the like goods, the resulting economic impact of the dumped or subsidized goods on the state of the domestic industry, and—if injury or threat of injury is found to exist—whether a causal relationship exists between the dumping or subsidizing of the goods and the injury or threat of injury.

27. As set out in section 35 of *SIMA*, if the Tribunal comes to the conclusion that the evidence does not disclose a reasonable indication that the dumping or subsidizing of the goods has caused injury or retardation or is threatening to cause injury, the Tribunal shall cause the preliminary injury inquiry to be terminated, and the CBSA shall terminate the dumping and subsidizing investigations in respect of the goods.

Like Goods and Classes of Goods

28. The Tribunal would normally begin its analysis by making findings or preliminary findings with respect to which goods are the “like goods” in relation to the subject goods and whether there is more than one class of goods. However, for judicial economy, the Tribunal has not conducted this analysis because, as detailed below, even if the Tribunal assumes that the complainants are correct that “stick” and fixed-point products are not “like goods” in relation to unitized wall modules and that there is only one class of goods, the Tribunal’s conclusion would remain the same, that is, the evidence did not disclose a reasonable indication that the dumping and subsidizing of the subject goods had caused injury or retardation or were threatening to cause injury.

Domestic Industry

29. The evidence discloses that there are at least 25 domestic producers of unitized wall modules. However, only 8 of the 25 have filed the present complaint, and the information submitted does not disclose the share of domestic production that they each represent. This lack of evidence is significant because, as is discussed in greater detail below, the claim that injury has been caused by dumping and subsidizing largely relies on project-specific allegations of price depression or lost sales to some—but not all—of the complainants. Depending on the analytic approach used, most of these allegations do not withstand scrutiny,

8. *Certain Grain Corn* (10 October 2000), PI-2000-001 (CITT) [*Grain Corn*] at 4-5; *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD).

9. Article 5 of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (WTO *Anti-dumping Agreement*) and Article 11 of the WTO *Agreement on Subsidies and Countervailing Measures* require an investigating authority to examine the accuracy and adequacy of the evidence provided in a dumping and subsidizing complaint to determine whether there is sufficient evidence to justify the initiation of an investigation, to reject a complaint or terminate an investigation as soon as the investigating authority is satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the investigation, and not to consider unsubstantiated assertions as sufficient evidence.

10. S.O.R./84-927 [*Regulations*].

leaving the Tribunal with evidence of lost sales and price depression in relation to only two¹¹ of the complainants. Again, without knowing the share of total domestic production that these two complainants represent, the Tribunal is unable to determine that the evidence discloses a reasonable indication that those losses which are attributable to the dumping and subsidizing of the subject goods constitute injury to a major proportion of the total domestic production of like goods.

State of the Domestic Industry

30. The Tribunal began its analysis by considering the state of the domestic industry.

31. The evidence shows that there was a steady decrease in the value of production by the complainants and other domestic producers from 2009 to 2011.¹² The Tribunal notes that the complainants' value of production decreased at a faster rate over this period than the value of production of the other domestic producers.

32. The Tribunal observes that there was a significant increase in the volume and value of domestic sales of domestically produced unitized wall modules in 2010.¹³ Although there was a decrease in sales in 2011, sales remained higher than 2009 levels.

33. The Tribunal estimated the value of the domestic market by combining the value of domestic sales of domestically produced unitized wall modules provided in the complaint with the CBSA's information on the value of imports from the Facility for Information Retrieval Management (FIRM).¹⁴ This analysis shows that the market share of the domestic producers was relatively stable from 2009 to 2011, and was even marginally higher in 2011 than in 2009.

34. The complainants' consolidated financial results for domestic sales from domestic production show a decline in gross margin and net income from 2009 to 2011. The evidence also shows that this decline continued into the first quarter of 2012, compared to the first quarter of 2011.¹⁵

35. The evidence shows that the complainants experienced a decrease in their capacity utilization from 2009 to 2011.¹⁶

36. With respect to the complainants' claim of reduced employment, the Tribunal observes that there was a decline in direct employment from 2009 to 2010, but that employment increased in 2011, although not to 2009 levels.¹⁷

37. The Tribunal notes that information on the typical indicators of injury was not provided for each of the eight complainants, let alone for any of the other domestic producers. Accordingly, for the reasons

11 The evidence with regard to the lost sales relates to one complainant under the first approach and to a different complainant under the second approach. The evidence with regard to price depression relates to a single complainant. See the "Project-specific Allegations and Causation" section, below.

12. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 108.

13. *Ibid.* at 88.

14. Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 18. The CBSA used FIRM to retrieve import data stored in the Customs Commercial System. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 88.

15. Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 175.

16. *Ibid.* at 164.

17. *Ibid.* at 166.

discussed above, the Tribunal was unable to determine conclusively if the trends evident in the consolidated information were indicative of injury to a major proportion of domestic producers.

Volume of Dumped and Subsidized Goods

38. According to the CBSA's FIRM data,¹⁸ the absolute value of imports from China increased by more than 200 percent from 2009 to 2010 and by more than 30 percent between 2010 and 2011. In 2011, imports from China represented 50 percent of the total value of imports of unitized wall modules. The complainants' estimates for the value of imports from China show the same increasing trend from 2009 to 2011 as does the CBSA's data.¹⁹

39. The value of imports of the subject goods increased to a much lesser extent compared to the production and consumption of domestically produced unitized wall modules, with the former ratio increasing by 6 percentage points from 2009 to 2011 and the latter ratio increasing by 4 percentage points.²⁰

40. However, FIRM data in the first quarter of 2012, which is the most recent quarter for which data exist, show that the value of imports from China decreased relative to imports from other sources and that China's share of total imports decreased to 22 percent.²¹ This casts doubt on the allegation that the dumping and subsidizing of the subject goods are threatening to cause injury.

41. Therefore, while the evidence seems to indicate that there was a significant absolute increase in the value of imports of the subject goods from 2009 to 2011, the increase was small relative to the value of domestic production and consumption. Furthermore, as will be discussed below, there is little evidence on the record that this increase coincided with those losses experienced by the complainants which could reasonably be attributable to the dumping or subsidizing of the subject goods.

Effect on the Price of Like Goods

42. The traditional indicia of the price effects caused by dumping and subsidizing reveal mixed results. On the one hand, the complainants' estimates of the average unit price of the like goods and the average unit price of the subject goods show that the average unit price of the like goods decreased from 2009 to 2011 and that there was undercutting by the subject goods in 2009 and 2010.²² On the other hand, the complainants' estimates also show that the average unit price of the subject goods was higher than the domestic industry's average unit price in 2011.²³

43. In any event, the complainants' case is largely based on project-specific allegations of price depression and lost sales. They submitted that, given the customized nature of unitized wall modules,

18. Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 18. The CBSA only provided these import data in terms of value for duty and not in square metres or kilograms.

19. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 88; Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 13.

20. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 88, 108; Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 18.

21. Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 18; Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 13.

22. Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 88.

23. *Ibid.*

average selling prices are not the most reliable basis for assessing the price effects of the subject goods and, consequently, that the pricing comparisons could only be done on a project-specific basis.²⁴

44. Regarding price suppression, the Tribunal notes that, other than claiming that their costs have increased, the complainants have not provided evidence as to which specific costs increased during the POI, nor by how much.

Project-specific Allegations and Causation

45. As mentioned, the complainants submitted that average unit sales values were of limited use in determining price competition between sellers. The complainants, therefore, relied largely on 10 project-specific allegations of injury, comprising 9 allegations of lost sales and 1 of price depression.

46. The Tribunal analyzed the nine allegations of lost sales using two different approaches, each involving the CBSA's estimated margins of dumping and amounts of subsidy.²⁵ The first approach is a comparison of the project-specific margins of dumping and amounts of subsidy, as estimated by the CBSA, with the percentage by which the Chinese bids undercut the complainants' bids.²⁶ Under the second approach, instead of using the project-specific margins of dumping and amounts of subsidy, the Tribunal compared the CBSA's estimated weighted average margin of dumping and weighted average amount of subsidy²⁷ with the percentage by which the Chinese bids undercut the complainants' bids.

47. The first approach addresses an evidentiary gap caused by the fact that the complainants submitted allegations of lost sales concerning nine projects to support their claims of injury, but only five of these allegations were included in the projects for which the CBSA calculated margins of dumping and subsidizing. As a result, there is no evidence on the record that the subject goods in four of the allegations of lost sales, and in the single allegation of price depression, were dumped or subsidized.²⁸

48. The second approach addresses the fact that the CBSA estimated that 100 percent of the subject goods had been dumped or subsidized, despite its opinion that the subject goods proposed on one project were not dumped or subsidized.²⁹

49. In short, whereas the first approach relies on project-specific evidence of both injury and a causal relationship between such injury and the dumping or subsidizing of the subject goods proposed in the

24. Tribunal Exhibit PI-2012-004-02.01 at para. 7, Administrative Record, Vol. 1; Tribunal Exhibit PI-2012-004-08.01 at para. 75, Administrative Record, Vol. 3A.

