Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2014-003

Photovoltaic Modules and Laminates

Finding issued
Friday, July 3, 2015

Reasons issued
Monday, July 20, 2015

Canada

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

PHOTOVOLTAIC MODULES AND LAMINATES ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping and subsidizing of photovoltaic modules and laminates consisting of crystalline silicon photovoltaic cells, including laminates shipped or packaged with other components of photovoltaic modules, and thin-film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS), originating in or exported from the People's Republic of China, excluding modules, laminates or thin-film products with a power output not exceeding 100 W, and also excluding modules, laminates or thin-film products incorporated into electrical goods where the function of the electrical goods is other than power generation and these electrical goods consume the electricity generated by the photovoltaic product, have caused injury or are threatening to cause injury to the domestic industry.

Further to the issuance by the President of the Canada Border Services Agency of final determinations dated June 3, 2015, that the aforementioned goods have been dumped and subsidized, and pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping and subsidizing of the above-mentioned goods have not caused injury, but are threatening to cause injury to the domestic industry.

Furthermore, the Canadian International Trade Tribunal hereby excludes from its threat of injury finding 195 W monocrystalline photovoltaic modules made of 72 monocrystalline cells, each cell being no more than 5 inches in width and height.

Jean Bédard
Jean Bédard
Presiding Member

Peter Burn
Peter Burn
Member

Rose Ritcey
Rose Ritcey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	June 1 to 5, 2015
Tribunal Members:	Jean Bédard, Presiding Member Peter Burn, Member Rose Ritcey, Member
Director, Trade Remedies Investigations:	Mark Howell
Senior Trade Remedies Investigations Officer:	Gary Rourke
Trade Remedies Investigations Officer:	Julie Charlebois
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Opposing Parties	**Counsel/Representatives**
Abundant Solar Energy Inc.	Annette Macaro
AGRV Products/9135-4738 Quebec Inc.	Alain Généreux
Canadian Solar Solutions Inc.	Vincent Routhier Gabrielle Dumas-Aubin
Changzhou Trina Solar Energy Co., Ltd. Hefei JA Solar Technology Co., Ltd. JA Development Co., Ltd. JA Solar USA Inc. Shanghai JA Solar Technology Co., Ltd. Trina Solar (Canada) Inc.	Peter Clark Renée Clark Golsa Ghamari

Opposing Parties	**Counsel/Representatives**
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Jinko Solar Canada Co., Ltd. Jinko Solar Co., Ltd. Zhejiang Jinko Solar Co., Ltd.	Cyndee Todgham Cherniak Mara Chadnick
Solar Flow Through (2014) Ltd.	Ernest W. Belyea

Parties that Requested Product Exclusions	**Counsel/Representatives**
AGRV Products/9135-4738 Quebec Inc.	Alain Généreux
Invensun Environmental Corporation	Dharmesh Makwana
Trans-Canada Energies/Rozon Batteries Inc.	Joël Rozon Élise Rozon

WITNESSES:

Paolo Maccario Silfab Ontario Inc. General Manager and Chief Operating Officer	Hanna Ayyad Silfab Solar Inc. Chief Financial Officer
John Gamble EnerDynamic Hybrid Technologies Inc. Chief Executive Officer	Martin Pochtaruk Heliene Inc. President
Joal Suraci Heliene Inc. Controller	Mikael Niskanen FATH PV Tech Director, Manufacturing Operations
Vadim Lyubchenko Solgate Inc. President	Joël Rozon Trans-Canada Energies Inc. Purchasing Director
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Walter Buzzelli
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STATEMENT OF REASONS

INTRODUCTION

1. The purpose of this inquiry[1] is to determine whether the dumping and subsidizing of certain photovoltaic modules and laminates originating in or exported from the People's Republic of China (China) (the subject goods) have caused or are threatening to cause injury to the domestic industry for photovoltaic modules and laminates.

2. The Tribunal has determined, for the reasons that follow, that the dumping and subsidizing of the subject goods are threatening to cause material injury to the domestic industry producing like goods in relation to the subject goods. Therefore, the Canada Border Services Agency (CBSA) will impose definitive anti-dumping and countervailing duties on imports of the subject goods.

BACKGROUND

3. This inquiry stems from a complaint filed on October 1, 2014, by Heliene Inc. (Heliene), Eclipsall Manufacturing Corp. (formerly Eclipsall Energy Corp.) (Eclipsall), Silfab Solar Inc. (Silfab) and Solgate Inc. (Solgate) and the subsequent decision of the President of the CBSA on December 5, 2014, to initiate dumping and subsidizing investigations.

4. The decision to initiate the investigations triggered a preliminary injury inquiry by the Canadian International Trade Tribunal (the Tribunal), which culminated in the Tribunal's preliminary determination of February 3, 2015, that the evidence disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused or were threatening to cause injury.[2]

5. On March 5, 2015 the CBSA made preliminary determinations of dumping and subsidizing, resulting in the imposition of provisional anti-dumping and countervailing duties on the subject goods and the commencement of this inquiry. On March 6, 2015, the Tribunal issued a notice of commencement of inquiry.[3] On June 3, 2015, the CBSA made final determinations of dumping and subsidizing.[4]

6. The Tribunal's period of inquiry (POI) covered three full years, from January 1, 2012, to December 31, 2014. On March 6, 2015, the Tribunal sent requests to complete questionnaires to domestic producers, importers, purchasers and foreign producers of photovoltaic modules and laminates. Using the questionnaire replies and data from the CBSA, public and protected versions of the investigation report were

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1. The inquiry is conducted pursuant to section 42 of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 [*SIMA*].
2. The Tribunal's preliminary determination was based on the conclusion that there was a reasonable indication that the dumping and subsidizing of the subject goods were threatening to cause injury. In its decision, the Tribunal stated as follows: "Should the CBSA make a preliminary determination that the subject goods are dumped or subsidized, then the Tribunal shall, pursuant to section 42 of *SIMA*, inquire into whether the dumping or subsidizing has caused or is threatening to cause injury. As a result of the statutory scheme, such an inquiry would not be restricted to determining whether there is a threat of injury." See *Photovoltaic Modules and Laminates* (3 February 2015), PI-2014-003 (CITT) at para. 93.
3. C. Gaz. 2015.I.149.
4. Exhibit NQ-2014-003-04, Vol. 1A at 12-15.

prepared and distributed to those parties that filed notices of participation in the inquiry.[5] Parties filed case briefs and evidence in response.

7. The supporting parties are the domestic producers that filed the complaint—Heliene, Eclipsall, Silfab and Solgate—together with EnerDynamic Hybrid Technologies Inc. (EnerDynamic). The supporting parties submitted evidence and argument, and provided witnesses during the Tribunal's hearing.

8. The following opposing parties filed evidence and argument with the Tribunal:[6] Canadian Solar Solutions Inc. (CSSI), Jinko Solar Canada Co., Ltd. (Jinko Canada), Jinko Solar Co., Ltd. (Jinko Solar), Zhejiang Jinko Solar Co., Ltd. (collectively referred to as the "Jinko Group"), and the China Chamber of Commerce for Import & Export of Machinery and Electronic Products (CCCME) on behalf of Hefei JA Solar Technology Co., Ltd. (Hefei JA Solar), JA Development Co., Ltd., JA Solar USA Inc., Shanghai JA Solar Technology Co., Ltd., Trina Solar (Canada) Inc., Changzhou Trina Solar Energy Co., Ltd., and associated companies: Wuxi Suntech Power Co., Ltd. (Wuxi Suntech), Jiangsu Jiasheng Photovoltaic Technology Co., Ltd., Wuxi Taichang Electronic Co., Ltd., Znshine PV-Tech Co., Ltd. and Shenzhen Sungold Solar Co., Ltd.. Abundant Solar Energy Inc. (Abundant Solar) filed a witness statement. CSSI and Abundant Solar provided witnesses during the Tribunal's hearing. CSSI and the CCCME made oral arguments at the hearing.

9. In addition, the Tribunal called a witness to testify at the hearing: Mr. Walter Buzzelli of Panasonic Eco Solutions Canada Inc. (Panasonic).

10. On May 4, 2015, the parties filed requests for information (RFIs) with the Tribunal, which were directed at the other parties. As some parties objected to certain RFIs, the Tribunal issued directions on May 11, 2015, regarding the RFIs that required responses and also requested that parties and other producers of like goods respond to the Tribunal's own RFIs. The responses and clarifications were received between May 19 and June 2, 2015, and placed on the record of the proceedings. In addition, the Tribunal directed FATH PV Tech (FATH PV) to respond to certain Tribunal RFIs on May 21, 2015. FATH PV responded to the Tribunal's request on May 28, 2015.

11. Trans-Canada Energies/Rozon Batteries Inc. (TCE), AGRV Products/9135-4738 Quebec Inc. (AGRV) and Invensun Environmental Corporation (Invensun) each filed product exclusion requests. TCE and AGRV also provided witnesses to testify with respect to their exclusion requests during the course of the Tribunal's hearing.

12. The Tribunal's hearing, which included public and *in camera* sessions, was held in Ottawa, Ontario, from June 1 to 5, 2015.

RESULTS OF THE CBSA'S INVESTIGATIONS

13. The CBSA's period of investigation for its dumping investigation covered October 1, 2013, to September 30, 2014. The period of investigation for its subsidizing investigation covered October 1, 2012, to September 30, 2014. The CBSA determined that 100 percent of the subject goods imported into Canada had been dumped at a weighted average margin of dumping of 124.4 percent, when expressed as a percentage of the export price. The CBSA also determined that 100 percent of the subject goods imported

5. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed the required declaration and confidentiality undertaking with the Tribunal in respect of confidential information.
6. Solar Flow Through (2014) Ltd. filed a notice of participation, but did not file a brief or evidence.

into Canada had been subsidized at a weighted average amount of subsidy of 6.2 percent, when expressed as a percentage of the export price.[7]

PRODUCT

Product Definition

14. The subject goods are defined as follows:

> photovoltaic modules and laminates consisting of crystalline silicon photovoltaic cells, including laminates shipped or packaged with other components of photovoltaic modules, and thin-film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS), originating in or exported from the People's Republic of China, excluding modules, laminates or thin-film products with a power output not exceeding 100 W, and also excluding modules, laminates or thin-film products incorporated into electrical goods where the function of the electrical goods is other than power generation and these electrical goods consume the electricity generated by the photovoltaic product.

Product Information[8]

15. The final assembled product sold to end users is referred to as a solar module. A laminate refers to the consolidation of various raw materials, including strung-together solar cells, a cover glass and an encapsulant (such as ethylene vinyl acetate) which are encapsulated (i.e. consolidated) into a more solid and durable product and most often made into a solar module by affixing to it additional solar module components, such as a frame and/or a junction box. The subject goods include both modules and laminates, whether or not the laminate is attached to an electrical junction box or a protective frame or other components, or whether or not the laminate is packaged with any such products or components.

16. For further clarity, a laminate included in a package of goods or shipped alongside other products serving to create a module (e.g. aluminum extrusions for the frame, and/or an electrical junction box, and/or batteries for electrical storage) falls within the definition of the subject goods.

17. The production of the subject goods is measured in watts (W) or megawatts (MW). One megawatt is equivalent to one million watts. Canadian production is also measured in W or MW. Watts are synonymous with peak-watts, which are defined as the direct current (DC) watts output under specified laboratory settings.

18. As noted above, the definition of the subject goods excludes both modules, laminates or thin-film products with a power output not exceeding 100 W, and modules, laminates or thin-film products incorporated into electrical goods where the function of the electrical goods is other than power generation and where these electrical goods consume the electricity generated by the photovoltaic product.

19. These exclusions serve to exclude small portable modules, as well as consumer products and small appliances which use solar modules. For example, items ranging from solar garden lights to calculators to parking meters, as well as portable modules used as camping equipment, would be excluded from the

7. Exhibit NQ-2014-003-04, Vol. 1A at 22-23.
8. Exhibit NQ-2014-003-01A, Vol. 1 at 34-35.

product definition by virtue of power output or by virtue of the fact that these goods consume the electricity generated by the product.

PRELIMINARY PROCEDURAL MATTERS

Investigation Report Supplement (1)

20. On May 27, 2015, public and protected versions of Investigation Report Supplement (IRS) (1) were distributed to parties. The public and protected versions of IRS (1) presented the data from the investigation report in a manner which reflected the possible exclusion of CSSI from the composition of the domestic industry.[9]

21. On May 27, 2015, counsel for CSSI wrote to the Tribunal and asked that IRS (1) be removed from the Tribunal's record. That same day, counsel for the CCCME also wrote to the Tribunal, asking for an explanation as to why "amendments" to the investigation report were issued at such a late stage in the inquiry without an opportunity for parties to address the Tribunal on this matter.

22. On May 28, 2015, counsel for the supporting parties wrote to the Tribunal to express their understanding that IRS (1) did not replace the investigation report but rather served as a useful tool by which the Tribunal might assess the composition of the domestic industry, as well as the alleged threat of injury.

23. On May 28, 2015, the Tribunal denied CSSI's request to have IRS (1) removed from the record.[10] The Tribunal explained that IRS (1) did not replace or amend the investigation report issued on May 4, 2015, or the revisions to the investigation report issued on May 14, 2015, and that IRS (1) was an additional set of tables provided as an analytical tool for parties and counsel to ensure an informed and transparent decision-making process. The Tribunal also clarified that IRS (1) did not represent a decision of the Tribunal on the composition of the domestic industry.

The Use of Single Copy Exhibits

24. As part of the matters arising process, the supporting parties sought leave from the Tribunal on May 28, 2015, to file a recent edition of a licensed Bloomberg New Energy Finance publication as a single copy protected exhibit. That same day, Abundant Solar also sought leave to file a different edition of the same publication as a single copy exhibit and asked the Tribunal for direction as to whether the document should be filed on the public or protected record.

25. Counsel for the CCCME did not object to the filing of these documents but did object to the single copy designation, indicating that, in his view, seeking to rely on single copy exhibits was excessive and ignored fair dealing exceptions under copyright law. Counsel for CSSI also objected to the use of single copy exhibits as being prejudicial because the documents were unavailable for consultation by counsel and parties located outside of Ottawa.

26. On May 28, 2015, the Tribunal informed parties that it would deal with these requests at the outset of the hearing. Before the hearing, counsel for the supporting parties, counsel for CSSI and counsel for the CCCME met with senior counsel to the Tribunal, who explained that the Tribunal was planning to issue a practice notice that would provide guidance on the procedures for filing single copy exhibits and

9. Exhibit NQ-2014-003-06C, Vol. 1.1B; Exhibit NQ-2014-003-07C (protected), Vol. 2.1B.
10. Letter from Presiding Member to Mr. Vincent Routhier dated May 28, 2015, Vol. 20A.

summarized the contents of the proposed notice.[11] Following this exchange, the supporting parties obtained permission from the publisher to reproduce a limited number of copies of all Bloomberg New Energy Finance publications currently on the record. The supporting parties proposed that these documents be placed on the Tribunal's public record for the purposes of this inquiry and that a limited number of copies be distributed to counsel.[12] Counsel for CSSI and counsel for the CCCME were satisfied with this proposal and the Tribunal allowed the supporting parties to file the documents under the conditions proposed by the supporting parties.[13]

27. On June 4, 2015, the Tribunal allowed Abundant Solar to file a Bloomberg New Energy Finance publication onto the public record under the same conditions outlined above, and a limited number of copies of that publication were made available to counsel.[14]

Post-hearing Submissions

28. On June 5, 2015 (the last day of the hearing), the Tribunal placed a copy of *Commission Implementing Regulation (EU) 2015/866* onto the public record.[15] This regulation, which was published in the Official Journal of the European Union on June 4, 2015, withdrew the Commission's acceptance of price undertakings from certain producers in respect of a provisional anti-dumping duty on imports into the European Union of solar modules and key components from China. In response to objections from CSSI and the CCCME, the Tribunal provided parties with the opportunity to file post-hearing submissions in relation to the regulation. CSSI, the CCCME, Jinko Solar and the supporting parties filed submissions.[16]

LEGAL FRAMEWORK

29. The Tribunal is required, pursuant to subsection 42(1) of *SIMA*, to inquire as to whether the dumping and subsidizing of the subject goods have caused injury or retardation or are threatening to cause injury, with "injury" being defined, in subsection 2(1), as ". . . material injury to a domestic industry". In this regard, "domestic industry" is defined in subsection 2(1) by reference to the domestic production of "like goods".

30. Accordingly, the Tribunal must first determine what constitutes "like goods". Once that determination has been made, the Tribunal must determine what constitutes the "domestic industry" for purposes of its injury analysis.

31. Given that the CBSA has determined that the subject goods have been dumped and subsidized, the Tribunal must also determine whether it is appropriate to make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods (i.e. whether it will cross-cumulate the effect) in this inquiry.

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11. A draft practice notice on the filing of publications under licence agreements on the Tribunal's record has since been published on the Tribunal's Web site. See http://www.citt-tcce.gc.ca/filing_licence_e.
12. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 6.
13. *Ibid.* at 7-9; *Transcript of In Camera Hearing*, Vol. 1, 1 June 2015, at 1.
14. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 394-95, Vol. 5, 5 June 2015, at 519.
15. *Commission Implementing Regulation (EU) No. 2015/866* (4 June 2015) [*EC Regulation*]; Exhibit NQ-2014-003-26.10, Vol. 1D; *Transcript of Public Hearing*, Vol. 5, 5 June 2015, at 512.
16. Exhibits NQ-2014-003-37.01, NQ-2014-003-37.02, NQ-2014-003-37.03 and NQ-2014-003-38.01, Vol. 1E.

32. The Tribunal can then assess whether the dumping and subsidizing of the subject goods have caused material injury to the domestic industry. Should the Tribunal arrive at a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.[17] As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.[18]

33. In conducting its analysis, the Tribunal will also examine other factors that might have had an impact on the domestic industry to ensure that any injury or threat of injury caused by such factors is not attributed to the effects of the dumping and subsidizing.

