Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

DETERMINATION AND REASONS

Preliminary injury inquiry
PI-2023-001

Certain Wind Towers

Determination issued
Tuesday, June 20, 2023

Reasons issued
Wednesday, July 5, 2023

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

CERTAIN WIND TOWERS

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 certain steel utility wind towers and sections thereof originating in or exported from the People's Republic of China (the subject goods) have caused injury or retardation, or are threatening to cause injury, as these words are defined in SIMA. The subject goods covered by this investigation are defined as follows:

1. Certain steel utility wind towers and sections thereof originating in or exported from the People's Republic of China:

    A. with or without flanges, doors, or internal or external components (e.g., flooring/decking/platforms, ladders, lifts, brackets, electrical busbars, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached or adjoined to the wind tower or section, and

    B. whether or not they are joined with non-subject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject merchandise,

    C. but excluding,

        i. nacelles and rotors (e.g. blades and hubs), regardless of whether they are attached to the wind tower or sections,
        ii. Subject to paragraph 1.C.i., flanges, doors and internal or external components which are not attached to the wind towers or sections thereof, unless those components are shipped with the wind towers or sections and are intended to be attached to the wind tower or sections as part of its final assembly or construction,

2. For certainty and clarity,

    A. The wind towers and sections described at paragraph 1 are designed to, or capable of, supporting the nacelle and rotor blades for a wind turbine with both:

        i. a minimum rated electrical power generation capacity in excess of 100 kilowatts ("kW"), and
        ii. with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled,

    B. Items described at paragraph 1.A. and attached to the towers or sections thereof are part of the tower or tower sections and within scope unless specifically excluded under paragraph 1.C.,

C. The goods described at paragraph 1.A. are a non-exhaustive list. The absence of a good from the list does not mean the good is excluded.

D. The goods described at paragraph 1.A include a kit of fabricated steel components that are designed and intended to be assembled or constructed into a wind tower or section thereof.

This preliminary injury inquiry follows the notification, on April 21, 2023, 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 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.

Georges Bujold
Georges Bujold
Presiding Member

Bree Jamieson-Holloway
Bree Jamieson-Holloway
Member

Serge Fréchette
Serge Fréchette
Member

The statement of reasons will be issued within 15 days.

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STATEMENT OF REASONS

INTRODUCTION

[1] On March 1, 2023, the complainants, Marmen Inc. and Marmen Énergie Inc. (collectively referred to as Marmen), filed a complaint with the Canada Border Services Agency (CBSA) alleging that the dumping and subsidizing of certain wind towers originating in or exported from the People's Republic of China (China) (the subject goods) have caused injury or are threatening to cause injury to the domestic industry.

[2] On April 21, 2023, the CBSA initiated investigations respecting the dumping and subsidizing of the subject goods pursuant to subsection 31(1) of the *Special Import Measures Act* (SIMA).[1]

[3] As a result of the CBSA's decision to initiate these investigations, on April 24, 2023, 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 one domestic purchaser, Vestas Canadian Wind Technology, Inc. (Vestas), and from the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME).[3] Siemens Gamesa Renewable Energy Limited (Siemens); Boralex Inc.; Wild Rose 2 Wind LP, Buffalo Atlee 1 Wind LP, Buffalo Atlee 2 Wind LP, Buffalo Atlee 3 Wind LP, and Buffalo Atlee 4 Wind LP (collectively referred to as Wild Rose); and the ministère de l'Économie, de l'Innovation et de l'Énergie (Ministry of Economy, Innovation and Energy) of Quebec (MEIE) filed notices of participation with the Tribunal but did not file submissions.

[5] On June 20, 2023, 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.

PRELIMINARY ISSUE: PARTICIPATION OF THE MEIE AND COUNSEL ACCESS TO THE PROTECTED RECORD

[6] On May 9, 2023, the Tribunal advised the parties by letter that Marc-Antoine Couet, counsel for the MEIE, had filed a notice of representation and a declaration and undertaking in the proceeding, and he sought access to the confidential record. The Tribunal provided the parties with a copy of Marc-Antoine Couet's curriculum vitae and requested that any objections to the disclosure of the confidential record be made by May 12, 2023.[4]

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1 R.S.C., 1985, c. S-15.

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

3 The CCCME is an organization representing the international trade interests of Chinese companies in a wide range of industries, including those of Chinese wind tower exporters and suppliers of wind farm projects.

4 Exhibit PI-2023-001-09.02. This is a standard step taken with respect to every counsel representing a party in SIMA proceedings for the first time. It gives parties an opportunity to object to the issuance of a disclosure order if, as in this case, they have any concerns with that counsel's request to access confidential information.

