Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2013-001

Silicon Metal

Determination issued
Friday, June 21, 2013

Reasons issued
Monday, July 8, 2013

Canada

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

SILICON METAL ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

PRELIMINARY DETERMINATION OF INJURY

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 silicon metal containing at least 96.00 percent but less than 99.99 percent silicon by weight, and silicon metal containing between 89.00 percent and 96.00 percent silicon by weight that contains aluminum greater than 0.20 percent by weight, of all forms and sizes, originating in or exported from the People's Republic of China, have caused injury or are threatening to cause injury to the domestic industry.

This preliminary injury inquiry follows the notification, on April 22, 2013, that the President of the Canada Border Services Agency had initiated investigations into the alleged injurious dumping and subsidizing 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 and subsidizing of the above-mentioned goods have caused injury or are threatening to cause injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Jason W. Downey
Jason W. Downey
Member

Dominique Laporte
Dominique Laporte
Secretary

The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

BACKGROUND

1. On April 22, 2013, following a complaint filed on March 1, 2013, by Québec Silicon Limited Partnership (QSLP) and its affiliate QSIP Canada ULC (QSIP Canada) (collectively, the complainants), the President of the Canada Border Services Agency (CBSA) initiated investigations into the alleged injurious dumping and subsidizing of silicon metal containing at least 96.00 percent but less than 99.99 percent silicon by weight, and silicon metal containing between 89.00 percent and 96.00 percent silicon by weight that contains aluminum greater than 0.20 percent by weight, of all forms and sizes, originating in or exported from the People's Republic of China (China) (the subject goods).

2. On April 23, 2013, the Canadian International Trade Tribunal (the Tribunal) issued a notice of commencement of preliminary injury inquiry.[1]

3. The complaint is opposed by Rio Tinto Alcan Inc. (RTA), an importer and end user of the subject goods.

4. On June 21, 2013, 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 and subsidizing of the subject goods had caused injury or were threatening to cause injury to the domestic industry.

CBSA'S DECISION TO INITIATE INVESTIGATIONS

5. In accordance with subsection 31(1) of *SIMA*, the CBSA was of the opinion 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, on April 22, 2013, the CBSA initiated investigations into the alleged dumping and subsidizing of the subject goods.

6. The CBSA's period of investigation with respect to the alleged dumping and subsidizing was from January 1 to December 31, 2012. The CBSA was of the view that the subject goods had been dumped, with an estimated overall margin of dumping of 28 percent, expressed as a percentage of the export price of the subject goods.[3] The CBSA was also of the view that the subject goods had been subsidized, with an estimated amount of subsidy equal to 19 percent of the export price of the subject goods.[4]

7. Further, the CBSA was of the opinion that the estimated overall margin of dumping and amount of subsidy were not insignificant and that the estimated volumes of dumped and subsidized goods were not negligible.[5]

1. C. Gaz. 2013.I.1112.
2. R.S.C. 1985, c. S-15 [*SIMA*].
3. Tribunal Exhibit PI-2013-001-05 at para. 55, Administrative Record, Vol. 1J.
4. *Ibid.* at para. 94.
5. *Ibid.* at paras. 58, 99.

SUBMISSIONS ON INJURY AND THREAT OF INJURY

Complainants

8. The complainants submitted that the dumping and subsidizing of the subject goods had caused injury. In support of their allegations, they provided evidence of increased volumes of the subject goods, loss of market share, lost sales, price undercutting, price depression, a reduction in employment, and a decline in revenue, gross margins and profits due to the dumping and subsidizing of the subject goods.

9. The complainants further submitted that the dumping and subsidizing of the subject goods threatened to cause injury. In this regard, they alleged that the subject goods dominate the Canadian market, that China has significant production capacity and capacity underutilization and that Chinese producers are export-oriented and filed evidence in support of their position. They also noted that silicon metal from China is subject to trade restrictions in the United States, the European Union and Australia and that China recently terminated a 15 percent export tax on silicon metal, thereby allowing traders to further reduce export prices. According to the complainants, this demonstrates the propensity of Chinese producers to engage in injurious dumping of the subject goods, thereby posing an imminent threat to the domestic industry, which is especially vulnerable due to its weakened financial condition.

Party Opposed to the Complaint

10. RTA submitted that there is no evidence before the Tribunal that establishes a reasonable indication that the dumping or subsidizing of the subject goods has caused injury or is threatening to cause injury.