34. There are two aspects of this inquiry that are rather unusual. The supporting parties focused their submissions entirely on the threat of injury posed by the dumping and subsidizing of the subject goods and did not argue that the dumping and subsidizing of the subject goods had caused injury. Nevertheless, as discussed further below, the Tribunal analyzed the evidence on the record in light of the prescribed injury factors and concluded that the dumping and subsidizing of the subject goods have not caused material injury. Indeed, the subject goods (or, for that matter, any imports of photovoltaic modules and laminates) had very limited access to the domestic market during the POI due to minimum local content requirements that were in place for contracts issued under the Ontario government's Feed-in Tariff (FIT) Program.

35. Furthermore, the supporting parties raised the question of whether CSSI, a very significant producer of like goods during the POI, should be included in the domestic industry. As noted during the preliminary injury inquiry, CSSI also imported the subject goods and is affiliated with Chinese producers and exporters of the subject goods. Over the course of the inquiry, the Tribunal further explored CSSI's business structure and its behaviour in the Canadian market in order to decide whether it should exercise its discretion, as provided for in subsection 2(1) of *SIMA*, and exclude CSSI from the scope of the domestic industry as argued by the supporting parties. For the reasons discussed in detail below, the Tribunal finds it appropriate to exclude CSSI from the domestic industry.

LIKE GOODS AND CLASSES OF GOODS

36. In order for the Tribunal to determine whether the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.

37. 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.

17. Injury and threat of injury are distinct findings; the Tribunal is not required to make a finding relating to threat of injury pursuant to subsection 43(1) of *SIMA* unless it first makes a finding of no injury.
18. Subsection 2(1) of *SIMA* defines "retardation" as ". . . material retardation of the establishment of a domestic industry". In previous decisions, the Tribunal has consistently held that there could be no retardation if there was domestic production of like goods. See, for example, *Potassium Silicate Solids* (6 March 2012), PI-2011-003 (CITT) at paras. 35, 37.

38. In deciding the issue of like goods when goods are not identical in all respects to the other 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).[19]

39. In addressing the issue of classes of goods, the Tribunal typically examines whether goods potentially included in separate classes of goods constitute "like goods" in relation to each other. If those goods are "like goods" in relation to each other, they will be regarded as comprising a single class of goods.[20]

40. During the preliminary injury inquiry, it was not disputed that domestically produced photovoltaic modules and laminates, defined in the same manner as the subject goods, are like goods in relation to the subject goods. While the parties opposed proposed a number of potential classes of goods during the preliminary injury inquiry, the Tribunal ultimately concluded that the subject goods and like goods constituted a single class of goods.[21] In particular, the Tribunal accepted that, despite a price premium for crystalline photovoltaic modules and laminates as compared to thin-film photovoltaic modules and laminates, differing levels of efficiency, varying physical characteristics and the fact that the two products were not perfectly substitutable, the goods fell at various points along a continuum of like goods that serve the same general end use and are distributed through the same channels and, therefore, should be considered a single class of goods.[22]

41. No evidence or arguments were presented during the present inquiry that warrants a departure from the Tribunal's previous conclusions. The Tribunal therefore finds that domestically produced photovoltaic modules and laminates constitute like goods in relation to the subject goods and that the subject goods and like goods constitute a single class of goods.

DOMESTIC INDUSTRY

42. Subsection 2(1) of *SIMA* defines "domestic industry" as follows:

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

43. The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole or to those domestic producers whose production represents a major proportion of the total production of like goods.

19. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) [*Pipe Fittings*] at para. 48.
20. *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) [*Aluminum Extrusions*] at para. 115; *Polyisocyanurate Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.
21. *Photovoltaic Modules and Laminates* (3 February 2015), PI-2014-003 (CITT) at para. 37.
22. *Ibid.* at paras. 28-35.

Scope of Domestic Production

44. At the preliminary injury inquiry stage, the Tribunal treated the original equipment manufacturing (OEM) production of domestic producers as domestic production, but indicated that it would investigate this issue in the context of the final injury inquiry.

45. The supporting parties submitted that there is no difference between the production process of a domestic producer that manufactures and sells solar modules and one that is paid to assemble raw materials and inputs (such as solar cells) into a solar module on behalf of a third party that markets and sells the finished product. They submitted that both arrangements constitute Canadian production of like goods.

46. CSSI did not argue that OEM production should be excluded from the scope of domestic production. The CCCME referred to OEM production as "production in Canada" but questioned whose production it was and submitted that OEM producers were akin to service providers not producers.[23] In its written submissions, Jinko Solar did not explicitly argue that OEM production outside the scope of domestic production; however, it did submit that certain producers whose production is entirely OEM assembly should not be considered part of the domestic industry because they do not produce like goods for commercial sale.

47. In assessing whether OEM production should be treated as domestic production of like goods, the Tribunal notes the ordinary meaning of the terms "produce" and "producer". "Produce" is defined, *inter alia*, as "1. Bring (something) into existence . . . 2. Manufacture (goods) from raw materials etc.",[24] while "producer" is defined, *inter alia*, as "1. A person, company, country, etc. that produces goods or materials".[25] The Tribunal also notes the following definition of "manufacture", which was cited by the supporting parties: ". . . the production of articles for use from raw or prepared material by giving to these materials *new forms, qualities and properties or combinations* whether by hand or machinery"[26] [emphasis added].

48. When considered in light of these definitions, the Tribunal is satisfied that OEM production is domestic production for the purposes of this inquiry. OEM production takes place entirely in Canada, and the evidence shows that there is little to no difference between the production processes applied to OEM and other solar module and laminate production.[27] At the most basic level, each process involves raw material inputs (polysilicon cells, glass, aluminum frames, electrical junction boxes and electric inverters) which are transformed through the manufacturing process into a solar module or laminate.[28]

49. The Tribunal is also satisfied that OEM production is more than a mere assembly or finishing service. The manufacturing process involves the application of capital, labour, highly specialized equipment, product testing and certification.[29] As noted by Mr. Vadim Lyubchenko in his testimony, OEM production ". . . is assembling, but it is not just assembling. We have to meet a requirement of a big

23. Exhibit NQ-2014-003-M-01 at para. 24, Vol. 13; *Transcript of Public Hearing*, Vol. 5, 5 June 2015, at 605.
24. *Canadian Oxford Dictionary*, 2nd ed., *s.v.* "produce".
25. *Ibid.*, *s.v.* "producer".
26. *The Queen v. York Marble, Tile and Terrazzo Ltd.*, [1968] SCR 140 at 145, 1968 CanLII 112 (SCC).
27. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 37-38, 62-63, Vol. 2, 2 June 2015, at 120.
28. Exhibit NQ-2014-003-01A, Vol. 1 at 34-35.
29. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 38, Vol. 2, 2 June 2015, at 205.

company . . . we have to meet their quality requirement. It means we need to make some research in the beginning in order to meet this requirement. It is not just blind assembling. It is manufacturing."[30]

50. The Tribunal heard evidence that OEM arrangements take a variety of forms. In certain cases, producers use their own materials and sell the finished module with a private label or brand to their client.[31] In other cases, the components are supplied by the client that pays a production fee to the OEM producer.[32] Other variations on these arrangements also exist.[33] In all cases, the Tribunal is of the view that the decision to produce solar modules or laminates on an "OEM" basis under another company's label is a business decision made by each company. While an understanding of the various OEM arrangements provides important context for the Tribunal's inquiry, these types of business arrangements *per se* do not detract from the fact that OEM production is domestic production of like goods. On this point, as noted above, the evidence is clear—like goods include finished solar modules or laminates that are produced in Canada, regardless of whether they are produced under an OEM arrangement using non-subject materials imported from China, as the production process is the same and requires the same skills and equipment.

51. Therefore, for the purposes of this inquiry and the assessment of whether the dumping and subsidizing of the subject goods have caused or are threatening to cause material injury to the domestic industry, the Tribunal finds that OEM production constitutes domestic production of like goods.

Domestic Producers

52. The five supporting parties submitted that they, together with Celestica Inc. (Celestica), constitute the domestic industry for the purposes of the Tribunal's inquiry. The supporting parties argued that the "domestic industry" should be interpreted as excluding CSSI because it is an importer and related to an exporter of the subject goods, with an overarching corporate strategy of supporting affiliated Chinese production facilities.

53. The opposing parties each submitted that CSSI should be included in the "domestic industry". In particular, CSSI and the CCCME argued that the exclusion of CSSI, a major domestic producer, would gravely distort the injury analysis. According to CSSI, the purpose of its relatively limited imports of the subject goods from affiliated Chinese exporters during the POI was to meet consumer demand and was not aggressive in nature.

54. The matter of CSSI's status in the domestic industry was first raised by the complainants[34] in the preliminary injury inquiry. Although the Tribunal observed, in its preliminary determination, that clear linkages exist between CSSI's operations in Canada and affiliated Chinese producers and exporters of the subject goods, there was not enough evidence at that stage to decide this issue.[35] As a result, in the present inquiry, the Tribunal collected information from all known domestic producers of the like goods, including the five supporting parties, CSSI, Celestica, GMA Solar Inc. (GMA Solar) and Flextronics Global Services (Flextronics).[36]

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30. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 214.
31. *Ibid.* at 113.
32. *Ibid.* at 182, 205.
33. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 38; Exhibit NQ-2014-003-06A, Vol. 1.1A at 17.
34. Heliene, Silfab, Eclipsall and Solgate.
35. *Photovoltaic Modules and Laminates* (3 February 2015), PI-2014-003 (CITT) at para. 44.
36. Although Celestica, GMA Solar and Flextronics did not take a position in this inquiry, each of these companies cooperated with the Tribunal's investigation and provided replies to the producers' questionnaire.

55. The Tribunal finds, for the reasons that follow, that Heliene, Silfab, Eclipsall,[37] Solgate, EnerDynamic and Celestica are primarily domestic producers of like goods and that, together, they account for the domestic production as a whole of the like goods and, thus, constitute the "domestic industry".[38]

56. Where a domestic producer of the like goods contributes to or benefits from the potentially injurious dumping or subsidizing, either directly or indirectly through related companies, the Tribunal may consider whether to treat that domestic producer as if it were not part of the domestic industry and limit its analysis of injury and threat of injury to the other domestic producers in order to promote the objectives of *SIMA*. Those objectives include protecting producers in Canada from injury or threat of injury caused by imports of dumped or subsidized goods.[39]

57. Subsection 2(1.2) of *SIMA* sets out the test for determining when a producer is related to an exporter or importer. It states as follows:

> For the purposes of the definition "domestic industry" in subsection (1), a domestic producer is related to an exporter or an importer of dumped or subsidized goods where
>
> (*a*) the producer either directly or indirectly controls, or is controlled by, the exporter or importer,
>
> (*b*) *the producer and the exporter or the importer, as the case may be, are directly or indirectly controlled by a third person*, or
>
> (*c*) the producer and the exporter or the importer, as the case may be, directly or indirectly control a third person,
>
> *and* there are grounds to believe that *the producer behaves differently towards the exporter or importer than does a non-related producer*.
>
> [Emphasis added]

58. Subsection 2(1.3) of *SIMA* provides that a person is deemed to control another ". . . where the first person is legally or operationally in a position to exercise restraint or direction over the other person."

59. In previous cases, the Tribunal has set out the following factors, which are neither universally applicable or exhaustive, to assist in making its decision whether to exclude a domestic producer from the definition of the domestic industry:[40]

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37. The status of Eclipsall, which was in issue at the preliminary injury inquiry stage, has been confirmed in this inquiry. Essentially, Eclipsall has continued the operations of its predecessor (Eclipsall Energy Corp.), which entered into receivership on August 28, 2014. On February 23, 2015, the former entity was declared bankrupt and its assets were purchased by a holding company, Strathcona Energy Group (Strathcona) and the new Eclipsall entity was established. Exhibit NQ-2014-003-D-03 at paras. 8-9, 11, Vol. 11; *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 175-76.
38. Flextronics produced like goods during the POI up until July 2014, when it ceased production in Canada. Exhibit NQ-2014-003-11.03, Vol. 3 at 24. FATH PV, in its response to RFIs from the Tribunal, stated that it does not produce like goods or import the subject goods. FATH PV is in the business of producing mounting systems for solar modules. It installs laminates produced by other companies, including its affiliate Eclipsall, on its mounting systems. Eclipsall reported its production of these like goods in its response to the producers' questionnaire. Exhibit NQ-2014-003-RI-28, Vol. 9.
39. *Cross-linked Polyethylene Tubing* (29 September 2006), NQ-2006-001 (CITT) [*Polyethylene Tubing*] at para. 54; *Refill Paper* (27 September 1996), NQ-96-001 (CITT); *Canadian Steel Producers Assn. v. Canada (Commissioner of Customs and Revenue)*, [2004] 2 FCR 642, 2003 FC 1311 (CanLII) at para. 40.
40. *Polyethylene Tubing* at paras. 56-59; *Stainless Steel Sinks* (24 May 2012), NQ-2011-002 (CITT) at paras. 64-65; *Pipe Fittings* at para. 65.

- Structural factors concern the characteristics of the market and the producer's place in that market, including the ratio of the producer's sales of dumped goods to its total sales in the domestic market; the ratio of the producer's volume of dumped goods to its production of like goods; and the producer's actual volume of imports of dumped goods and its share of the total volume of dumped goods.
- Behavioural factors focus on the behaviour of the producer (both directly and in terms of its association with related companies), including whether the producer imported the dumped goods as a defensive measure against other dumped goods or as an aggressive measure to capture market share from other domestic producers of like goods; whether the producer imported the dumped goods to fill a specific market niche or to compete broadly with the like goods produced by other domestic producers; and whether the producer's own like goods compete in the domestic market with the dumped goods that it imports.

CSSI

60. In the exercise of its discretion concerning CSSI, the Tribunal considered the evidence relating to its corporate structure, its association with Chinese producers and exporters of the subject goods and its behaviour in the Canadian market, including its domestic production and import-related activities.

61. The evidence establishes that CSSI is "related" to an exporter of the dumped and subsidized goods within the meaning of subsection 2(1.2) of *SIMA*.

62. CSSI is a federally incorporated Canadian company established in June 2009, as a wholly owned subsidiary of Canadian Solar Inc. (CSI).[41] CSI is a Canadian corporation with headquarters in Guelph, Ontario.[42] It was founded in 2001 and started to produce solar modules in China (through its subsidiaries) in 2002 and in Canada (through CSSI) in 2010.[43] CSSI has become the largest manufacturer of like goods in Canada, with sales from domestic production that accounted for an increasing share of the total apparent market in 2012, 2013 and 2014.[44] CSSI employs approximately 800 people at its production facilities in Guelph and London, Ontario.[45] Nevertheless, the bulk of CSI's global module manufacturing capacity is in China.[46] An investor presentation by CSI dated November 14, 2014, shows that it has 3.0 gigawatts (GW) of total module manufacturing capacity, of which 2.5 GW is located in China and 500 MW in Canada.[47]

63. CSI's role as the parent company of CSSI and the direct or indirect parent company of various producers and exporters in China[48] indicates that it is in a position to exercise some degree of restraint or direction over the operations of those entities. According to the evidence of Mr. Thomas Koerner of CSI, the

41. Exhibit PI-2014-003-09, Vol. 1O at 89.
42. CSI was incorporated in Ontario in October 2001 and was continued, effective June 1, 2006, as a Canadian corporation under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. It is a public company listed on NASDAQ. Exhibit NQ-2014-003-26.06, Vol. 1B at 75, Vol. 1C at 38; Exhibit PI-2014-003-09, Vol. 1O at 89; Exhibit NQ-2014-003-F-01 at para. 5, Vol. 13.
43. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 337; Exhibit PI-2014-003-09, Vol. 1O at 90-91.
44. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 297; Exhibit NQ-2014-003-07B (protected), Tables 48, 50, Vol. 2.1B.
45. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 296.
46. *Ibid.* at 369; Exhibit NQ-2014-003-26.06, Vol. 1C at 33.
47. Exhibit NQ-2014-003-A-05, tab 1 at 5, 10, Vol. 11A.
48. Exhibit NQ-2014-003-17.14, Vol. 5.1F at 13, 17-18; Exhibit NQ-2014-003-11.11, Vol. 3D at 17-18; Exhibit PI-2014-003-09, Vol. 1O at 89-90.

company's Canadian operations are managed independently from its Chinese operations.[49] However, other evidence, including the *in camera* testimony of the witnesses presented by CSSI, establishes that CSI is actively involved in the operational management of its subsidiaries in both Canada and China and exercises control (directly or indirectly) over their operations, in line with its global business strategy.[50] This global strategy entails positioning the company as a vertically integrated, total solar energy solutions service provider.[51]

64. In light of the above, the Tribunal finds that CSI exercises, directly or indirectly, control over its subsidiaries, including CSSI and various Chinese producers and exporters of the subject goods.

65. CSSI, in its case brief, submitted that ". . . the mere existence of a cross-border business strategy should not be considered as sufficient to justify the exclusion of the domestic producer".[52] This is not to say, however, that this should not be considered at all in conjunction with other factors.

66. In terms of structural factors, CSSI's imports during the POI were modest in relation to both its domestic production and its total sales in the domestic market.[53] Mr. Koerner stated that CSSI imported the subject goods when necessary during the POI to ensure timely delivery of sales commitments during periods of maximum capacity utilization, not as an aggressive measure.[54]

67. The Tribunal finds that structural factors do not point to CSSI being foremost an importer. However, as will be discussed in further detail later in these reasons, the Tribunal considers CSSI's limited imports of the subject goods during the POI to be a reflection of the fact that the local content requirement for contracts issued under the FIT Program were still in place for most of that period.

