Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2012-001

Liquid Dielectric Transformers

Determination issued
Friday, June 22, 2012

Reasons issued
Monday, July 9, 2012

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:

LIQUID DIELECTRIC TRANSFORMERS ORIGINATING IN OR EXPORTED FROM THE REPUBLIC OF KOREA

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 of liquid dielectric transformers having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes), whether assembled or unassembled, complete or incomplete, originating in or exported from the Republic of Korea has caused injury or retardation or is threatening to cause injury.

This preliminary injury inquiry follows the notification, on April 23, 2012, 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 or is threatening to cause injury (Member Downey dissenting).

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

Dissenting
Jason W. Downey
Member

Gillian Burnett
Gillian Burnett
Acting Secretary

The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

BACKGROUND

1. On April 23, 2012, following a complaint filed on March 2, 2012, by ABB, Inc. (ABB) and CG Power Systems Canada Inc. (CG), the President of the Canada Border Services Agency (CBSA) initiated an investigation into the alleged injurious dumping of liquid dielectric transformers having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes [MVA]), whether assembled or unassembled, complete or incomplete, originating in or exported from the Republic of Korea (Korea) (the subject goods).

2. On April 24, 2012, the Canadian International Trade Tribunal (the Tribunal) issued a notice of commencement of preliminary injury inquiry.

3. The complaint is opposed by Hyundai Heavy Industries Co., Ltd. (Hyundai), an exporter, as well as Hyosung Corporation (Hyosung), an exporter, and its U.S. subsidiary, HICO America Inc. (HICO).

4. On June 22, 2012, pursuant to subsection 37.1(1) of the *Special Import Measures Act*,[1] the Tribunal determined that there was evidence that disclosed a reasonable indication that the dumping of the subject goods had caused injury or was threatening to cause injury (Member Downey dissenting).

CBSA'S DECISION TO INITIATE INVESTIGATION

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, as well as evidence that disclosed a reasonable indication that the dumping had caused injury and was threatening to cause injury. Accordingly, the CBSA initiated an investigation on April 23, 2012.

6. The CBSA's period of investigation (POI) with respect to the alleged dumping was from October 1, 2010, to March 31, 2012. The CBSA was of the view that the subject goods had been dumped, with an estimated overall weighted average margin of dumping of 34.6 percent, expressed as a percentage of the export price.[2]

7. Further, the CBSA was of the opinion that the estimated overall weighted average margin of dumping was not insignificant and that the estimated volumes of dumped goods were not negligible.[3]

SUBMISSIONS ON INJURY

Complainants

8. ABB and CG submitted that the dumping of the subject goods had caused injury. In support of their allegations, they provided evidence of increased volumes of the subject goods, price undercutting, price depression, price suppression, lost sales, a reduction in employment and declines in revenue, gross margins and profit due to the dumping of the subject goods.

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1. R.S.C. 1985, c. S-15 [*SIMA*].
2. Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 224.
3. *Ibid.*

9. ABB and CG further submitted that the dumping of the subject goods was threatening to cause injury. In this regard, ABB and CG made reference to the affirmative preliminary determination of the U.S. Department of Commerce on February 10, 2012, concerning large power transformers originating in or exported from Korea.[4] Moreover, the U.S. Department of Commerce found dumping margins of 21.79 percent and 38.08 percent for Hyundai and HICO respectively. According to ABB and CG, this demonstrates that Korean exporters have a propensity to engage in injurious dumping.

Parties Opposed to the Complaint

10. Hyundai, Hyosung and HICO submitted that ABB and CG failed to provide sufficient evidence to disclose a reasonable indication that the alleged dumping has caused injury or is threatening to cause injury.

11. Hyosung and HICO further submitted that any injury suffered by ABB and CG is due primarily to their high prices. Moreover, Hyosung and HICO noted that non-price factors, such as quality, timeliness, ability to meet customer specifications, after-sale concerns in relation to the like goods that they produce, intra-industry competition and competition from non-subject exporters, have been detrimental to ABB's and CG's financial performances.

ANALYSIS

Legislative Framework

12. 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 there is evidence that discloses a reasonable indication that the alleged dumping of the subject goods has caused injury or retardation or is threatening to cause injury.

13. In making its determination, the Tribunal takes into account the factors prescribed in section 37.1 of the *Special Import Measures Regulations*.[5]

14. The "reasonable indication" standard is lower than the evidentiary threshold that applies in injury inquiries under section 42 of *SIMA*.[6] That is, the evidence in question need not be "... conclusive, or probative on a balance of probabilities ...."[7] Nevertheless, simple assertions are not sufficient and must be supported by relevant evidence.[8]

15. In the present case, it is alleged that the dumping has caused injury or is threatening to cause injury; there is no allegation of retardation.

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4. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 93-94.
5. S.O.R./84-927 [*Regulations*].
6. *Certain Grain Corn* (10 October 2000), PI-2000-001 (CITT) [*Grain Corn*] at 4-5.
7. *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD).
8. The Tribunal notes that 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*] requires an investigating authority to examine the accuracy and adequacy of the evidence provided in a dumping 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 case and not to consider unsubstantiated assertions as sufficient evidence.

16. However, before examining the allegations of injury and threat of injury, the Tribunal must identify the domestically produced goods that are like goods in relation to the subject goods and the domestic industry that produces those goods. This preliminary analysis is required because subsection 2(1) of *SIMA* defines "injury" as "material injury to a domestic industry" and "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 . . . ."

Like Goods and Class of Goods

17. In assessing whether the evidence discloses a reasonable indication that the dumping of the subject goods has caused injury or is threatening to cause injury to the domestic producers of like goods, the Tribunal must define the scope of the like goods in relation to the subject goods and may consider whether the subject goods constitute one or more classes of goods.