25. While the Tribunal recognizes that these estimates are preliminary, it must make its assessment on the basis of the evidence currently before it.

26. The Tribunal added the project-specific margins of dumping and amounts of subsidy to arrive at combined project-specific margins of dumping and subsidizing. The Tribunal calculated the percentage by which the Chinese bids undercut the complainants' bids by dividing the difference between the value of the initial domestic bid and the value of the winning Chinese bid by the value of the initial domestic bid. The Tribunal notes that this latter calculation gives the same percentages as those presented by the complainants. Tribunal Exhibit PI-2012-004-09.01 (protected) at paras. 80-81, Administrative Record, Vol. 4A.

27. Tribunal Exhibit PI-2012-004-05, Administrative Record, Vol. 1D at 15-16, 20, 22.

28. The projects are referenced in Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 125, 136, 143, 146, 150, Administrative Record, Vol. 2.

29. Tribunal Exhibit PI-2012-004-03.01 (protected) at para. 132, Administrative Record, Vol. 2. Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 85-86, 112-13. The CBSA explains its rationale in this regard in its complaint analysis. Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 25, 52.

competing bid, the second approach ignores the evidentiary gap and assumes that the subject goods proposed in each of the projects were dumped and subsidized (except the single project in which the CBSA was not persuaded that the goods were dumped or subsidized).

50. For the reasons that follow, whether under the first or second approach, the Tribunal finds that only one of the nine allegations of lost sales seems to support a causal relationship between the estimated dumping and subsidizing of the subject goods and the alleged injury.

51. Under the first approach, the combined project-specific estimated margin of dumping and amount of subsidy for three of the four projects is less than the percentage by which the Chinese bid undercut the initial domestic bid.³⁰ Indeed, the Tribunal notes that, for two of the three projects, the combined project-specific margin of dumping and subsidizing is dramatically lower than the percentage by which the Chinese bid undercut the domestic bid. Given these results, the Tribunal considers it unlikely that the complainants would have won these three sales. Consequently, the Tribunal finds that the evidence does not disclose a reasonable indication that the loss of these three sales was caused by the dumping or subsidizing of the subject goods.

52. In summary, under the first approach, only one project-specific allegation withstands reasonable scrutiny.³¹

53. Applying the second approach to each of the eight allegations of lost sales, the evidence suggests that it is unlikely that the complainants would have won seven of the sales because the combined weighted average margin of dumping and amount of subsidy is less than the percentage by which the Chinese bid undercut the initial domestic bid. Accordingly, the second approach also yields only one allegation of lost sales that withstands reasonable scrutiny.³²

54. With regard to price depression, the complainants provided just a single project-specific allegation where it appears that a domestic producer had to lower its price in order to win the sale.³³

55. Thus, at best, the complainants would have suffered losses in relation to only two projects: one allegation of lost sales (under either the first or the second approach) and one project-specific allegation of price depression.

30. The Tribunal based its analysis on the initial domestic bid because this is the value that the complainants used to tally the alleged value of lost sales. Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 148-49, Administrative Record, Vol. 2; Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 114, 115-18, 119-31, Administrative Record, Vol. 2; Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 48-53, 55-63, 65-80; Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 85-86, 112-13.

31. Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 134-35, Administrative Record, Vol. 2; Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 120-27; Tribunal Exhibit PI-2012-004-03.02 (protected), Administrative Record, Vol. 2D at 85-86, 112-13.

32. The sole exception is referred to in Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 136-42, Administrative Record, Vol. 2; Tribunal Exhibit PI-2012-004-03.01A (protected), Administrative Record, Vol. 2A at 109-120; Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 129-37. The Tribunal notes that this project is different from the project which would have been lost under the first approach.

33. Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 154-62; Tribunal Exhibit PI-2012-004-03.01 (protected) at paras. 150-55, Administrative Record, Vol. 2. This is a project for which no specific evidence of dumping or subsidizing was submitted to the CBSA.

56. Furthermore, the Tribunal finds that these two losses are insufficient to account for the decline in the complainants' economic performance.

57. Under the first approach, initial bidding on the project took place near the middle of 2011. Under the second approach, the earliest bid took place toward the end of 2010. Consequently, the losses experienced on these projects could not reasonably explain the decrease in margins, income, production, capacity utilization and employment that the complainants experienced before 2011. At best, the loss of revenue from the projects might explain the decrease in the complainants' margins, net income, production and capacity utilization in 2011, though even that is unlikely, considering the complainants' own position that a domestic producer could lose significant sales in 2011 but not feel a dip in production and capacity utilization until 2012 as it completes orders from 2009-2010.³⁴

Materiality

58. In addition, the Tribunal is not satisfied that the evidence discloses a reasonable indication that the injury caused by the dumping or subsidizing of the subject goods is material. The total project-specific losses that could reasonably be attributable to the dumping and subsidizing of the subject goods amount to less than 2 percent of either the eight complainants' domestic sales between 2009 and 2011 or the total value of the domestic market over the same period.³⁵ This scale of loss, including any possible resultant impact on such performance indicators as capacity utilization and gross margins, would not be sufficient to constitute material injury.

