Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary Injury Inquiry
No. PI-2020-007

Certain Upholstered Domestic Seating

Determination issued
Friday, February 19, 2021

Reasons issued
Monday, March 8, 2021

Canada

TABLE OF CONTENTS

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

CERTAIN UPHOLSTERED DOMESTIC SEATING

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 there is evidence that discloses a reasonable indication that the dumping and subsidizing of the subject goods (defined as follows) have caused injury or retardation or are threatening to cause injury:

> Upholstered seating for domestic purposes originating in or exported from the People's Republic of China and the Socialist Republic of Vietnam, whether motion (including reclining, swivel and other motion features) or stationary, whether upholstered with a covering of leather (either full or partial), fabric (including leather-substitutes) or both, including, but not limited to seating such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theatre seating.
>
> Excluding:
>
> (a) stationary (i.e. non-motion) seating upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl);
> (b) dining table chairs or benches (with or without arms) that are manufactured for dining room end-use, which are commonly paired with dining table sets;
> (c) upholstered stools with a seating height greater than 24 inches (commonly referred to as "bar stools" or "counter stools"), with or without backs, and/or foldable;
> (d) seating manufactured for outdoor use (e.g. patio or swing chairs);
> (e) bean bag seating; and
> (f) foldable or stackable seating.
>
> For greater certainty, the product definition includes:
>
> (a) upholstered motion seating with reclining, swivel, rocking, zero-gravity, gliding, adjustable headrest, massage functions or similar functions;
> (b) seating with frames constructed from metal, wood or both;
> (c) seating produced as sectional items or parts of sectional items;
> (d) seating with or without arms, whether part of sectional items or not; and
> (e) foot rests and foot stools (with or without storage).

This preliminary injury inquiry follows the notification, on December 21, 2020, that the President of the Canada Border Services Agency had initiated investigations into the alleged injurious dumping and subsidizing of the subject goods.

Pursuant to subsection 37.1(1) of *SIMA*, the Tribunal hereby determines that there is evidence that discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury to the domestic industry (Member Burn dissenting).

Georges Bujold
Georges Bujold
Presiding Member

Cheryl Beckett
Cheryl Beckett
Member

Peter Burn (dissenting)
Peter Burn (dissenting)
Member

The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

INTRODUCTION

[1] On October 16, 2020, Palliser Furniture Ltd. (Palliser) filed a complaint with the Canada Border Services Agency (CBSA) alleging that the dumping and subsidizing of certain upholstered domestic seating originating in or exported from the People's Republic of China (China) and the Socialist Republic of Vietnam (Vietnam) (the subject goods) have caused injury or are threatening the cause injury to the domestic industry.

[2] On December 21, 2020, the CBSA initiated investigations respecting the dumping and the subsidizing of the subject goods pursuant to subsection 31(1) of the *Special Import Measures Act*.[1]

[3] As a result of the CBSA's decision to initiate the investigations, on December 22, 2020, the Canadian International Trade Tribunal began its preliminary injury inquiry, pursuant to subsection 34(2) of *SIMA*, to determine whether the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury to the domestic industry.[2]

[4] The Tribunal received submissions opposing the complaint from a number of importers: Arozzi North America Incorporated (Arozzi); Dodd's Furniture Ltd. (Dodd's Furniture); Dorel Industries Inc. (Dorel); Retail Council of Canada (RCC); and Wayfair LLC (Wayfair). A foreign producer, Fuli Furniture International Group Ltd, also filed a submission opposing the complaint. Canadian Tire Corporation, Limited (Canadian Tire), Jag's Furniture & Mattress (Jag's Furniture), and 2571882 Ontario Inc. filed notices of participation with the Tribunal but did not file submissions.

[5] On February 19, 2021, pursuant to subsection 37.1(1) of *SIMA*, the Tribunal determined that there is evidence that discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury to the domestic industry. The reasons for that determination are set out below.

PRODUCT DEFINITION

[6] The CBSA defined the subject goods as follows:[3]

> Upholstered seating for domestic purposes originating in or exported from the People's Republic of China and the Socialist Republic of Vietnam, whether motion (including reclining, swivel and other motion features) or stationary, whether upholstered with a covering of leather (either full or partial), fabric (including leather-substitutes) or both, including, but not limited to seating such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theatre seating.
>
> Excluding:
>
> (a) stationary (i.e. non-motion) seating upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl);

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

2 As a domestic industry is already established, the Tribunal need not consider the question of retardation.

3 Exhibit PI-2020-007-05 at 7-8.

(b) dining table chairs or benches (with or without arms) that are manufactured for dining room end-use, which are commonly paired with dining table sets;
(c) upholstered stools with a seating height greater than 24 inches (commonly referred to as "bar stools" or "counter stools"), with or without backs, and/or foldable;
(d) seating manufactured for outdoor use (e.g. patio or swing chairs);
(e) bean bag seating; and
(f) foldable or stackable seating.

For greater certainty, the product definition includes:

(a) upholstered motion seating with reclining, swivel, rocking, zero-gravity, gliding, adjustable headrest, massage functions or similar functions;
(b) seating with frames constructed from metal, wood or both;
(c) seating produced as sectional items or parts of sectional items;
(d) seating with or without arms, whether part of sectional items or not; and
(e) foot rests and foot stools (with or without storage).

CBSA'S DECISION TO INITIATE THE INVESTIGATIONS

[7] The CBSA initiated the investigations pursuant to subsection 31(1) of *SIMA* as it was of the opinion that there was evidence that the subject goods had been dumped and subsidized, as well as evidence that disclosed a reasonable indication that the dumping and subsidizing had caused injury to the domestic industry.

[8] Using information for its chosen dumping period of investigation (POI) of June 1, 2019, to November 30, 2020, the CBSA estimated the following margins of dumping: 35.85 percent for China and 28.45 percent for Vietnam, each expressed as a percentage of export price.[4]

[9] Using information for its chosen subsidy POI of the same time period, the CBSA estimated amounts of subsidy, as a percentage of export price, as 17.73 percent for China and 11.73 percent for Vietnam.[5]

LEGISLATIVE FRAMEWORK

[10] 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."

[11] The term "reasonable indication" is not defined in *SIMA*, but is understood to mean that the evidence need not be "conclusive, or probative on a balance of probabilities".[6] The reasonable indication standard is lower than the standard that applies in a final injury inquiry under section 42 of *SIMA*.[7]

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4 *Ibid.* at 23.
5 *Ibid.* at 29.
6 *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD).
7 *Grain Corn* (10 October 2000), PI-2000-001 (CITT) at 5.

[12] The evidence at the preliminary phase of proceedings will be significantly less detailed and comprehensive than the evidence in a final injury inquiry. Not all the evidence is available at the preliminary phase.[8] As a result, the evidence cannot be tested to the same extent as it would during a final injury inquiry.

[13] Given the lower standard of evidence at this stage, complaints will be read generously.[9] This interpretation of the standard is consistent with the object and purpose of *SIMA*, which is to provide protection to Canadian industries adversely impacted by unfairly traded imports.[10]

[14] Indeed, domestic producers have no authority to collect data from adverse parties, their competitors or their customers at the complaint stage. They simply cannot gather the level of detailed information that the Tribunal can collect in the context of an inquiry pursuant to section 42 of *SIMA*. Imposing a high evidentiary threshold on complainants at this stage would place a significant burden on domestic producers allegedly injured by unfairly priced imports and would likely prevent certain domestic producers and industries from accessing a remedy under *SIMA*.

[15] It must also be stressed that, at this stage of the process contemplated by *SIMA*, the Tribunal's role is to assess whether there is sufficient evidence for the CBSA to continue with an investigation, whereas, at the final injury inquiry stage, the Tribunal's role is to determine whether to impose a trade remedy.[11] Therefore, the standard of "reasonable indication" of injury or threat of injury does not require the extensive evidence needed to satisfy the higher threshold of reliability and cogency that is needed in the context of a final injury inquiry.