11. In particular, RTA alleged that the complainants' evidence failed to establish:

- a deterioration in the financial results of QSLP, the sole domestic producer, on the basis of RTA's submission that the Tribunal should not rely upon the merged financial performance of QSLP and QSIP Canada, given that QSIP Canada is an end user or downstream consumer of silicon metal and, therefore, should not be considered part of the domestic industry in this preliminary injury inquiry;
- a base year or clear temporal point of departure to allow the Tribunal to conduct a comparative analysis of the evidence on the changes in the relevant injury factors;
- the specific timing of the alleged material injury; and
- a causal relationship between the alleged dumping and subsidizing of the subject goods and injury.

12. With respect to causation, RTA submitted that any injury suffered by the complainants was caused by other factors, such as the following: the market slowdown and global recession in 2009; the complainants' business decision to sell a large share of QSLP's production to Wacker Chemie AG (Wacker) of Germany[6] and to a related company, Dow Corning Canada, Inc., thereby limiting QSLP's ability to supply the domestic merchant market; the low profit margins realized by QSLP under the terms of the high-volume, long-term supply contract into which it entered with Wacker; the collapse of the polysilicon market into which the complainants' previous owner invested significant resources;[7] and the competition from non-subject goods.

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6. Tribunal Exhibit PI-2013-001-06.01, Administrative Record, Vol. 3 at 16, 19, 22-23, 27.
7. Silicon metal is used as an input in the production of polysilicon or solar-grade silicon.

13. RTA further submitted that there is no reasonable indication of threat of injury, alleging, *inter alia*, that the complainants did not provide positive evidence to support their submission that the excess capacity of Chinese producers will be used to capture a larger share of the Canadian market, and that the complainants will likely be in a better financial position and less vulnerable to injury in the near term, given recent changes in their corporate ownership. RTA also alleged that the anti-dumping orders against silicon metal from China in other jurisdictions have been in place since the early 1990s and, therefore, cannot be considered the cause of increased volumes of the subject goods in the Canadian market or as evidence of an imminent change in circumstances in the near future that poses a threat of injury.

ANALYSIS

Legislative Framework

14. 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."

15. In the present case, it is alleged that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury; retardation is not alleged.

16. 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 alleged injury, retardation or threat of injury to warrant investigation.[9] The Tribunal recently found that this test is passed where:

- the evidence is relevant, accurate and adequate; and
- in light of the evidence, the allegations stand up to a somewhat probing examination, even if the theory of the case might not seem convincing or compelling.[10]

17. 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*.[11] These include the import volumes of the dumped and subsidized goods, the effects of the dumped or subsidized goods on the price of like goods, the resulting economic impact of the dumped or subsidized goods on the

8. *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. *Unitized Wall Modules* (3 May 2013), PI-2012-006 (CITT) [*Unitized Wall Modules II*] at para. 24; *Liquid Dielectric Transformers* (22 June 2012), PI-2012-001 (CITT) at para. 86.
11. S.O.R./84-927 [*Regulations*].

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.[12]

18. 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."

19. Before examining the allegations of injury and threat of injury, the Tribunal must therefore identify the domestically produced goods that are like goods in relation to the subject goods and the domestic industry that produces those goods.

Like Goods and Classes of Goods

20. The CBSA has defined the subject goods as silicon metal having certain characteristics, including a specific content of silicon per weight, originating in or exported from China, and the Tribunal must conduct its preliminary injury inquiry on the basis of this product definition.

21. However, in assessing whether the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or threaten to cause injury to domestic producers of like goods, the Tribunal must examine whether the domestically produced silicon metal is like goods in relation to the subject goods and may also consider whether there is one or more classes of goods.

22. 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 characteristics of which closely resemble those of the other goods.

23. In determining the like goods and whether there is one or more classes of goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).[13]

24. The parties did not dispute that domestically produced silicon metal constitutes like goods in relation to the goods described in the CBSA's product definition. The parties also agreed that the subject goods and like goods comprise a single class of goods. The Tribunal further notes that there is no evidence on the record that would call into question the parties' statements on this issue or the CBSA's conclusions that domestically produced silicon metal and the subject goods are like goods and constitute only one class of goods.[14] To the contrary, the evidence indicates that silicon metal produced in Canada is substitutable for and competes directly with the subject goods.[15]

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12. It is not sufficient that dumping or subsidizing contribute to material injury to a domestic industry or to a threat of material injury. There must be evidence that discloses a reasonable indication that the dumping or subsidizing has caused, or is threatening to cause, material injury. See *Unitized Wall Modules II* at para. 23.
13. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.
14. Tribunal Exhibit PI-2013-001-05 at paras. 26, 27, Administrative Record, Vol. 1J.
15. *Ibid.* at para. 26.