[7] On May 12, 2023,[5] counsel for Siemens wrote to the Tribunal asking that the Tribunal satisfy itself that the MEIE had the requisite pecuniary interest in the proceeding to warrant granting it party status. Siemens did not take the position that a government agency is precluded from having standing, but rather that the MEIE had not disclosed such a pecuniary interest in the proceeding.

[8] In that same letter, counsel for Siemens objected to Marc-Antoine Couet's request for access to the confidential record on the basis that such access would contravene subsection 45(3) of the *Canadian International Trade Tribunal Act* (CITT Act).[6]

[9] Subsection 45(3) of the CITT Act sets out the conditions upon which information provided to the Tribunal by a person, and designated as confidential by that person, can be disclosed by the Tribunal. It reads as follows:

> **(3)** Notwithstanding subsection (1), information to which that subsection applies that has been provided to the Tribunal in any proceedings before the Tribunal *may be disclosed by the Tribunal to counsel for any party to those proceedings* or to other proceedings arising out of those proceedings or to an expert, acting under the control or direction of that counsel, for use, notwithstanding any other Act or law, by that counsel or expert only in those proceedings, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by counsel or the expert to any person in any manner that is calculated or likely to make it available to
>
> > **(a)** any party to the proceedings or other proceedings, including a party who is represented by that counsel or on whose behalf the expert is acting; or
> >
> > **(b)** any business competitor or rival of any person to whose business or affairs the information relates.
>
> [Emphasis added]

[10] Subsection 45(4) of the CITT Act defines the term "counsel" for the purposes of subsection 45(3) as follows:

> **(4)** In subsection (3), ***counsel***, in relation to a party to proceedings, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party.
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> [Bolding and emphasis in original]

[11] Siemens argued that, because Marc-Antoine Couet is an employee of the ministère de la Justice (Ministry of Justice) of Quebec (MJQ), and therefore an employee of the Government of Quebec, he is an employee of a party (assuming the Tribunal granted the MEIE party status) on the basis that there is no relevant distinction to be drawn between the MEIE and the Government of Quebec. Siemens argued that Marc-Antoine Couet is therefore excluded from the definition of

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5 Exhibit PI-2023-001-09.03.

6 R.S.C., 1985, c. 47 (4th Supp.). Siemens also argued that disclosure would violate subsection 84(3) of SIMA. The language of that provision mirrors the language of subsection 45(3) of the CITT Act.

counsel in subsection 45(4) of the CITT Act and may not be granted access to the confidential record.

[12] On May 17, 2023, Marc-Antoine Couet submitted in response to Siemens that the *Canadian International Trade Tribunal Rules* (CITT Rules)[7] do not require a party to set out its interest in its notice of participation. He further submitted that the Tribunal has broad discretion to determine whether a person who files a notice of participation constitutes an interested party in the proceeding within the meaning of Rule 2 of the CITT Rules and that "[i]t generally interprets its rules in a liberal manner and with a view to promoting fairness, access to justice and transparency."[8] Marc-Antoine Couet argued that counsel for Siemens bore the burden of establishing that the MEIE did not possess the requisite interest in these proceedings and that it had failed to discharge that burden.

[13] With respect to Siemens's objection regarding access to the confidential record, Marc-Antoine Couet argued that Siemens's interpretation of the definition of "counsel" in subsection 45(4) of the CITT Act, which has been previously accepted by the Tribunal[9], is incorrect, is inconsistent with the legislative intent of the provision and would violate a party's right to retain their counsel of choice.

[14] Marc-Antoine Couet referred to the French version of subsection 45(4) of the CITT Act and argued that it does not narrow the definition of counsel for the purposes of disclosing confidential information. Rather, the expression "assimilée à l'avocat" read in conjunction with section 31 of the CITT Act[10] broadens the scope of the definition of counsel to include not only lawyers but also any person who acts on behalf of a party, so long as they are not directors, servants or employees of the party they represent. Marc-Antoine Couet explained that this interpretation is consistent with the legislator's intent to allow parties before the Tribunal to be represented by lawyers or non-lawyers and would avoid the absurdity of forcing government agencies appearing before the Tribunal to retain outside counsel to represent them. Essentially, the Tribunal understands Marc-Antoine Couet's argument to be that the requirement at subsection 45(4), which is that a person seeking access to confidential information not be a director, servant or employee of the party they represent, does not apply to lawyers.