68. In the first quarter of 2015, CSSI's imports of the subject goods spiked dramatically as compared to the first quarter of 2014, increasing by 1,876 percent.[55] This is a significant change from CSSI's import activities during the POI. Mr. Koerner testified that CSSI's imports of the subject goods in the first two months of 2015, i.e. prior to the imposition of provisional duties by the CBSA effective March 5, 2015, resulted from a diversion of shipments bound for the U.S. market following the imposition, in January 2015, of anti-dumping and countervailing duties in the United States on photovoltaic modules from China made using cells from any other country.[56]

69. This recent development in CSSI's import activities, following the removal of the Ontario domestic content requirement, is an important indicator of its behaviour in the Canadian market when the subject goods have unrestricted access. The first reaction of CSI to the inability to access the U.S. market with Chinese modules (made with cells from other countries) was to divert the shipment to the still-open

49. Exhibit NQ-2014-002-F-03 at paras. 27-28, Vol. 13.
50. *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 221; Exhibit NQ-2014-003-12.11 (protected), Vol. 4B at 232-43; Exhibit NQ-2014-003-17.14, Vol. 5.1G at 19.
51. Exhibit NQ-2014-003-A-05, tab 1, Vol. 11A; Exhibit NQ-2014-003-26.06, Vol. 1C at 39-40; Exhibit NQ-2014-003-F-05 at paras. 23-28, Vol. 13.
52. Exhibit NQ-2014-003-F-01 at para. 55, Vol. 13.
53. Exhibit NQ-2014-003-07B (protected), Tables 35, 48, Vol. 2.1B; Exhibit NQ-2014-003-12.11 (protected), Vol. 4B at 154-58.
54. Exhibit NQ-2014-003-F-03 at paras. 53-55, Vol. 13.
55. Exhibit NQ-2014-003-07D (protected), Table 5, Vol. 2.1B.
56. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 325, 362; *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 187; *Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, Investigation Nos. 701-TA-511 and 731-TA-1246-1247 (Final), USITC Publication 4519, January 2015.

Canadian market, while increasing exports of like goods (made with cells that did not originate in China or Chinese Taipei) to foreign markets (including the United States and European Union).[57]

70. When asked to explain why CSSI is opposing the complaint, Mr. Koerner responded that "Canadian Solar stands very clearly for free trade *and the ability to act as a global company internationally*"[58] [emphasis added]. He further stated that the company opposes any trade measures because it is not reflective of the nature of the photovoltaic industry, which is to provide affordable and cost-effective green energy worldwide.[59] It is important to note that, while the answer given by Mr. Koerner to a question from CSSI's counsel is relevant to the Tribunal's analysis, the mere fact that CSSI opposed the complaint is not a relevant factor for determining its status in the domestic industry.[60]

71. The Tribunal has no doubt that CSI/CSSI is committed to continuing its manufacturing operations in Canada.[61] CSSI has significant production capacity in Canada which it needs to utilize, while ensuring that its global business operations remain competitive in international markets.[62] Nor is the fact that CSSI opposed the complaint a relevant factor for the determination of its status in the domestic industry for the purposes of the Tribunal's analysis.[63] Still, the Tribunal cannot ignore the clear evidence regarding CSSI's prospective behaviour in the domestic market.

72. The documentary evidence on the record indicates that, in the context of no longer having to meet a local content requirement in Ontario, CSI's global strategy points towards an increasing reliance on its access to modules from its Chinese manufacturing operations to supply the markets where trade measures are not imposed on Chinese product and the increasing use of its Canadian production operations to supply other markets, particularly those where such trade measures are currently imposed. This will result in increased sales of the subject goods in the Canadian market in 2015, in the absence of a finding leading to trade measures being imposed in Canada.[64]

73. Moreover, Mr. Koerner testified that, when developing a solar project, the financial attractiveness of the like goods is an important factor for CSI; if they are not financially attractive, CSI will look to "other sources" for the product.[65] Therefore, CSI's current global business strategy seemingly promotes increasing volumes of low-priced imports of the subject goods from its Chinese assets in order to supply the Canadian market.[66] Given that CSSI was the sole importer of the subject goods from CSI in China during the POI, the Tribunal considers it likely that it would continue to be the conduit for the subject goods, especially given CSI's business model as a total solutions provider.

57. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 298, 300, 363, 369; Exhibit NQ-2014-003-07A (protected), Table 57, Vol. 2.1A.
58. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 298.
59. *Ibid.*
60. *Polyethylene Tubing* at para. 60.
61. Exhibit NQ-2014-003-F-05 at paras. 17-22, Vol. 13; *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 297, 300-301, 328.
62. *Transcript of Public Hearing*, Vol.3, 3 June 2015, at 300; Exhibit NQ-2014-003-F-03 at paras. 25-27, Vol. 13.
63. *Polyethylene Tubing* at para. 60.
64. Exhibit NQ-2014-003-12.11 (protected), Vol. 4B at 214, 240.
65. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 356-57.
66. Exhibit NQ-2014-003-12.11 (protected), Vol. 4B at 215, 240.

74. In fact, CSI has identified the potential finding of injury or threat of injury as a risk to its investors,[67] the risk being that CSI will no longer being able to import the subject goods into Canada.[68]

75. Having carefully considered the evidence, including the sheer volume of CSSI's imports of the subject goods in the first quarter of 2015, the preponderance of the evidence shows that CSSI can be reasonably expected to import the subject goods as an aggressive measure in the absence of a positive finding. Specifically, rather than being a "one off" occurrence, CSSI is likely to continue importing significant volumes of the subject goods, under the direction of CSI, in order to capture market share from the domestic producers in the event that there is a negative finding and no duties are imposed.

76. After careful consideration of the evidence and on the basis of the specific facts of this case, the Tribunal finds that CSSI's behaviour in the Canadian market, in terms of its association with related companies, positions its interests primarily as an importer of dumped and subsidized goods and secondarily as a producer of like goods.

77. For the above reasons, the Tribunal finds it appropriate to exclude CSSI from the "domestic industry".

Heliene and GMA Solar

78. Two other domestic producers of like goods imported the subject goods during the POI: Heliene and GMA Solar. In order to determine if they should be treated as part of the domestic industry, the Tribunal considered whether each of those companies was first and foremost a domestic producer of like goods or an importer or conduit of dumped and subsidized goods.

79. Heliene imported a relatively small quantity of the subject goods, both in relation to its total domestic production of like goods and total imports of the subject goods.[69] Mr. Martin Pochtaruk of Heliene explained that those imports were defensive in nature.[70] The Tribunal accepts this explanation as credible and finds that Heliene should be treated as part of the "domestic industry".

80. Conversely, the evidence shows that GMA Solar is almost strictly an importer of the subject goods.[71] On this basis, the Tribunal finds it appropriate to exclude GMA Solar from the "domestic industry".[72]

CROSS-CUMULATION

81. The supporting parties submitted that the Tribunal should assess the impact of the dumping jointly with the impact of the subsidizing. The opposing parties made no submissions on the issue.

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67. Exhibit NQ-2014-003-26.06, Vol. 1C at 11-12.
68. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 365.
69. Exhibit NQ-2014-003-07B (protected), Tables 35, 48, Vol. 2.1B; Exhibit NQ-2014-003-12.05B (protected), Vol. 4 at 195-96.
70. Exhibit NQ-2014-003-A-04 (protected), at paras. 46-49, Vol. 12.
71. Exhibit NQ-2014-003-07B (protected), Vol. 2.1B at 7, 10; Exhibit NQ-2014-003-12.12 (protected), Vol. 4C at 15-19.
72. Given that GMA Solar accounts for a very small volume of domestic production, both in absolute terms and relative to total domestic production, its exclusion from the domestic industry does not affect the consolidated data or trends in IRS (1). Therefore, this statement of reasons will rely on the data in IRS (1), as is. Exhibit NQ-2014-003-07C (protected), Schedules 1, 3, Vol. 2.1B.

82. There are no legislative provisions in *SIMA* that directly address the issue of cross-cumulation of the effects of both dumping and subsidizing. When dealing with goods from an individual country, the effects of dumping and subsidizing are manifested in a single set of price effects, and it is not possible to isolate the effects caused by the dumping from the effects caused by the subsidizing.[73] In reality, the effects are so closely intertwined as to render it impossible to allocate discrete portions to the dumping and the subsidizing respectively. Therefore, the Tribunal has determined that it is appropriate to make a cumulative assessment of the effects of the dumping and subsidizing of the subject goods in this inquiry.

INJURY ANALYSIS

83. As stated above, the supporting parties did not claim that the dumping and subsidizing of the subject goods have caused injury. They submitted however that the dumping and subsidizing were threatening to cause injury. Nevertheless, the Tribunal is required, pursuant to subsection 42(1) of *SIMA*, to inquire into whether the dumping and subsidizing of the subject goods have caused injury before it can consider whether they are threatening to cause injury.[74]

84. Subsection 37.1(1) of the *Special Import Measures Regulations*[75] prescribes that, in determining whether the dumping and subsidizing have caused material injury to the domestic industry, the Tribunal is to consider the volume of the dumped and subsidized goods, their effect on the price of like goods in the domestic market, and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the injury on the basis of the factors listed in subsection 37.1(1), and whether any factors other than the dumping and subsidizing of the goods have caused injury.

85. Neither *SIMA* nor the *Regulations* define the term "material". However, both the extent of injury during the relevant time frame and the timing and duration of the injury are relevant considerations in determining whether any injury caused by the subject goods is "material".[76]

Context for the Tribunal's Assessment of Injury

86. In assessing the effects of the dumping and subsidizing of the subject goods and the materiality of any resulting injury, the Tribunal was mindful of the unique market conditions created by the Ontario government's minimum local content requirement under the FIT Program. Ontario constitutes by far the largest share of the domestic market for solar modules and laminates, with the domestic market during the

73. *Copper Rod* (28 March 2007), NQ-2006-003 (CITT) at para. 48; *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at para. 76; *Aluminum Extrusions* at para. 147.

74. At the hearing, the Tribunal indicated that it is required to do an injury analysis and invited counsel for the parties to address the issue of injury in oral argument. Counsel for the supporting parties made no submissions on injury. Counsel for CSSI and the CCCME made brief submissions, arguing that the dumped and subsidized goods have not caused injury and that any negative effects sustained by the supporting parties during the POI were caused by other factors. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 8, Vol. 4, 4 June 2015, at 509, Vol. 5, 5 June 2015, at 541, 565, 592; Exhibit NQ-2014-003-M-01 at paras. 9, 16-27, Vol. 13.

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

76. The Tribunal suggested, in *Hot-rolled Carbon Steel Plate* (27 October 1997), NQ-97-001 (CITT) at 13, that the concept of materiality could entail both temporal and quantitative dimensions, "[h]owever, the Tribunal is of the view that, to date, the injury suffered by the industry has not been *for such a duration or to such an extent* as to constitute 'material injury' within the meaning of SIMA" [emphasis added].

POI essentially restricted to like goods produced in Ontario.[77] As such, Ontario's local content policy severely limited domestic market access for all imports of solar modules and laminates during most of the POI.

87. The Ontario FIT Program, which was implemented as a major component of the *Green Energy Act, 2009,*[78] offers price incentives to renewable energy project developers. Participation is open to facilities located in Ontario that generate electricity exclusively from one or more of the following sources of renewable energy: wind, solar photovoltaics, renewable biomass, biogas, landfill gas and waterpower. Under the FIT Program, generators of electricity from renewable energy sources are paid a guaranteed price under 20-year or 40-year contracts.[79] It is administered by the Independent Electricity System Operator (IESO)[80] through the application of standardized rules, contracts and, for each class of generation technology, pricing.

88. The FIT Program is divided into two streams: (1) the FIT stream applies to renewable energy projects with a capacity to produce electricity over 10 kW and less than 500 kW; and (2) the micro-FIT stream applies to projects with a capacity to produce up to 10 kW of electricity.[81] Projects greater than 500 kW were removed from the scope of the FIT Program and, starting with FIT 3 contracts,[82] are procured separately under the Large Renewable Procurement (LRP) process.[83]

89. Applications for FIT projects are generally accepted over a specified "window" that occurs periodically throughout the year in order to meet annual procurement targets. Projects under the FIT Program are typically referred to according to the applicable version of the FIT contract (i.e. version 1, version 2, etc.). FIT 1 and FIT 2 projects relate to offers made on or before April 2012 and July 2013 respectively. Similarly, micro-FIT 1 and micro-FIT 2 projects relate to offers made before or after September 2012.[84]

90. Initially, qualifying solar power generation projects had to meet a minimum local (i.e. Ontario) content requirement under the standard FIT and micro-FIT contracts.[85] The applicable formula under those contracts essentially necessitated manufacturing the solar generation equipment, i.e. solar modules, in Ontario in order to meet the local content threshold that varied between 40 percent and 60 percent of a designated list of activities, depending on the type of contract and when it was offered.[86]

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77. Exhibit NQ-2014-003-26.03, Vol. 1B at 19. Off-grid systems, which once dominated a much smaller market in Canada, accounted for approximately 1 percent of total installed capacity in 2013 and, therefore, represent a relatively small share of total demand. Exhibit NQ-2014-003-A-05, tab 29, Vol. 11A; Exhibit PI-2014-003-02.01, Vol. 1 at 189, 193-96; Exhibit PI-2014-003-02.01, Vol. 1A at 18; *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 21, 38-39, 43, 50, 71, Vol. 2, 2 June 2015, at 163, 217, Vol. 4, 4 June 2015, at 472, 474.
78. S.O. 2009, c. 12, Sch. A.
79. Exhibit NQ-2014-003-A-01 at paras. 58-61, 64-90, Vol. 11; Exhibit NQ-2014-003-A-05, tab 20 at 31, Vol. 11A.
80. Throughout the POI, the FIT Program was administered by the Ontario Power Authority (OPA). On January 1, 2015, the IESO merged with the OPA and is now the operator of the FIT Program.
81. Exhibit NQ-2014-003-A-05, tab 7, Vol. 11A.
82. "FIT 3" refers to the procurement of contracts offered by the OPA on July 30, 2014. Following the FIT 3 application period from November 4 to December 13, 2013, the OPA was authorized to offer up to 123.5 MW of contracts to proponents with successful applications. Exhibit NQ-2014-003-A-05, tab 11, Vol. 11A.
83. Exhibit NQ-2014-003-A-05, tab 18, Vol. 11A; *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 469.
84. Exhibit NQ-2014-003-A-01 at paras. 64-69, Vol. 11.
85. Exhibit NQ-2014-003-A-05, tab 19, Vol. 11A.
86. *Ibid.*, tabs 19, 20.

91. On May 6, 2013, the WTO Appellate Body issued two decisions in relation to challenges brought by Japan and the European Union against, *inter alia*, the FIT Program's local content requirement.[87] On August 16, 2013, in an interim step towards compliance with these decisions, the OPA reduced the FIT Program's minimum local content requirement from 60 percent to 22 percent.[88] The supporting parties submitted that the minimum local content requirement was effectively eliminated at this time, as the lower threshold no longer compelled the use of locally made solar generation equipment, i.e. solar modules.[89] The lower threshold was applied for FIT 3, micro-FIT 3 (2013) and micro-FIT 3 (2014) contracts.[90]

92. On July 25, 2014, the local content requirements were fully removed for the purposes of new FIT, micro-FIT and LRP contracts (i.e. FIT 3.1 and FIT 4 contracts).[91]

93. During the POI, a large share of FIT-related sales were for contracts issued under earlier phases of the FIT Program that had a minimum local content requirement of up to 60 percent, such as micro-FIT 1, FIT 1, micro-FIT 2 and FIT 2 contracts.[92] There were few sales related to FIT 3 during the POI (the Tribunal is only aware of one instance)[93] and no known sales for post-FIT 3 contracts.[94] The evidence before the Tribunal indicates that this is because there is generally a lag time of several months between the award of FIT contracts and the subsequent purchase and installation of solar modules as part of the overall construction of the project.[95]

94. Bearing in mind the unique circumstances existing in the domestic market throughout most of the POI, the Tribunal will now assess whether the dumping and subsidizing of the subject goods have caused injury.

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87. *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program* (6 May 2013), WTO Docs. WT/DS412/AB/R and WT/DS426/AB/R, Reports of the Appellate Body at para. 6.1.6.1. Among its numerous findings, the Appellate Body held that the minimum required domestic content levels prescribed under the FIT Program implemented by the Government of Ontario and related FIT and micro-FIT contracts are inconsistent with Article 2.1 of the *Agreement on Trade-related Investment Measures* and Article III:4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
88. Exhibit NQ-2014-003-A-05, tab 9, Vol. 11A.
89. Although the FIT local content requirement was not entirely eliminated until July 25, 2014, when Mr. Paolo Maccario of Silfab was questioned about the reduction of the local content requirement from 60 percent to 22 percent in 2013, he replied that "[t]he 22 percent is very easy to achieve by either engineering or constructing. . . . Therefore . . . the need of having [solar modules] done domestically disappeared." *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 23; Exhibit NQ-2014-003-S-05, tab 48 at 139, Vol. 13A.
90. FIT 3 contract offers were made on July 30, 2014, micro-FIT 3 (2013) contract offers were made after August 28, 2013, micro-FIT 3 (2014) contract offers were made after January 6, 2014. Exhibit NQ-2014-003-A-01 at paras. 70-71, 74, Vol. 11; Exhibit NQ-2014-003-A-05, tabs 10, 11, Vol. 11A.
91. Exhibit NQ-2014-003-A-01 at para. 87, Vol. 11; Exhibit NQ-2014-003-S-05, tab 48 at 139-40, Vol. 13A.
92. Exhibit NQ-2014-003-A-02 at para. 65, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 24-25, 106, Vol. 4, 4 June 2015, at 507.
93. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 25; *Transcript of In Camera Hearing*, Vol. 2, 2 June 2015, at 106; Exhibit NQ-2014-003-A-02, at para. 153, Vol. 11; Exhibit NQ-2014-003-B-04 (protected) at 11-12, Vol. 12; Exhibit NQ-2014-003-12.06 (protected), Vol. 4A at 55-57.
94. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 24-25, 106, Vol. 4, 4 June 2015, at 419, 422, 507; *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 200.
95. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 24, Vol. 2, 2 June 2015, at 105-106, Vol. 4, 4 June 2015, at 419-20, 422, 463-64, 475-76; Exhibit NQ-2014-003-B-03 at 6, Vol. 11. The timing of the various phases of FIT contract offers, as well as the delay in related sales of the solar modules, is further discussed in the threat of injury analysis.

