Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2020-003

Wheat Gluten

Determination issued
Tuesday, October 13, 2020

Reasons issued
Wednesday, October 28, 2020

Canada

TABLE OF CONTENTS

PRELIMINARY DETERMINATION OF INJURY i

STATEMENT OF REASONS 1
BACKGROUND 1
PARTIES' SUBMISSIONS ON INJURY AND THREAT OF INJURY 1
ANALYSIS 2
Legislative Framework 2
Like Goods and Classes of Goods 3
Domestic Industry 4
Cumulation 4
Volume of Dumped Goods 5
Effect on the Price of Like Goods 5
Impact on the Domestic Industry 6
Other Factors 6
Threat of Injury 7
CONCLUSION 7

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

WHEAT GLUTEN

PRELIMINARY DETERMINATION OF INJURY

The Canadian International Trade Tribunal, pursuant to the provisions of subsection 34(2) of the *Special Import Measures Act* (*SIMA*), has conducted a preliminary injury inquiry into whether the evidence discloses a reasonable indication that the dumping of wheat gluten, whether or not blended with wheat flour, salt or any other substance, with a minimum wheat protein content of 40% by weight on a dry basis calculated using a Jones Factor of 5.7, originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania, but excluding (i) devitalized wheat gluten; (ii) hydrolyzed wheat gluten; (iii) wheat protein isolates; and (iv) organic wheat gluten that is certified organic in accordance with and otherwise meets the requirements of the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and regulations made thereunder, and the *Safe Food for Canadians Act*, S.C. 2012, c. 24, and regulations made thereunder including the *Safe Food for Canadians Regulations*, S.O.R./2018-108, all of which as may be amended or replaced from time to time (the subject goods), has caused injury or retardation or is threatening to cause injury, as these words are defined in *SIMA*.

For greater certainty, the subject goods include but are not limited to vital wheat gluten as defined by the World Health Organization's Codex Standard 163-1987, Rev. 1-2001 ("Standard for Wheat Protein Products Including Wheat Gluten").

This preliminary injury inquiry follows the notification, on August 14, 2020, that the President of the Canada Border Services Agency had initiated an investigation into the alleged injurious dumping of wheat gluten from Australia, Austria, Belgium, France, Germany and Lithuania.

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

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

Jean Bédard
Jean Bédard
Member

Serge Fréchette
Serge Fréchette
Member

The statement of reasons will be issued within 15 days.

Tribunal Panel:	Randolph W. Heggart, Presiding Member Jean Bédard, Member Serge Fréchette, Member
Support Staff:	Peter Jarosz, Lead Counsel Isaac Turner, Student-at-Law Mark Howell, Lead Analyst Josée St-Amand, Analyst Thy Dao, Analyst Andrew Wigmore, Analyst Julie Charlebois, Data Services Advisor

PARTICIPANTS:

Domestic Producers	**Counsel/Representatives**
ADM Agri-Industries Co.	Christopher J. Kent Christopher J. Cochlin Gerry Stobo Andrew M. Lanouette Marc McLaren-Caux Michael Milne Susana May Yon Lee Cynthia Wallace Andrew Paterson E. Melisa Celebican Alexander Hobbs Jordan Lebold
Permolex Ltd.	Paul Conlin Benjamin P. Bedard M. Drew Tyler Linden Dales Anne-Marie Oatway Shannon McSheffrey Lydia Blois Greg Landry Meagan Brae Vestby Manon Carpentier

Importers/Exporters/Others	**Counsel/Representatives**
Roquette Frères	Greg Tereposky Daniel Hohnstein Stephanie Desjardins Alejandro Barragan

Roquette Amilina AB	Greg Tereposky Daniel Hohnstein Stephanie Desjardins Alejandro Barragan
Can Am Ingredients Inc.	Joe Gillen
Tereos Starch & Sweetners Belgium	Paul Jacquelin
The Delegation of the European Union to Canada	Leah Littlepage
Embassy of the Republic of Lithuania to Canada	Inga Miškinytė
Manildra Group USA	Beau Jackson Jeffrey Neeley
Shoalhaven Starches PTY	Beau Jackson Jeffrey Neeley

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

BACKGROUND

[1] This preliminary injury inquiry concerns a complaint filed on June 24, 2020, by ADM Agri-Industries Co. (ADM), a domestic producer of wheat gluten.