Threat of Injury

59. The complaint contains 164 paragraphs, with only 2 paragraphs being devoted to threat of injury. Both paragraphs comprise argument without substantiation.³⁶ By and large, the complaint does not address the threat of injury factors that are prescribed in the *Regulations*.

60. In the first instance, the complainants more or less argue that any injury which has already been suffered will worsen. Considering that the evidence does not disclose a reasonable indication of material injury, the Tribunal does not find that argument to be compelling.³⁷

61. In the second instance, the complainants simply argue that increasing costs will translate into declining prices and margins. However, the Tribunal finds little or no evidence that could disclose a reasonable indication of any such losses, at least not to an extent that would be material, and not in circumstances that are clearly foreseen and imminent.³⁸

62. In their reply brief, the complainants added that the establishment of Canadian subsidiaries through which Jangho Canada, Far East Group and Yuanda import the subject goods provides evidence of their

34. Tribunal Exhibit PI-2012-004-09.01 (protected) at para. 62, Administrative Record, Vol. 4A.

35. Tribunal Exhibit PI-2012-004-03.01C (protected), Administrative Record, Vol. 2C at 175; Tribunal Exhibit PI-2012-004-03.01 (protected), Administrative Record, Vol. 2 at 88.

36. In this respect, the Tribunal observes that Article 3.7 of the WTO *Anti-dumping Agreement* and Article 15.7 of the WTO *Agreement on Subsidies and Countervailing Measures* provide that a threat of material injury must be based on facts and not merely on allegation, conjecture or remote possibility.

37. Tribunal Exhibit PI-2012-004-03.01 (protected) at para. 162, Administrative Record, Vol. 2.

38. Tribunal Exhibit PI-2012-004-03.01 (protected) at para. 163, Administrative Record, Vol. 2.

long-term interest in the Canadian market and that the lag time between the placement of orders and delivery means that injury from lost sales has yet to manifest itself in customs data or financial reports.³⁹

63. With respect to the first point, a continuing long-term interest in the Canadian market by exporters of the subject goods does not, in and of itself, reasonably indicate a change in circumstances that is clearly foreseen and imminent. Nor, together with the other scant evidence of a threat of injury, is the Tribunal satisfied that it supports a reasonable indication of a threat of injury.

64. With respect to the second point, even if the effect of the alleged project-specific losses that could reasonably have been caused by the dumping and subsidizing has yet to materialize, as previously discussed, the Tribunal finds that such losses would not be material.

Summary

65. The Tribunal finds that, in numerous respects, the complainants have failed to discharge their evidentiary burden.

66. Firstly, the Tribunal finds that the evidence of injury is at best limited to one lost sale and one instance of price depression in relation to 2 of at least 25 domestic producers over a span of three years.

67. Secondly, because the complainants failed to provide evidence of their respective share of domestic production, the Tribunal cannot conclusively determine if the project-specific losses to two domestic producers might reasonably constitute injury to a major proportion of the total domestic production of like goods.

68. Thirdly, the timing of the losses to two domestic producers, in the latter portion of the POI, cannot reasonably explain the declining performance of the complainants.

69. Fourthly, the Tribunal finds that the evidence of injury attributable to the dumping and subsidizing of the subject goods only amounts to less than 2 percent of the total value of the market for unitized wall modules or to the eight complainant's domestic sales between 2009 and 2011; therefore, the evidence does not disclose a reasonable indication of injury that is material.

70. Lastly, the complainants failed to submit cogent evidence that the dumping and subsidizing of the subject goods threaten to cause injury. Indeed, the two paragraphs submitted regarding threat of injury amount to an assumption that there is a reasonable indication of injury and a declarative statement that such injury will worsen.

39. Tribunal Exhibit PI-2012-004-09.01 (protected) at paras. 111-12, Administrative Record, Vol. 4A.

CONCLUSION

71. Pursuant to paragraph 35(1)(b) of *SIMA*, the Tribunal concludes that the evidence does not disclose a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or retardation or are threatening to cause injury.

Jason W. Downey

Jason W. Downey

Presiding Member

Stephen A. Leach

Stephen A. Leach

Member

Serge Fréchette

Serge Fréchette

Member