[16] However, simple assertions are not sufficient. Complaints, as well as the cases of parties opposed, must be supported by some positive and pertinent evidence, addressing the necessary requirements in *SIMA* and the relevant factors that are prescribed in section 37.1 of the *Special Import Measures Regulations*.[12] In previous cases, the Tribunal stated that the "reasonable indication" test is passed where, in light of the evidence presented, the allegations stand up to a somewhat probing examination, even if the theory of the case might not seem convincing or compelling.[13]

[17] In this inquiry, the complainant's theory of the case can be summarized as follows:

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8 In this case, on its own initiative, the Tribunal conducted a teleconference with the participants to gather evidence on the issue of classes of goods. However, the teleconference was limited in scope. Its focus was strictly to hear the types of evidence that the Tribunal normally considers when it examines the issues of like goods and/or classes of goods, including their physical characteristics and market characteristics. The evidence on the central issue of reasonable indication of injury or threat of injury was not discussed or probed during this teleconference.

9 See, e.g., *Corrosion-resistant Steel Sheet* (7 January 2020), PI-2019-002 (CITT) at para. 12.

10 *Gypsum Board* (19 January 2017), GC-2016-001 (CITT) at para. 37.

11 Pursuant to the relevant provisions of *SIMA*, the legal consequence of a determination by the Tribunal that there is a reasonable indication of injury or threat of injury is the continuation of the previously initiated CBSA's investigation into the dumping or subsidizing of the subject goods. In contrast, at the conclusion of an inquiry pursuant to section 42 of *SIMA*, the Tribunal shall notably declare to what goods, including, where applicable, from what supplier and from what country of export, an order or finding that material injury has been caused applies (see section 43).

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

13 See, for example, *Silicon Metal* (21 June 2013), PI-2013-001 (CITT) at para. 16 and other cases therein referred to.

- The prevalence of subject goods in the Canadian market dates back to the early 2000s when Chinese goods captured the large Canadian retailers (such as Leon's and The Brick), then moved into the smaller-scale retail market. Palliser and the other producers were steadily but inexorably pushed out of this large-scale market due to the massive volume and low-price points of subject goods.

- The complainant's response to this influx of imported goods has been to develop more specialized, higher-value products. For a short while thereafter, mass-produced Chinese and Vietnamese imports were unable to directly compete with its more customized product offerings.

- Having captured the Canadian mass retail market, Chinese and Vietnamese producers have now begun similarly targeting the higher-value segment of the market, the last customer segment available to Canadian producers.

- Market data shows an increased volume of low-priced subject imports[14] over the recent period, notably between 2017 and into 2020.

- The complainant's reaction was to attempt to keep its remaining market share by competing on price with the subject goods. In the words of its witness: "Palliser attempted to keep market share by sacrificing prices and losing margin."[15]

- The net result for the complainant was injury in the form of shrinking gross margins, loss of revenue, significant negative net margins, lost sales, reduced utilization of its manufacturing capacity and return on investment.[16]

- This state of affairs is financially unsustainable. Should the current trends continue, they will force the complainant and the other remaining Canadian producers out of this last market segment and thereby call into question the existence of the domestic industry.

[18] As will be elaborated upon below, there is sufficient relevant and credible evidence on the record in support of these allegations at this stage. While the evidence might not be conclusive on a balance of probabilities, the Tribunal's majority is of the view that the complainant's allegations clearly stand up to a somewhat probing examination. It is only in the context of an inquiry pursuant to section 42 of *SIMA* if the CBSA concludes, in its preliminary determination, that the subject goods have been dumped or subsidized, that the Tribunal will be able, with the benefit of a more complete evidentiary record, to decide if the domestic industry is entitled to a trade remedy.

LIKE GOODS AND CLASSES OF GOODS

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

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14 The CBSA estimated that, during its dumping POI of June 1, 2019, to November 20, 2020, the subject goods were dumped by substantial margins: 35.85 percent in the case of China and 28.45 percent in the case of Vietnam, as noted above.

15 Exhibit PI-2020-007-09.01A at para. 20.

16 Exhibit PI-2020-007-02.01 at 129, 144 and 145.

[20] In determining the like goods and whether there is more than one class 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).

[21] In order to assess whether the evidence discloses a reasonable indication that the dumping or subsidizing of the subject goods has caused injury or threatens to cause injury to the domestic producers of like goods, the Tribunal must define the scope of the like goods in relation to the subject goods. In doing so, the Tribunal cannot modify or amend the CBSA's definition of the subject goods. It must conduct its preliminary inquiry on the basis of the CBSA's product definition.[17]

[22] In determining the scope of the like goods, the Tribunal starts with the principle, articulated in previous decisions, that the like goods must be co-extensive with the scope of the subject goods as defined by the CBSA in the product definition.[18] This means that the like goods should not include goods which would not be subject goods if exported from the subject countries instead of being produced domestically, even if, arguably, those domestically produced goods share physical and market characteristics with, have similar end uses or compete with goods included in the product definition.

[23] The Tribunal notes that the RCC submitted that some of the goods that the CBSA excluded from the scope of the definition of the subject goods constitute like goods which compete with the subject goods in the Canadian marketplace. However, at this stage, the Tribunal is not persuaded that there are adequate grounds to distinguish its previous decisions concerning the characterization of like goods and the application of the principle of co-extensiveness. Therefore, the Tribunal finds, in the context of this preliminary injury inquiry, that the like goods do not include upholstered seating products that are excluded from the product definition (an area of exclusive CBSA jurisdiction). These exclusions are, amongst others, upholstered seating for non-domestic (i.e. commercial) purposes, domestic stationary seating products upholstered only with fabric (rather than leather) and dining table chairs or benches manufactured for dining room end use. Consequently, for the purpose of this preliminary inquiry, the Tribunal need not consider these excluded goods and the domestic production of such goods either in the like goods/classes of goods analysis or in its reasonable indication of injury analysis.[19]

Product exclusions

[24] Participants also raised the issue of whether the Tribunal should grant certain product exclusions at the conclusion of this preliminary inquiry. In fact, Arozzi submitted that an exclusion should be granted for "gaming chairs for use with a desk" and the complainant consented to this

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17 *MAAX Bath Inc. v. Almag Aluminum Inc.*, 2010 FCA 62 at para. 35; *Unitized Wall Modules* (3 May 2013), PI-2012-006 (CITT) at para. 29.

18 See *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) at paras. 46-48; *Steel Piling Pipe* (4 July 2018), RR-2017-003 (CITT) at paras. 30-33; *Gypsum Board* (20 August 2018), PI-2018-003 (CITT) at paras. 32-34.

19 While the Tribunal notes that there is evidence that the goods excluded from the product definition account for a large share of the broader total domestic market for upholstered seating, analyzing the domestic industry's performance by incorporating the production and sales of such goods would be inconsistent with the Tribunal's previously stated approach to defining like goods. Following this approach, the scope of the like goods should not be broader than the scope of the subject goods. However, arguments in support of defining the like goods more broadly may merit further consideration during an eventual inquiry under section 42 of *SIMA*.

request in its submissions. The witness for the complainant also appeared to suggest that it would consent to exclusions for other products seemingly covered by the definition of the subject goods, i.e. storage ottomans that are upholstered with a fabric, futons or day-beds consisting only of an external frame, and flat-box furniture that is upholstered with fabric.[20]

[25] It appears that the Tribunal has never granted product exclusions at the preliminary injury inquiry stage. However, the Tribunal has previously stated that it has the ability to grant product exclusion requests in "exceptional circumstances".[21] Assuming that *SIMA* enables the Tribunal to exclude goods covered by the definition of the subject goods provided by the CBSA from the scope of its determination in a preliminary injury inquiry,[22] the Tribunal finds that the product exclusion request made in this preliminary injury inquiry does not disclose exceptional circumstances that would warrant its consideration at this time. Therefore, it would be premature to adjudicate it at this stage of the proceedings.