25. Therefore, on the basis of the evidence on the record and upon consideration of the relevant factors, the Tribunal finds that domestically produced silicon metal, defined in the same manner as the subject goods, constitutes like goods in relation to the subject goods. The Tribunal further finds that the subject goods and like goods constitute a single class of goods.

Domestic Industry

26. The complainants, that is, the group of entities formed by QSLP and QSIP Canada, are presented as constituting the domestic industry for the purposes of this preliminary injury inquiry. In its decision to initiate the investigations, the CBSA indicated that the complainants accounted for all known domestic production of like goods.[16]

27. According to the evidence on the record, the relationship between QSLP and QSIP Canada and the manner in which they have organized the production and sales of silicon metal can be described as follows:

- QSLP is the sole Canadian producer of silicon metal;
- QSLP is 50.99 percent owned by QSIP Canada and 49 percent owned by Dow Corning Corporation (DCC), through its wholly owned subsidiary DC Global Holdings S.r.a.l. The remaining 0.01 percent is held by another related entity, Québec Silicon General Partnership Inc.;
- QSIP Canada, which is ultimately owned by Globe Specialty Metals Inc., operates QSLP's facility and, with two notable exceptions (discussed below), is responsible for the sale of QSLP's production either on the Canadian market or on export markets;
- pursuant to a supply agreement, sales of QSLP's production destined for one large export customer are made through another related company, QSIP Sales ULC, and do not pass through QSIP Canada;[17] and
- pursuant to a supply agreement, DCC is entitled to a significant share of QSLP's production,[18] and this allocation entitlement is purchased directly from QSLP and does not pass through QSIP Canada.

28. RTA submitted that QSIP Canada is not a producer, but rather a downstream consumer or end user of the like goods produced by QSLP and, therefore, should not be considered part of the domestic industry. On that basis, RTA alleged that any injury suffered by QSIP Canada does not provide evidence of injury to the domestic industry. It added that the Tribunal should not rely upon the merged financial results of QSLP and QSIP Canada as evidence of injury or threat of injury to the domestic industry. According to RTA, the Tribunal should rely solely upon the evidence relating to QSLP, and none of the data related to the operations and financial results of a downstream consumer of the like goods should be considered in this preliminary injury inquiry.

16. *Ibid.* at para. 28.
17. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 11-14, 25-26; Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 16-19, 30-31; Tribunal Exhibit PI-2013-001-06.01A, Administrative Record, Vol. 3 at 13-15. In the parties' public submissions, the complainants' large export customer has been identified as Wacker. See Tribunal Exhibit PI-2013-001-06.01, Administrative Record, Vol. 3 at 16, 19, 23, 27.
18. *Ibid.* at 26.

29. The complainants did not take issue with RTA's assertion that QSIP Canada is not, in itself, a domestic producer of like goods. Indeed, this assertion is consistent with the evidence on the record. It is argued however that QSLP and QSIP Canada are parts of a single corporate group and that the fact that the corporate group has organized its production and sales functions into different legal entities does not deprive the corporate group of its rights under *SIMA*.

30. The Tribunal has previously recognized that a domestic producer may be structured as a corporate group and that the fact that the group has organized its production and sales functions into different legal entities does not deprive the corporate group of its right to seek remedial trade measures under *SIMA*. In *Carbon Steel Welded Pipe*,[19] for example, the Tribunal held that Novamerican Steel Inc. (Novamerican), a parent company that did not produce standard welded pipe *per se*, was nonetheless a domestic producer of like goods on the basis of its ownership of separate legal entities, namely, Nova Steel Inc. and Nova Tube Inc. (Nova Tube), that operated facilities involved in the production of the like goods. In that case, the Tribunal determined that Novamerican was a domestic producer through its affiliates.[20]

31. Moreover, in rejecting an argument to exclude Nova Tube from the definition of the domestic industry, the Tribunal stated that ". . . Nova Tube is an entity that is integrated into the Novamerican group of companies and is responsible for the production of certain [carbon steel welded pipe], as well as for the sale and marketing of all [carbon steel welded pipe]."[21]

32. Similarly, QSLP and QSIP Canada are integrated into a single corporate group that is responsible for the domestic production and the sale of like goods, such that the group (i.e. the two companies considered together) constitutes the domestic industry. In this regard, it is the Tribunal's view that the domestic industry can in principle, and within the meaning ascribed to that term under subsection 2(1) of *SIMA*, be comprised of related entities respectively responsible for the production of like goods and their arm's-length sale at the first level of distribution in the marketplace. This understanding is in line with the concept of injury, which is to be measured not only in terms of production but also in terms of sales and overall financial performance.