[15] Marc-Antoine Couet argued in the alternative that, if the Tribunal agreed with the position advanced by Siemens, the MJQ, his employer, is sufficiently independent from the MEIE such that there would be no risk that confidential information would be inadvertently disclosed to this party. He submitted that this would fulfill the purpose of subsection 45(4) of the CITT Act.

[16] By order dated May 23, 2023, the Tribunal determined that the MEIE was an "interested party" in the proceeding and dismissed Siemens's objection to Marc-Antoine Couet being granted access to the confidential information in this preliminary injury inquiry, subject to the conditions of his declaration and undertaking.[11] The reasons for those decisions are detailed below.

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7 SOR/91-499.

8 Exhibit PI-2023-001-09.07 at 3–4, citing *Carbon and Alloy Steel Line Pipe* (order dated 19 January 2016), NQ-2015-002 (CITT) [*Line Pipe*] at para. 24.

9 See *Certain Fasteners* (26 March 2014), LE-2013-003 (CITT).

10 Section 31 of the CITT Act stipulates that "[a]ll parties to a hearing before the Tribunal may appear in person or may be represented at the hearing by counsel or an agent."

11 Exhibit PI-2023-001-09.08.

The MEIE is an interested party

[17] In the Tribunal's view, the argument that the MEIE is required to demonstrate its pecuniary interest in this proceeding is without merit.

[18] Rule 2 of the CITT Rules defines "interested party" broadly as, *inter alia*, any "person who, because their rights or pecuniary interests may be affected or *for any other reason*, is entitled to be heard by the Tribunal …" [emphasis added]. Therefore, a person can be deemed an "interested party" in proceedings before the Tribunal for reasons other than pecuniary interests. As explained in *Carbon and Alloy Steel Line Pipe*,[12] while the Tribunal has the discretionary authority to determine whether a person constitutes an "interested party", its practice in injury inquiries under section 42 of SIMA has been to accept participants and evidence liberally and only exceptionally deny the participation of those persons whose participation would be frivolous or vexatious. Further, persons who file notices of participation are typically not required to establish the nature of their interest before the Tribunal accepts their participation. These principles apply equally in preliminary injury inquiries under subsection 34(2) of SIMA.

[19] In any case, in the Tribunal's view, the MEIE clearly established its interest in this proceeding by demonstrating that it is entitled to be heard for important reasons. Wind energy is an important pillar of Quebec's energy infrastructure planning, for which the MEIE is largely responsible. It therefore has a clear interest in both the cost and other factors impacting the development of wind energy in the province, which may be impacted by the outcome of this proceeding. Moreover, as discussed below, Marmen constitutes the entirety of the domestic industry and is located primarily, if not exclusively, in the province of Quebec. The potential impact of this proceeding on a provincial industry is therefore also of obvious interest to the MEIE, because it is the provincial ministry which is largely responsible for policy making in the sphere of economic development.[13]

[20] For these reasons, the Tribunal found that the MEIE is an interested party in this proceeding.

Provincial government counsel access to the confidential record

[21] With respect to Siemens's objection to Marc-Antoine Couet being granted access to the confidential record, the Tribunal concludes that, in light of the object and purpose of the CITT Act and, in particular, of the legislative intent behind its provisions governing the protection of confidential information, subsection 45(4) of the CITT Act does not preclude a lawyer who is employed by a provincial department of justice or the attorney general and who is acting as counsel for another branch of the provincial executive from accessing the confidential record in proceedings before the Tribunal.

[22] The intent of the requirements of subsection 45(4) of the CITT Act is to prevent confidential information from becoming available to business competitors of the party providing the information. The risk of improper disclosure is mitigated where, like here, government counsel seeking disclosure of the confidential record represents a public interest and is therefore not an employee or servant of a

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12 *Line Pipe* at paras. 21–34. See also *Silicon Metal* (order dated 22 August 2019), RR-2018-003 (CITT) at para. 50.

13 Exhibit PI-2023-001-09.07 at 5–7.

business rival. Siemens's interpretation of the provision ignores this contextual distinction and the object and purpose of the CITT Act provisions governing the protection of confidential information.

[23] Furthermore, in the circumstances of this case, the Tribunal accepts that Marc-Antoine Couet's employer, the MJQ, is sufficiently independent from the MEIE so as not to be considered one and the same party. There is no relevant distinction to be made between Marc-Antoine Couet's situation and that of employees of the federal Department of Justice who regularly act as counsel on behalf of other branches of the federal government in proceedings before the Tribunal and are granted access to the confidential record, subject to certain conditions. As such, the Tribunal finds that Marc-Antoine Couet is not a director, an employee or servant of the MEIE within the meaning of subsection 45(4) of the CITT Act. Since Marc-Antoine Couet therefore qualifies as an independent counsel to whom confidential information may be disclosed by the Tribunal pursuant to subsection 45(3), the only question that remains is under which conditions. In this regard, the Tribunal considers the guarantees offered by Marc-Antoine Couet in his declaration and undertaking with respect to the non-disclosure of confidential information to be sufficient and meet the objectives of section 45.