Classes of goods

[26] Turning to the issue of like goods, the complainant argues that domestically produced upholstered domestic seating, defined in the same manner as the subject goods, are like goods in relation to the subject goods and that there is a single class of goods. In this regard, the complainant indicates that the range of products that it manufactures is interchangeable with the range of subject goods. According to the evidence, they share similar characteristics in terms of function, composition and physical appearance.[23] The functions of both domestically produced like goods and the subject goods include for seating or laying on in a household.

[27] The market characteristics are also very similar for imported and domestically produced upholstered domestic seating, as are the customers' needs that they meet.[24] The complainant produces domestic upholstered seating of all kinds described in the CBSA's product definition or substitutable products.[25] In light of the evidence on record and of the factors relevant to the issue of like goods,[26] the Tribunal finds that domestically produced domestic upholstered seating of the same description as the subject goods are "like goods" in relation to subject goods.

[28] Concerning the issue of classes of goods, the Tribunal underscored this question in its notice of initiation in view of the range of goods seemingly covered by the definition of the subject goods provided by the CBSA. For this reason, the Tribunal directed participants to address the issue of whether the subject goods comprise more than one class of goods in their submissions. On January 28, 2021, the Tribunal also conducted a teleconference with interested parties in order to ask questions and gather evidence on this issue. The Tribunal's objective was to make possible the early resolution

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20 Transcript of teleconference on classes of goods [Transcript of teleconference] at 28-32, 36-41 and 45-47.

21 See, for example, *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (12 August 2003), PI-2003-002 (CITT) at 4.

22 As discussed below, in Presiding Member Bujold's opinion, whether the Tribunal has this authority is unclear.

23 Exhibit PI-2020-007-02.01 at 19-24 and 40.

24 *Ibid.* at 35-38.

25 While it appears that the complainant does not produce futons, it manufactures sofa-beds and day-beds, goods that have a similar end use or fulfill a similar customer need.

26 In deciding the issues of like goods and classes of goods, the Tribunal considers 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). *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

of this issue in order to potentially simplify any final injury inquiry that could later be initiated by the Tribunal following a preliminary determination of dumping or subsidizing by the CBSA and a preliminary determination of injury in this case.

[29] Palliser, Arozzi, Dorel, Canadian Tire, Wayfair, RCC, Dodd's Furniture, and Jag's Furniture participated in the teleconference – only Palliser and Dodd's Furniture gave evidence. In the teleconference, the parties that participated made the following arguments with respect to classes of goods:

- Palliser argued that despite some differences amongst the subject goods, the subject goods represent a "continuum" of like goods that comprise a single class of goods.

- Dorel argued that based on differences in physical characteristics of the goods, their method of manufacture and composition, their market characteristics, and consumer needs, there are several different classes of goods that should be considered for the purposes of the injury inquiry.[27]

- Wayfair argued that the multitude of items encompassed by the product definition are not "similar in appearance" or "larger or smaller versions of each other" and do not fulfil the same end uses of domestic consumers. Wayfair further argued that within these broad types of furniture exist different marketing, pricing, distribution, and end use characteristics depending on whether the goods are custom-made or off-the-shelf consumer models and their physical characteristics.[28]

- RCC acknowledged that it appeared possible that there is only one class of subject goods, but argued that it is premature for the Tribunal to make a determination on classes of goods at the preliminary stage.

[30] The subject and like goods include upholstered domestic seating of various types and configurations, such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theater seating. In addressing the issue of classes of goods, the Tribunal typically examines whether goods allegedly 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.

[31] In this regard, the Tribunal notes that, in previous cases, it has stated that (1) the fact that certain goods may not be fully substitutable for each other for some end uses is not, in and of itself, a sufficient basis for determining that there exists multiple classes of goods, and (2) goods can belong to the same class of goods even if they come in numerous styles and varieties.[29] As such, the

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27 Dorel proposed the following classes of goods: futons (i.e. furniture designed to be used for sleeping or sitting); day-beds (i.e. furniture designed to be used for sleeping or lounging, does not fold or move like a futon); and ready-to-assemble flat-boxed furniture (i.e. furniture that is shipped to the consumer unassembled and requires significant assembly). The Tribunal notes that these proposed classes were admitted not to be exhaustive of all of the like goods.

28 Wayfair proposed the following classes of goods: custom upholstered domestic seating vs. stock inventory domestic seating; single seats (i.e. recliners and gliders, rockers, stationary chairs, gaming chairs, massage chairs, chaise lounges); multiple seats (i.e. sofas and sectional sofas, home-theatre seating); bedding (i.e. sofa-beds and day-beds, futons); and complementary furniture (i.e. ottomans, footstools, accent stools and benches, children's playroom furniture).

29 *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at para. 45; *Waterproof Footwear and Bottoms* (8 December 2000), NQ-2000-004 (CITT) at 8.

Tribunal's jurisprudence is for the most part supportive of a broad rather than a narrow approach to the application of the definition of "like goods" in *SIMA* in order to determine whether there are multiple classes of goods in any inquiry.

[32] The Tribunal is satisfied that, overall, while evidently not identical in all respects to each other, the various types of upholstered domestic seating that fall within the scope of the product definition have similar physical and market characteristics and similar end uses, and generally resemble one another.

[33] In this regard, the complainant adduced evidence indicating the following:

- The goods are all composed of the same materials, with wooden or metal frames, foam, and a cover composed of leather or fabric (which for this purpose includes materials like polyurethane and polyvinyl). The goods are generally similar in appearance, in particular with sofas, loveseats and chairs often being effectively larger or smaller versions of each other.

- The goods serve the same end use and same customer needs: they are intended for a person to sit on in a domestic or household setting. The specific cover materials (such as different types of fabrics or leather, or a combination of the two) and features (such as swivel, reclining, or other motion features, or other features, like lighting, built-in cooling or storage) of particular seating products are characteristics that are secondary to their primary end use purpose for sitting in a household setting.

- The goods all have similar distribution channels. Producers primarily sell them to Canadian retailers for resale to customers.[30]

[34] The evidence also indicates that upholstered domestic seating products of various types are often sold together in bundles or sets comprising a sofa or loveseat and matching chairs or ottomans. The elements of the group are all priced relative to sofa pricing from the same group.[31] For example, the complainant's witness explained that ottomans would roughly be priced at about 20 percent of the price of the sofa, whereas the price of chairs for both imported and domestically produced goods would typically amount to 60 or 70 percent of the price of the matching sofa.[32]

[35] According to the complainant, producers typically offer bundling discounts for a furniture set, which may include a sofa, a loveseat, a chair and an ottoman.[33] This industry practice suggests that, in terms of pricing, domestic upholstered seating products of different kinds are considered together or as part of the same generic category.

[36] Moreover, Mr. Dodd, who represents a retailer of subject and like goods, suggested that there is an overlap in customers' preference for any given type of seating. He confirmed that he has seen customers trying to decide whether to buy a sofa as opposed to two chairs to put in their living room.[34] He also corroborated the complainant's evidence on the similar composite materials and main purpose of the subject and like goods.

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30 Exhibit PI-2020-007-09.01A at paras. 4-6.
31 Exhibit PI-2020-007-02.01 at 17.
32 Transcript of teleconference at 19-21.
33 Exhibit PI-2020-007-02.01 at 37.
34 Transcript of teleconference at 51.

[37] This evidence supports the complainant's position that upholstered domestic seating represents a continuum of like goods that comprise a single class of goods. In short, the situation in this case is similar to that in numerous prior cases where at issue was a range of goods with varying physical characteristics, appearance and efficiencies, but serving the same general end use and, under the right circumstances, sufficiently substitutable for one another.[35]

[38] The parties opposed submitted that there was a basis to separate the subject and like goods into multiple classes in view of their varying styles, design, customization and quality. They made suggestions on potential classes, but they did not provide evidence that could convince the Tribunal that the differences between these products are sufficient to justify separating the goods into different classes. In fact, other than Mr. Dodd,[36] the parties opposed did not take advantage of the teleconference to present witness testimony to rebut the complainant's evidence or otherwise support their views on their alleged separate classes of goods.