[2] ADM alleged that the dumping of wheat gluten, whether or not blended with wheat flour, salt or any other substance, with a minimum wheat protein content of 40% by weight on a dry basis calculated using a Jones Factor of 5.7, originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania, but excluding (i) devitalized wheat gluten; (ii) hydrolyzed wheat gluten; (iii) wheat protein isolates; and (iv) organic wheat gluten that is certified organic in accordance with and otherwise meets the requirements of the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and regulations made thereunder, and the *Safe Food for Canadians Act*, S.C. 2012, c. 24, and regulations made thereunder including the *Safe Food for Canadians Regulations*, S.O.R./2018-108, all of which as may be amended or replaced from time to time (the subject goods), has caused injury or retardation or is threatening to cause injury.

[3] The President of the Canada Border Services Agency (CBSA) initiated a dumping investigation in respect of the subject goods on August 14, 2020. In accordance with subsection 31(1) of *SIMA*, the CBSA was of the opinion that there was evidence that the subject goods had been dumped, as well as evidence that disclosed a reasonable indication that the dumping had caused injury or was threatening to cause injury to the domestic industry.

[4] The CBSA's period of investigation with respect to the alleged dumping of the subject goods was from January 1, 2019, to April 30, 2020. The CBSA estimated the margins of dumped goods for each of the subject countries to be significant.

[5] On August 17, 2020, the Canadian International Trade Tribunal commenced this preliminary injury inquiry.

[6] Five foreign producers of the subject goods, Tereos Starch & Sweeteners Belgium, Roquette Frères and Roquette Amilina, Manildra Group USA and Shoalhaven Starches PTY, as well as the Delegation of the European Union (EU) to Canada and the Embassy of the Republic of Lithuania to Canada, filed submissions opposing the complaint.

[7] Other participants to this preliminary injury inquiry are Permolex Ltd. (Permolex), a domestic producer of wheat gluten who sent a letter in support of the complaint but did not file a submission, and Can Am Ingredients Inc. who did not file a submission either supporting or opposing the complaint.

[8] On October 13, 2020, pursuant to subsection 37.1(1) of the *Special Import Measures Act*,[1] the Tribunal determined that the evidence disclosed a reasonable indication that the dumping of the above-mentioned goods has caused or is threatening to cause injury to the domestic industry. This Statement of Reasons provides the rationale for this determination.

PARTIES' SUBMISSIONS ON INJURY AND THREAT OF INJURY

[9] In support of its claim that the dumping of the subject goods has caused injury or is threatening to cause injury, ADM provided evidence of increased volumes of imports of the subject goods, lost sales, price undercutting, reduced revenue and profits.

---

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

[10] A number of parties opposed a determination of reasonable indication of injury. As well, they made a number of other arguments. Roquette Frères and Roquette Amilina argued that the subject imports of wheat gluten and the basket of "like" goods produced by the domestic industry consisted of multiple classes of goods. In making this argument, Roquette Frères and Roquette Amilina asserted that the complaint described a number of different wheat gluten products produced by ADM in Canada.[2]

[11] The Embassy of the Republic of Lithuania to Canada argued that ADM should be excluded from the definition of domestic industry because ADM is an importer of subject wheat gluten and is also related to the U.S.-based exporter Archer-Daniels-Midland Company, which is the complainant's ultimate parent.[3]

[12] Manildra Group USA and Shoalhaven Starches PTY argued that Australian imports should not be cumulated with the imports from the remaining subject countries because products imported from Australia face different conditions of competition.[4] Specifically, these Australian imports are allegedly sold to one customer in B.C., continued to be subject to a tariff rate quota (TRQ), compete with U.S. goods rather than those from Europe, and are higher-priced.

ANALYSIS

Legislative Framework

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

[14] In the present case, ADM alleged that the dumping has caused injury or is threatening to cause injury. No allegations were submitted with regard to retardation.