[24] This interpretation is consistent with Federal Court of Appeal jurisprudence.

[25] In *Canada (Attorney General) v. Nike Canada Ltd.*,[14] the Federal Court of Appeal held that (federal) Department of Justice officials could be granted access to the confidential record under subsection 45(3) of the CITT Act, subject to certain conditions imposed by the Tribunal and, by implication, therefore satisfy the requirements of subsection 45(4). The Court stated the following:

> The condition imposed by the Tribunal Rules is that counsel for the Attorney General, acting for the Deputy Minister of National Revenue, sign an undertaking accordingly. *We believe this is fully authorized by subsection 45(3)* and that counsel for the Attorney General must comply with the Tribunal's form of undertaking subject to the modifications to which counsel for the respondent is prepared to consent.
>
> [Emphasis added]

[26] Again, the Tribunal sees no reason why the Court's statement should not apply equally to counsel who is employed by a provincial department of justice or an attorney general and who is acting for another provincial government department or entity.

[27] Furthermore, in *Canada (Director, Investigation and Research Competition Act) v. Canadian International Trade Tribunal*,[15] the Court suggested that it was open to the Tribunal's interpreting subsection 45(4) of the CITT Act in a manner that does not consider counsel acting for a party representing the "public interest" as an "employee" or "servant" of that party. In particular, the Court noted that the Tribunal might have decided, in that case, that a broad interpretation of these terms that would preclude counsel employed by the federal Department of Justice acting for another public entity from accessing confidential information is not possible. The Court explained that, where the party for which counsel is acting represents the public interest, as opposed to a competing private business interest, different considerations might be called for. It added that such a conclusion could be reached by reason of the predominant concern of Parliament that confidential information does not find its way into the hands of business competitors or rivals of the person providing the

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14 [1996] F.C.J. No. 1543, 1996 CanLII 3902 (FCA).

15 [1991] F.C.J. No. 816.

information. The Court implied that this concern does not arise with the same acuity where counsel seeking access to confidential information represents the public interest and is not an employee or a servant of a business rival. Based on the statements of the Court, the Tribunal finds that it has the discretion to account for the distinct role and status of counsel representing the public interest in interpreting subsection 45(4). In contrast, Siemens's interpretation of this provision ignores these important considerations.

[28] In sum, the Tribunal is satisfied as to Marc-Antoine Couet's independence from the operations of the MEIE and therefore finds that his declaration and undertaking offers sufficient guarantees to warrant his access to the confidential record pursuant to subsection 45(3) of the CITT Act. In addition, the Tribunal notes that Marc-Antoine Couet is an officer of the court governed by a professional disciplinary body and bound by strict rules of professional conduct but also, as counsel for MEIE, he acknowledged that he "would not breach his confidentiality undertaking"[16]. In these circumstances, the Tribunal is persuaded that confidential information that has been provided by other parties in these proceedings may be disclosed by the Tribunal to Marc-Antoine Couet in accordance with the provisions of the CITT Act.

PRODUCT DEFINITION

[29] The CBSA defined the subject goods as follows:[17]

1. Certain steel utility wind towers and sections thereof originating in or exported from the People's Republic of China:

   A. with or without flanges, doors, or internal or external components (e.g., flooring/decking/platforms, ladders, lifts, brackets, electrical busbars, electrical cabling, conduit, cable harness for nacelle generator, interior lighting, tool and storage lockers) attached or adjoined to the wind tower or section, and

   B. whether or not they are joined with non-subject merchandise, such as nacelles or rotor blades, and whether or not they have internal or external components attached to the subject merchandise,

   C. but excluding,

      i. nacelles and rotors (e.g. blades and hubs), regardless of whether they are attached to the wind tower or sections,

      ii. Subject to paragraph 1.C.i., flanges, doors and internal or external components which are not attached to the wind towers or sections thereof, unless those components are shipped with the wind towers or sections and are intended to be attached to the wind tower or sections as part of its final assembly or construction,

2. For certainty and clarity,

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16 Exhibit PI-2023-001-09.03 at 3.