[39] Finally, administrative feasibility is a matter that the Tribunal should take into account in deciding whether to separate the goods into multiple classes.[37] It would be unreasonable to require that the Tribunal define as many separate classes of goods as there are specific seating configurations (i.e. single seats, multiple seats, etc.) or specific end uses or features (e.g. storage, bedding, etc.) of domestic upholstered seating. Following this approach would require the Tribunal to conduct multiple injury analyses each requiring, for example, a separate determination on the composition of the domestic industry, discrete financial information and a specific investigation report. On balance, separating domestic upholstered seating into different classes on the basis of their customized or variable features would be both arbitrary and impractical for the purposes of carrying out the Tribunal's mandate in this case.

[40] For these reasons, the Tribunal is not persuaded by the arguments made by parties opposed that there is more than one class of goods.

DOMESTIC INDUSTRY

[41] Subsection 2(1) of *SIMA* defines "domestic industry" as "the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods . . . ."

[42] The evidence provided by the complainant and the CBSA's statement of reasons concerning the initiation of investigations indicate that there are seven confirmed producers and 40 other potential domestic producers of upholstered domestic seating.

[43] The Tribunal must define the 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 like goods. The term "major proportion" is not defined in *SIMA*. However, it has been interpreted to mean an important, serious or significant proportion and not necessarily a majority.[38] The Tribunal has previously implied that in certain circumstances, a proportion of 20 percent or more of total domestic production may constitute a major proportion.[39]

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35 For example, *Wheat Gluten* (13 October 2020), PI-2020-003 (CITT) at para. 23.

36 Whose testimony, as discussed above, ultimately supports the complainant's position in several respects.

37 *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 131.

38 *Japan Electrical Manufacturers Assoc. v. Canada (Anti-Dumping Tribunal)*, [1982] 2 FC 816 (F.C.A.).

39 *Venetian Blinds and Slats* (20 July 2004), NQ-2003-003 (CITT) at paras. 66-67.

[44] The Tribunal is also cognizant that the WTO Appellate Body has found, in the case of a fragmented industry with numerous producers, as appears to be the situation in this case, that a major proportion may in fact be a smaller proportion than in a case with a concentrated industry.[40] Thus, in the circumstances of this inquiry, it is reasonable to accept that a "major proportion" may be a lower amount than in a standard case.

[45] The evidence on the record indicates that the complainant accounts for more than 20 percent, by value, of the total production of like goods, by the domestic industry.[41] In the circumstances of this case, especially considering the fact that at issue is the impact of the subject goods on an industry that is very fragmented and appears to include many small producers, the Tribunal finds that the complainant accounts for a major proportion of total domestic production. Therefore, for the purposes of this preliminary injury inquiry, the Tribunal will consider the impact of the subject goods on the complainant since, based on the information available, its production appears to be sufficient to account for a major proportion of total domestic production of the like goods.

[46] While the Tribunal considers that the data concerning the complainant's situation is reasonably representative of the state of the entire domestic industry for the purposes of this preliminary inquiry, it intends to collect data from other domestic producers in the context of an eventual final injury inquiry. Therefore, the issue of the composition of the domestic industry will have to be addressed more fully if the CBSA concludes, in its preliminary determination, that the subject goods have been dumped or subsidized and the proceedings move to the next phase.

CUMULATION AND CROSS-CUMULATION

[47] In the context of a final injury inquiry, subsection 42(3) of *SIMA* requires the Tribunal to make an assessment of the cumulative effect of the dumping or subsidizing of goods that are imported into Canada from more than one subject country if it is satisfied that (1) the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods imported from each of those countries is not negligible, and (2) such an assessment would be appropriate taking into account the conditions of competition between the goods from any of those countries and the goods from any other of those countries or the domestically produced like goods.

[48] While subsection 42(3) of *SIMA* applies to final injury inquiries, the Tribunal's practice has been to adopt the same framework in preliminary injury inquiries.[42] The Tribunal normally considers that it is exceptional not to cumulate the subject goods in a preliminary injury inquiry when the available evidence appears to justify cumulation.[43]

[49] The Tribunal generally assesses insignificance and negligibility based on the CBSA's estimated margins of dumping, amounts of subsidy, and import volumes for its dumping POI. In the present case, the estimated margin of dumping and amount of subsidy for each country are not insignificant (i.e. the margin of dumping is not less than 2 percent of the export price of the goods and the amount of subsidy is not less than 1 percent of the export price of the goods) and the

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40 Appellate Body Report, *EC – Fasteners (China)*, WT/DS397/AB/R at paras. 415-416.

41 Exhibit PI-2020-007-03.01 (protected) at para. 25.

42 *Galvanized Steel Wire* (22 March 2013), PI-2012-005 (CITT) at para. 40; *Corrosion-resistant Steel Sheet* (2 February 2001), PI-2000-005 (CITT) at 4, 5.

43 See, for example, *Heavy Plate* (27 July 2020), PI-2020-001 (CITT) at para. 51.

estimated import volume for each country is not negligible (i.e. it is not less than 3 percent of the total volume of imports from all countries).[44] The estimated margins of dumping for China and Vietnam were 35.85 percent and 28.45 percent, respectively, and the estimated amounts of subsidy were 17.73 percent and 11.73 percent. The estimated import volumes from August 2019 to July 2020, expressed as a percentage based on volume (pieces), for China and Vietnam were 71 percent and 11 percent, respectively.[45]

[50] With respect to the conditions of competition, the Tribunal has previously made its assessment based on factors such as interchangeability, quality, pricing, distribution channels, modes of transportation, timing of arrivals and geographic dispersion.[46] In this case, the complainant asserted that there are no distinctions between the subject goods and like goods in the Canadian market in terms of end use function and characteristics. The complainant further noted that subject imports compete directly with like goods at multiple trade levels, particularly at the wholesale and retail levels.[47] None of the parties opposed presented evidence indicating that the conditions of competition between the subject goods or between the subject and like goods would make cumulation inappropriate in this case.

[51] The Tribunal finds that the evidence available at this stage of the proceedings reasonably indicates similar conditions of competition among the subject goods, and between the subject goods and the like goods.

[52] Where subject goods from multiple sources are both dumped and subsidized, as is the case here, the Tribunal considers that it is not necessary or practicable to disentangle the effects of subsidizing from the effects of dumping of these goods. The Tribunal therefore assesses the impact of the dumping and subsidizing of the goods from both China and Vietnam cumulatively in this preliminary inquiry.

INJURY ANALYSIS

Import volume of dumped and subsidized goods

[53] The CBSA conducted its own estimate of import volumes of subject goods in value and volume, which differed significantly from the complainant's estimates which are based solely on value as a proxy for the absence of volume information by units or pieces in the complaint. In this regard, the complainant provided the following rationale:

> In the upholstered domestic seating industry, unit counts or unit prices are not used when considering market share, and rarely used for any purpose. This is because of the non-commodity nature of Upholstered Domestic Seating and the associated wide range of products. There are thousands, if not tens of thousands of different styles and configurations currently available in Canada of sofas, loveseats, chairs, recliners and so forth. Some Upholstered Domestic Seating can also be custom-ordered. In this context, unit counts or

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44 The terms "insignificant" and "negligible" are defined at subsection 2(1) of *SIMA*.

45 Exhibit PI-2020-007-05 at 16, 23.

46 See, for example, *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 16; *Waterproof Footwear* (25 September 2009), NQ-2009-001 (CITT) at note 28. The Tribunal has recognized that other factors may be considered and that no single factor may be determinative. See *Laminate Flooring* (16 June 2005), NQ-2004-006 (CITT) at para. 80.

47 Exhibit PI-2020-007-02.01 at para. 61.

> average prices per unit are not meaningful, and the relevant metric is the value in dollars. All of Palliser's market size and share analysis will be on the basis of dollar value.[48]

[54] Based on the complainant's estimates using dollar value, imports from China and Vietnam increased by 11.5 percent from 2017 to 2019.[49]

[55] Based on its own estimates of the value of imports, the CBSA found that the total volume of imports from the subject countries collectively significantly increased by 60 percent from 2017 to 2019. The CBSA's information on subject imports by pieces shows a more significant increase by 118 percent for the same period.[50]

[56] Having considered the evidence on the 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 imports of subject goods.