33. Therefore, to the extent that companies or entities forming a related group are involved in activities associated with the production as well as the sale and marketing of the like goods, as in the present case, the group may legitimately be considered a domestic producer for the purpose of the definition of "domestic industry" in subsection 2(1) of *SIMA*. The identity of the companies or entities comprising such a group will of course depend on the circumstances of each case and, in particular, on the manner in which production and sales functions have been organized.

34. In this case, and on the basis of the foregoing, the Tribunal is satisfied that QSLP and QSIP Canada together constitute a corporate group which produces and makes arm's-length sales of the like goods at the first level of distribution in the marketplace. As such, the Tribunal finds that the complainants (i.e. QSLP and QSIP Canada considered together) constitute the domestic industry for the purposes of this preliminary injury inquiry.

35. The Tribunal notes however that the definition of the domestic industry and the determination as to whether there is a reasonable indication of injury must not be conflated. In this regard, the nature of the relationship between two or more entities that form the corporate group seeking relief under *SIMA* needs to

19. (11 December 2012), NQ-2012-003 (CITT).
20. *Ibid.* at paras. 44-47, 65.
21. *Ibid.* at para. 66.

be examined carefully in the context of the Tribunal's final injury analysis, as this relationship may affect how relevant production volumes, prices and financial results are presented and the manner in which they must be assessed.

36. In this case, the evidence indicates that the share of QSLP's production that passes through QSIP Canada represents a major proportion of the total domestic production of the like goods.[22] Therefore, for the purposes of determining whether there is a reasonable indication of injury, the Tribunal may examine the merged financial results and data of QSLP and QSIP Canada as evidence of injury or threat of injury.

37. That being said, the nature of the relationship between QSLP and QSIP Canada and with other entities that are part of their corporate group may merit further consideration during a final injury inquiry under section 42 of *SIMA*, should the CBSA make a preliminary determination of dumping or subsidizing. In that context, the Tribunal may explore in greater detail the issue of whether other entities integrated in the corporate group should be included in the definition of the domestic industry[23] and the impact that the relationship between all the related entities may have on the injury analysis.

Cross-cumulation

38. Given that this preliminary injury inquiry concerns investigations into the alleged injurious dumping and subsidizing of the subject goods, an issue that arises is whether the impact of the dumping should be assessed separately from the impact of the subsidizing. However, *SIMA* does not prohibit such "cross-cumulation". Moreover, it is the Tribunal's longstanding view that it is not realistically possible to isolate the effects caused by dumping from those caused by subsidizing, as they are too closely intertwined to reasonably allocate discrete portions to the dumping and to the subsidizing respectively.[24]

39. The Tribunal continues to hold this view and will therefore not differentiate any effect resulting from the dumping of the subject goods from any effect resulting from the subsidizing of the same goods for the purposes of its preliminary injury analysis.

Relevant Period for Analyzing the Injury and Threat of Injury Allegations

40. RTA submitted that the complainants have failed to pinpoint the specific timing of material injury in this case. It noted that various years are specified as being of importance in terms of when the domestic industry began to suffer injury. RTA further submitted that there exists an extremely long delay between the alleged time when the domestic industry claims to have first felt injury (2005) and the filing of the complaint in March 2013 and that the complainants have failed to establish a temporal baseline or benchmark for assessing injury. According to RTA, this means that the complaint does not support a finding of reasonable indication of injury because it does not clearly establish what prior years are to be examined.

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22. The evidence indicates that a major proportion of QSLP's production is sold through QSIP Canada. As a matter of law, the term "major" is construed as meaning "significant" rather than having the more precise mathematical sense of more than 50 percent. See *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A.). As previously noted, except for the sales to one export customer, QSIP Canada is responsible for the external sale either on the domestic merchant market or on export markets of the share of QSLP's production that is not allocated to DCC. Tribunal Exhibit PI-2013-001-06.01, Administrative Record, Vol. 3 at 26-27.
23. In this regard, the Tribunal notes that, according to the evidence, a share of QSLP's output destined for export markets is sold and marketed through another entity, QSIP Sales ULC.
24. See, for example, *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at paras. 75-77.

41. The complainants replied that there is nothing in *SIMA* that requires a temporal benchmark or base year. They also submitted that neither *SIMA* nor Tribunal jurisprudence provides that it is incumbent upon the complainants to specifically set the temporal baseline to be examined in a preliminary injury inquiry. In their view, it is well established that it is the Tribunal that has the discretion to choose its own period of inquiry. They further submitted that they provided detailed information on multiple injury factors to assess whether there is a reasonable indication of injury between 2010 and 2012.