17 Exhibit PI-2023-001-02.07.

A. The wind towers and sections described at paragraph 1 are designed to, or capable of, supporting the nacelle and rotor blades for a wind turbine with both:

   i. a minimum rated electrical power generation capacity in excess of 100 kilowatts ("kW"), and

   ii. with a minimum height of 50 meters measured from the base of the tower to the bottom of the nacelle (i.e., where the top of the tower and nacelle are joined) when fully assembled,

B. Items described at paragraph 1.A. and attached to the towers or sections thereof are part of the tower or tower sections and within scope unless specifically excluded under paragraph 1.C.,

C. The goods described at paragraph 1.A. are a non-exhaustive list. The absence of a good from the list does not mean the good is excluded.

D. The goods described at paragraph 1.A include a kit of fabricated steel components that are designed and intended to be assembled or constructed into a wind tower or section thereof.

THE CBSA'S DECISION TO INITIATE THE INVESTIGATIONS

[30] The CBSA initiated 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 and that there was evidence that disclosed a reasonable indication that the dumping and subsidizing had caused and were threatening to cause injury to the domestic industry.

[31] Using information for the period of January 1, 2021, to December 31, 2022, the CBSA estimated that the subject goods were dumped by a margin of 31.7%, expressed as a percentage of the export price.[18]

[32] For the same period, the CBSA estimated that the subject goods were subsidized by an amount of 15.1%, expressed as a percentage of the export price.[19]

LEGISLATIVE FRAMEWORK

[33] 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."

Reasonable indication

[34] 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".[20] The reasonable

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18 Exhibit PI-2023-001-05 at 17.

19 *Ibid.* at 19–22.

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

indication standard is lower than the standard that applies in a final injury inquiry under section 42 of SIMA.[21]

[35] The evidence at the preliminary phase of proceedings tends to be significantly less detailed and comprehensive than the evidence in a final injury inquiry. Not all the evidence is available at the preliminary phase, and the evidence cannot be tested to the same extent as it would be tested during a final injury inquiry. At this stage of the process contemplated by SIMA, the Tribunal's role is to assess whether there is sufficient evidence of injury or threat of injury caused by the subject goods for the CBSA to continue with an investigation, whereas, at the final injury inquiry stage, the Tribunal's role is to determine whether the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury, justifying the imposition of a trade remedy. 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.[22]

[36] However, the outcome of preliminary injury inquiries must not be taken for granted.[23] Simple assertions are not sufficient.[24] Complaints, as well as the cases of parties opposed, must be supported by positive evidence that is both relevant and sufficient in that it addresses the requirements in SIMA and the relevant factors of the *Special Import Measures Regulations* (Regulations).[25] 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.[26]

Injury factors and framework issues

[37] In making its preliminary determination of injury, the Tribunal takes into account the injury and threat of injury factors that are prescribed in section 37.1 of the Regulations, including the import volumes of the dumped and subsidized goods and the effects of the dumped and subsidized goods on the price of like goods, the resulting economic impact of the dumped and 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 and subsidizing of the goods and the injury or threat of injury.

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21 *Sucker Rods* (17 July 2018), PI-2018-001 (CITT) at para. 13; *Certain Fabricated Industrial Steel Components* (10 November 2016), PI-2016-003 (CITT) at para. 13.

22 *Certain Upholstered Domestic Seating* (19 February 2021), PI-2020-007 (CITT) [*UDS PI*] at para. 15.

23 *Concrete Reinforcing Bar* (12 August 2014), PI-2014-001 (CITT) at paras. 18–19.

24 Article 5 of the World Trade Organization (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires an investigating authority to examine the accuracy and adequacy of the evidence provided in a dumping complaint to determine whether there is sufficient evidence to justify the initiation of an investigation and to reject a complaint or to terminate an investigation as soon as an investigating authority is satisfied that there is not sufficient evidence of dumping or injury. Article 5 also specifies that simple assertions that are not substantiated with relevant evidence cannot be considered sufficient to meet the requirements of the article. Article 11 of the WTO Agreement on Subsidies and Countervailing Measures imposes the same requirements regarding subsidy investigations.

25. SOR/84-927.

26 *UDS PI* at para. 16. See, e.g., *Silicon Metal* (21 June 2013), PI-2013-001 (CITT) at para. 16; *Unitized Wall Modules* (3 May 2013), PI-2012-006 (CITT) at para. 24; *Liquid Dielectric Transformers* (22 June 2012), PI-2012-001 (CITT) at para. 86.

[38] However, before examining whether there is evidence of injury or threat of injury, the Tribunal must address a number of framework issues. Specifically, it must identify the domestically produced goods that are "like goods" in relation to the subject goods, determine whether there is more than one class of goods and identify the domestic industry that produces those like goods. This 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

[39] 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".