[57] In the context of the Tribunal's final inquiry, the import data will have to be closely examined in order to make sure not to capture non-subject goods and to overestimate the volume of subject goods. Given the complainant's reservation about the reliance on unit counts to assess domestic production and imports in this industry, the Tribunal will also have to consider the weight to give to information broken down by units and determine whether, as submitted by the complainant, value or another metric is more appropriate to assess the volume of imports.

Effects on prices of like goods

[58] The complainant alleges price undercutting by the subject goods, leading to lost sales and a loss of market share. The complainant also alleges that the subject goods have significantly depressed its prices in the Canadian market.

[59] The Tribunal used volume and value data provided by the complainant and the CBSA's confidential complaint analysis to estimate average domestic sales and import unit values. The results showed abnormally very high average import unit values, compared to the complainant's average pricing. While this exercise did not reveal average price undercutting, average prices per unit may not be a reliable indicator in this case in view of the non-commodity nature of upholstered domestic seating and the associated wide range of products.[51]

[60] The Tribunal notes that product mix is an issue of concern in many *SIMA* cases, as it is unusual to find either a domestic industry or a group of importers that produces or imports, respectively, the identical assortments of goods year after year. In light of the especially large number of different products that are envisaged in this case, the Tribunal acknowledges the constraints inherent in using averages prices for these types of products.[52]

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48 Exhibit PI-2020-007-02.01 at 47.

49 Exhibit PI-2020-007-02.01 at 123-124.

50 Exhibit PI-2020-007-03.13 (protected) at 16-17.

51 As previously mentioned, the complainant's position is that average prices per unit are not meaningful in this industry.

52 In an eventual inquiry under section 42 of *SIMA*, the Tribunal will collect import data through questionnaires and define benchmark products in order to obtain data that mitigate any potential issues related to product mix. In that event and with the benefit of better data, average import unit and selling prices could remain a reliable indicator to examine competition in the marketplace.

[61] Besides, the average pricing data is at odds with other information on the record concerning the prices at which the subject goods are apparently offered to Canadian importers. In this regard, the complainant estimated the export price of the subject goods based on the best information available to it, including the following sources: a confidential price list of an exporter in China and Vietnam, commercial documents from a Chinese exporter, commercial intelligence of Chinese and Vietnamese exporters, adjusted prices obtained from Canadian retailer websites with stated origins from China and Vietnam.[53]

[62] According to this information, the prices of subject goods that compete with the complainant's offerings are lower than the estimated average unit values. It also appears that importer retailers use the availability of low-priced subject goods as leverage to obtain pricing concessions from the complainant.

[63] In support of its claims concerning adverse price effects, the complainant's case rests on specific injury allegations. With respect to the latter, the complaint contains allegations of lost sales due to price undercutting, and allegations of instances in which the domestic producers had to decrease their prices to retain sales.[54]

[64] On balance, the Tribunal finds that these allegations are credible and reasonably supported in light of the limited information available to the complainant concerning the likely prices of the subject goods.

[65] In this case, competition occurs at the wholesale trade level. The relevant price comparison is therefore between the complainant's wholesale price and the import wholesale price, that is, the price offered by domestic producers or exporters of the subject goods to retailers. According to the complaint, retailers typically act as the importers. Thus, import prices (not retail prices) are the most accurate yardstick to compare the prices, considering the trade level at which competition occurs. However, retail import pricing, which the complainant provided for each account-specific allegation, can be used as a basis to attempt to estimate plausible import wholesale prices.

[66] Again, the complainant cannot be expected, at this stage, to have direct access to the import wholesale prices and provide conclusive evidence in this regard. Bearing in mind that the record evidence will necessarily be incomplete in a preliminary injury inquiry and that these allegations will therefore have to be vetted more thoroughly in an eventual final injury inquiry, the evidence nevertheless indicates the following:

- The retail prices of the subject goods provided by the complainant for these model-specific comparisons are in all cases lower and, in most cases, significantly lower than the retail prices of the complainant's similar products. This suggests that the underlying wholesale import prices are also significantly lower than the complainant's wholesale prices for similar products. Indeed, a rational retailer seeking to maximize profits can be expected to aim for similar gross margins regardless of the supplier.

- Based on the complainant's evidence,[55] there is a significant difference between the complainant's wholesale prices and the corresponding retail prices for its products. This indicates that, in this industry, the retailers' markup is substantial.

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53 Exhibit PI-2020-007-03.01 (protected) at 95-97.
54 Exhibit PI-2020-007-03.01 (protected) at 130-143.
55 Exhibit PI-2020-007-03.01 (protected), Appendix 11.

- There is no evidence indicating that the retailers' markups on top of the import wholesale price of the subject goods would be different or lower than those added to the complainant's wholesale prices to arrive at retail prices for similar domestically produced products. In fact, there is evidence indicating that at least one retailer's markups are typically very high and in the same range as for imported goods.[56]

- Based on this information, it is reasonable to infer that, for all account-specific injury allegations, import wholesale prices were significantly lower than import retail prices (after adjusting the latter downward to account for the apparent prevailing retailers' markups in this industry). This analysis provides a reasonable indication that import wholesale prices were lower than the complainant's wholesale prices in all cases.

- In short, the information on the record suggests that, as alleged by the complainant, in instances for which there is evidence that there was head-to-head competition at individual customer accounts, import wholesale prices undercut domestic wholesale prices and often by a significant margin.

- There are even some instances where the import *retail* prices are lower than the complainant's *wholesale* price.[57] In other cases, import retail prices, while higher, are very close to the complainant's wholesale selling prices. This provides evidence of significant underselling at the trade level where competition occurs.

[67] Accordingly, the information available on the retail prices of the subject goods, when examined in light of other information on the record, supports the complainant's position that the import pricing is significantly undercutting its wholesale prices to its customer retailers.

[68] The complainant also provided confidential evidence of the delivered or "landed" price of the subject goods against which it was competing or of comparable domestic and import wholesale pricing for certain allegations.[58] This information corroborates the above analysis and provides documentary evidence of underselling.

[69] Having considered the evidence on record, the Tribunal finds that there is a reasonable indication of significant price undercutting and price depressing effects caused by the subject goods in the Canadian market. Overall, the evidence supports the complainant's submissions that, due to the availability of dumped and subsidized Chinese and Vietnamese goods, it either reduced its prices to make sales to retailers or lost sales.

Resultant impact on the domestic industry

[70] As part of its analysis under paragraph 37.1(1)(c) of the *Regulations*, the Tribunal must consider the impact of the dumped or 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.

[71] In a preliminary injury inquiry, the Tribunal must determine whether the evidence discloses a reasonable indication of a causal link between the dumping or subsidizing of the subject goods and

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56 Exhibit PI-2020-007-03.01 (protected) at 138.
57 Exhibit PI-2020-007-02.01 at para. 467. See also Exhibit PI-2020-007-03.01 (protected) at 188-239.
58 Exhibit PI-2020-007-03.01 (protected) at paras. 444-453, 478-479.

the injury on the basis of the resultant impact of the volume and price effects of the dumped or subsidized goods on the domestic industry. The standard is whether there is a reasonable indication that the dumping or subsidizing of the subject goods has, *in and of itself*,[59] caused injury.

[72] The complainant alleges that the subject goods have caused material injury to the domestic industry through price undercutting, price depression, lost sales and market share, underutilization of capacity, and a negative impact on the financial results and return on investments.