18. 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.

19. In deciding the issues of like goods and 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).[9]

20. The goods that are the subject of this preliminary injury inquiry are defined as liquid dielectric transformers having a top power handling capacity equal to or exceeding 60 MVAs, whether assembled or unassembled, complete or incomplete.[10]

21. ABB and CG submitted that power transformers with a top power handling capacity of 60 MVAs or greater represent a single class of goods despite the fact that, within that single class of goods, there are a number of customizable features or product characteristics which can be obtained to correspond to specific customer criteria.[11] They also submitted that power transformers with a top power handling capacity of 60 MVAs or greater produced in Canada are like goods in relation to the subject goods because they compete directly with the subject goods, have the same end uses as the subject goods (i.e. transforming voltages from one level to another), are produced using substantially the same raw materials and production process as the subject goods, possess the same basic characteristics (i.e. core, windings, tank and cooling system) and are completely substitutable for the subject goods, given the same design specifications.[12]

22. Hyosung and HICO have not expressed a view with respect to like goods or separate classes of goods except to state that, because power transformers are custom-built, they are not fungible.[13] Similarly, Hyundai submitted that, at this point, it takes the position that the subject goods comprise a single class of

9. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.
10. Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 214.
11. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 33-34.
12. *Ibid.* at 41-42.
13. Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 5.

goods, although it reserves the right to alter course in the event of a final injury inquiry.[14] Hyundai also took the position that there are no goods produced in Canada that are like goods to the subject goods, other than those identified by the CBSA.[15]

23. The evidence discloses that, whereas power transformers with a top power handling capacity lower than 60 MVAs are used to distribute lower voltages of electricity to homes or clusters of homes or to businesses below the secondary substation level, power transformers with a top power handling capacity of 60 MVAs or greater are used to step up or step down higher voltages at the substation level or to transmit these higher voltages across long distances.[16] On this fundamental basis, the Tribunal is satisfied that the smaller transformers are not like goods to power transformers with a top power handling capacity of 60 MVAs or greater.[17] Indeed, the Tribunal notes that it has previously recognized that there are different types of power transformers that perform distinct functions during the separate phases of electricity transmission and distribution.[18]

24. Among the power transformers with a top power handling capacity of at least 60 MVAs, there is a great deal of variation in light of the fact that they are built to customer specifications. However, regardless of custom specifications, these goods share certain physical characteristics: they are constructed with the same basic raw materials, including electrical steel, tank steel plate, copper and insulation material,[19] and they have at least one active part where electromagnetic induction occurs, consisting of a silicone steel core, insulated copper conductor winding, electrical insulation, an internal assembly, metal tank and cooling system.[20] ABB and CG also referred to the fact that the goods are manufactured on the same equipment by the same employees.[21] Furthermore, the subject goods share certain market characteristics: they are typically sold through the same channels of distribution to electrical utilities or large industrial customers on a procurement bidding basis, and they are sold at prices along a continuum reflective of their relative size, raw material content and complexity, regardless of the customization required.[22] In addition, as already discussed, the subject goods have the same end use, i.e. to step up or step down high voltages at the substation level or to transmit high voltages across long distances.

25. It is noteworthy that, in a recent preliminary injury inquiry, the United States International Trade Commission (USITC) found that power transformers with a top power handling capacity of 60 MVAs or greater constitute a continuum of products with certain common physical characteristics, uses, distribution channels, manufacturing facilities, production processes, employees and possibly common producer and customer perceptions, even though they are custom-built and come in a wide variety of sizes and configurations and, as such, are not interchangeable with each other.[23] On this basis, the USITC determined that power transformers with a top power handling capacity greater than or equal to 60 MVAs constituted a single domestic like product within the scope of that investigation.[24]

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14. Tribunal Exhibit PI-2012-001-06.01, Administrative Record, Vol. 3 at 2.
15. *Ibid.*
16. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 44-45; Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 218.
17. See *Large Power Transformers from Korea* (September 2011), 731-TA-1189 (Preliminary) (USITC) [*USITC Preliminary Investigation*] at 7.
18. *Hydro-Québec v. M.N.R.* (20 December 1991), 2374 (CITT).
19. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 43.
20. *Ibid.* at 32-35.
21. *Ibid.* at 43.
22. Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 220; Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 43-44.
23. *USITC Preliminary Investigation* at 5-7.
24. *Ibid.* at 7.

26. Moreover, the Tribunal is convinced that subdividing power transformers with a top power handling capacity of 60 MVAs or greater into separate classes of goods on the basis of their customized features would be both arbitrary and impractical for the purposes of carrying out its mandate in this case.

27. Based on these considerations, the Tribunal is satisfied that there is a single class of goods consisting of power transformers with a top power handling capacity of 60 MVAs or greater. The Tribunal also accepts, on the basis of the uncontroverted submissions of ABB and CG in this regard,[25] that domestically produced power transformers with a top power handling capacity of 60 MVAs or greater are like goods in relation to the subject goods.