42. The Tribunal finds that *SIMA* does not impose on complainants an obligation to establish that they suffered injury during a specific period of time. Moreover, *SIMA* does not provide that injury or threat of injury must necessarily be assessed by reference to a specific temporal benchmark or base year. What matters is that the evidence provided discloses a reasonable indication of injury or threat thereof. In this regard, it is for the Tribunal to decide the relevant period for its analysis, to weigh the evidence on the record bearing upon the relevant injury and threat of injury factors, and to assess the adequacy of the evidence on the record disclosing a reasonable indication of injury or threat thereof.

43. In this preliminary injury inquiry, the Tribunal finds that there is sufficient information on the record to assess whether the evidence discloses a reasonable indication of injury between 2010 and 2012. Therefore, the Tribunal will focus on this period in its analysis of the evidence on the record.

Volume of Dumped and Subsidized Goods

44. RTA submitted that the complainants did not address the issue of import volumes of the subject goods in sufficient detail. However, the complainants submitted evidence demonstrating that the volume of imports of the subject goods increased from 2010 to 2011, and decreased in 2012.[25] They attributed the 2012 decrease, in part, to a global decline in demand for silicon metal and an overall contraction of the Canadian market.[26]

45. Similarly, the import data compiled by the CBSA demonstrate that the volume of imports of the subject goods increased in absolute terms from 2010 to 2011, before declining in 2012.[27] Relative to the total imports on the Canadian market during the period from 2010 to 2012, the share held by the subject goods remained constant at 87 percent in 2010 and 2011, before decreasing to 71 percent or by 16 percentage points in 2012, due mainly to increases in the volume of imports from the United States and Brazil.[28] Notwithstanding the decline in 2012, the data demonstrate that, in absolute terms, the vast majority of imports that entered the Canadian market during the period from 2010 to 2012 originated in China.

46. A comparison of the volume of the subject goods relative to both the domestic production and consumption of like goods also shows an increase from 2010 to 2011, followed by a decrease in 2012.[29] However, when expressed as a percentage of domestic consumption, the fluctuations in the volume of

25. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5; Tribunal Exhibit PI-2013-001-08.01, Administrative Record, Vol. 3M at 15; Tribunal Exhibit PI-2013-001-09.01 (protected), Administrative Record, Vol. 4 at 15.
26. Tribunal Exhibit PI-2013-001-08.01, Administrative Record, Vol. 3M at 15-16; Tribunal Exhibit PI-2013-001-09.01 (protected), Administrative Record, Vol. 4 at 15-16.
27. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162.
28. Tribunal Exhibit PI-2013-001-05 at para. 36, Administrative Record, Vol. 1J.
29. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5, 158; Tribunal Exhibit PI-2013-001-09.01 (protected), Administrative Record, Vol. 4 at 15.

imports of the subject goods were far more significant, given the much lower volume of sales of domestically produced goods, which decreased in 2011 and remained low in 2012.[30]

47. Despite the decrease in the volume of the subject goods from 2011 to 2012, the Tribunal finds that there is sufficient evidence that discloses a reasonable indication that, from 2010 to 2011, the absolute volume of imports of the subject goods increased significantly and that the subject goods constituted a large proportion of total imports between 2010 and 2012. In addition, during this period, the volume of imports of the subject goods increased relative to both the volume of domestic production and the volume of domestic consumption of like goods. On balance, the Tribunal finds that the available data on the volume of the subject goods support the complainants' allegations of injury or threat of injury.

Effect on the Price of Like Goods

48. The complainants submitted that they have suffered injury in the form of price undercutting and price depression. Specifically, they stated that the subject goods were priced substantially below the like goods in 2010 and 2011, resulting in lost sales volume to imports from China and forcing the complainants to lower their prices in order to remain competitive.

49. RTA argued that it is unlikely that low-priced imports from China negatively affected the complainants' pricing, on the basis that a significant volume of domestic production was allocated to export sales; therefore, the alleged price depression could have impacted only a small percentage of total sales. RTA also submitted that the complainants' submission was deficient because it did not provide an analysis of the impact of their sales for export and/or imports from non-subject countries on the complainants' pricing or financial performance.

50. In reply, the complainants asserted that their export sales were relevant to their injury only insofar as they were the complainants' defensive response to the dumping and subsidizing of the subject goods.