[73] The Tribunal has reviewed the evidence submitted by the complainant on the confidential and public record in light of the relevant factors. Tribunal jurisprudence indicates that when faced with competition from dumped or subsidized imports, domestic producers may choose to maintain market share by cutting prices, and this price cutting may result in injury:

> While the company was able to maintain sales volumes, it did so at a considerable cost. The company's market strength had been its lower prices, but it was forced to lower prices further in order to maintain its market share, which resulted in a significant negative effect on the company's financial performance.[60]

[74] In this case, the complainant's market strength appears to be the higher value of its products.[61] The evidence provides a reasonable indication that it was forced to lower prices in order to maintain its market share in that market segment because of increased competition from low-priced Chinese and Vietnamese products of comparable quality.

[75] For example, the complainant's witness stated that beginning in 2018, Palliser was attempting to compete with subject imports for the business of large retailers in Canada. His evidence is that they all demanded prices that were competitive against low import prices, but also required quick local delivery, while imported Asian products were taking three to four months to arrive by container ships.[62]

[76] He also indicated that the price concessions that the complainant made to retain the business of a large retailer resulted in an unsustainable margin, which ultimately forced it to terminate the supply arrangement with that retailer.[63] Other evidence indicates that, while the complainant was seemingly able to keep market share, it did so by cutting its margins with its customers.[64]

[77] Based on the information available at this stage, the resultant negative effect of these lost sales and loss in revenue on the complainant's financial performance can therefore reasonably be attributed to the subject goods. For example, the considerable cost to the complainant is apparent in the decline of its gross margin on Canadian sales of domestic production.[65] The financial information provided also shows a worsening performance at the net income level.

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59 *Copper Rod* (30 October 2006), PI-2006-002 (CITT) at paras. 40, 43.
60 *Concrete Panels* (27 June 1997), NQ-96-004 (CITT) at 8.
61 The complainant's witness indicated that the majority of its sales are upholstered domestic seating products with motion mechanisms. PI-2020-007-09.01A at para. 31.
62 *Ibid.* at para. 19.
63 *Ibid.* at para. 20.
64 Exhibit PI-2020-007-03.01 (protected), Appendix 10 and 11.
65 Exhibit PI-2020-007-03.01 (protected), Appendix 10.

[78] In sum, the confidential data and trends pertaining to the complainant's financial performance are generally suggestive of a negative impact of subject imports.[66] The Tribunal is satisfied at this stage that this information is indicative of the situation of the broader domestic industry as the complainant represents a sufficient proportion of the total domestic production of the like goods. The Tribunal's final injury inquiry (if the CBSA makes a preliminary determination of dumping or subsidizing) will provide a more complete and more accurate picture of the state of the domestic industry as a whole.

[79] The complainant also provided confidential evidence of a strategy that it has been forced to implement in order to compete with the subject goods and stay afloat financially.[67] In the Tribunal's opinion, this evidence discloses a reasonable indication of the serious adverse impact that the subject goods have already caused to the production of like goods in Canada. It also supports the complainant's submissions that, if the current harmful trends continue, the very existence of Canadian producers of like goods would be at risk.[68]

[80] Finally, there is some evidence that as a result of the negative impact of the subject goods, the complainant experienced reduced utilization of its capacity and return on investments.[69]

[81] Having considered the totality of the evidence on record, the Tribunal finds that it provides a reasonable indication that the domestic industry experienced material injury. In particular, the evidence provides a reasonable indication of lost sales and reduced financial results.

[82] Moreover, the evidence discloses a reasonable indication of a causal relationship between the significant increase in the volume of subject imports and the undercutting of the price of the domestic like goods by those imports on the one hand, and the deterioration of the economic performance of the domestic industry during the period of 2017 to 2019 on the other. Should there be a final injury inquiry, the Tribunal will examine whether other factors have contributed to the deterioration of the economic performance of the domestic industry.[70]

[83] For the foregoing reasons, the Tribunal finds that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused material injury to the domestic industry.

THREAT OF INJURY

[84] In light of the finding that there is a reasonable indication that the dumping and subsidizing of the subject goods have caused injury, the Tribunal will exercise judicial economy and not consider

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66 Exhibit PI-2020-007-03.01 (protected) at 128-129.

67 Exhibit PI-2020-007-03.01 at 121-122.

68 In this respect, there is evidence that offshore competition at low prices including from China is a major concern for furniture manufacturers in Canada and that Barrymore Furniture, one of eastern Canada's largest furniture makers, filed for bankruptcy in January 2020 and went into liquidation. Exhibit No. 03.01 at 157 and Appendix 8.

69 Exhibit PI-2020-007-03.01 (protected) at 145.

70 The Tribunal notes that Dodd's Furniture raised certain factors other than dumping which it argued resulted in self-inflicted injury to the complainant (i.e. quality issues and inability to supply due to production and delivery slowdowns). The complainant responded in detail to these allegations with contradictory and credible evidence in the form of a witness statement. It is only with the benefit of a full hearing in the context of a final injury inquiry that the Tribunal will be able to assess the potential impact of the factors alleged by Dodd's Furniture.

whether there is a reasonable indication that the dumping and subsidizing of the subject goods are threatening to cause injury.

ADDITIONAL CONCURRING OPINION OF PRESIDING MEMBER BUJOLD CONCERNING PRODUCT EXCLUSIONS

[85] I agree with my colleague that, on the facts of this case, there is no compelling reason to address Arozzi's request for a product exclusion at this stage. However, I also consider that there is another, and even more persuasive, basis to refrain from adjudicating requests for product exclusion in a preliminary injury inquiry. In short, there have been recent developments which suggest that, as a matter of law, the Tribunal does not have the discretionary power to grant product exclusion requests at this stage.

[86] In its recent decision in *Fluor Canada Ltd.*,[71] the Federal Court of Appeal implied that the Tribunal does not have the authority to grant product exclusions in a preliminary injury inquiry. The Court indicated that the Tribunal's authority to grant product exclusions stems from subsection 43(1) of *SIMA*, which enables the Tribunal to state, at the conclusion of a *final injury inquiry* under section 42, "to what goods its finding applies". The Court added the following: "This provision provides the implicit authorization for the Tribunal to grant exclusion requests for particular goods that would not cause injury."[72]

[87] There is no similar enabling provision in a preliminary injury inquiry conducted pursuant to subsection 34(2) of *SIMA*. At this juncture, the Tribunal's mandate seems limited to determining the narrow question of whether the evidence discloses a reasonable indication that the dumping or subsidizing of the subject goods, *as defined by the CBSA*, has caused injury or retardation or is threatening to cause injury. Where, as in this preliminary injury inquiry, there is only one class of goods, once the Tribunal has determined that the evidence discloses such a reasonable indication, I fail to see which provision of the statute would provide it with the authority to grant exclusion requests for particular goods covered by the product definition.

[88] Therefore, the Tribunal does not appear to have the power to specify to what particular goods its determination applies, which it clearly has in a final injury inquiry. Given this difference in the statutory framework for a preliminary and a final injury inquiry, it is far from clear that *SIMA* provides the implicit authorization for the Tribunal to grant exclusion requests for particular goods included in the universe of subject goods defined by the CBSA, as it does in a final injury inquiry, at this early stage.

[89] As such, I consider that Tribunal precedents which assume, without discussing the statutory framework or identifying any enabling provision, that there is an implicit authority to grant exclusion requests for particular goods in a preliminary injury inquiry may have been wrongly decided. In my view, those cases should no longer be followed on this issue, particularly as there is doubt as to whether the Tribunal has jurisdiction in this respect given the recent guidance provided by the Federal Court of Appeal. For these reasons, I find that it would be wholly inappropriate to deal with exclusion requests at this time.

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71 *Fluor Canada Ltd. v. Supreme Group LP*, 2020 FCA 58 [*Fluor Canada Ltd.*].

72 *Fluor Canada Ltd.* at para. 16.

CONCLUSION

[90] On the basis of the foregoing analysis, the Tribunal determines that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic industry.

Georges Bujold

Georges Bujold
Presiding Member

Cheryl Beckett

Cheryl Beckett
Member

DISSENTING OPINION OF MEMBER BURN

[91] I am writing this dissenting opinion in full knowledge that my colleagues have determined that the evidence is sufficient to disclose a reasonable indication that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury, thereby allowing the process to move forward to the final injury determination stage. As such, I appreciate that my situation is akin to a quarterback who knows he can take a free shot down field following the throwing of an offside flag on a defender.