Domestic Industry

28. ABB and CG submitted that their collective production of like goods constituted a major proportion of the total domestic production of like goods on the basis that they represented a significant portion of the total domestic production of like goods in 2011, with the balance produced by Alstom Grid Canada Inc. (Alstom).[26]

29. Whereas Hyosung and HICO did not take issue with this claim, Hyundai pointed out that ABB and CG had not filed any evidence to substantiate their estimate of Alstom's share of the total domestic production and argued that, therefore, the Tribunal could not be satisfied that ABB and CG accounted for a major proportion of the total domestic production.[27] In fact, Hyundai went as far as to suggest that ABB and CG may not have had standing to file a properly documented complaint.[28] Hyundai also took the position that the domestic industry included other domestic producers, such as ". . . private engineering companies that design, supply, and install [power transformers] as well as sub-contractors that act of behalf of Canadian purchasers and/or producers to finish or assemble . . ." power transformers.[29]

30. However, the Tribunal is satisfied that ABB and CG represent the "domestic industry". Even if, *arguendo*, ABB and CG were significantly underestimating Alstom's share of domestic production of the like goods, it is clear that these three companies constitute the domestic industry of like goods,[30] and it appears that the collective share of ABB and CG would be sufficient to constitute a major proportion for the purposes of the present proceedings. Moreover, there is no evidence on the record that supports the existence of other "domestic producers" of the like goods or which demonstrates that these firms to which Hyundai referred in the abstract are not just subcontractors or other service providers to whom the design, installation and maintenance of like goods is outsourced by ABB, CG or Alstom.[31] Further, the major proportion requirement ought not to be conflated, as Hyundai appears to have done, with the separate requirement for standing to file a complaint with the CBSA under section 31 of *SIMA*.[32] The Tribunal does not have authority in relation to the latter, which falls within the ambit of the CBSA's statutory responsibilities under *SIMA*. Therefore, the Tribunal must examine whether the evidence discloses a

25. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 41-42.
26. *Ibid.* at 50; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 40.
27. Tribunal Exhibit PI-2012-06.01, Administrative Record, Vol. 3 at 4.
28. *Ibid.* at 5.
29. *Ibid.* at 4.
30. Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 218.
31. *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 141.
32. Tribunal Exhibit PI-2012-08.01, Administrative Record, Vol. 3 at 21; Tribunal Exhibit PI-2012-09.01 (protected), Administrative Record, Vol. 4 at 21.

reasonable indication that the dumping of the subject goods has caused or is threatening to cause material injury to the domestic production of power transformers with a top power handling capacity of 60 MVAs or greater.

Capital Goods

31. Power transformers are large capital goods, which raises unique challenges in the analysis of injury and threat of injury. Since production is typically marked by high fixed expenses, producers try to optimize plant loading, the disruption of which can be particularly costly.[33] Also, because the goods are custom-designed, have high unit costs and are ordered relatively infrequently, the loss of a single order can have severe and long-lasting injurious effects on a domestic producer.[34] In addition, given that there tends to be a very long time delay between an order and delivery, it is conceivable that the price effects of the alleged dumping and the resultant impact on the domestic industry may materialize before any significant increase in the import volumes of dumped goods.[35]

32. ABB and CG submitted that, because of this time lag, some of the injurious effects stemming from dumping and lost sales during the POI may not be experienced until afterwards and that, therefore, it would be appropriate to take their financial projections into account for the purposes of determining whether the dumping has caused injury.[36] A determination that dumping "has caused" material injury must, by definition, be based on injurious effects that crystalized (i.e. became manifest) during the POI. Arguably, any foreseeably imminent injury to ABB and CG attributable to the dumping of the subject goods would support a determination that the dumping is *threatening* to cause material injury. However, the Tribunal does not need to expound more fully on this issue at this phase of the proceedings, as it is sufficient that the evidence discloses a reasonable indication that the alleged dumping is causing or threatening to cause material injury.

Targeted Dumping

33. ABB and CG have alleged targeted dumping, i.e. that there are significant variations in the prices of the subject goods among purchasers, regions or time periods. The CBSA has indicated that it will gather data to examine whether targeted dumping has occurred.[37]

34. HICO and Hyosung have asked the Tribunal to direct ABB and CG to specify the purchasers, regions or time periods that have been affected by the alleged targeted dumping and to direct the CBSA to collect and break out the data per factor that must be taken into account when analyzing whether targeted dumping has occurred. HICO and Hyosung claim that the exporters will not know the case that they must meet without such a breakdown.[38] The Tribunal simply notes that, under *SIMA*, the CBSA has exclusive responsibility for determinations of dumping, including the calculation of dumping margins in targeted

33. *Electric Generators* (14 July 1983), ADT-8-83 (ADT) at 13-14.
34. Klaus Stegemann, "Special Import Measures Legislation: Deterring Dumping of Capital Goods", *Canadian Public Policy*, 4 (Autumn) (1982) at 575; *Hydraulic Turbines* (27 July 1976), ADT-4B-76 (ADT) at 6.
35. *Hydraulic Turbines* (19 June 1990) RR-89-004 (CITT) [*Hydraulic Turbines*] at 18.
36. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 53-54.
37. Tribunal Exhibit PI-2012-001-05, Administrative Record, Vol. 1B at 227.
38. Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 11.

dumping situations.[39] That said, the Tribunal is confident, however, that any such finding will be duly explained and substantiated, in accordance with basic fairness.

Volume of Dumped Goods

35. ABB and CG submitted that imports of the subject goods increased steadily from 2006 to 2011 and represent the largest source of imports in the Canadian market. Moreover, ABB and CG submitted that the subject goods increased from an estimated $4.4 million in 2007 to $64.5 million in 2010.[40]

36. Hyundai submitted that, due to the time lag between the date of the sales order and the date of importation, historical import data do not necessarily correlate to sales orders and injury that occurred during the same time frame. In other words, the increased volume of imports between 2006 and 2010 may reflect orders that occurred several years prior to the date of importation.[41]

37. Furthermore, Hyosung and HICO submitted that the CBSA's decision to exclude all imported transformers that fall below a unit value threshold of $350,000 is erroneous, given the probability that transformers below 60 MVAs could be at or above the established unit value threshold.[42]

38. From 2009 to 2010, imports of the subject goods increased significantly, along with, but to a lesser extent than, sales from domestic production, which reflected an overall increase in the domestic market. This increase was to be short-lived, given the dramatic decrease in the market in 2011, when both sales from domestic production and sales of the subject goods plummeted. However, both still managed to maintain their market shares, with each only experiencing a slight loss.