Import Volume of Dumped and Subsidized Goods

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

96. The volume of imports of the subject goods, albeit small in terms of kW, increased by 44 percent in 2013 and 24 percent in 2014, for a net increase of 79 percent during the POI.[96] However, the ratios of the subject goods to domestic production and consumption of like goods were low and showed only minimal increases during the POI.[97]

97. Accordingly, the Tribunal finds that there was a significant increase in the volume of the dumped and subsidized goods in absolute terms, but not in relative terms.

Price Effects of Dumped and Subsidized Goods

98. Paragraph 37.1(1)(*b*) of the *Regulations* directs the Tribunal to consider the effects of the dumped and subsidized goods on the price of like goods and, in particular, whether the dumped and subsidized goods have significantly undercut or depressed the price of like goods, or suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred. In this regard, the Tribunal distinguishes the price effects of the dumped or subsidized goods from any price effects that have resulted from other factors.

99. At the level of the apparent market, the price of the subject goods undercut the price of the like goods[98] in both 2013 and 2014, albeit to a lesser extent in 2014.[99] The average prices of the subject goods were also well below those of non-subject imports in 2013, with an even larger spread in 2014.[100]

100. In this inquiry, the Tribunal identified seven benchmark products and collected data on the prices of the like goods and the subject goods for each of these products on a quarterly basis for the last eight quarters of the POI, i.e. from the first quarter of 2013 to the fourth quarter of 2014. However, benchmark product No. 1 was the only product that provided a meaningful basis for comparison between the subject goods and the like goods. For this benchmark product, the prices of the subject goods undercut those of the like goods in seven of eight quarters.[101]

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96. Exhibit NQ-2014-003-06C, Tables 34, 38, Vol. 1.1B.
97. Exhibit NQ-2014-003-07C (protected), Table 47, Vol. 2.1B.
98. To assess price undercutting, the Tribunal compared unit selling values of the subject goods to unit values of sales from domestic production, as shown separately in the investigation report and IRS (1). This latter value does not include sales from OEM production, which are not sold by the domestic producers into the merchant market. Under most OEM agreements, the domestic producers are paid a fixed rate per solar module by the contracting parties, which are often the importing arm of a foreign producer or exporter, and the contracting parties have reported these sales in their responses to the importers' questionnaire. Since domestic producers do not determine the selling prices of OEM-produced modules in the merchant market, the Tribunal did not assess the effects of the subject goods on those prices.
99. Exhibit NQ-2014-003-07C (protected), Table 54, Vol. 2.1B.
100. *Ibid.*
101. Benchmark product No. 1 covered 60-cell multi-crystalline silicon modules, with a peak power wattage between 240 and 250, Pmax or Wp inclusive. For benchmark product Nos. 3, 4, 6 and 7, there were no imports of the subject goods in 2013 or 2014. The volumes of imports of the subject goods for the remaining benchmark products were small. Exhibit NQ-2014-003-07C (protected), Tables 69-84, Vol. 2.1B.

101. Heliene and Silfab made a number of account-specific allegations of price undercutting.[102] Several of these allegations are based on general information on Chinese pricing obtained either directly from Chinese producers/exporters or from Canadian customers, as opposed to direct evidence that the price of the subject goods undercut the price of the like goods on a specific sale. Nonetheless, in the Tribunal's view, this evidence is indicative of the availability of the subject goods at prices lower than those of the like goods.

102. In terms of price depression, the Tribunal observes the overall downward trend in average selling prices of the like goods and the subject goods from 2012 to 2014. The magnitude of the decrease in the average price of the subject goods was much greater than that of the like goods. Conversely, the average selling price of non-subject imports steadily increased over the POI.

103. However, on a yearly basis, prices of the like goods and prices of the subject goods changed in opposite directions. In 2013, the price of the like goods increased by 6 percent, while the price of the subject goods decreased by 46 percent. In the following year, the price of the like goods decreased by 18 percent, while the price of the subject goods increased by 4 percent.[103]

104. Similarly, for benchmark product No 1, on a quarter-to-quarter basis, the prices of the subject goods and the prices of the like goods did not always change in the same direction.[104]

105. In view of the above, the Tribunal is not persuaded that the net downward trend in prices of the like goods observed during the POI is attributable to the subject goods.

106. The Tribunal finds that there is no evidence of price suppression during the POI.[105] Although the domestic industry's consolidated unit cost of goods manufactured increased in 2013, the price of the like goods increased by essentially the same percentage. In 2014, the unit cost of goods manufactured declined.

107. In sum, the Tribunal finds that, although the subject goods significantly undercut the price of like goods in 2013 and 2014, they did not significantly depress or suppress the price of like goods.

Resultant Impact on the Domestic Industry

108. Paragraph 37.1(1)(*c*) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped and subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry.[106] These impacts are to be

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102. Exhibit NQ-2014-003-A-03, tab 1, Vol. 11; Exhibit NQ-2014-003-A-04 (protected) at 6-7, tabs, 2, 3, Vol. 12; Exhibit NQ-2014-003-12.05 (protected), Vol. 4 at 129-31; Exhibit NQ-2014-003-12.06 (protected), Vol. 4A at 55-57; Exhibit NQ-2014-003-B-04 (protected) at 17, tab 8, Vol. 12.
103. Exhibit NQ-2014-003-06C, Table 55, Vol. 1.1B.
104. Exhibit NQ-2014-003-07C (protected), Table 69, Vol. 2.1B.
105. *Ibid.*, Table 97.
106. Such factors and indices include (i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and (iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support programme.

distinguished from the impact of other factors also having a bearing on the domestic industry.[107] Paragraph 37.1(3)(*a*) requires the Tribunal to consider whether a causal relationship exists between the dumping or subsidizing of the goods and the injury, retardation or threat of injury, on the basis of the volume, the price effect and the impact on the domestic industry of the dumped or subsidized goods.

109. With regard to several indicators, the domestic industry performed well during the POI. From 2012 to 2014, total production increased substantially, as did the volume and value of domestic sales.[108] The domestic industry improved productivity, increased its production capacity and capacity utilization and saw employment rise slightly.[109] The domestic industry made investments throughout the POI, although the value of investments in 2014 was the lowest of the three years.[110]

110. However, the domestic industry was unable to benefit from the significant expansion in the size of the domestic market, losing 7 percentage points of market share during the POI. The market share held by OEM production also declined between 2012 and 2014. Still, the Tribunal does not consider that the decline in market share held by the domestic industry's sales of domestic production over the POI can be attributed to the subject goods. The subject goods had an insignificant presence in the market throughout the POI, and their market share declined by 1 percentage point. Imports of solar modules from non-subject countries had essentially disappeared from the market by the end of the POI.[111] CSSI, on the other hand, increased its market share by more than 20 percentage points for sales of solar modules produced in Canada and was the dominant player in the market.[112]

111. Despite healthy production and sales, the domestic industry's financial performance for sales of domestically produced goods (non-OEM production) during the POI was less than robust, with several indicators of profitability in decline. Net income was positive in 2013, but negative in both 2012 and 2014.[113] Gross margin as a percent of net sales decreased, but remained positive throughout the POI.[114] Financial results for production under OEM agreements were negative in 2012, but positive in both 2013 and 2014, although results declined significantly in 2014. Gross margins as a percentage of net sales on OEM production were also positive in all periods of the POI.[115]

112. In view of the limited presence of the subject goods in the market throughout the POI, the Tribunal does not consider that the domestic industry's weak financial performance is attributable to the subject goods.

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107. Paragraph 37.1(3)(*b*) of the *Regulations* directs the Tribunal to consider whether any factors other than dumping or subsidizing of the subject goods have caused injury. The factors which are prescribed in this regard are (i) the volumes and prices of imports of like goods that are not dumped or subsidized, (ii) a contraction in demand for the goods or like goods, (iii) any change in the pattern of consumption of the goods or like goods, (iv) trade-restrictive practices of, and competition between, foreign and domestic producers, (v) developments in technology, (vi) the export performance and productivity of the domestic industry in respect of like goods, and (vii) any other factors that are relevant in the circumstances.
108. Exhibit NQ-2014-003-06C, Tables 35, 36, Schedule 2, Vol. 1.1B; Exhibit NQ-2014-003-07C (protected), Table 48, Vol. 2.1B.
109. Exhibit NQ-2014-003-07C (protected), Tables 100, 103, 104, Vol. 2.1B.
110. *Ibid.*, Table 105.
111. *Ibid.*, Table 50.
112. *Ibid.*, Table 50.
113. *Ibid.*, Table 93.
114. *Ibid.*, Table 93.
115. *Ibid.*, Table 94.

Materiality

113. Given the above, the Tribunal finds that any injury incurred by the domestic industry during the POI was not sufficiently grave or sustained as to qualify as "material" as contemplated by the definition of "injury" under section 2 of *SIMA*.

THREAT OF INJURY ANALYSIS

114. Having found that the dumping and subsidizing of the subject goods have not caused material injury to the domestic industry, the Tribunal must now consider whether they are threatening to cause material injury. The Tribunal is guided in its consideration of this question by subsection 37.1(2) of the *Regulations*, which prescribes factors to be taken into account for the purposes of its threat of injury analysis.[116] Also of relevance is subsection 2(1.5) of *SIMA*, which indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping and subsidizing of the goods would cause injury are clearly foreseen and imminent. Further, subsection 37.1(3) of the *Regulations* directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the threat of injury on the basis of the factors listed in subsection 37.1(2) of the *Regulations*, and whether any factors other than the dumping and subsidizing of the goods are threatening to cause injury.

115. The domestic industry's recent performance, as discussed in the above injury analysis, is relevant to set the context for the threat of injury analysis.[117]

116. In addition, all the parties in this inquiry have referred to the removal of the minimum local content requirements under the FIT Program as a major shift in the domestic market conditions. The supporting parties submitted that the inventory of contracts that required local content will be exhausted by the end of 2015, leaving the domestic industry fully exposed to the injurious impact of the dumped and subsidized goods, which threaten to capture the market with devastating effects for the domestic producers.

117. The opposing parties argued that it would be improper to use the removal of the local content requirement to justify the application of anti-dumping or countervailing duties because the measure was inconsistent with Canada's WTO obligations. They further submitted that the local content requirement

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116. Subsection 37.1(2) of the *Regulations* reads as follows: "For the purposes of determining whether the dumping or subsidizing of any goods is threatening to cause injury, the following factors are prescribed: (*a*) the nature of the subsidy in question and the effects it is likely to have on trade; (*b*) whether there has been a significant rate of increase of dumped or subsidized goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped or subsidized goods; (*c*) whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter, that indicates a likelihood of a substantial increase of dumped or subsidized goods, taking into account the availability of other export markets to absorb any increase; (*d*) the potential for product shifting where production facilities that can be used to produce the goods are currently being used to produce other goods; (*e*) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of the goods; (*f*) inventories of the goods; (*g*) the actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced version of like goods; (*g*.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods; (*g*.2) evidence of the imposition of anti-dumping or countervailing measures by the authorities of a country other than Canada in respect of goods of the same description or in respect of similar goods; and (*h*) any other factors that are relevant in the circumstances."

117. *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* (22 March 2004), WTO Doc. WT/DS277/R, Report of the Panel [*Softwood Lumber*] at paras. 7.105-7.112.

created market distortions by attracting the entry of smaller producers that are unable to compete without government support.

118. As explained in the reasons that follow, the Tribunal has not used the removal of the local content requirement to justify its finding that the subject goods are threatening to cause injury. In applying the relevant provisions of *SIMA* and the *Regulations*, by which Canada's WTO obligations with respect to anti-dumping and countervailing duties are implemented in domestic law, the Tribunal recognized the removal of the local content requirement as an important development in the domestic industry that has altered the prospective conditions of competition between the like goods and the subject goods.[118]

119. The fact that the local content requirement under the FIT Program was found to be inconsistent with certain WTO obligations, and has since been removed by the Government of Ontario, does not somehow negate the possibility that the domestic industry may be entitled to protection from dumped and subsidized imports that are threatening to cause injury. Such a view would be inconsistent with Canada's WTO rights and obligations, as well as the objectives of *SIMA*. As stated above, its objectives are, *inter alia*, to protect producers in Canada from injury or threat of injury caused by imports of dumped or subsidized goods. Providing government support is not one of them.

120. As further explained below, the impact of this change in circumstance affecting the prospective competitive environment of the domestic industry has been delayed, as existing FIT and micro-FIT projects with a minimum local content requirement continued to generate sales during most of the POI and into 2015. However, the Tribunal finds that a preponderance of the evidence in this inquiry conclusively establishes that the emerging competitive conditions in the domestic market created by the removal of the local content requirement under the FIT Program give rise to a situation in which a threat of injury is "clearly foreseen and imminent", based on the following assessment of the prescribed threat of injury factors.

Time Frame

121. In assessing whether the circumstances in which the dumping and subsidizing of the subject goods would cause injury are clearly foreseen and imminent, the Tribunal has typically considered a time frame of 12 to 18 months, and not more than 24 months, beyond the date of its finding. This time frame may vary depending on the unique circumstances of each case, such as the nature of the industry or conditions of competition.[119]

122. In this case, the supporting parties submitted that, due to the time lag between the award of a FIT contract and the sale and delivery of the solar modules, a period of 12 months to assess likely prices would be appropriate, while a period of approximately 24 months would be appropriate to assess likely volumes and the consequent impact on the state of the domestic industry. CSSI submitted that a time frame of 12 months would be appropriate in this case because of the fast-paced nature of the solar industry. CSSI also noted that solar modules have a relatively short delivery time and that the lengthy FIT project time frame encompasses much more than just the construction aspects of a FIT project.

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118. A WTO Panel has broadly interpreted the requirement of a "change in circumstances" that would give rise to a situation in which injury would occur as encompassing ". . . a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently". *Softwood Lumber* at para. 7.57.
119. *Galvanized Steel Wire* (20 August 2013), NQ-2013-001 (CITT) at para. 118; *Unitized Wall Modules* (12 November 2013), NQ-2013-002 (CITT) at paras. 133-34.

123. The Tribunal acknowledges that delivery times for like goods and imports of the subject goods are fairly short. The evidence shows that, once purchased, like goods are typically delivered within 30 days and the subject goods within 60 days.[120] However, these delivery times must be considered in the context of the entire solar project.

124. As discussed above, the domestic market is largely driven by the FIT Program. The development of a FIT (or LRP) project is a significant undertaking and can span from one to three years and sometimes more.[121] Although planning for a solar project starts well in advance, such as the evaluation of potential project locations, the official FIT process starts with an application period set by the IESO. Applications undergo a lengthy eligibility review, ranking and screening processes, as well as a connection screen.[122] Following this, the IESO issues contracts to successful applicants.

125. Once contracts have been executed, there are various grid connection assessments and regulatory approvals that must be sought before a notice to proceed can be obtained. As part of the approval process, a project developer would typically be required to identify a number of key pieces of the project, such as the investor, the type of module, the wattage, the size of the system, etc.,[123] although developers may not be bound by these decisions, and the Tribunal heard evidence that amendments may be sought in some circumstances.[124] This approval process results in a significant lag time between the award of a FIT contract and the commencement of the construction phase of the project. Mr. Pochtaruk testified that the approval could take upwards of 12 to 18 months for large projects.[125]

126. Once the notice to proceed has been obtained, the engineering and procurement phases of the FIT project begin.[126] This is followed by the construction phase, which could last from 1 to 10 months depending on the size of the project.[127] In order to receive the guaranteed price of electricity, a project must be operational within the time frame specified in the FIT contract. This is known as the milestone commercial operation date.[128] Projects are typically required to be operational within 18 to 36 months from the date of the FIT (or LRP) contract, although the exact timing depends on the terms of the applicable FIT contract (FIT 1, FIT 2, etc.), as well as the nature and size of the project.[129]

127. Production of solar modules related to FIT 2 projects, which had minimum local content requirements high enough to necessitate the use of Ontario-made solar panels, is winding down in the next few months and should be completed by the end of 2015. Mr. John Gamble testified that EnerDynamic stopped production in May 2015, as it had no more orders.[130] Mr. Pochtaruk and Mr. Maccario both stated that, after 2015, there will be no more orders requiring local content.[131] Mr. Mikael Niskanen testified that

120. Exhibit NQ-2014-003-06A, Table 14, Vol. 1; *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 279. The Tribunal notes that delivery times could be up to 120 days for imports from non-subject countries.
121. Exhibit NQ-2014-003-A-05, tabs 18, 20, Vol. 11A; *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 469.
122. Exhibit NQ-2014-003-A-05, tab 6 at 27, Vol. 11A.
123. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 464.
124. *Ibid.* at 466.
125. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 105.
126. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 464, 476.
127. *Ibid.* at 476-77.
128. Exhibit NQ-2014-003-A-05, tab 6 at 81, Vol. 11A.
129. Exhibit NQ-2014-003-A-05, tab 18 at 210-11, tab 20 at 316, Vol. 11A; *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 469.
130. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 84-85.
131. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 106, Vol. 1, 1 June 2015, at 25.

most of Eclipsall's production requiring local content will be completed in the third quarter of 2015 or early on in the fourth quarter of 2015.[132]

128. In 2014, 223 MW of FIT 3 and FIT 3.1 contracts, for which there was no requirement for locally produced solar modules, were awarded.[133] Purchases of solar modules relating to these projects do not appear to have occurred to any great extent, either because projects have not advanced to the purchase and installation phase or because purchasers have adopted a *wait-and-see* approach in order to learn the results of this inquiry before making purchasing decisions.[134] However, the Tribunal's understanding of the length of a FIT project indicates that orders for solar modules relating to these contracts will begin shortly and occur over the next 24 months and beyond.[135]

129. In terms of FIT 4 contracts, the Tribunal finds it speculative to consider the projected volume of 241 MW as part of its threat of injury analysis. The FIT 4 application period, which was planned for July 2015, has been delayed and, as a result, FIT 4 contracts are not likely to be issued for several months.[136] The solar modules themselves would not likely be purchased until several months after the contract date, in accordance with the process outlined above.