[92] I will take my free shot.

Concerning the product definition

[93] Readers of a certain age will recall the restaurant scene in the movie *Five Easy Pieces*, where the character played by Jack Nicholson (named Bobby Dupea) desired an omelette with a side order of wheat toast. As toast was not an item on the menu and there was a "no substitutes" rule in the restaurant, "Bobby" sought to obtain the toast by ordering a toasted chicken salad sandwich, hold the butter, mayo, lettuce and chicken. After a confrontation with the waitress, he was kicked out of the restaurant for his efforts.

[94] I suspect that if the authors of the Product Definition in *Certain Upholstered Domestic Seating* had written the script for *Five Easy Pieces*, Bobby Dupea would have received and accepted the side order of plain wheat toast, but then sent it back to have the crusts removed.

[95] In Canada's bifurcated trade remedy regime, the CBSA has the exclusive authority to define the imported goods subject to an inquiry and to determine the margin of dumping and/or amount of subsidy. The statutory authority of the Tribunal is confined to determining whether the importation of the subject goods as defined by the CBSA has caused or is threatening to cause material injury to the like goods produced in Canada.

[96] In this case, the CBSA defined the subject goods as follows:[73]

> Upholstered seating for domestic purposes originating in or exported from the People's Republic of China and the Socialist Republic of Vietnam, whether motion (including reclining, swivel and other motion features) or stationary, whether upholstered with a covering of leather (either full or partial), fabric (including leather-substitutes) or both, including, but not limited to seating such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theatre seating.
>
> Excluding:
>
> (a) stationary (i.e. non-motion) seating upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl);
> (b) dining table chairs or benches (with or without arms) that are manufactured for dining room end-use, which are commonly paired with dining table sets;
> (c) upholstered stools with a seating height greater than 24 inches (commonly referred to as "bar stools" or "counter stools"), with or without backs, and/or foldable;
> (d) seating manufactured for outdoor use (e.g. patio or swing chairs);
> (e) bean bag seating; and
> (f) foldable or stackable seating.
>
> For greater certainty, the product definition includes:
>
> (a) upholstered motion seating with reclining, swivel, rocking, zero-gravity, gliding, adjustable headrest, massage functions or similar functions;
> (b) seating with frames constructed from metal, wood or both;
> (c) seating produced as sectional items or parts of sectional items;
> (d) seating with or without arms, whether part of sectional items or not; and
> (e) foot rests and foot stools (with or without storage).

[97] The Tribunal does not possess the power to change a CBSA Product Definition. But this lack of statutory authority does not prevent comment.

[98] There are two major challenges facing the Tribunal as it pursues this investigation into "Certain Upholstered Domestic Seating". The first is the decision of the CBSA to limit the subject goods in the Product Definition to seats primarily used for domestic purposes, as defined by Tribunal customs tariff jurisprudence.[74] The second is the decision to consciously exclude stationary seats upholstered with leather-like fabric.

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73 Exhibit PI-2020-007-05 at 7-8.

74 See, for example, *Jardin de Ville v. President of the Canada Border Services Agency* (8 March 2019), AP-2017-052 (CITT).

[99] The narrative in this case is that low-cost furniture from primarily China has steadily gained market share at the low end of the Canadian furniture market over the past 10-15 years, forcing the complainant to retreat to the higher-end market segment. More recently, the dumping and subsidization of Chinese and Vietnamese furniture of increasingly high quality is allowing Asian imports to take a larger share of the high end of the market, in the process squeezing the Canadian industry towards extinction.[75]

[100] Imported seating that is supplied to the higher-end residential market enters Canada classified for tariff purposes as either (i) seats used primarily for domestic purposes or (ii) seats used for "other" purposes, the latter essentially meaning seats that are marketed primarily to the non-residential commercial market (i.e. hotels, condos, business reception areas, etc.) or that are intended equally for use in the commercial and (high-end) residential markets.[76]

[101] It is relatively easy for the CBSA to distinguish at the port of entry between imported seats primarily intended for domestic purposes – the subject goods – and those used for "other" purposes, based on the presentation of relevant documentation concerning business plans, design documents, marketing materials, etc. Common sense suggests that these separate tariff classifications for "domestic" and "other" seats, and the resulting segmented import data, had some influence in shaping the Product Definition, including the exclusion from the Product Definition of some products (e.g. upholstered dining table chairs, "bar stools" and patio chairs) that are often intended for use in both commercial establishments and high-end private residences.

[102] What is convenient for the CBSA while collecting import data is not necessarily convenient for the Tribunal in its injury inquiry. In order to assess injury, the Tribunal must identify the domestically produced goods that are "like goods" to the subject goods. In doing so, it seeks to follow the WTO principle of co-extensiveness by mirroring the like goods produced in Canada with the subject goods delineated in the CBSA's Product Definition.[77]

[103] It is much more difficult to differentiate between *de jure* "like goods" made in Canada that are intended for domestic purposes and *de facto* similar goods intended equally for use in the commercial and high-end residential markets. Yet this is what the Tribunal must attempt to do following the CBSA's decision to limit the Product Definition to seats primarily used for a domestic purpose. To do otherwise would be to potentially overstate the domestic sales of like goods by Canadian producers. Tribunal Secretariat staff will have to be creative to acquire this information – information that the Tribunal will need if it is to properly assess the market dynamics in the high-end residential market segment.

[104] How to handle the exclusion from "subject goods" and "like goods" of seating that is intended for use equally in the commercial and residential markets is one major challenge facing the Tribunal in its injury analysis. A second is the explicit exclusion of stationary (i.e. non-motion) seating upholstered only with a leather-substitute fabric (rather than "real leather").

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75 Exhibit PI-2020-007-02.01 at paras. 548-549.

76 Exhibit PI-2020-007-05 at paras. 23-27. See also Memorandum D10-15-30.

77 See *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) at paras. 46-48; *Steel Piling Pipe* (4 July 2018), RR-2017-003 (CITT) at paras. 30-33; *Gypsum Board* (20 August 2018), PI-2018-003 (CITT) at paras. 32-34.

[105] The complainant argued, and the Tribunal has agreed, that the goods in the Product Definition constitute a "continuum of like goods" that form a single class of goods.[78] It could also be argued that within this continuum of like goods is a continuum of identical goods covered by a range of leather and leather-like fabrics.

[106] For purposes of the Product Definition, the CBSA explained that:

> [p]articularly, leather or leather-like cover material may consist of the following materials:
>
> (a) Leather – Genuine leather is commercially known as "top grain".[79] The outer surface of the hide is processed with varying degrees of finish but based on the original outer surface.
>
> (b) Split leather – Leather processed in a tannery is typically split into the outer layer and a second layer known as "split". This is genuine leather but given a manufactured surface. Split leather is less strong structurally, is less expensive and may be used on the sides or back of furniture where strength is not a factor.
>
> (c) Bicast – Split leather that is covered with a film of some kind of plastic to provide a look and a more durable surface.
>
> (d) Bonded leather – This is a leather-substitute such as polyurethane that has leather shavings glued to the back. The leather shavings cannot be seen or felt, and add very little to the cost compared to a pure leather substitute product. The shavings are used as a marketing strategy to allow for the use of the word "leather".
>
> (e) Leather-match – An upholstered product that combines the use of real or top grain leather together with a leather-substitute such as vinyl or polyurethane on the same item. Normally the leather is used on surfaces that can be touched by the consumer or are more visible. The leather-substitute will be produced to look as identical as possible to genuine leather and is used on the side or back of the product. This combination is done to reduce cost and leather-match products are typically less expensive than comparable pure leather products.
>
> (f) Leather-substitutes – These are covering materials constructed from polyurethane, vinyl or other chemicals that may be constructed as a sheet of material or as a textile but in all case designed to create the feel or visual look of leather. They are typically less expensive than a comparable product containing any degree of leather. [80]

[107] For purposes of the Product Definition, and notwithstanding the CBSA's recognition that most customers cannot readily distinguish between the various kinds of "real leather" and leather-like goods,[81] the CBSA has defined "leather" as all the goods listed above save for leather-substitute (also known as leather-like) goods.