39. The Tribunal is of the view that the evidence on the record is reasonably indicative of a significant increase in imports of the subject goods from 2009 to 2010. Even with the decline in 2011, the subject goods managed to maintain a significant share of the Canadian market.

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39. In international law, the basis for calculating margins in targeted dumping situations resides in Article 2.4.2 of the WTO *Anti-dumping Agreement*, which provides as follows: ". . . the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. *A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison*" [emphasis added]. Article 2.4.2 of the WTO *Anti-dumping Agreement* is given effect in Canadian domestic law by subsection 30.2(2) of *SIMA*, which provides as follows: "The [CBSA] may determine the margin of dumping in relation to any goods of a particular exporter to be the weighted average of the margins of dumping in relation to the goods of that exporter that are sold in any individual sales of goods of that exporter that the [CBSA] considers relevant *if, in the opinion of the [CBSA], there are significant variations in the prices of goods of that exporter among purchasers, regions in Canada or time periods*" [emphasis added]. Given the bifurcation of responsibilities under *SIMA* and the arms-length relationship maintained between the CBSA and the Tribunal in relation to their respective responsibilities, it is not for the Tribunal, as a matter of law, to direct the CBSA on how to calculate margins in situations of alleged targeted dumping.
40. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 71, 87.
41. Tribunal Exhibit PI-2012-001-6.01, Administrative Record, Vol. 3 at 8-9.
42. Tribunal Exhibit PI-2012-001-6.02, Administrative Record, Vol. 3 at 12.

40. While, since 2009, the volume of the subject goods has declined both in absolute terms and as a percentage of domestic production and domestic consumption, the Tribunal notes that, with respect to such capital goods, there is a time lag between contract award and final delivery. The Tribunal also notes that many of the alleged lost sales would not have resulted in the importation of the corresponding volumes of the subject goods.

41. In addition, the evidence reasonably indicates the possibility of a significant increase in the import volumes of the subject goods in the near future. In this regard, Hyundai has an estimated rate of capacity utilization of 83 to 85 percent with an annual production capacity of 120,000 MVAs, which would be more than enough to supply the entire Canadian market.[43] In addition, Hyosung has expanded its production capacity by an amount between 30,000 to 34,000 MVAs.[44] ABB and CG noted that Hyundai has announced plans to attempt to capture 50 percent of the North American market.[45] Hyundai submitted that its claim of being the number one supplier in North America was made in the context of its recent award of a $600 million contract for the supply of transformers to Southern California Edison in the United States and did not relate to the Canadian market.[46] In the same vein, Hyosung submitted that Canada represents a very small part of its global business activity in relation to power transformers.[47] Given, however, the evidence on Korean production capacity and considering the current trade remedy action in the United States against power transformers from Korea, the Tribunal is of the view that there is a significant foreseeable risk of Korean power transformers which would have been destined for the U.S. market being diverted to Canada. This risk is made all the more real by the nature of the demand for such capital goods and the disproportionately larger size of the U.S. market relative to that of Canada. While the Tribunal is satisfied that it is working with the best information reasonably available at this early stage in the inquiry process, the fact that the size of power transformers can greatly impact the time and resources that are required to produce them raises an issue as to whether measuring volume in terms of units might be misleading and skew comparisons. In this respect, it might therefore be more appropriate to measure the volume of power transformers in terms of MVAs, which reflect the amount of electrical energy being transformed in the electrical circuit. Accordingly, when collecting data for the inquiry stage, under section 42 of *SIMA*, the Tribunal will examine whether data should also be measured on the basis of MVAs as a means of expressing key indicators, such as production, capacity and volume. The Tribunal understands that this approach would be consistent with industry practice.[48] In this regard, the Tribunal notes that, in *Hydraulic Turbines*, a previous capital goods case, it was noted that "[m]arket demand for turbines and generators is typically measured in terms of [megawatt] additions to existing hydrogeneration capacity."[49]

Effect on the Price of Like Goods

42. ABB and CG submitted that power transformers are purchased primarily by way of competitive tender in open procurement processes where price is not only a key factor but also, in many cases, the most important factor distinguishing one bid from another. Moreover, ABB and CG stated that the effects of the

43. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 90-91; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 90-91.
44. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 87, 91; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 87, 91; Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 13.
45. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 90.
46. Tribunal Exhibit PI-2012-001-06.01, Administrative Record, Vol. 3 at 22.
47. Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 13.
48. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 30.
49. *Hydraulic Turbines* at 18.

subject goods on the prices of ABB's and CG's power transformers are readily apparent, given the price sensitivity associated with the procurement processes of Canadian utilities and other purchasers of power transformers.[50]

43. ABB and CG submitted that price competition occurs when an order is quoted and not at the time of delivery. Consequently, prices in a given year can affect the earnings of a producer one or two years later, and possibly even longer in the case of blanket requests.[51]

44. ABB and CG submitted that they have experienced underbidding in relation to the subject goods by margins as high as 40 percent on major Canadian procurements, particularly since 2009. In fact, ABB and CG cited specific instances where each faced the difficult choice of either losing the contract or lowering the price quoted in its own bid, in order to sustain volume and plant throughput. In the Tribunal's view, these examples provide a reasonable indication of price undercutting of like goods.[52]