[15] The "reasonable indication" standard that applies in a preliminary injury inquiry is lower than the evidentiary threshold that applies in final injury inquiries under section 42 of *SIMA*. The evidence in question need not be "conclusive, or probative on a balance of probabilities".[5] Nevertheless, simple assertions are not sufficient and must be supported by relevant evidence.[6]

[16] In making its preliminary determination, the Tribunal takes into account the injury and threat of injury factors that are prescribed in section 37.1 of the *Special Import Measures Regulations*,[7]

---

2 Exhibit PI-2020-003-06.04, Vol. 3 at paras. 11-17; Exhibit PI-2020-003-07.04 (protected), Vol. 4 at paras. 11-17.

3 Exhibit PI-2020-003-06.01, Vol. 3 at 3.

4 Exhibit PI-2020-003-06.05, Vol. 3 at paras. 4-8; Exhibit PI-2020-003-07.05 (protected), Vol. 4 at paras. 4-8. A more detailed analysis of this issue follows in the subtitle "Cumulation" below.

5 *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD).

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

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

including the import volumes of the dumped and subsidized goods, the effects of the dumped or subsidized goods on the price of like goods, the resulting economic impact of the dumped or subsidized goods on the state of the domestic industry, and—if injury or threat of injury is found to exist—whether a causal relationship exists between the dumping or subsidizing of the goods and the injury or threat of injury.

[17] However, before examining the allegations of injury and threat of injury, the Tribunal must identify the domestically produced goods that are like goods in relation to the subject goods and the domestic industry that produces those goods. This preliminary analysis is required because subsection 2(1) of *SIMA* defines "injury" as "material injury to a domestic industry" and "domestic industry" as "the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods . . . ."

Like Goods and Classes of Goods

[18] In order to assess whether the evidence discloses a reasonable indication that the dumping of the subject goods has caused injury or is threatening to cause injury to the domestic producers of like goods, the Tribunal must first define the scope of the like goods in relation to the subject goods. It may also consider whether the subject goods constitute one or more classes of goods.

[19] ADM submitted that the wheat gluten products it produces are "like goods" to the subject goods and constitute a single class of goods. To support this position, ADM argued that domestically produced wheat gluten is produced in identical or nearly identical production processes as the subject goods, has the same or similar physical properties, is marketed and sold through the same distribution channels, is purchased by the same end users for the same end uses, and is always interchangeable with subject goods containing the same or similar protein contents.[8]

[20] Subsection 2(1) of *SIMA* defines "like goods", in relation to any other goods, as follows:

> (a) goods that are identical in all respects to the other goods, or
>
> (b) in the absence of any goods described in paragraph (a), goods the uses and characteristics of which closely resemble those of the other goods.

[21] In determining the like goods and whether there is one or more classes of goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).[9]

[22] Applying these factors in the context of this preliminary injury inquiry, the Tribunal finds that wheat gluten produced in Canada that is of the same description as the subject goods constitutes like goods in relation to the subject goods.

[23] With respect to the issue of classes of goods, the issue is whether there are sufficient differences between the various types of wheat gluten that comprise the like goods to justify separating them into different classes. The Tribunal has previously stated that a single class of goods

---

8 Exhibit PI-2020-003-02.01, Vol. 1 at 75.

9 See, for example, *Circular Copper Tube* (6 August 2013), PI-2013-002 (CITT) at para. 32.

can exist even when goods are "not fully substitutable across the entire spectrum of applications, they nevertheless fall within a continuum of like goods within a single class, which represents a range of goods with varying physical characteristics and efficiencies but serves the same general end use, and are, under the right circumstances, sufficiently substitutable for one another" [footnote omitted].[10] No party expressly advocated for the Tribunal to analyze injury based on specific multiple classes of goods.

[24] However, Roquette Frères and Roquette Amilina advanced arguments and evidence that *implied* that separate classes may be necessary in this preliminary injury inquiry.[11] Roquette indicated differences in the subject goods based on pricing, specifications and end use.

[25] The Tribunal finds that the submission made by Roquette Frères and Roquette Amilina was not convincing. The evidence and arguments, regarding pricing and product specifications in particular, were largely rebutted in ADM's reply submission.[12] Therefore, the Tribunal finds that the subject goods constitute one class of goods.

Domestic Industry

[26] ADM claimed that it and Permolex are the only two domestic producers of the like goods, with ADM representing a major proportion of the total production by the domestic industry.[13] This was accepted by the CBSA, but was, as described above, disputed by the Embassy of the Republic of Lithuania to Canada based on the fact that ADM reported that it had imported subject goods.

[27] The Tribunal did not have any direct information on Permolex's operations.