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78 Exhibit PI-2020-007-09.01 at para. 18; above at para. 37.
79 The author does not believe that this sentence is correct.
80 Exhibit PI-2020-007-05 at para. 31.
81 Exhibit PI-2020-007-05 at para. 32.

[108] Creating a dividing line between leather-match and leather-like goods is particularly interesting in light of the (successful) argument of counsel for the complainant that the goods form a single class, with the primary factor uniting the goods in a continuum of goods within a single class being "their primary end-use purpose of sitting in the household setting", with other factors (like fabric) being "secondary to their primary end-use purpose".[82] Why then exclude from the continuum stationary seats upholstered with leather-like fabric, while including the same frame upholstered with indistinguishable leather-match fabric?

[109] This exclusion leaves a major hole in "the continuum of subject/like goods" which could impede the ability of the Tribunal to understand the market trends and degree of competition between stationary seats upholstered with leather-substitute fabric (whether imported or made in Canada), and seats, whether stationary or capable of motion, that are upholstered with one of the various kinds of "real leather" as defined by the CBSA.

Concerning classes of goods and exclusions

[110] It should be noted that the lack of evidence at the preliminary stage of an investigation has caused the Tribunal to refrain from dividing one class of like goods into multiple classes of like goods at this stage. Instead, the Tribunal has chosen to foreshadow the eventual creation of different classes by shaping its questions to firms in terms of "likely or possible" classes.[83] In doing so, the Tribunal can avoid a frustrating future "Catch 22", where the Tribunal finds itself unable to divide like goods into more than one class due to a lack of granularity in the evidence.

[111] To that end, the Tribunal held a teleconference with interested parties on January 27, 2021, to discuss the issue of classes of goods. During this prehearing teleconference, some parties went beyond the issue of classes of goods and sought exclusions for particular goods, with the complainant indicating its consent to exclusions for "futon and day beds composed of a mattress and an unattached external frame", "storage ottomans upholstered with a fabric", and "flat box furniture upholstered with fabric".[84] The complainant also previously indicated its consent to an exclusion for "Gaming Chairs for use with a desk" in a written submission.[85]

[112] The author is pleased to note that the CBSA has already provided a clarification on the status of "Gaming Chairs for use with a desk".[86] It is hoped that the CBSA will clarify the status of the other goods described above relative to the Product Definition, as this will not only create legal certainty for the relevant Canadian producers, but assist the Tribunal in organizing its data collection efforts.

Concerning the evidence

[113] 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."

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82 Exhibit PI-2020-007-09.01 at para. 23.

83 See *Decorative and Other Non-structural Plywood* (10 August 2020), PI-2020-002 (CITT) at para. 16; *Concrete Reinforcing Bar* (12 August 2014), PI-2014-001 (CITT) at para. 41.

84 Transcript of teleconference at 28, 30, 32, 36-38, 41, 45-47.

85 Exhibit PI-2020-007-09.01 at para. 73.

86 Exhibit PI-2020-007-11 at 1; Exhibit PI-2020-007-12 (protected) at 2.

[114] The term "reasonable indication" is not defined in *SIMA*, but it is understood to mean that the evidence need not be "conclusive, or probative on a balance of probabilities".[87] The reasonable indication standard that applies in a preliminary injury inquiry is also lower than the evidentiary threshold that applies in a final injury inquiry under section 42 of *SIMA*.[88] Indeed, not all the evidence is available at this stage of the proceedings and what is available will be significantly less detailed and comprehensive than the evidence in a final injury inquiry.

[115] However, while the reasonable indication standard is lower, the Tribunal repeatedly emphasizes that the outcome of preliminary injury inquiries must not be taken for granted.[89] The Tribunal must be satisfied that there is positive and sufficient evidence on the record to support a preliminary determination of injury or threat of injury. This evidence must address the necessary requirements in *SIMA* and the relevant factors of the *Regulations*.

[116] In making its preliminary injury determination, the Tribunal takes into account the injury and threat of injury factors that are prescribed in section 37.1 of the *Regulations*, and – if injury or threat of injury is found to exist – whether a causal relationship exists between the dumping of the goods and the injury or threat of injury.

[117] As part of its injury analysis, the Tribunal must consider the impact of the dumped 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.[90] The Tribunal must also consider whether the evidence discloses a reasonable indication of a causal relationship between the dumping of the subject goods and the injury.[91] The standard is whether there is a reasonable indication that the dumping of the subject goods has, *in and of itself*,[92] caused injury.

[118] In its Statement of Reasons dated January 5, 2021, the CBSA asserted "[t]he nature of the injury is well[-]documented with respect to the volume of dumped and subsidized imports, lost market share, lost sales, price undercutting, price depression, impacted financial performance, reduced capacity utilization and reduced rates of investments."[93]

[119] The writer disagrees. Yes, there was some indication of injury. However, there is reason to doubt that the imported goods reported by the CBSA match the product mix of the goods sold by the complainant. There is a distinct lack of prescribed evidence concerning the volumes of the subject and like goods. Consequently, the lack of reliable volume data impedes an analysis of unit pricing. Price comparisons of subject goods and like goods were made using different trade levels. Using the volume and value data provided by the CBSA in its Confidential Complaint Analysis, Tribunal staff calculated import unit values, and found that the average import prices are well *in excess* of domestic sales prices, and do *not* indicate any average price undercutting. Significant reliance was placed on alleged price undercutting at key individual accounts, yet there was a lack of documented examples, including a noticeable absence of invoices for subject goods pertaining to the loss of these key

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87 *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD).
88 *Grain Corn* (10 October 2000), PI-2000-001 (CITT) at 5.
89 *Concrete Reinforcing Bar* (12 August 2014), PI-2014-001 (CITT) at para. 19.
90 See paragraph 37.1(1)(c) of the *Regulations*.
91 See subsection 37.1(3) of the *Regulations*.
92 *Gypsum Board* (5 August 2016), PI-2016-001 (CITT) at para. 44; *Galvanized Steel Wire* (22 March 2013), PI-2012-005 (CITT) at para. 75; *Circular Copper Tube* (22 July 2013), PI-2013-002 (CITT) at para. 82.
93 Exhibit PI-2020-007-05 at para. 150.

accounts – invoices which the CBSA could have obtained and shared in its Confidential Complaint Analysis. There was also no capacity utilization or employment data for the proposed POI.

[120] Well-documented injury? Regrettably, I beg to differ. Rather, the assertion by the CBSA appears to be a pro forma statement that goes through the motions and takes the Preliminary Determination result for granted.

[121] While I appreciate very much that this is a complex industry that is unfamiliar to both the CBSA and the Tribunal, I am of the view that the prescribed evidence presented to the Tribunal in this case is not sufficient to disclose a reasonable indication that the dumping/subsidizing of the subject goods has, in and of itself, caused injury to the domestic industry. The insufficiency of the evidence is in part caused by the nature of the furniture trade, but also in part by a Product Definition that is clever, but ill-considered.

[122] Three final comments for consideration.

[123] First, this is not the first time that the absence in the *SIMA* framework of a consultative role for the Tribunal in the formulation of the Product Definition has led to problems later in the trade remedy process – problems that frequently impact negatively on the domestic industry. In the absence of change in the framework, it will not be the last, particularly if complainants and the CBSA do not begin to pay more attention to the issues that the subject goods definition may cause with the determination of the like goods.

[124] Second, it is time for some sober second thought on the "how and when" of the exclusions process. This is especially important in the context of expiry reviews, when the Tribunal must apply the same, old Product Definition to different, new and often fast-changing circumstances and market conditions.

[125] Finally, it is my sincere hope that these comments will cause all involved in the *SIMA* process to not take the trade remedy process for granted, but rather try harder, do better and take greater care going forward.

Peter Burn

Peter Burn
Member