45. Furthermore, ABB and CG submitted that they experienced significant price suppression, as demonstrated by the decrease in their gross percentage margins for power transformer sales in Canada from 2010 to 2012. ABB and CG claimed that the projected results were directly attributable to them being forced to sell transformers at depressed prices in order to meet the aggressive, low-price bidding of the subject goods in the Canadian market.[53]

46. Hyundai, Hyosung and HICO argued that ABB and CG did not present any credible evidence of the alleged "aggressive" pricing of the subject goods, arguing that the estimates of Korean pricing were unsubstantiated. Furthermore, Hyundai, Hyosung and HICO submitted that price is often not the driving factor in the purchasing decisions of power transformer purchasers in Canada. They submitted that a variety of factors plays an important role, such as, but not limited to, delivery, design, quality assurance, proven track record and after-sales servicing.[54]

47. The Tribunal is of the view that the deterioration of the domestic industry's gross margins is indicative of price depression suffered by the domestic industry. In particular, ABB and CG experienced a substantial decline in consolidated gross margins in 2011 and 2012. While consolidated gross margins, expressed as a percentage of net sales value, remained stable throughout 2009 to 2011, they are projected to decrease drastically in 2012. The Tribunal accepts, for the purpose of the preliminary injury inquiry, the

50. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 72-73; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 62-63.
51. A blanket request occurs when a customer puts out a request for a proposal covering its power transformer needs for a defined period of time, usually three to five years. A blanket request may specify the precise quantities each year, it may specify the precise quantities for a particular year with non-binding forecasts for additional years, or it may simply provide non-binding forecasts for every year under the blanket.
52. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 73; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 63, 69-75.
53. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 73; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 63.
54. Tribunal Exhibit PI-2012-001-06.01, Administrative Record, Vol. 3 at 12-13, 15-16; Tribunal Exhibit PI-2012-001-07.01 (protected), Administrative Record, Vol. 4 at 12-13, 15-16; Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 6-7.

projections provided by ABB and CG for 2012.[55] These data are consistent with ABB's and CG's allegations that they had no option but to sell transformers at depressed prices in order to meet the aggressive, low-priced subject goods in the Canadian market.[56]

48. The Tribunal is of the further view that the decline in the domestic industry's net income before taxes is also indicative of price depression and consistent with the deterioration of its gross margins. The evidence on the record supports the allegation put forth by ABB and CG that price depression has negatively impacted their net profit margins. The net income for the domestic industry increased from 2009 to 2010; however, this increase was short-lived, given the sharp decrease in 2011 and 2012. Moreover, the consolidated net income expressed as a percentage of net sales value was stable in 2009 and 2010, then decreased slightly in 2011, and is projected to decrease significantly in 2012.[57] The Tribunal accepts, for the purpose of the preliminary injury inquiry, the projections provided by ABB and CG for 2012 for reasons already explained.[58]

49. There is also evidence that ABB and CG lost accounts and sales due to price undercutting by suppliers of the subject goods. This evidence includes examples of price undercutting by the subject goods on specific contracts, including blanket sourcing opportunities. There also appears to be evidence of a loss of major supplier status to a producer of the subject goods on one account.[59] Moreover, lost blanket bids play a key role in the domestic industry's performance, given the significant quantities that they represent over an extended period of time. In this regard, the Tribunal finds that a sufficient volume of the alleged lost sales has been sufficiently substantiated, taking into account the evidentiary threshold that applies in this preliminary injury inquiry. Further, the Korean exporters have not seized upon the opportunity to rebut the evidence, which the Tribunal infers to be largely accurate.

50. At the final injury inquiry stage, under section 42 of *SIMA*, the evidence surrounding lost accounts and sales will be investigated further, with particular attention being placed on the relative importance of price, the specific circumstances of the transactions and other considerations which the Tribunal considers relevant.

51. 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 and price depression. Moreover, the prospect of a U.S. trade remedy measure on Korean transformers gives rise to the likelihood of the subject goods exerting a significant price-depressing effect on the price of the like goods in the near future.

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55. The Tribunal considers these projections reliable, given that, as was noted in *Hydraulic Turbines*, (i) in the case of capital goods, unlike consumer goods, there are long lags between contract awards, production and delivery, and (ii) most producers record sales at the time of delivery, although progress payments are usually received during the time of fabrication. Moreover, projections are reliable insofar as they relate to sales revenues on contracts awarded earlier in the POI.
56. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 73; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 63.
57. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 73; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 63.
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59. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 79-86; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 69-76.

Impact on the Domestic Industry

52. ABB and CG submitted that the dumping of the subject goods has resulted in material injury in the form of lost sales, a decline in production, a reduction in employment and declines in revenue, margins and profit.

53. Hyundai submitted that the consolidated financial data of ABB and CG do not support the allegation that ABB's and CG's gross margins are in "sharp decline" and submitted that the projected gross margins for 2012 are purely speculative.[60]

54. Hyosung and HICO submitted that the financial data presented by ABB and CG are misleading, in that profit and loss data for 2009 and 2010 refer to orders for power transformers made prior to the POI, while data for 2011 and 2012 refer to orders placed before the POI and during the POI respectively. The time lag between the placing of an order and the receipt of revenue makes gauging ABB's and CG's injury claims difficult.[61]

55. Contrary to the above assertion that only 2012 data would reflect orders placed during the POI, the Tribunal notes that the lag of up to two years between order and delivery suggests that financial data for 2012, 2011 and even possibly 2010 may reflect orders made within the POI.

56. The Tribunal examined the evidence submitted by ABB and CG and observed that their performance on a number of key injury indicators declined from 2009 to 2011. The Tribunal also finds that the allegations of underbidding by the subject goods in relation to specific bid opportunities provide a reasonable indication that the dumping of the subject goods has caused lost sales and/or lost revenue for ABB and CG.