130. The LRP process is expected to be run in two phases and does not call for local content. The first phase (LRP I), which is currently under development, includes a procurement target of 140 MW for solar energy projects.[137] According to the evidence on the record, the LRP I application period was scheduled to close on June 1, 2015, with the notification of successful applicants in August 2015.[138]

131. Micro-FIT contracts have a different, streamlined application process, which means shorter project timelines than for FIT or LRP projects.[139] The IESO has set an annual procurement target of 50 MW for micro-FIT projects for each of the next four years.[140]

132. In light of these specific considerations, the Tribunal finds it appropriate and reasonable in this case to look at prices and volumes within a period of up to 24 months.

Likelihood of Increased Dumped and Subsidized Goods

133. Paragraphs 37.1(2)(*b*) and (*c*) of the *Regulations* require the Tribunal to consider the rate of increase of dumped or subsidized goods imported into Canada and the disposable capacity of the producers of those goods in its determination of whether there is a likelihood of substantially increased imports of the subject goods. In making its determination, the Tribunal also considers demand forecasts, the potential for product

132. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 179.
133. Exhibit NQ-2014-003-A-05, tabs 11, 14, Vol. 11A.
134. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 161; *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 200.
135. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 25-26, 72, Vol. 2, 2 June 2015, at 104-105, 161, 178-79, 203-204, Vol. 4, 4 June 2015, at 419-20, 422, 469-70, 507.
136. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 420, 433-34; Exhibit NQ-2014-003-A-05, tab 6, Vol. 11A.
137. Exhibit NQ-2014-003-A-05, tab 18 at 125, Vol. 11A.
138. *Ibid.*, tab 18 at 129.
139. *Ibid.*, tab 6 at 80-81; *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 24.
140. Exhibit NQ-2014-003-A-05, tab 44, Vol. 11D.

shifting, inventories of the subject goods and the likely effects on trade and the imposition of anti-dumping or countervailing duties against the subject goods by other countries.[141]

Demand Forecast

134. In recent years, the global demand for solar modules has grown significantly, and continued expansion is projected in the near term.[142] According to a March 2015 market research report, global solar project installations are forecast to increase by 57.3 GW, or 30 percent in 2015, doubling growth in 2014, which was 14 percent.[143] The key markets driving this projected growth are the Asia-Pacific region, the United States and the United Kingdom. Demand in the European market is expected to rebound in 2015 from weak conditions in 2014.[144] China and Japan were the two largest markets in 2014, with 12.6 GW of new solar capacity installed in China alone.

135. According to a 2014 report of the International Energy Agency titled "Technology Roadmap: Solar Photovoltaic Energy", the emergence of the global photovoltaic market has coincided with rapid reductions in the costs of solar modules and a dramatic shift in manufacturing from Europe (primarily Germany) to Asia, mostly China and Chinese Taipei. Several factors have been driving these developments, including economies of scale in large new production facilities, supply-chain development and access to finance, particularly in China, as well improvements in technology and a downward trend in the pricing of major material components, particularly silicon-based cells.[145]

136. In March 2015, China's National Energy Administration announced a total target of 17.8 GW for solar power generation capacity of ground-mounted projects in 2015, up from 12.6 GW in 2014.[146] There are also forecasts which suggest that demand for solar modules in China will increase significantly in the medium to long term. The Chinese government has set a target of reaching 100 GW of installed solar capacity in China by 2020.[147] China is expected to become the largest producer of solar electricity soon after 2020, with its share increasing from 18 percent of global generation by 2015 to 40 percent in 2030.[148]

137. In terms of the Canadian market, the total apparent market increased significantly over the POI.[149] The annual growth rate slowed somewhat in 2014 as compared to 2013 but remained strong. The growth in demand for solar modules has been driven by the Ontario market, which accounts for close to 100 percent of solar capacity for grid-connected applications in Canada, in large part due to the FIT Program.[150] Off-grid systems, which made up the bulk of the solar module and laminate market in Canada before the Ontario FIT Program, accounted for approximately 1 percent of total capacity in 2013.[151]

141. Paragraphs 37.1(2)(*a*), (*d*), (*f*), (*g.2*) and (*h*) of the *Regulations*.
142. Exhibit NQ-2014-003-A-05, tab 29, Vol. 11A.
143. Exhibit NQ-2014-003-S-05, tab 54, Vol. 13A; Exhibit NQ-2014-003-A-05, tab 30, Vol. 11A.
144. Exhibit NQ-2014-003-S-05, tab 54, Vol. 13A; Exhibit NQ-2014-003-A-05, tab 30, Vol. 11A; Exhibit NQ-2014-003-26.06, Vol. 1C at 10.
145. Exhibit NQ-2014-003-A-05, tab 29, Vol. 11A; Exhibit NQ-2014-003-S-05, tab 54, Vol. 13A.
146. Exhibit NQ-2014-003-A-05, tab 30, Vol. 11A; Exhibit NQ-2014-003-A-05, tab 34 at 55, Vol. 11B.
147. Exhibit NQ-2014-003-14.14, Vol. 5B at 76; Exhibit NQ-2014-003-A-05, tab 38 at 73, Vol. 11B.
148. Exhibit NQ-2014-003-A-05, tab 29, Vol. 11A.
149. Exhibit NQ-2014-003-07C (protected), Table 49, Vol. 2.1B.
150. Exhibit NQ-2014-003-26.03, Vol. 1B at 19; Exhibit NQ-2014-003-07C (protected), Table 56, Vol. 2.1B.
151. Exhibit NQ-2014-003-26.03, Vol. 1B at 19; Exhibit NQ-2014-003-A-05, tab 29, Vol. 11A.

138. The supporting parties submitted that Canadian demand for solar modules is "... stable and will grow in the next 12 to 18 months."[152] As well, Mr. Richard J. Haug of CSSI testified that the demand in Ontario has grown in the past year.[153] Witnesses at the hearing estimated the total apparent market size in 2015 to be in the range of 400-600 MW.[154] This projection is dependent upon the Ontario government's annual procurement targets of 150 MW and 50 MW for FIT and micro-FIT, respectively, from 2014 to 2017.[155] The supporting parties submitted that the volumes of approved FIT and micro-FIT projects are a reliable indication of the volumes of solar modules to be procured in the next 12 to 18 months. In this regard, they have filed evidence of recently announced volumes to be procured in 2015 and 2016 for solar projects under micro-FIT 3 (2014), FIT 3, FIT 3.1 and FIT 4 contracts, as well as the LRP process for projects greater than 500 KW.[156] For instance, purchases under FIT 3 and FIT 3.1 contracts are together expected to account for more than 223 MW in 2015.[157]

139. There was no evidence of significant market demand, either current or projected, outside Ontario, though some witnesses indicated the possibility of increased activity in Alberta.[158]

140. With respect to the off-grid market, several witnesses gave evidence that the off-grid market, which was approximately 15 MW to 20 MW in 2015, is expected to grow in 2016 and 2017.[159]

141. The evidence indicates substantial pending demand for solar modules in the domestic market, particularly in Ontario. Due to the gradual elimination of the local content requirement in the FIT Program, which will be fully experienced by the domestic industry by the end of 2015, future sales will be open to competition between like goods and imports, including the subject goods. As discussed further below, this will make Canada a more attractive market for exporters of the subject goods.

Pending Volumes

142. As previously noted, the absolute volume of imports of the subject goods increased by 44 percent from 2012 to 2013 and by 24 percent from 2013 to 2014.[160]

143. However, the supporting parties contended that the import data for 2014 do not reflect the true extent of anticipated market penetration by the subject goods. They argued that solar module sales for FIT projects that must meet a minimum local content requirement of 22 percent (i.e. FIT 3) or none at all (i.e. FIT 3.1 and FIT 4) will only get underway in 2015 due to the inherent time lag in the overall process, which involves various phases of assessment, approval, engineering, procurement and construction.

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152. Exhibit NQ-2014-003-A-01, at paras. 126-29, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 91-92; Exhibit NQ-2014-003-11.13, Vol. 3D at 53.
153. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 319.
154. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 34, Vol. 2, 2 June 2015, at 162, 217, Vol. 3, 3 June 2015, at 303-306; *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 209.
155. Exhibit NQ-2014-003-26.03 at 27, Vol. 1B.
156. Exhibit NQ-2014-003-A-02 (protected), at paras. 71-79, 233, Vol. 12; Exhibit NQ-2014-003-A-05, tabs 10, 17, 18, Vol. 11A; Exhibit NQ-2014-003-A-05, tab 44, Vol. 11D; Exhibit NQ-2014-003-B-04 (protected) at 4, Vol. 12.
157. Exhibit NQ-2014-003-A-02 at para. 146, Vol. 12; *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 422.
158. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 71, 77, Vol. 2, 2 June 2015, at 108, 162, Vol. 4, 4 June 2015, at 472.
159. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 107, 115, 159-60, Vol. 3, 3 June 2015, at 304; Exhibit NQ-2014-003-D-03 at para. 45, Vol. 11.
160. Exhibit NQ-2014-003-06C, Table 38, Vol. 1.1B.

144. The Tribunal agrees that the backlog in the marketplace of FIT contracts that still require made-in-Ontario solar modules explains why the growth of imports of the subject goods did not accelerate in 2014 following the decrease in August 2013 and subsequent removal in August 2015 of the minimum local content requirement. As previously discussed, the existence of the local content requirement in Ontario effectively limited the volume of dumped and subsidized goods that entered the domestic market. According to the evidence before the Tribunal, the effect of the local content requirement in the domestic market will be completely eliminated by the end of 2015.

145. In these circumstances, the Tribunal is convinced that the evidence of recent import activity of the subject goods in the domestic market, while only providing part of the picture, is a proxy for what will happen on a larger scale in the absence of a finding of threat of injury, once the remaining contracts with a local content requirement have been completed. Specifically, these recent developments include a significant rate of increase in imports of the subject goods in the first quarter of 2015, and the dominance of the subject goods in sales for micro-FIT 3 (2013) projects governed by the lower (22 percent) local content requirement.

146. In terms of the first of these recent developments, there was a sharp upward trend in the absolute volume of imports of the subject goods in the first quarter of 2015 as compared to imports in the first quarter of 2014.[161] This evidence is based on import and export sales data provided by several importers and Chinese producers and exporters in response to RFIs. The usefulness of the data is somewhat limited, as the Tribunal does not have similar information from all importers and Chinese producers and exporters that completed the Tribunal's questionnaires, and there is no comparable quarterly data on domestic production. Nevertheless, the Tribunal views these data, on their face, as good indicators of the pending import volume of the subject goods.

147. In particular, there was a very substantial increase in CSI's exports of the subject goods to CSSI in the first quarter of 2015 compared to the first quarter of 2014. Jinko Solar's export sales to Jinko Canada also increased by 226 percent in the first quarter of 2015.[162] Of the 13 Chinese producers and exporters that responded to RFIs, several of those that had reported exports sales to Canada in 2014 reported no sales in the first quarter of 2015. Overall, however, there was a 324 percent increase in export volume to Canada in the first quarter of 2015 as compared to the first quarter of 2014.[163]

148. The upward trend in imports of the subject goods in the first quarter of 2015 is particularly telling, given that provisional duties came into effect in the last month of the first quarter of 2015, i.e. on March 5, 2015. Furthermore, the data on the import volume of the subject goods in the first quarter of 2015, while incomplete, represent 80 percent of total imports of the subject goods in full year 2014.[164]

149. CSSI described the spike in its imports of the subject goods in the first quarter of 2015 as a one-time event.[165] As discussed above, the Tribunal disagrees and views the diversion that occurred as an example of how easy it will be for CSSI, acting under the direction of its parent company, CSI, to use the Canadian market for the sale of dumped and subsidized goods that cannot be sold in the United States and the European Union, because of those markets' respective anti-dumping and countervailing duties.

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161. Exhibit NQ-2014-003-07D (protected), Tables 5, 6, Vol. 2.1B.
162. *Ibid.*, Table 6.
163. *Ibid.*, Table 6.
164. *Ibid.*, Table 5; Exhibit NQ-2014-003-07C (protected), Table 37, Vol. 2.1B.
165. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 325, 385.

150. In light of the above, the Tribunal concludes that the available data relating to imports of the subject goods in the first quarter of 2015 are a key indicator of a significant rate of increase of imports of dumped and subsidized goods into Canada, and it finds accordingly.

151. In terms of the second recent development, with respect to the micro-FIT market, the Tribunal agrees with the supporting parties' submission that, although the micro-FIT 3 projects accounted for a relatively small volume of MW installed during the POI, they provide an excellent indication of what will occur more broadly in the FIT-related market going forward.

152. The supporting parties provided an analysis comparing micro-FIT sales from the first half of 2013 to the first half of 2014.[166] This latter period coincided with the first projects to arrive in the market for micro-FIT Programs with no requirement for locally produced solar modules.[167] In particular, Heliene, Silfab and Eclipsall reported several customers that have ceased or drastically reduced purchases from them since the changes in the micro-FIT domestic content requirements.[168] This evidence shows an 87 percent decline of their sales, year over year, during that period. These losses have been experienced across the board by several of the supporting parties and are not limited to only one of them.

153. The evidence clearly demonstrates that these sales have not been cannibalized among the supporting parties. Mr. Pochtaruk testified that Heliene lost micro-FIT 3 sales to imports of the subject goods, which were generally between 20 percent and 25 percent lower than Heliene's price of like goods at the time.[169] Mr. Maccario made similar submissions with respect to Silfab's recent experience in the micro-FIT 3 market.[170] Both Mr. Maccario and Mr. Pochtaruk explained the basis for their respective conclusions that these sales were lost to imports from China.[171] Among other things, Mr. Pochtaruk pointed out that, while imports from non-subject countries have been decreasing, imports of the subject goods have been increasing.[172] This testimony is consistent with data in IRS (1).[173]

154. The above evidence strongly suggests that the subject goods captured micro-FIT sales from the supporting parties during the first half of 2014. This evidence was undisputed by CSSI and the other opposing parties. Furthermore, there is no evidence before the Tribunal to suggest that the lost micro-FIT accounts or sales in question went to Celestica. Therefore, the Tribunal finds, on a preponderance of probabilities disclosed by the facts and circumstances of this particular case,[174] that the evidence provided

166. Exhibit NQ-2014-003-A-04 (protected) at paras. 9, 40-41, Vol. 12; Exhibit NQ-2014-003-D-04 (protected) at paras. 26-28, Vol. 12A; Exhibit NQ-2014-003-B-04 (protected) at para. 49, tab 7, Vol. 12.
167. Exhibit NQ-2014-003-B-03 at paras. 23-25, Vol. 11; Exhibit NQ-2014-003-A-04 (protected) at paras. 9, 40-41, Vol. 12; Exhibit NQ-2014-003-E-03 at para. 5, Vol. 11; Exhibit NQ-2014-003-D-04 (protected) at paras. 26-28, Vol. 12A; Exhibit NQ-2014-003-B-04 (protected) at para. 49, tab 7, Vol. 12; *Transcript of Public Hearing*, Vol. 2, 2 June 2014, at 103-104.
168. Exhibit NQ-2014-003-A-02 (protected), Table 2, Vol. 12.
169. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 103-104.
170. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 26.
171. *Transcript of In Camera Hearing*, Vol. 1, 1 June 2015, at 48-49, Vol. 2, 2 June 2015, at 158-59; *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 104.
172. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 104.
173. Exhibit NQ-2014-003-07C (protected), Table 39, Vol. 2.1B.
174. As stated by the British Columbia Court of Appeal, in *R. v. Pressley*, [1948] B.C.J. No. 63 (B.C.C.A.) (QL) at para. 12, "[t]he Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case."

by Mr. Pochtaruk and Mr. Maccario is credible and reliable. Accordingly, the Tribunal finds that the subject goods were responsible for the collapse in sales experienced by the supporting parties with regard to the micro-FIT sales during the first half of 2014.

155. Mr. Pochtaruk of Heliene compared the domestic industry's loss of micro-FIT business to the subject goods in Ontario to the proverbial canary in the coal mine,[175] in that it signals a pending significant rate of increase of imports of the dumped and subsidized goods in the broader market. The Tribunal agrees with his characterization. The micro-FIT 3 (2013) sales in question accounted for a modest total volume of 14.7 MW, which increased noticeably under the micro-FIT 3 (2014) program that began accepting applications in 2014 for a total volume of 65.3 MW.[176] However, several witnesses at the hearing testified that sales for micro-FIT 3 (2014) and FIT 3 projects are currently being delayed, as customers are taking a *wait-and-see* approach pending the outcome of this inquiry.[177]

156. Furthermore, the off-grid market, although small, provides another indicator of the likelihood that imports of the subject goods will capture a significant share of the total apparent market in the absence of a threat finding. During the POI, the off-grid market for solar modules in Canada was not subject to any minimum local content requirement and was completely dominated by imports of dumped and subsidized goods.[178] However, at least one witness for the domestic industry testified that his company has already seen its off-grid business return in 2015, since the imposition of provisional duties, both in terms of confirmed sales and expressions of interest. Mr. Pochtaruk reported that, immediately following the imposition of provisional duties, a large Canadian retailer signed with Heliene a contract that entails monthly shipments of modules for the off-grid market.[179]

157. The Tribunal finds that the dominance of the subject imports in the micro-FIT and off-grid markets strongly suggests what will happen on a larger scale once production for projects with a local content requirement is completed by the end of 2015 and in the absence of a finding of threat of injury.

Disposable Capacity

158. The supporting parties submitted that the global solar industry is dominated by Chinese production, that Chinese producers have significant production capacity and excess capacity and that Chinese producers have been expanding their manufacturing capacity. They also submitted that Chinese producers are heavily export dependent. These submissions were not contradicted by the opposing parties.