[28] However, for the purposes of these proceedings and based on the evidence that has been provided by ADM with respect to the volume and value of its domestic production of the like goods and imports of subject goods (and its estimates of Permolex's production),[14] the Tribunal finds that ADM is both a domestic producer *and* represents the major proportion of the total production of the domestic industry. The Tribunal will conduct its analysis in this preliminary injury inquiry on this basis.

Cumulation

[29] Except for Australian imports, there was no evidence or argument that the subject goods from the various countries are faced with differing conditions of competition such as to warrant separate analysis for the purposes of this preliminary inquiry.

---

10 *Photovoltaic Modules and Laminates* (3 February 2015), PI-2014-003 (CITT) at para. 35.

11 Exhibit PI-2020-003-06.04, Vol. 3 at 5-6; Exhibit PI-2020-003-07.04 (protected), Vol. 4 at 5-6.

12 Exhibit PI-2020-003-08.01, Vol. 3 at 10-13; Exhibit PI-2020-003-09.01 (protected), Vol. 4 at 10-13. The Tribunal wishes to note that the vast majority of the evidence presented by ADM in rebuttal was of a confidential nature. This makes it difficult for the Tribunal to elaborate further in these reasons on what convinced it that, on balance, the differences in product and market characteristics alleged by Roquette Frères were not sufficient to justify a consideration of different classes of goods. Furthermore, the nature of this information would have made it very difficult for the Tribunal to effectively collect evidence regarding the product or products as a class of goods. The Tribunal would request that all parties review their confidentiality designations about such issues (as with all other issues) to facilitate the Tribunal's use of this information. The Tribunal will continue to carefully scrutinize all confidentiality designations in its injury inquiry.

13 Exhibit PI-2020-003-02.01, Vol. 1 at 79, 82; Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 43, 47.

14 Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 47-48.

[30] Regarding Australian imports, at this point in the proceedings, the Tribunal does not view the evidence regarding Australian imports as sufficiently persuasive in terms of establishing differing conditions of competition for these imports. However, the Tribunal intends to pursue this issue further in the context of a final injury inquiry.

[31] The subject goods are also stated to be dumped at significant margins and in non-negligible volumes. The margins of dumping will be confirmed by the CBSA's determinations of dumping and the Tribunal has no role in their determination. In contrast, negligibility is an issue that the Tribunal has to independently decide in its inquiry. The Tribunal takes note of the opposing parties' arguments (including those of the Embassy of the Republic of Lithuania to Canada and the Delegation of the European Union to Canada) that volumes of subject goods from several of the named countries may have been negligible had the CBSA not adopted its 16-month POI. In the event that the CBSA makes a preliminary determination regarding the imports in issue, whether these import volumes are negligible will be an issue for the Tribunal to examine in its injury inquiry given the Tribunal's obligation under subsection 42(4.1) of *SIMA* to terminate its injury inquiry on that basis.

[32] For the purposes of its preliminary injury inquiry, the Tribunal has cumulated all of the subject goods and the effects thereof.

Volume of Dumped Goods

[33] The CBSA conducted its own estimate of import volumes of subject goods, which differed from the volumes estimated by the complainant.[15] The CBSA made adjustments to the data based on information obtained from customs data, the complainant and CBSA research. While the data submitted by the complainant differs from the estimates by the CBSA, similar trends remain. According to the CBSA's estimates in *absolute* terms, subject imports increased by more than 257% between 2017 and 2019.[16] This increase occurred while the total market of wheat gluten underwent moderate growth over the same period.[17] In *relative* terms (compared to domestic production and domestic sales of domestic production), the volume of subject imports has been steadily increasing from 2017 to 2019.[18]

[34] Further, from 2017 to 2019, imports from subject countries gained market share relative to imports from non-subject countries, and represented a significant portion of total imports.[19]

[35] Having considered the evidence on record, and in particular the CBSA's estimates of the volumes of imports, the Tribunal finds that there is a reasonable indication of a significant increase in both the absolute and relative volume of imports of subject goods.