57. In addition, given the considerable amount of time that is required to produce power transformers, the domestic industry's financial performance in the near future could be negatively affected by orders that were lost during the POI. The Tribunal therefore accepts the projections for 2012 submitted by ABB and CG.

58. Additionally, the Tribunal notes that ABB and CG provided evidence to support their claims that their consolidated employment levels experienced a significant drop from 2010 to 2011. This is consistent with ABB's and CG's allegations that the decrease in their employment levels was due to their inability to maintain a sufficient level of profitable throughput in their power transformer production facilities.[62] ABB and CG have projected further declines in consolidated employment levels in 2012.

59. The Tribunal is satisfied that the evidence discloses a reasonable indication of a material impact on the performance of the domestic industry resulting from the dumping of the subject goods.

60. Based on these considerations, the Tribunal finds that the evidence discloses a reasonable indication that the dumping of the subject goods has caused injury or is threatening to cause injury in the form of lost sales and accounts, a decline in capacity utilization and a reduction in employment, revenues and gross margins.

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60. Tribunal Exhibit PI-2012-001-06.01, Administrative Record, Vol. 3 at 17-18; Tribunal Exhibit PI-2012-001-07.01 (protected), Administrative Record, Vol. 4 at 17-18.
61. Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 9-10.
62. Tribunal Exhibit PI-2012-001-02.01, Administrative Record, Vol. 1 at 77-78; Tribunal Exhibit PI-2012-001-03.01 (protected), Administrative Record, Vol. 2 at 67-68.

Other Factors

61. Parties opposed submitted that any injury experienced by the domestic industry is attributable to non-dumping factors, such as non-subject imports, the negativity associated with ABB's and CG's performance and reputation, and intra-industry competition.[63]

62. ABB and CG responded that the other factors submitted by Hyundai, Hyosung and HICO are better addressed at the final injury inquiry stage, under section 42 of *SIMA*, rather than the preliminary injury stage. Moreover, ABB and CG noted that Hyundai, Hyosung and HICO failed to substantiate their claims.[64]

63. In the Tribunal's view, it is only in the context of a final injury inquiry under section 42 of *SIMA* that the Tribunal would be in a position to fully explore whether the domestic industry has been injured by factors unrelated to the dumping of the subject goods.

CONCLUSION

64. On the basis of the foregoing analysis, the Tribunal determines that there is evidence that discloses a reasonable indication that the dumping of the subject goods has caused injury or is threatening to cause injury (Member Downey dissenting).

Serge Fréchette
Serge Fréchette
Presiding Member

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Member

DISSENTING OPINION OF MEMBER DOWNEY

65. I must respectfully disagree with my learned colleagues' determination.

66. The Tribunal's mandate in a preliminary injury inquiry is set out in subsection 34(2) of *SIMA*, which requires the Tribunal to make a preliminary inquiry into whether the evidence discloses a reasonable indication that the alleged dumping of the subject goods has caused injury or retardation or is threatening to cause injury.

67. In my opinion, the evidence does not disclose a reasonable indication of injury or threat of injury.

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63. Tribunal Exhibit PI-2012-001-06.02, Administrative Record, Vol. 3 at 10-11; Tribunal Exhibit PI-2012-001-06.01, Administrative Record, Vol. 3 at 11, 20; Tribunal Exhibit PI-2012-001-07.01 (protected), Administrative Record, Vol. 4 at 11, 20.
64. Tribunal Exhibit PI-2012-001-08.01, Administrative Record, Vol. 3 at 16-17.

68. As my colleagues have noted, the "reasonable indication" threshold is lower than the evidentiary threshold of preponderance of evidence (or balance of probabilities) that applies in a final injury inquiry under section 42 of *SIMA*. This reality is reflected in the fact that the Tribunal has very rarely made a preliminary determination that the evidence did not disclose a reasonable indication of injury or retardation or threat of injury.

69. It makes sense that this bar is set relatively low. It is, after all, a preliminary injury inquiry. In effect, a preliminary determination of injury allows the proceedings to continue, which would give both the Tribunal and the CBSA more time to use their respective investigative powers to gather additional information and put the evidence to the test of a public hearing (in the case of the Tribunal) and a verification process (in the case of the CBSA).

70. That said, however, the bar ought not to be interpreted in such a way that effectively sets it too low. A preliminary determination of injury followed by a preliminary determination of dumping or subsidizing will result in the imposition of provisional measures. While any payments relating to such measures would be refunded in the event of a subsequent determination by the CBSA following its dumping or subsidizing investigation or a final determination by the Tribunal that there is no injury (or there is a threat of injury), those refunds would not completely undo the temporary disruption to the marketplace caused by the provisional measures and the uncertainty of the final outcome.

71. Consequently, while it is important not to hold complainants to a high evidentiary standard at this stage, at the same time, it is incumbent on the Tribunal to ensure that there is justification for allowing the case to proceed.

72. The Tribunal has not previously clearly articulated how it interprets the expression "reasonable indication". I believe that it is worth exploring its meaning here.

73. The *Merriam-Webster's Collegiate Dictionary* defines the term "indication" as follows: "**1 a :** something that serves to indicate". In turn, the term "indicate" is defined as follows: "**1 a :** to point out or point to **b :** to be a sign, symptom, or index of **c :** to demonstrate or suggest the necessity or advisability of".[65]

74. The *Canadian Oxford Dictionary* defines the term "indication" as follows: "**1 b** something that suggests or indicates; a sign or symptom." The definition of the term "indicate" is as follows: "**1** Point out; make known; show. **2** be a sign or symptom of; express the presence of."[66]

75. Thus, in accordance with its ordinary meaning, the word "indication" refers to something that suggests, points out, shows, makes known, demonstrates, or serves as a sign or symptom.