51. The manner in which the Tribunal should assess the alleged injury to the domestic industry when a significant volume of the production of like goods is exported has been clearly addressed in previous cases.[31] Following this approach, the Tribunal will focus its injury analysis on the Canadian merchant market. However, the materiality of any reasonable indication of injury caused by the dumping and subsidizing will be assessed against the domestic industry's production of like goods as a whole in the "Materiality" section below. Accordingly, for the purposes of assessing the effect of the subject goods on the price of the like goods, the Tribunal will examine the evidence on the effect of the subject goods on the like goods destined for the Canadian merchant market.

52. In this regard, the Tribunal accepts that, as stated in the complaint, the like goods and the subject goods are fully interchangeable and that price, therefore, plays a fundamental role in the competition between Canadian and Chinese suppliers.[32] The evidence indicates that there is high degree of price transparency in the domestic merchant market for silicon metal, as consumers are generally willing to discuss prices with suppliers, and pricing information is publicly available through industry publications.[33]

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30. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5; Tribunal Exhibit PI-2013-001-09.01 (protected), Administrative Record, Vol. 4 at 15.
31. *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 13; see, also, *Re Refrigerators, Dishwashers and Dryers* (2002), CDA-USA 2000-1904-04 (Ch. 19 Panel) at 17-23.
32. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 127.
33. *Ibid*. at 127-28.

The evidence also indicates that relatively small differences in price may prompt consumers to switch suppliers.[34]

53. A review of the pricing evidence indicates that the average unit import price of the subject goods was below the complainants' average unit selling price of like goods in 2010 and 2011.[35] However, the Tribunal is cognizant of the fact that this price gap is likely overestimated, as the comparison is between values for duty and selling values. In 2012, the reverse was observed, with an increase in the average unit import price of the subject goods. As noted by the CBSA and submitted by the complainants, it is plausible that this increase was partly attributed to the inclusion of related-party transactions, which may have inflated the import prices,[36] therefore distorting the price gap.

54. In light of the limitations precluding an effective comparison of prices at the aggregate level, the Tribunal considered other pricing information on the record, such as certain specific injury allegations. The comparable data demonstrate that prices offered by suppliers of the subject goods were consistently and significantly below prices quoted by the complainants, notwithstanding the fact that the prices quoted by the complainants' were, with the exception of 2012, already below the prevailing market values.[37]

55. The Tribunal also considered the evidence provided in support of the complainants' allegations of price depression. The preliminary pricing data suggest that imports of the subject goods were exerting downward pressure on the complainants' own prices[38] and that the complainants were forced to discount their price in an effort to retain business.[39] Moreover, during the period from 2010 to 2012, the evidence on the record indicates that prices in the Canadian market were consistently below those in the U.S. market,[40] where Chinese products are subject to anti-dumping duties.[41]

56. Although the complainants did not specifically allege price suppression, their confidential financial data demonstrate a reasonable indication that prices of the subject goods may have prevented them from raising their prices. The Tribunal notes that, at the aggregate level, the complainants' cost of goods sold comprised a significant proportion of their total net sales value from 2010 to 2011, and even surpassed their total net sales value in 2012. At the unit level, the complainants managed to increase their net sales value and reduce their cost of goods sold from 2010 to 2011; however, it was done to the detriment of their volume of sales in the Canadian merchant market. In 2012, the complainants were not able to recover the substantial increase in their unit cost of goods sold and experienced a dramatic reduction in their unit net sales value.[42]

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34. *Ibid*. at 127, 139-40, 145; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 122, 134-35, 140.
35. Tribunal Exhibit PI-2013-001-08.01, Administrative Record, Vol. 3M at 18; Tribunal Exhibit PI-2013-001-09.01 (protected), Administrative Record, Vol. 4 at 18.
36. Tribunal Exhibit PI-2013-001-05 at para. 112, Administrative Record, Vol. 1J.
37. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 127-40; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 9-12.
38. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 127-40.
39. Tribunal Exhibit PI-2013-001-08.01, Administrative Record, Vol. 3M at 19.
40. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 132; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 127; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 89-90.
41. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 154-55.
42. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 156.

57. On the basis of the foregoing, the Tribunal finds that the evidence in this preliminary injury inquiry discloses a reasonable indication that the dumping and subsidizing of the subject goods have resulted in price undercutting, at least between 2010 and 2011, and price depression and price suppression from 2010 to 2012.

Impact on the State of the Domestic Industry

58. The complainants submitted that they have suffered injury as a result of the dumped and subsidized imports of the subject goods and provided evidence of lost market share, lost sales, declined production and capacity utilization rates, and reductions in revenue, profits and employment.

59. RTA did not dispute that the domestic industry has not performed well in recent years, but alleged that any injury suffered by the complainants was unrelated to the subject goods and was incurred as a result of a variety of other factors. The Tribunal will address these allegations in the "Other Factors" section.