159. Production capacity in China increased over the POI. The total practical plant capacity of the 12 Chinese producers that responded to the Tribunal's foreign producers' questionnaire was 9.5 GW in 2012, 10.6 GW in 2013 and almost 13 GW in 2014.[180] This represents an increase in plant capacity of roughly 36 percent (or 3.5 GW) over the POI,[181] which is massive in comparison to the size of the apparent

175. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 103.
176. Exhibit NQ-2014-003-B-03 at para. 78, Vol. 11.
177. *Transcript of Public Hearing*, Vol. 1. 1 June 2015, at 25, 72, 75, 85, Vol. 2. 2 June 2015, at 161-62, 204.
178. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 107; *Transcript of In Camera Hearing*, Vol. 2, 2 June 2015, at 82-83, 130-31.
179. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 115, 160.
180. Exhibit NQ-2014-003-07A (protected), Table 109, Vol. 2.1A.
181. *Ibid.*, Table 109.

market in Canada in 2014.[182] The Chinese producers reporting the largest practical plant capacities during the POI were CSI, Hefei JA Solar, Wuxi Suntech and Jinko Solar.[183]

160. The supporting parties have filed evidence that Chinese producers have even greater production capacities than those reported in the Tribunal's investigation report. A Bloomberg New Energy Finance publication from January 2015 suggests that there is 56.7 GW of effective solar module manufacturing capacity in China. That same publication shows that Trina Solar had the greatest production capacity of all solar module producers, with 3.8 GW of solar module capacity.[184] In addition, several foreign producers of the subject goods have plans to increase production capacity.[185] In particular, Bloomberg New Energy Finance suggests that, in China, there is 3.3 GW of additional solar module capacity under construction and that 10.6 GW of capacity expansion has been announced.[186]

161. The consolidated utilization rate of the Chinese producers that responded to the Tribunal's questionnaire was 60, 64 and 79 percent in 2012, 2013 and 2014 respectively.[187] This is in line with information in the January 2015 Bloomberg New Energy Finance publication which suggests that the industry's average utilization rate for solar modules in China was 63 percent.[188] On the basis of an average utilization rate of 63 percent in 2014, the supporting parties submit that there is 21 GW of excess capacity in China.[189]

162. Mr. Koerner of CSI testified that the investigation report data relating to production capacity in China may be inflated due to the obsolescence of the equipment of certain manufacturers.[190] However, even if some of the reported capacity were obsolete, the remaining capacity in China still dwarfs the capacity of the domestic industry. Further, Mr. Koerner agreed with counsel for the supporting parties that there is currently global excess capacity for the production of solar modules.[191]

163. The strong export orientation of Chinese producers of the subject goods is supported by the investigation report data showing low domestic sales relative to total export sales.[192] In 2014, approximately 54 percent of sales reported by Chinese producers were export sales.[193] However, for some Chinese producers, export sales represented over 90 percent of their total sales at certain points during the POI.[194]

164. In addition, three major Chinese producers—Hanwha SolarOne Co., Ltd. (Hanwha), JinkoSolar Holding Co., Ltd. (JinkoSolar Holding), and Yingli Green Energy Holding Company Limited (Yingli Solar)—have indicated in their respective filings of Form 20-F with the U.S. Securities and Exchange Commission for the fiscal year ended December 31, 2013, that exports accounted for the majority of their

182. Exhibit NQ-2014-003-07C (protected), Table 48, Vol. 2.1B.
183. Exhibit NQ-2014-003-07A (protected), Schedules 89-110, Vol. 2.1A; Exhibit NQ-2014-003-07B (protected), Schedules 111, 112, Vol. 2.1B.
184. Exhibit NQ-2014-003-A-06, tab 33 at 12, Vol. 7.
185. Exhibit NQ-2014-003-A-01 at paras. 210-20, Vol. 11; Exhibit NQ-2014-003-A-02 (protected) at paras. 210-20, Vol. 12.
186. Exhibit NQ-2014-003-A-01 at para. 211, Vol. 11; Exhibit NQ-2014-003-A-06, tab 33 at 24, Vol. 7.
187. Exhibit NQ-2014-003-07A (protected) Table 109, Vol. 2.1A.
188. Exhibit NQ-2014-003-A-06, tab 33 at 12, Vol. 7.
189. Exhibit NQ-2014-003-A-01 at paras. 202-203, Vol. 11; Exhibit NQ-2014-003-A-06, tab 33 at 8-10, Vol. 7.
190. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 365.
191. *Ibid.* at 368.
192. Exhibit NQ-2014-003-07A (protected), Schedules 90, 92, 96, 100, 104, 106, Vol. 2.1A.
193. *Ibid.*, Table 110.
194. *Ibid.*, Schedules 90, 92, 100, 102, 104.

solar module sales.[195] For example, Hanwha states that "[o]ur export sales in 2011, 2012 and 2013 were RMB5,817.2 million, RMB3,295.9 million and RMB4,185.8 million (US$691.4 million), respectively, and accounted for 90.7%, 89.6% and 88.6% of our net revenues, respectively."[196] JinkoSolar Holding stated in its most recent filing that "[w]e sell the majority of our solar module sales in the overseas markets."[197] Yingli Solar stated that "[w]e have exported, and expect to continue to export, a substantial portion of our PV products outside of China."[198]

165. In sum, the Tribunal finds that there is significant freely disposable capacity in China's solar module and laminate industry and that this industry is heavily export-oriented, with a demonstrated propensity to export large proportions of its production and a history of producing far more than it consumes domestically.

Substantial Risk of Diversion

166. The supporting parties argued that the trade measures in place in the United States and the European Union threaten continued diversion of large volumes of imports of the subject goods to Canada. They also submitted that the European Commission's decision to withdraw its approval of a price undertaking with respect to three Chinese producers increases the likelihood that Canada will become a more important alternative market for these producers.

167. The Jinko Group submitted that diversion should not be a concern because the U.S. market is still open to imports of the subject goods. The CCCME submitted that there is no evidence that potentially diverted subject goods will be sold in Canada, as the subject goods could be exported to many other countries. CSSI submitted that the Tribunal should not draw any negative inferences against CSSI on the basis of the recent withdrawal of the European Commission's undertaking.

168. The Tribunal finds it significant that anti-dumping and countervailing duties have been imposed on the subject goods, or on goods of similar description, by authorities in other jurisdictions.

169. Of particular importance are the two anti-dumping and countervailing measures imposed against Chinese crystalline silicon photovoltaic modules, laminates and cells in the United States. These measures do not cover thin film products. The first set of measures has been in place since November 2012 and covers cells produced in China, modules produced in China from Chinese cells and modules produced in a third country using cells produced in China.[199] In February 2015, the United States imposed measures against modules produced in China from cells produced in a third country and also imposed measures against cells and certain modules and laminates produced in Chinese Taipei.[200]

170. In the European Union, provisional anti-dumping measures were imposed against Chinese crystalline silicon photovoltaic cells and modules (regardless of the origin of the cells contained therein) in June 2013.[201] The amount of the provisional duty ranged from 37.3 percent to 67.9 percent. Definitive anti-

195. Exhibit NQ-2014-003-A-05, tab 37, Vol. 11B, tabs 38, 43, Vol. 11C.
196. Exhibit NQ-2014-003-A-05, tab 43 at 100, Vol. 11C.
197. *Ibid.*, tab 37.
198. *Ibid.*
199. *Crystalline Silicon Photovoltaic Products from China*, Investigation Nos. 701-TA-481 and 731-TA-1190 (Final), USITC Publication 4360, November 2012; Exhibit NQ-2014-003-A-05, tab 27, Vol. 11A.
200. *Certain Crystalline Silicon Photovoltaic Products from China and Taiwan*, Investigation Nos. 701-TA-511 and 731-TA-1246-1247 (Final), USITC Publication 4519, January 2015; Exhibit NQ-2014-003-A-05, tab 47, Vol. 11O.
201. *Commission Implementing Regulation (EU) No. 513/2013* (4 June 2013).

dumping and countervailing duties were imposed in December 2013 and, at the same time, the European Union confirmed a "price undertaking" agreement with a number of Chinese exporters, which imposed volume quotas and minimum prices for a period of two years, or until the end of 2015. The definitive anti-dumping and countervailing duties were applied to Chinese exporters that were not subject to a price undertaking.[202] In June 2015, the European Union withdrew its acceptance of the price undertaking with respect to three Chinese exporters.[203]

171. While some exports of solar modules may continue to the United States and the European Union (e.g. particular exporters may have favourable rates), the Tribunal finds it likely that a significant portion of these goods will need to be shipped elsewhere, including potentially to Canada. Indeed, as discussed above, the Tribunal heard evidence that at least one substantial shipment of the subject goods was diverted from the United States to Canada after it became known that the products would face duties in the United States.[204] The Tribunal is not drawing any negative inferences against CSSI or any other party arising from the European Commission's withdrawal of its acceptance of the price undertaking with certain Chinese exporters or from the reasons for this withdrawal. The Tribunal nonetheless notes that this withdrawal may make it more difficult for these companies to sell Chinese-made modules, laminates and cells to the European Union. These exporters will likely be seeking out other markets for their goods, at least for the foreseeable future.[205]

172. The Tribunal finds that there is a very real possibility that measures in place in these other export markets, combined with changes in circumstances created by the gradual removal of the local content requirement in Ontario, will motivate Chinese producers of the subject goods to divert to Canada significant volumes of goods which would otherwise have been destined for the United States and EU markets.

Potential for Product Shifting

173. The available evidence indicates that the equipment used in the manufacturing of solar modules is customized and that, therefore, producers do not have the ability to shift production between the subject goods and other products.[206] Accordingly, this is not a relevant factor in the Tribunal's assessment of the threat of injury.

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202. *Commission Implementing Regulation (EU) Nos. 1238/2013 and 1239/2013* (2 December 2013); Exhibit NQ-2014-003-A-05, tabs 52-53, Vol. 11D.
203. *EC Regulation*. The exporters for which the acceptance of the undertaking was withdrawn are CSI Solar Power (China) Inc., Canadian Solar Manufacturing (Changshu) Inc., Canadian Solar Manufacturing (Luoyang) Inc., CSI Cells Co. Ltd., ET Solar Industry Limited, ET Energy Co. Ltd., ReneSola Zhejiang Ltd. and Renesola Jiangsu Ltd. and related companies in the European Union.
204. Exhibit NQ-2014-003-07D (protected), Table 5, Vol. 2.1B; *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 325, 385.
205. The Tribunal notes CSSI's stated intention to exercise its right of appeal with respect to the European Commission's withdrawal of its acceptance of the price undertaking with CSI. Exhibit NQ-2014-003-39.02, Vol. 1E at 63.
206. Exhibit NQ-2014-003-18.03 (protected), Vol. 6.1 at 16; Exhibit NQ-2014-003-18.04 (protected), Vol. 6.1 at 76; Exhibit NQ-2014-003-18.05 (protected), Vol. 6.1 at 134; Exhibit NQ-2014-003-18.06 (protected), Vol. 6.1 at 147; Exhibit NQ-2014-003-18.07 (protected), Vol. 6.1 at 160; Exhibit NQ-2014-003-18.08 (protected), Vol. 6.1 at 173; Exhibit NQ-2014-003-18.09 (protected), Vol. 6.1 at 186; Exhibit NQ-2014-003-18.10 (protected), Vol. 6.1 at 201; Exhibit NQ-2014-003-18.14 (protected), Vol. 6.1A at 80; Exhibit NQ-2014-003-18.15 (protected), Vol. 6.1A at 93; Exhibit NQ-2014-003-18.16 (protected), Vol. 6.1A at 106.

Inventories

174. The supporting parties submitted that Chinese producers have significant stocks of solar modules in inventory—more than US$1.7 billion. They submit that, at the end of 2014, Yingli Solar held US$338 million in inventory, Trina Solar US$352 million, Jinko Solar US$305 million, Canadian Solar US$432 million and Renesola Ltd. US$357 million.[207] Accordingly, they argued that, even if a small portion of these inventories were to be imported into Canada, they could potentially overwhelm the entire domestic industry.

175. The evidence on the record shows that some importers held inventories of the subject goods during the POI. The reported inventories peaked in 2013, representing an increase of more than 500 percent over 2012 levels. Inventories held by importers decreased by 52 percent in 2014 but still represented significantly more volume than in 2012.[208]

176. In terms of reported imports in the first quarter of 2015, the Tribunal is satisfied that the bulk of that inventory has already been sold.[209]

Summary

177. In the present case, the Tribunal had a clear picture of what will likely happen in the domestic market in the absence of a threat of injury finding. The evidence establishes that there is substantial production capacity in China, a significant share of which is freely disposable, and that Chinese producers have a propensity to dump and subsidize the subject goods or similar products in other major export markets, including the United States and the European Union. In particular, the fact that a significant volume of the subject goods was recently diverted from the United States to Canada shows, in the Tribunal's view, that the domestic market is an attractive destination for exporters of the subject goods, which are no longer fettered by local content requirements under the FIT Program in Ontario. The collapse of sales experienced by several of the supporting parties in connection with the micro-FIT 3 program in 2014 and the market's behaviour since the imposition of provisional duties in early March 2015 also provide a proxy for what will happen when the domestic industry experiences the full impact of the subject goods, in the absence of any local content requirement in Ontario, by the end of 2015. Given the specific set of projected circumstances created by the FIT Program, the Tribunal finds that the likelihood of increased dumped and subsidized goods is clearly foreseen and imminent.

Likely Price Effects of the Dumped and Subsidized Goods

178. Paragraph 37.1(2)(*e*) of the *Regulations* requires the Tribunal to consider whether the prices at which the dumped or subsidized goods are entering the domestic market are likely to have a significant depressing or suppressing effect on the price of the like goods and are likely to increase demand for further imports of the subject goods.[210]

179. The supporting parties submitted that solar modules and laminates are commodity products and that price is a principal factor in making purchasing decisions. They contended that the subject goods are the low price leaders in the market and referred to a number of examples of price undercutting and price depression

207. The values of inventories are derived from press releases for full year 2014 financial results, issued by the respective firms. Exhibit NQ-2014-003-A-05, tab 35 at 1010-1011, Vol. 11B, tab 39 at 1425, tab 41 at 1447, tab 42 at 1466, Vol. 11C.
208. Exhibit NQ-2014-003-07C (protected), Table 107, Vol. 2.1B.
209. *Transcript of In Camera Hearing*, Vol. 3, 3 June 2015, at 221.
210. Paragraph 37.1(2)(*e*) of the *Regulations*.

by the subject goods. Finally, they submitted that, if no duties were put in place, the low-priced subject goods would effectively eliminate any sales by the domestic producers.

180. CSSI argued that an increase in the price per watt of solar modules in Canada would have consequences for the viability of solar projects and the solar industry more generally. The CCCME submitted that prices have been decreasing because the cost of producing solar modules and laminates has decreased and also noted that Chinese solar modules are not the lowest-priced goods internationally. The Jinko Group echoed the CCCME's position on decreasing costs of production and also submitted that the prices set by FIT contracts influence the prices that purchasers are willing to pay for solar modules.

181. There is no doubt that price is a very important factor in purchasing decisions and, the evidence shows that purchasers will very often choose the lowest-priced product.[211] In addition, 12 of 13 respondents to the Tribunal's purchasers' questionnaire indicated that the subject goods had the low-price advantage compared to like goods.[212] Evidence in the investigation report indicates that the subject goods were the lowest-priced imports in the Canadian market in 2013 and 2014.[213] Moreover, the vast majority of imports of solar modules in 2014 comprised the subject goods.[214] In light of these considerations, and in the wake of the gradual removal of the local content requirement under FIT contracts, the Tribunal finds it reasonable to conclude that price competition between the like goods and the subject goods will become increasingly aggressive.

182. Witnesses at the hearing reported that, before the imposition of provisional duties, the price of the subject goods had fallen well below the 2014 average price.[215] For example, Mr. Maccario testified that, at the end of 2014, he saw prices of the subject goods in Canada that were between CAN$0.59 and CAN$0.65 per watt.[216] Mr. Pochtaruk testified that, before the provisional duties were in place, the price of solar modules in Canada was around CAN$0.60 per watt and that he anticipated that, if duties did not remain in place, this would become the prevailing price.[217] These prices are well below the average full year price of the subject goods in 2014.[218]

183. There is evidence on the record which suggests that the price of solar modules from some non-subject countries is lower than the price of solar modules from China in the European market.[219] However, the prices quoted for solar modules from China have likely been inflated by the trade measures in place against Chinese modules in Europe. Accordingly, the Tribunal is unable to determine what the relative prices of Chinese modules would be in the absence of such measures. In any event, the Tribunal notes that solar modules from non-subject countries have had a limited presence in the domestic market.

184. Given the price of the subject goods over the POI, which undercut the price of the like goods in both 2013 and 2014, the Tribunal is confident that the price of the subject goods will remain significantly lower than the price of like goods and that the price of like goods will need to continue to decrease in order

211. Exhibit NQ-2014-003-06A, Table 15, Vol. 1.1A; Exhibit NQ-2014-003-07A (protected), Table 16, Vol. 2.1A.
212. Exhibit NQ-2014-003-06A, Table 21, Vol. 1.1A.
213. Exhibit NQ-2014-003-07C (protected), Table 33, Vol. 2.1B.
214. *Ibid.*, Table 39.
215. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 27, 85, Vol. 2, 2 June 2015, at 109-110, 208-209; Exhibit NQ-2014-003-12.11 (protected), Vol. 4B at 215.
216. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 27.
217. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 109-110.
218. Exhibit NQ-2014-003-07C (protected), Table 43, Vol. 2.1B.
219. Exhibit NQ-2014-003-A-06 (protected), tab 54, Vol. 8; Exhibit NQ-2014-07C (protected), Table 54, Vol. 2.1B; Exhibit NQ-2014-003-S-05, tab 58, Vol. 13A.

for the domestic industry to remain competitive. Accordingly, the projected significant increase in imports of the subject goods is likely to have a significant depressing effect on the prices of the like goods in the near future.