76. The *Merriam-Webster's Collegiate Dictionary* defines the term "reasonable" as follows: "**1 a :** being in accordance with reason **b :** not extreme or excessive". In turn, it defines the term "reason" as follows: "**1 b :** a rational ground or motive **c :** a sufficient ground of explanation or of logical defense . . . ."[67]

65. Eleventh ed., *s.v.* "indication", "indicate".
66. Second ed., *s.v.* "indication", "indicate".
67. Eleventh ed., *s.v.* "reasonable", "reason".

77. The *Canadian Oxford Dictionary* defines "reasonable" as follows: "**1** having sound judgement; moderate; ready to listen to reason. **2**. in accordance with reason; not absurd. **3 a** within the limits of reason; fair, moderate (*a reasonable request*)."[68]

78. Thus, the ordinary meaning of the word "reasonable" is rational, logical, moderate, fair, sound or sufficient.

79. In the legal context, the term "reasonable" also has the connotation that the indication or evidence must be tenable or sufficient, though it need not be convincing or compelling.

80. For example, *Black's Law Dictionary* defines "reasonable" as follows: "2. According to reason <your argument is reasonable but not convincing>."[69]

81. Albeit in a different context, the following statement of Iacobucci J. in *Law Society of New Brunswick v. Ryan*,[70] referring to the Supreme Court of Canada's earlier decision in *Canada (Director of Investigation and Research) v. Southam Inc*.,[71] is similarly instructive:

> If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).[72]

82. It follows that the Tribunal must determine, in a preliminary injury inquiry, whether the evidence discloses a rational, logical or sufficient suggestion, sign or symptom that the dumping has caused injury or retardation or is threatening to cause injury. The suggestion, sign or symptom of injury, retardation or threat of injury will be rational, logical or sufficient if it is tenable in the sense that the suggestion, sign or symptom of injury, retardation or threat of injury can stand up to a somewhat probing examination, though not necessarily convincing or compelling.

83. In my view, that the evidence must be sufficient in order to disclose a reasonable indication of injury or threat of injury is consonant with Canada's international obligations. Article 5.8 the WTO *Anti-dumping Agreement* provides that ". . . an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

84. Articles 5.2 and 5.3 clarify the meaning of "sufficient evidence". Article 5.2, which requires that a dumping complaint include evidence of dumping and injury and a causal link between the two, provides as follows: "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph."

85. Article 5.3 requires the investigating authorities to ". . . examine the accuracy and adequacy of the evidence provided in the application [i.e. dumping complaint] to determine whether there is sufficient evidence to justify the initiation of an investigation." Thus, the evidence of injury must be sufficient in the

68. Second ed., *s.v.* "reasonable".
69. Eighth ed., *s.v.* "reasonable".
70. 2003 SCC 20 (CanLII) [*Ryan*].
71. 1997 CanLII 385 (SCC).
72. *Ryan* at para. 55.

sense that it is relevant, accurate and adequate and substantiates the allegation of injury to the extent that there is justification for proceeding with the investigation.

86. In light of the above, the "reasonable indication" test is passed if the following conditions are satisfied:

(1) the alleged injury or retardation or threat of injury is substantiated by evidence that is sufficient in the sense that it is relevant, accurate and adequate; and

(2) the evidence logically or rationally suggests that dumping has caused injury or retardation or is threatening to cause injury in the sense that the allegation stands up to a somewhat probing examination because of the evidence, even if the theory of the case might not seem convincing or compelling.

87. I am of the opinion that the allegations in the present case are, in a few important respects, not substantiated by adequate evidence.

88. ABB and CG admit that they do not account for the whole of the domestic production of power transformers and that there is at least one other domestic producer, Alstom. They assert that they account for a major proportion of the domestic production of the like goods. However, this assertion is not substantiated. Consequently, I am not in a position to conclude that ABB and CG represent a major proportion of total domestic production. As this is a threshold issue, it follows that it is not possible for me to make a preliminary determination that dumping has caused injury or is threatening to cause injury to a major proportion of the total domestic production of the like goods.

89. Another central problem with the evidence adduced by ABB and CG is the very basis upon which factors such as volumes and production capacity should be measured. It is my belief that this evidence is unclear and that the claims derived from it are not adequately substantiated. ABB and CG assert that the industry measures production volumes and capacity in terms of MVAs (i.e. the capacity rating of the goods) instead of the number of units.[73] However, import volumes are measured by Statistics Canada and the CBSA in terms of number of units and value. I cannot find a clear basis upon which the Tribunal can measure ABB's and CG's claims.

90. The CBSA has taken the liberty of equating transformers valued at $350,000 or more with the subject goods.[74] However, all the parties agree that the subject goods are custom-built, which implies that the values may differ significantly from transformer to transformer. It is conceivable that a significant volume of high-end power transformers with a top handling capacity under 60 MVAs (i.e. non-subject goods) have an import value exceeding $350,000, in which case the import volumes and resultant impact of the subject goods are grossly overstated. There is no evidence on the record, in my view, that substantiates such an arbitrary threshold.

