



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2009-005

Greenhouse Bell Peppers

*Determination issued
Friday, May 21, 2010*

*Reasons issued
Monday, June 7, 2010*

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

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

PRELIMINARY DETERMINATION OF INJURY

The Canadian International Trade Tribunal, under 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 of greenhouse bell peppers originating in or exported from the Netherlands has caused injury or retardation or is threatening to cause injury.

This preliminary injury inquiry is pursuant to the notification, on March 22, 2010, that the President of the Canada Border Services Agency had initiated an investigation into the alleged injurious dumping of the above-mentioned goods.

Pursuant to subsection 37.1(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby determines that there is evidence that discloses a reasonable indication that the dumping of the above-mentioned goods has caused injury.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

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STATEMENT OF REASONS

BACKGROUND

1. On March 22, 2010, following a complaint filed on January 29, 2010, by the Ontario Greenhouse Vegetable Growers (OGVG), the President of the Canada Border Services Agency (CBSA) initiated an investigation into the alleged injurious dumping of greenhouse bell peppers originating in or exported from the Netherlands (the subject goods).¹
2. On March 23, 2010, the Canadian International Trade Tribunal (the Tribunal) issued a notice of commencement of preliminary injury inquiry.
3. The complaint is supported by the BC Vegetable Marketing Commission.
4. The complaint is opposed by the Delegation of the European Union to Canada (EU Delegation).
5. On May 21, 2010, pursuant to subsection 37.1(1) of the *Special Import Measures Act*,² the Tribunal determined that there was evidence that disclosed a reasonable indication that the dumping of the subject goods had caused injury.

SUBMISSIONS ON INJURY

Domestic Growers in Support of the Complaint

6. The OGVG submitted that the dumping of the subject goods had caused injury to the domestic industry. In support of its allegations, the OGVG provided evidence of increased volumes of the subject goods, price undercutting, price depression, price suppression, lost sales, a reduction in gross margin and a reduction in profitability.
7. The OGVG also submitted that the dumping of the subject goods threatened to cause injury to the domestic industry. According to the OGVG, the rapid increase in exports of the subject goods to the United States from the Netherlands in recent years demonstrates that there is freely available capacity which could be used to increase exports to the Canadian market.³

Party Opposed to the Complaint

8. The EU Delegation submitted that the OGVG had not supported its claim of injury. Among other things, it argued that, in determining whether the subject goods had caused injury to the domestic industry, the Tribunal should also take into account the significant volume of imports into Canada of greenhouse bell peppers from Mexico.

1. See the CBSA's statement of reasons concerning the initiation of an investigation into the dumping of the subject goods, Administrative Record, Vol. 1 at 2, 334.
2. R.S.C. 1985, c. S-15 [*SIMA*].
3. In its complaint, the OGVG submitted that, in October 2009, the United States Department of Agriculture (USDA) suspended imports of the subject goods for phytosanitary reasons and that, consequently, there was a significant risk of diversion of the subject goods into Canada. However, as noted by the EU Delegation in its submission to the Tribunal, the ban was lifted in January 2010. In reply, the OGVG contended that there were still significant restrictions on imports of the subject goods into the United States, including examinations of all shipments by the USDA.

ANALYSIS

Legislative Framework

9. 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 of the subject goods has caused injury or is threatening to cause injury.⁴ In making its determination, the Tribunal takes into account the factors prescribed in section 37.1 of the *Special Import Measures Regulations*.⁵

10. Subsection 2(1) of *SIMA* defines "injury" as "... material injury to a domestic industry". It also defines "domestic industry" as "... 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." Therefore, the Tribunal must identify the like goods and the domestic industry that produces those goods before examining allegations of injury or threat of injury.

Like Goods and Classes of Goods

11. The CBSA has defined the subject goods as "greenhouse bell peppers originating in or exported from the Netherlands", and the Tribunal must conduct its preliminary injury inquiry on the basis of this product description. However, in assessing whether the evidence discloses a reasonable indication that the dumping of the subject goods has caused injury or retardation or threatens to cause injury to domestic producers of like goods, the Tribunal may consider whether the subject goods constitute one or more classes of goods and must define the scope of the domestically produced "like goods" in relation to the imported "subject goods".

12. Subsection 2(1) of *SIMA* defines "like goods", in relation to any 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.

13. The OGVG submitted that the subject goods constitute one class of goods and that domestically produced greenhouse bell peppers are like goods in relation to the subject goods.

14. On the issues of "like goods" and "classes of goods", the CBSA opined as follows in its statement of reasons:

[18] Greenhouse bell peppers produced by the complainant have the same physical characteristics and end uses as the subject goods imported from the Netherlands. The goods produced in Canada and in the Netherlands are fully interchangeable. Subject goods imported from the Netherlands compete directly with like goods produced by the complainant. Therefore, the CBSA has concluded that the greenhouse bell peppers produced by the Canadian industry constitute like goods to the subject goods.