[40] In determining the scope of 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).[27] 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.[28]

[41] In its complaint, Marmen submitted that the wind towers produced in Canada that meet the product definition are like goods in relation to the subject goods. It also submitted that, while wind towers are a custom good produced to the specifications of the original equipment manufacturer (OEM) for a specific wind turbine project at a specific installation site, they are nevertheless interchangeable and substitutable for the same wind turbine project. In other words, as each wind tower is produced to an OEM's custom specifications, the wind tower for any specific wind turbine would be substitutable and interchangeable, whether produced in Canada or China. Marmen submitted that this market characteristic is similar to those found by the Tribunal in *Unitized Wall Modules*[29] and *Fabricated Industrial Steel Components.*[30]

[42] Marmen also maintains that wind towers and sections produced from fabricated steel panels that are shipped to the installation site and then constructed on site into a tower or section (i.e., kits) are entirely substitutable for towers and sections produced by rolling and welding plate into sections at a manufacturing facility, the only difference being that a kit is easier to transport compared to a traditionally manufactured section.

[43] The CBSA, in its statement of reasons for initiating its investigations, concluded that domestically produced wind towers are like goods to the subject goods and constitute a single class of goods, without providing details of how it came to that conclusion.[31]

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27 See, e.g., *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

28 *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. See also *UDS PI* at para. 21.

29 (12 November 2013), NQ-2013-002 (CITT).

30 (25 May 2017), NQ-2016-004 (CITT) [*FISC NQ*].

31 Exhibit PI-2023-001-05 at 9.

[44] CCCME, in its submissions opposing the complaint, appears to dispute that the products manufactured by Marmen should be considered like goods in relation to the subject goods. It also proposed five classes of goods based on the type of wind tower the goods are ultimately used to construct and the method used to construct them, namely offshore, tubular/conical, "hybrid", segmented, and bolted.

[45] Marmen argued in reply that there is domestic production of like goods and that CCCME did not explain why its proposed classes of goods are not "like goods" to each other in terms of purpose, use, appearance, function and channels of distribution, beyond certain differences in manufacturing processes. Marmen further submitted the following regarding CCCME's proposed classes of goods:

- Offshore wind towers: there are no offshore wind towers currently installed, being installed or having been sold or imported in Canada.[32] Therefore, it would be premature for the Tribunal to declare offshore wind towers as a separate class of goods and to assess offshore wind towers based on speculative characteristics of a future offshore wind towers market.

- Tubular steel towers: these are the standard wind towers used in Canada; domestic "tubular" towers are like to those described by CCCME.

- "Hybrid" (concrete/steel) towers: CCCME describes these as wind towers with a concrete base portion and steel upper portions.[33] Marmen submitted that the steel portions of such towers are like goods to full steel wind towers in appearance, production, design, transportation, customers and channels of distribution.[34]

- Segmented and bolted steel towers: Marmen submitted that these proposed types are identical to each other, and consistent with the manufacturing and assembly process for "kits" as described in Marmen's complaint and included in the product definition.[35] Marmen submitted that towers produced using this method are substitutable and interchangeable for tubular/conical towers (including the steel portion of "hybrid" towers) as long as they meet the OEM's specifications and that all have the same use, function and appearance once assembled and installed as a tower.

[46] CCCME's submissions in places also appear to request product exclusions and to challenge the scope of the product definition.[36] As noted above, the Tribunal has no discretion to amend the CBSA's product definition, on which basis it must conduct its preliminary inquiry. Further, the revised notice of commencement of preliminary injury inquiry noted that the Tribunal will not consider product exclusion requests at this stage and that, should the matter proceed to a final injury

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32 Exhibit PI-2023-001-10.01A at 9, at para. 27.

33 Exhibit PI-2023-001-06.01 at 33–35.

34 Exhibit PI-2023-001-10.01A at 9, at para. 28.

35 Exhibit PI-2023-001-02.01 at 14, 19, at paras. 30, 38. See also Exhibit PI-2023-001-06.01 at 35–38. Both of these types of towers proposed by CCCME appear to consist of steel plates intended to be assembled into tower sections at the project site, consistent with paragraph 2.D of the product definition, although there may be differences in the transportation method based on the degree of bending that the panels undergo before shipment (with flatter panels capable of being shipped "flat-packed").