60. As discussed below, the evidence indicates that the complainants' performance declined from 2010 to 2012 with respect to a number of injury indicators.

61. In particular, compared to 2010, the volume of Canadian market sales from domestic production decreased dramatically in 2011 and 2012. The complainants' share of the Canadian market fell by 6 percentage points from 2010 to 2011 and made only a marginal recovery of 1 percentage point in 2012. Comparatively, the volume of sales of imports of the subject goods increased in 2011 and decreased significantly in 2012. The Canadian market share of the subject goods increased by 5 percentage points from 2010 to 2011, but decreased by 16 percentage points in 2012. The Tribunal notes however that the decline in the sales of the subject goods in 2012 occurred in the context of a contracting market.[43]

62. With respect to the market share held by imports of silicon metal from non-subject countries, it grew steadily throughout the period from 2010 to 2012, for a net increase of 16 percentage points.[44] Other than China, the United States and Brazil were the only countries that exported commercially significant quantities of silicon metal to Canada from 2010 to 2012.[45]

63. The Tribunal notes that, in absolute terms, the volume of sales from domestic production and the volume of sales from imports from non-subject countries, in 2010, 2011 and 2012, were significantly below the volume of sales from imports of the subject goods, which clearly dominated the Canadian market with two thirds of the sales from 2010 to 2012.[46]

64. The evidence also indicates that the domestic production of like goods and the capacity utilization rate declined slightly and steadily throughout the period from 2010 to 2012[47] and that there were significant reductions in domestic sales of like goods at specific accounts. The Tribunal considered the evidence in

43. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5.
44. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5.
45. Tribunal Exhibit PI-2013-001-05 at para. 33, Administrative Record, Vol. 1J.
46. Tribunal Exhibit PI-2013-001-03.02 (protected), Administrative Record, Vol. 2D at 162; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 5.
47. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 146-47; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 158.

support of specific injury allegations and finds that the complainants lost a significant volume of sales at important accounts and, in some instances, even lost the entire account to the low-priced subject goods.[48]

65. A deterioration of the economic indicators discussed above adversely affected the complainants' employment and financial performance. The evidence on the record indicates that the complainants had to reduce their number of employees in 2012.[49] With respect to the complainants' financial performance, the evidence indicates that it deteriorated steadily from 2010 to 2012. The complainants incurred significant losses in 2010, 2011 and 2012, both at the aggregate level and at the unit level. Moreover, there was a steady decline in their total gross margins during the entire period. At the unit level, their gross margin improved from 2010 to 2011, but fell in 2012 to a level significantly below that observed in 2010.[50]

66. On balance, the Tribunal finds that the evidence on the record supports the complainants' allegations that there is a reasonable indication that the dumping and subsidizing of the subject goods have caused injury to the domestic industry in the form of lost sales, a decline in production and capacity utilization, and reductions in employment, revenues and gross margins.

Materiality

67. On the basis of the foregoing analysis, the Tribunal finds that the evidence is sufficient to disclose a reasonable indication of a direct causal relationship between the volume and domestic price effect of the subject goods and the negative performance of the domestic industry in the Canadian merchant market.

68. The next issue to be addressed is whether the injury suffered by the domestic industry in the domestic merchant market is sufficient to be considered "material" within the meaning of *SIMA*, having regard to the fact that a substantial proportion of the complainants' production is exported.[51]

69. This issue is relevant in that the subject goods do not compete with the domestic industry's exports, with such exports being generally insulated from the effects of the dumping and subsidizing. In other words, the question is whether any injury attributable to the effects of dumping and subsidizing in the Canadian merchant market, when assessed against the domestic industry's production of like goods as a whole (i.e. including the share of domestic production that is exported), is sufficient to be considered "material".

70. The Tribunal notes however that the complainants submitted that they have been forced, as a defensive strategy, to export increasing volumes in order to secure sales for their production in response to RTA's claim of the unlikelihood of the subject goods having caused material injury, given that they could only have affected a small proportion of total domestic production. The complainants provided evidence in support of their position.[52]

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48. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 132-45; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 127-40.
49. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 147; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 142.
50. Tribunal Exhibit PI-2013-001-02.01, Administrative Record, Vol. 1 at 146; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2 at 141; Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 156.
51. RTA estimated that a substantial proportion of the complainants' production is exported. The complainants did not challenge RTA's assertions in this regard. On that basis, and after having considered the information on the record concerning the complainants' export sales, the Tribunal finds that RTA's estimate of the volume of the complainants' export sales is reasonable.
52. Tribunal Exhibit PI-2013-001-03.01 (protected), Administrative Record, Vol. 2C at 150; Tribunal Exhibit PI-2013-001-08.01, Administrative Record, Vol. 3M at 14, 22.