185. The Tribunal also heard evidence that the domestic producers have been more competitive in the market since the provisional duties have been in place. For example, most of the witnesses at the hearing agreed that current pricing is roughly CAN$0.78 per watt for multi-crystalline products and that this price is very close to prices in the U.S. market, where anti-dumping and countervailing duties are in place against the subject goods.[220] A number of the domestic producers testified that they are able to secure sales and earn profit at this price[221] (although Mr. Pochtaruk stated on cross-examination that pricing would need to increase to around CAN$0.80 per watt for there to be "fair competition").[222] Mr. Pochtaruk also indicated that the provisional duties have allowed Heliene to make inroads into the off-grid market, a segment of the market in which it had been unable to compete for some time due to the presence of the subject goods.[223]

186. There is no indication that the prices of the subject goods are likely to increase in the next 12 to 24 months. In fact, reduced manufacturing costs in China as a result of manufacturing improvements, economies of scale and technology innovation, such as the development of higher cell efficiencies, will likely continue to put downward pressure on the global prices of solar modules in the near to medium term.[224] In addition, the price of solar-grade silicon, a major component in silicon-based solar cells, has dropped significantly since the global economic recession in 2008, and further decreases are forecast in the next three years.[225] However, as discussed above, the domestic industry's costs have also been on the decline and, thus, the Tribunal does not find that the subject goods are likely to have a suppressing effect on the price of like goods.

187. The remaining FIT contracts requiring locally produced solar modules and laminates have meant that the domestic industry has yet to sustain losses that amount to material injury. However, as stated above, these contracts are expected to be completed by the end of 2015. Without the imposition of anti-dumping and countervailing duties, the domestic industry will not be able to compete on price for purchases of solar modules in connection with FIT 3.0 and FIT 3.1, for which local content requirements do not apply. In that regard, the Tribunal considers the experience of the domestic producers in the micro-FIT market, where low-priced subject goods captured a significant portion of sales in the Canadian market once the local content requirements were removed, to be a reasonable prediction of things to come for the reasons stated above.

188. In the absence of anti-dumping or countervailing duties, the Tribunal is confident that the demand for the subject goods will increase significantly in the near term. Most witnesses expected the on-grid market for solar modules and laminates to be between 400 MW and 600 MW in 2015 and 2016,[226] and there are still approximately 223 MW of FIT 3.0 and FIT 3.1 projects in progress.

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220. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 27, 30, 84, Vol. 2, 2 June 2014, at 109, 208-209, Vol. 4, 4 June 2015, at 427, 484.
221. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 65-66, Vol. 2, 2 June 2015, at 134.
222. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 169.
223. *Ibid.* at 106-107, 115, 159-60.
224. Exhibit NQ-2014-003-A-05, tab 29 at 7, 11, 29, Vol. 11A.
225. Exhibit NQ-2014-003-11.05C, Vol. 7 at 65; Exhibit NQ-2014-003-S-05, tab 57, Vol. 13A.
226. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 34, Vol. 2, 2 June 2015, at 162, 217, Vol. 3, 3 June 2015, at 304-306.

189. The Tribunal also heard testimony that the CBSA's initiation of dumping and subsidizing investigations, as well as the Tribunal's initiation of this inquiry, has led many purchasers to adopt a *wait-and-see* attitude with respect to the purchase of solar modules for FIT 3 and FIT 3.1 projects.[227] In the Tribunal's view, this means that in the absence of anti-dumping and countervailing duties, the current *wait-and-see* approach of purchasers will immediately lead to purchases of the subject goods at prices that are likely to significantly undercut those of domestic producers of the like goods.

190. As stated above, the CBSA has found the weighted average margin of dumping to be 124.4 percent and the weighted average amount of subsidy to be 6.2 percent, when expressed as a percentage of the export price. The amount of subsidy was low when compared to the margin of dumping. When considered together, however, these numbers are suggestive of the significant impact that the subject goods will have on prices in the Canadian market. The margin of dumping is particularly high, and the Tribunal is of the view that, in a competitive and price-sensitive market such as the solar module market, this high margin of dumping underscores the extent to which exporters of the subject goods might be able to sell at low prices in an effort to secure sales in the absence of anti-dumping or countervailing duties.

191. There are other market factors at play that will also likely exert downward pressure on the price of like goods. One such factor is the downward trend in the feed-in tariff rates of solar systems, which explains, at least in part, the push for technology innovation and improvements in the manufacturing process in order to reduce overall costs.[228] For example, the guaranteed price under the rooftop micro-FIT Program decreased from CAN$0.802 per kilowatt hour to CAN$0.385 per kilowatt hour between 2010 and 2015, whereas the guaranteed price under the rooftop FIT Program for projects under 250 KW decreased from CAN$0.713 per kilowatt hour to between CAN$0.316 and CAN$0.343 per kilowatt hour.[229] This downward trend is not limited to Ontario. Other jurisdictions outside of Canada that had similar feed-in tariff programs have also begun reducing the tariff rates for solar generators, as this form of energy moves closer to grid parity.[230]

192. Solar modules currently comprise approximately one quarter to one third of the cost of solar power projects,[231] which Mr. Koerner acknowledged on cross-examination was very significant at the cost level.[232] The declining feed-in tariff rates for solar projects is therefore placing downward pressure on global solar module prices. This downward pressure on the price of solar systems and, in turn, the prices of the like goods and the subject goods will lead to price becoming an even greater factor in purchasing decisions. The domestic industry will need to continue to adjust to this reality in order to remain competitive and achieve sales. The price pressures faced by the domestic industry in these circumstances will be exacerbated by the significant presence of dumped and subsidized goods.

193. In sum, the Tribunal finds that the prices of the subject goods will remain significantly lower than those of like goods. Accordingly, the projected increased imports of the subject goods are likely to significantly undercut and depress the price of the like goods in the next 12 to 24 months.

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227. *Transcript of Public Hearing*, Vol. 1, 1 June 2014, at 25, 72, 85, Vol. 2, 2 June 2014, at 105, 161, 204.
228. Exhibit NQ-2014-003-S-05, tabs 46, 49, 50, Vol. 13A.
229. Exhibit NQ-2014-003-F-03 at para. 11 and attachment, Vol. 13.
230. Exhibit PI-2014-003-02.01, Vol. 1A at 31; Exhibit NQ-2014-003-A-05, tab 29 at 46-49, Vol. 11A; Exhibit NQ-2014-003-26.06, Vol. 1C at 9.
231. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 21, 68, Vol. 4, 4 June 2015, at 427.
232. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 348.

Negative Effects on Existing Development and Production Efforts

194. As noted above, in 2014, total investments by domestic producers were at their lowest over the POI.[233] Mr. Pochtaruk testified that Heliene continues to invest between 7 and 10 percent of annual revenue in research and development, as well as other technological advances.[234] In response to a question on cross-examination, Mr. Lyubchenko confirmed that 10 percent of Solgate's revenue is allocated towards research and development.[235] However, in light of decreasing revenues, the absolute value of this investment will likely decrease. The Tribunal considers that, in the absence of a threat of injury finding, the domestic producers would be prevented from investing any significant amount of money in research, development and production efforts.

195. As discussed further below, the situation looking ahead appears even worse, as a number of domestic producers have indicated that they would be unable to maintain production facilities in Canada in the absence of a finding of injury or threat of injury.

Likely Performance of the Domestic Industry

196. The winding down of FIT contracts with a minimum local content requirement by the end of 2015 constitutes a change in the market conditions that existed during the POI and those that are almost certain to occur in the near future. In this context, the evidence establishes that the like goods will not be able to compete with the subject goods, which will be the lowest-priced product available in a domestic market that is no longer constrained by local content requirements. In the Tribunal's view, the likelihood of increased imports of the subject goods will result in significant losses in sales and market share for the domestic industry in the next 12 to 24 months.

197. Witnesses for several domestic producers made it abundantly clear that, in light of the threat posed by the dumped and subsidized goods, they would most likely cease production in Canada within a relatively short time frame, i.e. beginning in the next 6 to 12 months, if no trade measures are imposed as a result of this inquiry. Specifically, Mr. Pochtaruk testified that, without a positive finding in this inquiry, it is highly probable that Heliene would shut down its solar module manufacturing operations in Canada and move its equipment to a facility in the United States.[236] Similarly, Mr. Niskanen testified that, in those circumstances, Strathcona would shut down Eclipsall's manufacturing operations in Canada and move its assets to the United States.[237] Mr. Lyubchenko testified that, without a positive finding, Solgate will have to close.[238] Finally, without a positive finding, both Silfab and EnerDynamic indicated that they will likely relocate their respective manufacturing operations to the United States in the near future.[239]

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233. Exhibit NQ-2014-003-07C (protected), Table 105, Vol. 2.1B; *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 144-45.
234. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 136, 144; Exhibit NQ-2014-003-07A (protected), Schedules 17, 25, Vol. 2.1A.
235. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 213; Exhibit NQ-2014-003-12.07 (protected), Vol. 4A at 207.
236. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 115; *Transcript of In Camera Hearing*, Vol. 2, 2 June 2015, at 90; Exhibit NQ-2014-003-A-04 (protected) at paras. 74-75, Vol. 12.
237. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 178.
238. *Ibid.* at 210.
239. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 86-87, Vol. 2, 2 June 2015, at 182-83, 198-99; *Transcript of In Camera Hearing*, Vol. 1, 1 June 2015, at 10; Exhibit NQ-2014-003-B-04 (protected) at paras. 99-100, Vol. 12; Exhibit NQ-2014-003-D-04 (protected) at paras. 40-43, Vol. 12A.

198. It was suggested by the opposing parties that the domestic producers would potentially relocate their manufacturing operations to the United States regardless of the outcome of this inquiry. Indeed, Heliene has already commenced operations at a new facility in Minnesota, as of January 2015.[240] In the case of Eclipsall, its parent company, Strathcona, is affiliated with an existing solar module manufacturing facility in the state of Georgia.[241]

199. The Tribunal finds that, in the absence of a positive finding, all but one of the supporting parties might relocate to the United States as a defensive measure in response to the threat of injury from the dumped and subsidized goods, in order to ensure the continued existence of their business operations by taking advantage of other business opportunities available to them. In the case of Solgate, it does not appear to have any plans to relocate and would likely be forced to shut down entirely. The Tribunal is therefore satisfied that a preponderance of the evidence shows that the subject goods threaten to injure and severely jeopardize the operations of several domestic producers in the absence of a positive finding.[242]

200. Witnesses for the domestic producers stated that, in the event of a threat of injury finding, their businesses would remain in Canada with a positive outlook for sales and financial performance.[243] Indeed, since the imposition of provisional duties, there have been positive developments for the domestic industry in the form of inroads into the off-grid market, the return to a pricing level that is competitive and meaningful discussions with purchasers about possible sales for FIT 3 contracts, many of which have been delayed pending the outcome of this inquiry.

201. A positive outlook for the domestic industry is further supported by the evidence of healthy demand projections and, despite the large market share held by CSSI, a significant portion of the market would likely be available to the domestic industry. The Tribunal notes however that, in an inquiry pursuant to section 42 of *SIMA*, the Tribunal need not be convinced that final duties imposed as a result of its order or finding will ensure the competitiveness and commercial viability of the domestic industry.[244] The Tribunal's focus is whether the subject goods are threatening to cause material injury to the domestic industry.

Factors Other Than the Dumping or Subsidizing

202. The opposing parties submitted that the subject goods are not threatening to cause material injury to the domestic industry, as the supporting parties' problems are due to factors other than the dumping or subsidizing. Such factors include an unsustainable business model focused largely on the assembly of solar modules and a lack of bankability, technological innovation and research and development skills.

203. The Tribunal has determined that some of these factors are, to varying degrees, threatening to cause injury to the domestic injury, as explained in detail below. However, the Tribunal ultimately finds that these other factors do not negate its conclusion that the dumping and subsidizing of the subject goods are threatening to cause injury to the domestic industry.

240. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 115.
241. *Ibid.* at 176-77.
242. Furthermore, the Tribunal finds that there is no evidence pertaining to Celestica that negates its conclusion. In April 2015, Celestica announced the relocation of all but one of its Canadian production lines to Asia. Exhibit NQ-2014-003-RFI-01, Vol. 9 at 63, 65; Exhibit NQ-2014-003-12.10 (protected), Vol. 4B at 84.
243. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 39-40, 85, Vol. 2, 2 June 2015, at 115, 210.
244. *Silicon Metal* (19 November 2013), NQ-2013-003 (CITT) at para. 65.

Product Technology and Innovation

204. While the opposing parties argued that the supporting parties were adversely affected by their failure to keep pace with developments in product technology and innovation, the Tribunal disagrees. At the hearing, witnesses for the domestic industry testified that their companies are either directly or indirectly (through affiliated entities) investing in research and development, if not necessarily capital improvements, and are keeping abreast of recent developments in product technology.[245] For example, Mr. Pochtaruk testified that Heliene works on improving its lamination technology and the sturdiness of the module itself.[246] There is also evidence that some of them are creating innovative products, which integrate solar panel technology.[247]

205. Therefore, the Tribunal finds no significant threat of injury from a lack of technological development and innovation.

Impact of the Removal of Local Content Requirements on OEM Production

206. The CCCME and CSSI submitted that the supporting parties' OEM business model is not economically viable in a domestic market without minimum local content requirements. Specifically, the CCCME argued that OEM assembly by the domestic producers has largely been supported by Chinese producers that supplied some or all of the materials and that these arrangements were based on the need for owners of Chinese brands to secure Ontario-assembled solar modules in order to qualify for FIT projects. CSSI submitted that the supporting parties, by engaging in OEM production of solar modules which are sold under another label, have failed to develop their own brand recognition in the domestic market and that trying to continue with the same business model is the root cause of their problems.

207. The elimination of minimum local content requirements under the FIT Program is likely to have some negative impact on the demand for OEM production of like goods. In particular, there is evidence that several Chinese producers and exporters entered into OEM arrangements (with domestic producers) in the past in order to be able to have products with their brand and label sold in the Ontario market.[248] Going forward, some Chinese producers and exporters may no longer choose to enter into OEM arrangements and may opt to export the subject goods to the Ontario market instead.

208. This is not to say, however, that domestic OEM production will completely disappear in a domestic market where the price of the subject goods is not dumped or subsidized. In the Tribunal's view, private label or so-called "white label" manufacturing, whereby the domestic producer manufactures the modules under the contracting party's name,[249] is a business model that may also be viable in a context where there is no domestic content requirement. During the POI, some OEM production was exported.[250] For example,

245. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 54-55, Vol. 2, 2 June 2015, at 119, 213; *Transcript of In Camera Hearing*, Vol. 2, 2 June 2015, at 167-68.
246. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 138-39.
247. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 90-91, Vol. 2, 2 June 2015, at 185-88.
248. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 38-39, 84-86, Vol. 2, 2 June 2015, at 182; *Transcript of In Camera Hearing*, Vol. 2, 2 June 2015, at 119-20; Exhibit NQ-2014-003-E-03 at para. 6, Vol. 11; Exhibit NQ-2014-003-D-04 (protected) at para. 39, Vol. 12A.
249. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 471, 500-501.
250. Exhibit NQ-2014-003-12.06A (protected), Vol. 4A at 130; Exhibit NQ-2014-003-12.06D (protected), Vol. 4A at 137.20; Exhibit NQ-2014-003-12.08 (protected), Vol. 4B at 14; Exhibit NQ-2014-003-12.08C (protected), Vol. 4B at 79.7; *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 487-88; *Transcript of In Camera Hearing*, Vol. 1, 1 June 2015, at 4-5, 24, Vol. 2, 2 June 2015, at 123.

Mr. Buzzelli referred to having OEM modules produced for Panasonic's projects in the United States.[251] Moreover, Mr. Koerner testified that there are benefits to marketing products as "Assembled in Canada" in international markets.[252]

209. Although the opposing parties portrayed the supporting parties as almost entirely dependent on OEM production and doomed to fail, the Tribunal does not agree. In the case of Eclipsall, its OEM production in 2014 was described as a one-off event driven by the receiver while the company was in receivership. The evidence also reveals that, in the case of at least one other domestic producer, its proportion of OEM production in relation with the overall production has decreased significantly since the elimination of the local content requirement was announced.[253] This shows that the domestic industry has already started to adapt to this new reality. It is obvious that it will have to continue to adapt to this and other changing realities of the marketplace. This is not unique to the solar panel industry. It is hard to imagine, however, how the domestic industry would be in a position to continue to adapt and change in the face of the injurious effects of the dumped and subsidized subject goods.

210. For those reasons, the Tribunal finds that any negative effects on OEM production arising from the removal of the local content requirement do not negate its conclusion that the dumping and subsidizing of the subject goods are threatening to cause injury to the domestic industry.