91. If measured in units, it is not apparent to me that that there was a significant increase in the importation of the subject goods during the POI, particularly in the most recent portion of the POI. Imports of the subject goods in 2011 are well below 2009 levels.[75] While the share of the subject goods increased between 2009 and 2010, the domestic industry's apparent market share increased even more. In 2011, the

73. Tribunal Exhibit PI-2012-001-2.01, Administrative Record, Vol. 1 at 49.
74. It is interesting to consider that ABB and CG had initially proposed a different threshold giving further credence to the wide-ranging price variability of the subject goods.
75. Tribunal Exhibit PI-2012-001-03.02 (protected), Administrative Record, Vol. 2C at 347.

market share of the subject goods decreased, while sales from domestic production were almost unchanged from the year before.[76]

92. The crux of ABB's and CG's case is that they have lost several sales in recent years due to the dumping of the subject goods. ABB and CG attempt to substantiate these alleged lost sales with three "declarations" referring to the beliefs and impressions that they received from unnamed persons on unspecified dates, in fact, letters signed by apparently affiliated sales directors.

93. I understand that ABB and CG were at a disadvantage in gathering supporting evidence in this regard, given the apparent lack of price transparency in the competitive bidding process that is associated with the domestic power transformer market. However, I believe they could have done better.

94. First, they could have submitted sworn affidavits instead of simple letters. Second, the content of the letters could have been much more precise. For example, they could have specified the persons and titles of the persons from whom they obtained the feedback and what exactly was said and when it was said. The laws of evidence do not strictly apply before the Tribunal, which strives to be accessible. Nevertheless, it is incumbent upon parties that make serious allegations to support them in a serious fashion.

95. Those shortcomings, in and of themselves, are not fatal to the complaint. However, when compounded by the quality of the information in the "declarations", the sum is evidence that, in my opinion, is inadequate to support a preliminary determination of injury or threat of injury.

96. By way of example, in reference to the loss of a large contract, the first letter states as follows: "On the basis of informal communications from [the contracting company], [one of the complainants'] belief was that there was aggressive competition and that the main competitor at the end of the process was [a Korean supplier] (the other finalist being [a supplier from a third country])."[77] It is impossible to know from this statement what exactly the contracting company said that formed the belief of one of the complainants or even whether the unnamed person or persons from the contracting company were in a position to be well-informed of the situation.

97. Also, the form of "aggressive competition" from the Korean supplier is unclear. Did its bid price undercut the complainant's bid price, or was its bid aggressive in other ways unrelated to the alleged dumping (e.g. ambitious delivery time, superior after-sales service)? It is not even clear whether it was the Korean supplier that won the contract or the other finalist for that matter.

98. The evidence in the second letter is similarly inadequate. It mentions informal conversations with various unnamed persons and then expresses the view that a Korean producer outbid one of the complainants by approximately 10 percent on the basis of "[his] interpretation of what was said . . ." and of the comment that "[i]t was an easy decision to recommend [the Korean supplier] . . . ."[78]

99. By way of a final example, the third letter states as follows: ". . . we believe that price was the determinative factor in this loss" to a Korean supplier.[79] In my view, this sort of speculative evidence is not sufficient to justify proceeding with the case.

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76. *Ibid.* at 348.
77. Tribunal Exhibit PI-2012-001-3.01A (protected), Administrative Record, Vol. 2A at 174.
78. Tribunal Exhibit PI-2012-001-3.01B (protected), Administrative Record, Vol. 2B at 143.
79. *Ibid.* at 258.

100. Another problem in this case is that ABB and CG rely in large part on financial projections for 2012. They argue that these projections ought to be taken into account when assessing whether there is a reasonable indication that the alleged dumping has caused injury. I fail to see how the evidence discloses a reasonable indication that the alleged dumping "has caused" (past tense) injury when much of the alleged injury has, by ABB's and CG's own admission, not yet materialized.

101. At best, from the evidence available at this time, this may be a threat of injury case; however, as discussed, volumes are trending in the wrong direction to support even a preliminary determination of threat of injury. While the nature of capital goods is such that orders lost during the POI might not materialize until later due to the time lag between order and delivery, for reasons already discussed, the evidence of sales allegedly lost during the POI due to dumping is inadequate.

102. There are provisional anti-dumping measures on the subject goods in the United States, but it is speculative to suggest that, therefore, absent anti-dumping duties in Canada, the Korean producers will divert increasing volumes of the subject goods to Canada. The subject goods are custom-built; consequently, they could not be readily diverted to purchasers in Canada that would have their own specific requirements and, in the case of Hydro-Québec, an apparent preference for domestic suppliers.[80]

103. Furthermore, while the domestic industry's costs fluctuated between 2009 and 2010, they have remained steady relative to net sales value.[81] This logically suggests that ABB and CG have managed to pass costs increases on to customers. That being the case, it is hard to understand ABB's and CG's claims that their gross margins will sharply decrease in 2012. The historical evidence implies that, on the contrary, any cost increase would probably be passed on to customers.

104. Finally, while there is a downward trend in some of ABB's and CG's financial indicators for 2011, without adequate evidence of the prices of the subject goods or the exact reasons for which Korean suppliers might have won contracts at the expense of ABB and CG, I am not able to find sufficient evidence of a causal link between the alleged dumping of the subject goods and the recent change in the domestic industry's fortunes.

105. It is especially difficult to make such a finding when presented with evidence that import volumes decreased in 2011 (the most recent period for which there is available data) and sales from domestic production increased from 2009 onward, and with relatively unchanged numbers from 2010 onward. I realize that ABB's and CG's allegations do not need to be convincing or compelling, but as they now stand, they are not even tenable in light of what little evidence is on the record at this time.

106. For the above reasons, I would not make a preliminary determination that there is evidence that discloses a reasonable indication that the alleged dumping has caused injury or is threatening to cause injury.

Jason W. Downey
Jason W. Downey
Member

80. Tribunal Exhibit PI-2012-001-07.01 (protected), Administrative Record, Vol. 4 at para. 46.
81. Tribunal Exhibit PI-2012-001-03.01A (protected), Administrative Record, Vol. 2A at 9.