71. The Tribunal cannot, on the basis of the evidence at this early stage, rule out the possibility that it was the availability and prices of the subject goods on the domestic merchant market that forced the complainants, by way of defensive strategy, to turn to export markets, or accept RTA's contention that the subject goods could only have adversely affected a small proportion of the total domestic production. These issues will however warrant closer examination during the final injury inquiry, should the CBSA make a preliminary determination of dumping and/or subsidizing.

72. In summary, the evidence on the reasons underlying the complainants' significant export sales stands up to a somewhat probing examination, in that it indicates that the allocation of the complainants' sales between the domestic and export markets is the likely consequence of the dominance of the subject goods in the Canadian merchant market. In these circumstances, the Tribunal finds that the evidence provides a reasonable indication that the extent of the injury suffered by the domestic industry in the Canadian merchant market is sufficient to be material even when considered in relation to the domestic production as a whole.

73. Accordingly, the Tribunal finds that the evidence adduced in support of the complaint, in particular in respect of the impact of the subject goods on the complainants' prices and overall performance in the Canadian merchant market, is sufficient to disclose a reasonable indication that the dumping and subsidizing of the subject goods have caused material injury to the domestic industry.

Other Factors

74. RTA argued that any injury suffered by the complainants was caused by factors other than the dumping and subsidizing of the subject goods. These alleged factors included, *inter alia*, the following: a slowdown in the Canadian market for silicon metal due to the global recession in 2009; the complainants' business decision to commit to sales of large shares of their production to DCC and to export customers (i.e. under a long-term supply contract with Wacker in Germany), thereby limiting their ability to supply the domestic merchant market; the complainants' self-inflicted realization of low profit margins under the high-volume long-term supply contract with Wacker; the collapse of the polysilicon market into which the complainants' previous owner invested significant resources; and the competition from non-subject goods.

75. The complainants replied that, while other factors may have contributed to their lower production and sales, these factors do not negate the causality between the dumping and subsidizing of the subject goods and the injury suffered by the complainants. The complainants argued that a definitive determination on causation is a question for a final injury inquiry under section 42 of *SIMA* and that a reasonable indication of causation is all that is required at the preliminary injury inquiry stage.

76. For the purposes of this preliminary injury inquiry, the Tribunal finds that the evidence on the record regarding the impact that other factors might have had on the domestic industry is insufficient to negate the Tribunal's conclusion that the overall evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused material injury.

77. Although the other factors raised by RTA may have had an adverse impact on the domestic industry and thereby may have contributed to the injury suffered by the domestic industry, the Tribunal notes that *SIMA* does not require that the dumping and the subsidizing of the subject goods be the only cause of injury. What matters is that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury, that is, the dumping and subsidizing of the subject goods must constitute *a cause* of material injury or threat of injury.

78. In light of the above, the Tribunal is not persuaded that the other factors raised by RTA constituted the only causes of the said injury, such that it could be concluded that the dumping and subsidizing of the subject goods did not constitute a cause of material injury. Thus, RTA's allegations and supporting evidence are insufficient to sever the reasonable indication of a causal link between the dumping and subsidizing of the subject goods and the injury to the domestic industry which, in the Tribunal's view, is disclosed by an analysis of the totality of the evidence on the record. It is only in the context of a final injury inquiry under section 42 of *SIMA* that the Tribunal will be in a position to fully probe the impact of other factors and their relative importance.

Threat of Injury

79. Turning to the issue of threat of injury, the complainants' evidence focused on the data concerning projected production and production capacity in China, the market conditions in China, the high inventories of silicon metal, the removal of a Chinese export tax that previously applied to exports of silicon metal and the current vulnerability of the domestic industry. RTA disputed these allegations and submitted that they were speculative and not supported by cogent evidence.

80. On balance, however, considering that the "reasonable indication" standard that applies in a preliminary injury inquiry is lower than the evidentiary threshold that applies in a final injury inquiry under section 42 of *SIMA*, the Tribunal finds that the complainants' allegations are supported by relevant evidence and stand up to a somewhat probing examination, even if, at this stage, their theory of the case might not seem convincing or compelling.

81. Accordingly, the Tribunal concludes that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods are threatening to cause injury.

CONCLUSION

82. The Tribunal therefore determines that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Jason W. Downey
Jason W. Downey
Member