4. Subsection 34(2) allows, as well, for a finding of a reasonable indication of "retardation", which according to subsection 2(1) of *SIMA* is defined as "... material retardation to the establishment of a domestic industry." Because a domestic industry for greenhouse bell peppers exists in Canada, "retardation" is not an issue in this preliminary injury inquiry.

5. S.O.R./84-927.

[19] The various colours and sizes of greenhouse bell peppers are produced using the same process, have similar physical characteristics, and have the same end use. After considering these factors and all other relevant information, the CBSA is of the opinion that the subject goods constitute only one class of goods.

15. Based on the information currently before it, and not having received any submissions from the parties on the issue, the Tribunal finds that, for the purposes of this preliminary injury inquiry, greenhouse bell peppers produced by the domestic industry constitute like goods in relation to the subject goods. However, as a preliminary matter to its final injury inquiry, the Tribunal will seek submissions from the parties on the issue of whether like goods should be confined to those produced by the greenhouse method.

Domestic Industry

16. Apart from it, the OGVG identified producer associations in British Columbia and Alberta whose members grow greenhouse bell peppers. In addition, the CBSA identified producer associations in Saskatchewan and Nova Scotia which, in all likelihood, represent greenhouse bell pepper growers.

17. The Tribunal notes that the information on the record is more complete for the OGVG than for the other known domestic producers of like goods. However, the Tribunal notes that, in 2008, the membership of the OGVG, by itself, accounted for 58 percent of the volume, and 60 percent of the value of greenhouse bell pepper production in Canada.⁶ Accordingly, for the purposes of this preliminary injury inquiry, the Tribunal considers that injury can be assessed against the major proportion of domestic production that the OGVG represents on its own. The Tribunal will however undertake a more detailed consideration of this issue and render a definitive decision as part of its inquiry under section 42 of *SIMA*, having regard to such factors as its final decision on the scope of like goods and any additional evidence concerning the production of like goods outside Ontario.

Volume of Dumped Goods

18. The OGVG submitted that, in the first 10 months of 2009, the volume of imports of the subject goods increased substantially in comparison to previous years. The EU Delegation argued that Mexico represented a larger share of total Canadian imports of greenhouse bell peppers than did the Netherlands. However, the OGVG countered that the large volumes of greenhouse bell peppers imported into the Canadian market from Mexico were not a significant factor because they are seasonally countercyclical to both the like goods and the subject goods. In any event, it contended that the subject goods accounted for more than a *de minimis* share of total imports of greenhouse bell peppers from 2006 to October 2009.

19. The Tribunal notes that the import data compiled by the CBSA show that there was a decrease in the volume of imports of the subject goods between 2006 and 2008. However, in the first 10 months of 2009, imports of the subject goods were more than 30 percent greater than in all of 2008.⁷

20. The evidence on the record further shows that the volume of the subject goods decreased relative to both the volume of domestic production and the volume of domestic consumption between 2006 and 2008, but increased in the first 10 months of 2009, in comparison to all of 2008.⁸

6. In addition, the OGVG accounts for 59 percent of known dedicated production area. Administrative Record, Vol. 1 at 51.

7. Administrative Record, Vol. 1 at 68, 341, Vol. 2 at 107. The import data were received from the CBSA and were derived from Statistics Canada information.

8. Administrative Record, Vol. 1 at 341, Vol. 2 at 88, 107.

21. The Tribunal found that import volumes from Mexico were sizeable throughout the period that it examined. However, it also noted the largely non-coincidental growing seasons of greenhouse bell peppers in Mexico on the one hand and in Canada and the Netherlands on the other. As discussed below, the role of greenhouse bell peppers from Mexico in the Canadian market and their impact on the injury sustained by the domestic industry would need to be addressed fully in the context of any inquiry under section 42 of *SIMA*.⁹

22. On the basis of the above, the Tribunal finds that the evidence discloses a reasonable indication that, in the first 10 months of 2009, the volume of imports of the subject goods increased significantly.

Effect on the Price of Like Goods

23. The OGVG submitted that the prices of the subject goods were consistently lower than the average prices of the like goods and had been in a continuous decline since 2006, resulting in the depression and suppression of the prices of the like goods.¹⁰ The EU Delegation submitted that the prices of imports of greenhouse bell peppers from Mexico had also decreased since 2007 and, in recent periods, were similar to the prices of the subject goods.