36 For example, CCCME argued that "kits" comprised of fabricated steel panels intended to be assembled into wind tower sections at the construction site should be excluded from the product definition, despite being explicitly included under paragraph 2.D of the product definition. See Exhibit PI-2023-001-06.01 at 20–22, at paras. 32–34.

inquiry, the schedule for filing product exclusion requests will be included in the notice of commencement of inquiry.[37] Accordingly, to the extent that CCCME's submissions can be interpreted as product exclusion requests, the Tribunal will not consider them at this time.

[47] Based on the information set out in the complaint, the Tribunal finds that Marmen produces wind towers and sections that meet the product definition. As such, these domestically produced goods have uses and other characteristics closely resembling those of the subject goods. In short, they are like goods in relation to the subject goods.

[48] 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. Applying this test, the Tribunal sees nothing strongly supporting a finding of multiple classes of goods.

[49] In this regard, the Tribunal has previously 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.[38] The Tribunal is satisfied that, overall, while evidently not identical in all respects to each other, the various types of wind towers and sections that fall within the scope of the product definition essentially have similar physical and market characteristics and similar end uses, and they generally resemble one another.

[50] The evidence indicating that each tower is a custom-built product manufactured based on discrete OEM specifications, which CCCME appears to accept, also militates against a finding of multiple classes of goods.[39] Indeed, it is unclear how the concept of classes of goods may be relevant, or how the classes of goods proposed by CCCME would be defined on the facts of this case, as wind towers produced for a given project are, by definition, not fungible with towers produced to meet other OEM specifications. Therefore, the Tribunal is convinced that subdividing the subject and like goods into separate classes based on their customized features would be both arbitrary and impractical for the purposes of carrying out its mandate in this case. In the context of a final injury inquiry, the Tribunal may explore the factors which CCCME argued distinguish its proposed classes of goods through the questionnaire process, which could help clarify to what extent (if any) they are relevant and provide a firmer basis for considering potential exclusion requests.

[51] Accordingly, the Tribunal finds that wind towers and sections thereof produced in Canada that are of the same description as the subject goods are "like goods" in relation to the subject goods and that there is one class of goods.

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37 Exhibit PI-2023-001-04.A at 3.

38 *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.

39 See, e.g., Exhibit PI-2023-001-06.01 at 39, at para. 63.

DOMESTIC INDUSTRY

[52] Subsection 2(1) of SIMA defines "domestic industry" as follows:

> … the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods…

[53] Marmen submitted it is the only current known domestic producer of wind towers in Canada. While CS Wind had a Canadian wind tower production facility in Windsor, Ontario, it ceased operations in March 2019, and Marmen believes it did not make any Canadian sales that were delivered in 2018 or 2019. Delta Fabrication is another company that previously manufactured wind towers, but it has not done so since 2017.[40]

[54] The CBSA concluded that Marmen was the only known domestic producer of wind towers and therefore found that it accounts for 100% of the production of wind towers in Canada.[41]

[55] The uncontradicted evidence before the Tribunal is that Marmen is the only domestic producer of the like goods. The Tribunal therefore finds that, for the purposes of this preliminary injury inquiry, Marmen constitutes the domestic industry. As such, the Tribunal will consider the issues of reasonable indication of injury or threat of injury in relation to Marmen.

CROSS-CUMULATION

[56] Where subject goods from the same source are both dumped and subsidized, the Tribunal considers that it is not necessary or practicable to disentangle the effects of subsidizing from the effects of dumping of the same goods.[42] The Tribunal will therefore assess the impact of the dumping and subsidizing of the subject goods cumulatively.

INJURY ANALYSIS

Period of analysis

[57] Marmen's evidence of injury covers the period from 2018 to 2022. The CBSA's analysis, however, covers the period from 2019 to 2022.

[58] The Tribunal typically relies on CBSA estimates at the preliminary inquiry stage, given that the CBSA has access to better data than the complainants. Therefore, the CBSA's information should typically be more accurate.[43]

[59] Marmen's complaint estimates that there were no imports of subject goods in 2018. Although there are differences between the CBSA's estimates of subject imports from 2019 through 2022 and those of Marmen, they both indicate relatively similar volumes and, importantly, very similar trends

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40 Exhibit PI-2023-001-02.01 at 304–305.

41 Exhibit PI-2023-001-05 at 9.

42 See, e.g., *Corrosion-resistant Steel Sheet* (7 January 2020), PI-2019-002 (CITT) at para. 36.

43 See, e.g., *Certain Mattresses* (25 April 2022), PI-2021-005 (CITT) [*Mattresses PI*] at para. 32; *Heavy Plate* (27 July 2020), PI-2020-001 (CITT) at para. 26; *Certain Small Power Transformers* (14 June 2021), PI-2021-001 (CITT) at para. 65.

in those years.[44] The CBSA's finding of increased volume of subject goods and lost market share, on which the Tribunal primarily relies as discussed below, are also based on that period and do not depend on data from 2018.