Effect on the Price of Like Goods

[36] The complainant alleges that as a result of wheat gluten being a commodity product traded on the basis of price and having a high degree of transparency in the market, aggressive pricing of

---

15 Exhibit PI-2020-003-05, Vol. 1 at 21; Exhibit PI-2020-003-03.02 (protected), Vol. 2 at 52.
16 Exhibit PI-2020-003-05, Vol. 1 at 21.
17 Exhibit PI-2020-003-03.02 (protected), Vol. 2 at 53.
18 Exhibit PI-2020-003-03.02 (protected), Vol. 2 at 52; Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 45; Exhibit PI-2020-003-03.01E (protected), Vol. 2 at 7028; Exhibit PI-2020-003-03.01A, Vol. 2 (protected) at 2704.
19 Exhibit PI-2020-003-03.02 (protected), Vol. 2 at 52.

dumped goods has significantly undercut, depressed, and suppressed the price of like goods. To support the claim, the complainant provided a comparison of its commercial sales price to average import pricing from Statistics Canada import data. The comparison demonstrates that the subject imports undercut the domestic selling prices from 2017 to 2019, as well as during the first four months of 2020.[20]

[37] The CBSA conducted its own price comparison analysis. Its results indicate significant price undercutting by subject imports occurring between 2017 and 2019 and in the first four months of 2020.[21]

[38] With respect to specific injury allegations, the complaint contains allegations of price depression and lost sales due to price undercutting. Mr. Leon Bell, of ADM, attests to instances where the subject imports have undercut ADM's prices at the account-specific level.[22]

[39] Having considered the evidence on record, the Tribunal finds that there is a reasonable indication of significant price undercutting and price depression, both at the average pricing level and in the specific injury allegations.

Impact on the Domestic Industry

[40] The complainant submitted confidential information for wheat gluten, such as its financial statement from 2017 to the period January to April 2020, lost sales, its market share, inventory levels, employment data, and impact on investments for 2021, among others.[23] Considering that the financial and other impact indicators were information concerning only one domestic producer, much of that information is confidential.

[41] The Tribunal finds that the evidence discloses a reasonable indication that the dumped goods had a materially injurious impact on the domestic industry in terms of reduced profitability, lost sales and market share.

Other Factors

[42] The Tribunal finds that there is a reasonable indication that a causal relationship exists between the dumping of the goods and the injury suffered by the domestic industry for the following reasons:

- imports in 2019 were at a high point;
- there was price undercutting in 2019, both in terms of average import prices and specific injury allegations;
- domestic industry performance was negatively impacted by early 2020.[24]

---

20 Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 71; Exhibit PI-2020-003-02.01, Vol. 1 at 73, 105-106.
21 Exhibit PI-2020-003-03.02, Vol. 2 at 72; Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 71
22 Exhibit PI-2020-003-03.01E (protected), Vol. 2 at 5691-5692.
23 Exhibit PI-2020-003-02.01, Vol. 1 at 105, 109-113, 2731-2747; Exhibit PI-2020-003-03.01 (protected), Vol. 2 at 70, 74-78; Exhibit PI-2020-003-03.01A (protected), Vol. 2 at 2704; Exhibit PI-2020-003-03.01E (protected), Vol. 2 at 5680-5696.
24 Exhibit PI-2020-003-08.01, Vol. 3 at 24-25.

[43] Regarding non-dumping factors, the removal of TRQs for EU countries following the implementation of the *Canada-European Union Comprehensive and Economic Trade Agreement* (CETA) in September 2017 has been raised as a causal factor unconnected to dumping. The Tribunal is of the view that the liberalization of trade by the removal of quotas is not a reason to allow injurious dumping. However, this factor could be the subject of further submissions during the injury inquiry, should the CBSA make a preliminary determination of dumping. For example, the complainant submits that this increase in volume of subject imports followed CETA, which came into force on September 21, 2017, and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (CPTPP) on December 30, 2018.[25] The Tribunal will continue to examine volume and price trends given the timing of coming into force of these agreements.

Threat of Injury

[44] As there is a reasonable indication that the dumping of the subject goods has caused injury, the Tribunal will exercise judicial economy and not consider whether there is a reasonable indication that the dumping of the subject goods is threatening to cause injury.

CONCLUSION

[45] On the basis of the foregoing analysis, the Tribunal finds that there is evidence that discloses a reasonable indication that the dumping of the above-mentioned goods has caused or is threatening to cause injury to the domestic industry.

Randolph W. Heggart

Randolph W. Heggart
Presiding Member

Jean Bédard

Jean Bédard
Member

Serge Fréchette

Serge Fréchette
Member

25 Exhibit PI-2020-003-02.01, Vol. 1 at 71, 72.