Bankability

211. There has been much discussion in this case about the "bankability" of the domestic producers in terms of whether end users of their solar modules can obtain third party financing approval required as part their overall project, if the solar modules are produced by the domestic producers. Mr. Maccario and Mr. Buzzelli both commented that bankability is in the eye of the beholder, which, in this case, is often the lender.[254] The evidence also discloses that the concept of bankability, as it is understood in the solar module and laminate industry, has evolved over the years.[255]

212. The industry standard appears to be that solar modules generally carry a 20- to 25-year warranty, at least for major solar energy projects.[256] This creates a clear incentive for purchasers and their sources of project financing (i.e. lenders and investors) to choose a producer that can be expected to remain in business long term. Moreover, the concept of bankability is obviously a powerful tool in the hands of larger producers that can promote their size to back up their warranty. However, some high profile bankruptcies of solar module producers, both in the domestic market and internationally, have demonstrated that size is not necessarily a reliable indicator of longevity, which is a factor in determining bankability.[257]

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251. *Transcript of Public Hearing*, Vol. 4, 4 June 2015, at 487.
252. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 300.
253. Exhibit NQ-2014-003-07A (protected), Schedule 1, Vol. 2.1A; *Transcript of In Camera Hearing*, Vol. 1, 1 June 2015, at 23-25.
254. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 34, Vol. 4, 4 June 2015, at 500.
255. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 34-36; Exhibit NQ-2014-003-F-03 at paras. 37-43, Vol. 13.
256. *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 35, Vol. 2, 2 June 2015, at 141, Vol. 3, 3 June 2015, at 231, Vol. 4, 4 June 2015, at 410, 499.
257. Exhibit PI-2014-001-02.01, Vol. 1 at 25; Exhibit PI-2014-001-02.01, Vol. 1 at 201; Exhibit PI-2014-001-02.01, Vol. 1A at 49; Exhibit NQ-2014-003-A-05, tab 52 at para. 352, Vol. 11D; Exhibit NQ-2014-003-26.01, Vol. 1B at 5-8; Exhibit NQ-2014-003-S-05, tab 55 at 176, Vol. 13A; *Transcript of Public Hearing*, Vol. 1, 1 June 2015, at 36, Vol. 2, 2 June 2015, at 111-12, 144, 176, Vol. 4, 4 June 2015, at 439-40.

213. The evidence shows that bankability is only one criterion considered by lenders in determining the acceptability of a solar module producer for the overall project. In addition, different lenders tend to develop their own criteria and have different lists of approved suppliers.[258] Acceptability by lenders is a part of doing business for all producers in the solar module and laminate industry. It can, to varying degrees, be more of a challenge for some smaller producers, especially those that are not considered Tier 1 suppliers. This is not however an unsurmountable obstacle, as many of the domestic producers have demonstrated through sales of domestically produced like goods, whether under their own label or private labels as part of an OEM agreement. In both scenarios, they managed to have their product approved by lenders.[259]

214. In light of the above, the Tribunal finds that any threat arising from the issue of bankability does not negate the threat of injury caused by the subject goods to the domestic industry.

Materiality

215. The Tribunal finds that the threat of injury posed by the subject goods is material. The gradual removal of the minimum local content requirement under the FIT Program in Ontario has created new market conditions whereby the like goods are facing direct competition from the dumped and subsidized goods and the pending procurement for FIT 3 and LRP I projects. This elevates the threat of increased imports of low-priced subject goods.

216. In the present case, the Tribunal has been provided with a clear picture of what will happen in the near future in the absence of a finding of injury or threat of injury.

217. The likelihood of a significant increase in the volume of dumped and subsidized goods is supported by the evidence that the subject goods had an immediate and significant impact on the micro-FIT market after the 2013 reduction in the local content requirement threshold which effectively allowed the subject goods to compete head-on with the like goods manufactured by the domestic producers. In addition, since the imposition of provisional duties, domestic producers have seen increased sales in the off-grid market, a return to competitive pricing in the marketplace and expressions of interest from purchasers for sales related to FIT 3 contracts.

218. The Tribunal has considered the totality of the factors and finds that there is highly compelling evidence that, without anti-dumping and countervailing duties, the pending volume of imports of the dumped and subsidized subject goods will significantly undercut and depress prices and cause material injury in the form of lost sales, reduced market share and decreased production levels in the domestic industry within the next 12 to 24 months. Furthermore, the Tribunal is of the view that any likely injurious effects otherwise due to the gradual removal of the local content requirement under the FIT Program, particularly as it relates to OEM production, and the other factors described above do not negate its conclusion.

219. Therefore, the Tribunal finds that the threat of material injury is clearly foreseen and imminent.

EXCLUSIONS

220. The Tribunal received six requests to exclude products from a finding of injury or threat of injury.

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258. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 123-25, Vol. 4, 4 June 2015, at 400-401.
259. *Transcript of Public Hearing*, Vol. 2, 2 June 2015, at 111, Vol. 4, 4 June 2015, at 487-88.

General Principles

221. Subsection 43(1) of *SIMA* gives the Tribunal implicit authority to grant exclusions from the scope of a finding.[260] Exclusions are an extraordinary remedy that may be granted at the Tribunal's discretion, i.e. when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry.[261] The rationale is that, despite the general conclusion that the dumping and subsidizing of the subject goods is threatening to cause injury to the domestic industry, there may be case-specific evidence that imports of particular products captured by the definition of the subject goods are not threatening to cause injury.

222. In determining whether an exclusion is likely to cause injury to the domestic industry, the Tribunal considers such factors as whether the domestic industry produces, actively supplies or is capable of producing like goods in relation to the subject goods for which the exclusion is requested.[262]

223. The onus is upon the requester to demonstrate that imports of the specific goods for which the exclusion is requested are not threatening to be injurious to the domestic industry.[263] Thus there is an evidentiary burden on the requester to file evidence in support of its request.[264] However, there is also an evidentiary burden on the domestic producers to file evidence in order to rebut the evidence filed by the requester.[265]

224. The Tribunal observes that all three requesters of product exclusions in this inquiry were unrepresented. Accordingly, the Tribunal took steps to ensure fairness and to enable them to participate in the proceedings. The Tribunal acknowledges the ardent submissions on the part of the requesters and fully recognizes the impact that this decision may have on their business models. However, the Tribunal stresses that it must consider and evaluate product exclusion requests in light of the extraordinary nature of this remedy and the general principles discussed above. Ultimately, the Tribunal must determine whether it will exercise its discretion to grant product exclusions on the basis of its assessment of the totality of the evidence on the record.

225. It is with these considerations in mind that the Tribunal will now address the product exclusion requests that it received.

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260. Binational Panel, *Certain Cold-Rolled Steel Products Originating or Exported From the United States of America (Injury)* (13 July 1994), CDA-93-1904-09.
261. *Aluminum Extrusions* at para. 339; *Certain Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.
262. *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) [*Fasteners*] at para. 245.
263. *Fasteners* at para. 243.
264. *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) [*Aluminum Extrusions Review*] at para. 192. The Tribunal will generally reject product exclusion requests where there is a lack of cogent case-specific evidence concerning the likely non-injurious effect of imports of particular products covered by the definition of the subject good in support of the requesters' claims. Indeed, a failure to provide sufficient information prevents the parties opposing the request from adequately responding and leaves the Tribunal in a position where it lacks evidence to find that imports of particular products for which exclusions are requested are not likely to cause injury to the domestic industry.
265. A failure to do so could result in the requested exclusions being granted. In any case, much like its conclusion on the issue of whether the dumping or subsidizing of the subject goods has caused or is threatening to cause injury to the domestic industry, the Tribunal's decision on exclusion requests must be based on positive evidence, irrespective of the party that filed it. See *Aluminum Extrusions Review* at para. 197.

Analysis of Specific Exclusion Requests

TCE

226. TCE requested the following two product exclusions:

- 18.3Volts 195 Watt monocrystalline 10.66 IMP 72 cell; and
- photovoltaic module 150Watt 18 volts poly-crystalline cell

227. With respect to TCE's first request, it was initially opposed by the domestic producers on the basis that the domestic industry produces substitutable products and is capable and willing to make the requested product. After reviewing TCE's reply submissions, the domestic producers withdrew their opposition to this request and proposed the following wording for the exclusion:[266]

- 195W mono-crystalline solar module having a voltage of 18.3 V, and a rated current of 10.66 IMP, said module being made of 72 mono-crystalline cells, each cell being no more than 5 inches in width and height.

228. At the hearing Mr. Joël Rozon indicated that including precise language with respect to the voltage and amperage of each module could be problematic, as these elements could vary slightly between different units.[267] In order to address these concerns, the domestic producers removed the reference to voltage and amperage and proposed the following revised wording for the exclusion:[268]

- 195W mono-crystalline solar module, said module being made of 72 mono-crystalline cells, each cell being no more than 5 inches in width and height.

229. In view of the consent of the domestic producers and given that there is no evidence that they are capable of producing products which are identical or substitutable,[269] the Tribunal finds that the granting of the exclusion, using the wording proposed by the domestic producers and agreed to by TCE, will not threaten to cause injury to the domestic industry and should be granted.

230. Accordingly, the Tribunal excludes the following subject goods from its threat of injury finding:

> 195 W monocrystalline photovoltaic modules made of 72 monocrystalline cells, each cell being no more than 5 inches in width and height.

231. TCE's second request relates to a 150-watt, 18-volt, 36-cell module with an off-grid application that is typically used in recreational vehicles.[270] TCE submitted that it is difficult to purchase certified modules that meet these specifications from domestic producers with the customized packaging and in the smaller quantities that it requires. Mr. Rozon testified that he tried to contact a domestic producer about pricing for this type of module and did not receive a reply.[271] TCE also submitted that no single domestic producer offers the complete "line" of products covered by this request.

232. The domestic producers argued that they produce a substitutable product. In support of their position, they submitted product specification sheets, recent quotes that they have given to other customers

266. Exhibit NQ-2014-003-29.04, Vol. 1.3 at 126.2.
267. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 243-44.
268. Exhibit NQ-2014-003-29.04A, Vol. 1.3 at 126.4.
269. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 261.
270. *Ibid.* at 245.
271. *Ibid.* at 244, 279-80.

and invoices demonstrating recent sales to other customers of a variety of 36-cell solar modules with an off-grid application.[272] At the hearing, Mr. Pochtaruk testified that Heliene only began this type of production recently because the off-grid market had been dominated by the subject goods for many years.[273] Mr. Pochtaruk explained that production of Heliene's 36-cell solar modules follows essentially the same manufacturing process as that of larger on-grid solar modules except that fewer cells are strung together and different outputs are added.[274] He also testified that Heliene's 36-cell module is certified and should be identified as such on the Intertek Canada Web site within the next 60 to 90 days.[275] Finally, Mr. Pochtaruk testified that Heliene can provide individual packaging and indicated that it currently does so for two of its customers.[276]

233. The evidence demonstrates that the domestic industry is capable of producing and has begun producing goods which are substitutable for the product that is the subject of this exclusion request. This evidence was not challenged and was admitted by TCE. In correspondence with the Tribunal dated May 13, 2015, TCE stated as follows: "I see [both] Heliene and [Solgate] may produce smaller 150watts similar to our 150 panel."[277] The fact that the domestic industry has only recently begun producing these products due to the presence of the subject goods in the off-grid market does not diminish the fact that the subject goods would compete directly with domestically produced goods in this segment of the market and would threaten injury to the domestic industry. The Tribunal therefore denies this exclusion request.

AGRV

234. AGRV requested the following three product exclusions:

- Nature Power 140W-18M
- Ecowareness 165W Solar Panel
- Competition 145W Solar Panel

235. AGRV submitted that the domestic producers do not produce these types of 36-cell solar modules. At the hearing, Mr. Alain Généreux explained that AGRV's products are used in the 12-volt off-grid market in connection with recreational and marine vehicles.[278] AGRV contended that the domestic producers do not serve the off-grid market and that information on their Web sites, as well as in their product specifications, confirm important differences between their offered products and AGRV's needs, such as the available watt ranges and the type of cell that is used.[279] Mr. Généreux also testified that AGRV's products are all "plug and play", meaning that they are individually wrapped in custom packaging and include special fittings for easy installation directly out of the box.[280] Finally, Mr. Généreux submitted that, if the domestic producers want to sell their products to AGRV, it is the domestic producers that should be pursuing the sales relationship.

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272. Exhibit NQ-2014-003-29.02, Vol. 1.3 at 62-65; Exhibit NQ-2014-003-30.02 (protected), Vol. 2.3 at 46-73.
273. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 262-63.
274. *Ibid.* at 263-65.
275. *Ibid.* at 267-69.
276. *Ibid.* at 283-84.
277. Exhibit NQ-2014-003-31.01A, Vol. 1.3 at 134.2.
278. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 248-49.
279. *Ibid.* at 248-49.
280. *Ibid.* at 250, 257-58.

236. The domestic producers opposed these product exclusion requests on the basis that they produce an identical or substitutable product. As noted above, Mr. Pochtaruk testified that production of Heliene's 36-cell solar modules follows essentially the same manufacturing process as that of larger on-grid solar modules except that fewer cells are strung together and different outputs are added.[281] Heliene and EnerDynamic also filed product specification sheets, recent quotes that they have given and invoices demonstrating sales of a variety of 36-cell solar modules with an off-grid application.[282] At the hearing, Mr. Pochtaruk compared Heliene's product specifications with AGRV's requirements and indicated that Heliene can produce products with the wattage, amperage and voltage required by AGRV.[283] Mr. Pochtaruk also stated that his company sources its 160- to 165-watt cells from the same supplier as AGRV. Finally, the domestic producers submitted that AGRV has never contacted them for information or a quote.

237. Having reviewed the evidence and carefully considered the parties' arguments, the Tribunal is satisfied that the domestic industry is capable of producing goods which are substitutable for the products that are the subject of AGRV's exclusion requests. Heliene's product specifications and Mr. Pochtaruk's testimony are clear examples of this capability. In addition there is some evidence on the record of recent sales of similar modules into the domestic off-grid market.[284]

238. In light of this, the Tribunal finds that AGRV has not met its onus of demonstrating that imports of the goods, if excluded from the Tribunal's finding, are not likely to be injurious to the domestic industry. Where requesters claim that the domestic industry does not produce the goods in question, they are generally expected to provide documentary evidence showing that they contacted the domestic producers to confirm that information.[285] AGRV has not done so in this case. Rather, the focus of AGRV's arguments appeared to relate to its dissatisfaction with the domestic industry's marketing approach and lack of experience in the domestic off-grid market. As noted above, the fact that the domestic industry has only recently begun producing this range of products due to the presence of the subject goods in the off-grid market does not diminish the fact that the subject goods would compete directly with the like goods and would threaten injury to the domestic industry.

239. AGRV also expressed concern with respect to its ability to purchase "plug and play" type products. Although the Tribunal would not typically consider whether the domestic producers can provide the same packaging and shipping services in determining whether or not to grant a product exclusion request, in this case, the Tribunal notes Mr. Pochtaruk's testimony that Heliene can provide individual packaging and that it currently does so for two of its customers.[286]

240. In light of the foregoing, the Tribunal denies AGRV's exclusion requests.

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281. *Ibid.* at 261-65.
282. Exhibit NQ-2014-003-29.03, Vol. 1.3 at 110-12, 117-19, 124-26; Exhibit NQ-2014-003-29.02, Vol. 1.3 at 72-75, 83-86, 94-97; Exhibit NQ-2014-003-30.02 (protected), Vol. 2.3 at 75-102, 104-131, 133-60.
283. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 266-69; Exhibit NQ-2014-003-27.02, Vol. 1.3 at 30; Exhibit NQ-2014-003-29.02, Vol. 1.3 at 62-63.
284. Exhibit NQ-2014-003-29.02, Vol. 1.3 at 80; Exhibit NQ-2014-003-30.02 (protected), Vol. 2.3 at 75-102, 104-131, 133-60.
285. *Aluminum Extrusions Review* at para. 217.
286. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 283-84.

Invensun

241. Invensun requested a product exclusion for the following hazardous grade solar modules:

- Sundragon iNNN-36P PV Module, where NNN is 125W to 150W
- Sundragon iNNN-48P PV Module, where NNN is 165W to 200W
- Sundragon iNNN-54P PV Module, where NNN is 185W to 225W
- Sundragon iNNN-60P PV Module, where NNN is 205W to 250W

242. Invensun submitted that its solar modules are mostly used by oil and gas companies in hazardous locations and, as such, are required to be specially designed and certified for use in locations where explosive gases, vapours and liquids may be present. It submitted that none of the domestic producers had the necessary certifications to produce these goods.

243. The domestic producers opposed this request on the grounds that the domestic industry is capable of producing a substitutable product. Mr. Pochtaruk testified that the modules covered by this request are essentially standard solar modules that have undergone "Hazardous Area Protection - Class I Division 2" testing and certification.[287] The domestic producers also submitted evidence that Heliene's products are currently going through the certification process and, once complete, Heliene will begin producing substitutable goods.[288] Mr. Pochtaruk testified that the testing portion of the process was finalized on May 8, 2015, and that proof of certification should be available on the Intertek Canada Web site shortly.[289] Finally, the domestic producers submitted that, if this product exclusion is granted, Chinese competitors could easily circumvent any Tribunal finding by obtaining "Class I Division 2" certification for their standard models.

244. Invensun did not submit a reply to Heliene's arguments.

245. Although Heliene was still in the process of becoming certified to make these products at the time of the hearing, the Tribunal finds that the investment that Heliene has made in the certification process to date is evidence of a clear intention to pursue this market.[290] Furthermore, the evidence that the required certification is imminent has not been contested. Therefore, the Tribunal finds that the domestic industry is capable of producing a substitutable product, which would compete directly with the goods that Invensun seeks to exclude from the Tribunal's finding. This competition would threaten injury to the domestic industry. As such, the Tribunal denies Invensun's exclusion request.

287. *Ibid.* at 270. According to the CSA Group, Class 1 is defined as "[a] location made hazardous by the presence of flammable gases or vapors that may be present in the air in quantities sufficient to produce an explosive or ignitable mixture". Division 2 is defined as "[a] location where a classified hazard does not normally exist but is possible to appear under abnormal conditions". Exhibit NQ-2014-003-26.07, Vol. 1D at 16.

288. Exhibit NQ-2014-003-30.02 (protected), Vol. 2.3 at 162-89.

289. *Transcript of Public Hearing*, Vol. 3, 3 June 2015, at 270.

290. Exhibit NQ-2014-003-29.02, Vol. 1.3 at 101-103; Exhibit NQ-2014-003-30.02 (protected), Vol. 2.3 at 162-89.

CONCLUSION

246. For the reasons set out above, the Tribunal finds that the dumping and subsidizing of the subject goods originating in or exported from China have not caused injury but are threatening to cause injury to the domestic industry.

Jean Bédard
Jean Bédard
Presiding Member

Peter Burn
Peter Burn
Member

Rose Ritcey
Rose Ritcey
Member