24. A comparison of the prices of the like goods to the prices of the subject goods shows evidence of price undercutting throughout the period examined by the Tribunal. In this regard, the gap between the prices of the subject goods and those of the like goods was greater than 5 percent in 2006 and the first 10 months of 2009 and less than 5 percent in 2007 and 2008.¹¹

25. On the issue of price depression, the Tribunal notes that the prices of the subject goods declined steadily from 2006 to 2008, decreasing by 7 percent over that period, with a further decline of more than 25 percent in the first 10 months of 2009 relative to the same period in 2008. The evidence on the record also shows that the price of the like goods decreased by approximately 10 percent between 2006 and 2008, with this trend continuing in the first 10 months of 2009.¹²

26. Turning to price suppression, the Tribunal notes that, between 2007 and the first 10 months of 2009, the prices of the like goods decreased by to greater extent than the domestic industry's average unit cost of production. The domestic industry experienced an increasing amount of loss per unit from 2007 to the first 10 months of 2009. The Tribunal further notes that the OGVG provided anecdotal invoice evidence that indicated that the delivered prices of the subject goods were lower than the domestic industry's average cost of production, including packaging costs.¹³

27. On the basis of the foregoing, the Tribunal finds that the evidence discloses a reasonable indication that the dumping of the subject goods has resulted in price undercutting, price depression and price suppression.

9. *Ibid.*, Vol. 1 at 68, 341, Vol. 2 at 107.

10. The Tribunal notes that the average prices of the like goods provided by the OGVG were based on "farm gate value", i.e. net amount paid to growers. The prices of the subject goods presented by the OGVG were derived from Statistics Canada data, which means that they should have been on a value-for-duty basis, i.e. excluding the cost of delivery from the point of direct shipment to Canada. However, other evidence on the record suggests that, in fact, these data include the cost of delivery to Canada, and it is on this basis that the Tribunal undertook its analysis.

11. Administrative Record, Vol. 1 at 341, Vol. 2 at 88.

12. *Ibid.*, Vol. 1 at 341, 346, Vol. 2 at 88, 107.

13. *Ibid.*, Vol. 2 at 24, 52, 65-70, 83, 88, 346.

Impact on the Domestic Industry

28. The OGVG claimed that the adverse price effects of the dumping of the subject goods resulted in negative financial consequences for the domestic industry, including lost sales and reductions in gross margin and profitability.

29. The Tribunal notes that the CBSA analyzed the effects that the dumping of the subject goods had on the revenues of the domestic industry. First, the CBSA considered the revenues forgone due to price depression by estimating what the domestic industry's revenues would have been if it had been able to maintain prices at 2006 levels. The CBSA found that the amount of injury caused by price depression increased in every year. This injury resulted from the growth in the Canadian market for greenhouse bell peppers while pricing continually decreased.¹⁴

30. The CBSA also estimated the financial losses that the domestic industry incurred between 2007 and the first 10 months of 2009 due to the price-suppressive effects of the subject goods. These resulted in a significant reduction of gross margin and profitability for the domestic industry.¹⁵

31. On the basis of the foregoing analysis, which the Tribunal has reviewed and accepts, the Tribunal is of the view that the evidence on the record of this preliminary injury inquiry provides a reasonable indication that the price effects of the dumping of the subject goods had a negative impact on the state of the domestic industry and caused injury to the domestic industry.

32. Although there was little in the way of evidence and submissions concerning the effect of the subject imports on other relevant industrial performance factors and indicators (such as capacity utilization, productivity, return on investment, cash flow, inventories, employment and wages), this does not negate the Tribunal's conclusion that the evidence provides a reasonable indication that the dumping of the subject goods has had a negative impact on the state of the domestic industry. The Tribunal will undertake a more detailed consideration of these other indicators as part of an inquiry pursuant to section 42 of *SIMA* on the basis of the additional information to be gathered as part of that process.

Other Factors

33. The EU Delegation submitted that the seasonal import cycles of greenhouse bell peppers from Mexico and the Netherlands would need to be analyzed in order to corroborate the OGVG's argument that the seasonal import cycle of greenhouse bell peppers from Mexico did not affect the domestic industry's performance. In this regard, the EU Delegation submitted that the significant volume of imports from Mexico sold at low prices in the Canadian market could be causing injury to the domestic industry.

34. On the basis of the available evidence in this preliminary injury inquiry, it does not appear to the Tribunal that imports of greenhouse bell peppers from Mexico have had injurious effects on the domestic industry. However, it is only in the context of an inquiry pursuant to section 42 of *SIMA* that the Tribunal will be in a position to fully probe this factor, as well as other factors that may have had an impact on the performance of the domestic industry, for example, its export sales.

14. *Ibid.*, Vol. 1 at 345-46.

15. *Ibid.* at 346.

CONCLUSION

35. On the basis of the foregoing analysis, the Tribunal finds that the evidence discloses a reasonable indication that the dumping of the subject goods has caused injury.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
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Member

Pasquale Michaele Saroli
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