[60] In other words, although the CBSA's analysis does not cover the full period contemplated in Marmen's complaint, this has no meaningful impact on the CBSA's analysis or the Tribunal's analysis of import volumes. As there is sufficient relevant data on sales, pricing and financial performance of the domestic industry included in the complaint pertaining to the period from 2018 to 2022, the fact that the CBSA's analysis does not extend to 2018 also had little impact on the Tribunal's preliminary assessment of the price effects of the subject goods and their resulting impact on the domestic industry.

[61] On balance, the Tribunal considered it useful to assess Marmen's allegations of injury by considering information regarding Marmen's performance before the subject goods apparently entered the market, in 2018. The Tribunal also notes that some of Marmen's lost sales allegations pertain to projects to be delivered in 2019 but for which quotes were submitted in 2018.[45] At this stage, the Tribunal deemed this information relevant.

[62] In summary, the Tribunal's analysis at this stage rests heavily on information for the period analyzed by the CBSA (i.e., from 2019 to 2022). However, the Tribunal did not ignore Marmen's evidence pertaining to 2018 to assess the fluctuations of its performance in relation to certain economic factors having a bearing on the state of the domestic industry (e.g., production, lost sales and employment).[46]

Wind tower market conditions and channels of distribution

[63] Marmen submitted evidence in the form of a witness statement signed by Marmen's president, Patrick Pellerin, regarding the characteristics of the market and bidding process for wind towers in Canada.

[64] Wind towers are a component of utility wind turbines that generate electricity from wind and are installed individually or as part of a larger wind electricity generation project or "wind farm". The evidence indicates that the Canadian wind tower market is currently concentrated in Western Canada, while demand in Ontario and Quebec for wind towers has declined since 2018.[47]

[65] Wind turbines are typically purchased by a developer, commonly a public utility or private company, which may also work with an engineering, procurement and construction contractor responsible for engineering the wind farm. Developers or engineering, procurement and construction contractors approach wind turbine OEMs to bid on or quote for the supply of wind turbines, and OEMs (at least in Canada), in turn, approach wind tower producers to bid on or quote for the supply of wind towers to the OEM. While its submissions in this regard are not supported by a witness

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44 Exhibit PI-2023-001-03.01 (protected) at 393; Exhibit PI-2023-001-03.04 (protected) at 13.

45 Exhibit PI-2023-001-03.01 (protected) at 317–318, 588–589.

46 In anticipation of an eventual final injury inquiry, the Tribunal Secretariat will, in due course and as part of its standard administrative processes, consult the parties and seek their views on the most appropriate period of inquiry in the circumstances of the wind towers market.

47 Exhibit PI-2023-001-02.01 at 301, 305–306; see also Exhibit PI-2023-001-03.01 (protected) at 309, 394–396.

statement, CCCME noted that OEMs will only purchase wind towers from producers that are certified or otherwise prequalified to produce towers that adapt to their turbines.[48]

[66] OEMs typically request quotes from multiple wind tower producers (domestic and foreign), and more than one OEM may ask the same producer to provide a quote for the wind towers for their own bid to the developer.[49]

[67] Wind tower producers will work with the OEM to prepare their proposals and, in advance of submitting their bid, will seek pricing on the input materials including steel plate, flanges, welding materials and internal components. It is common that internal components are excluded from the quote, as the OEMs have a separate budget for them. Prices are set based on material costs, production hours and labour, and a calculated margin. An OEM can award the project to a producer for the supply of the wind tower *and* internal components, just the wind tower, or just the internal components.[50]

[68] Vestas contested certain elements of Marmen's description of the dynamics of the Canadian wind towers market and specifically took issue with Marmen's statement regarding the degree to which competition takes place on a bid-by-bid basis, at least with regard to Vestas's business. Vestas's submissions also appear to suggest, although they do not explicitly allege, that Marmen and other wind tower producers are, in reality, service providers that convert steel plate, flanges and internal and external accessories into wind tower sections.[51]

[69] Vestas's submissions in this regard were somewhat limited and, in the Tribunal's view, do not contradict Marmen's overall framing of the Canadian wind towers market as working primarily on the basis of quotes for individual projects, which is supported by documentary evidence.[52]

Import volume of dumped and subsidized goods

[70] In its complaint, Marmen used data obtained from the Canadian Renewable Energy Association in conjunction with its market intelligence to estimate wind tower importations from 2018 to 2022. Marmen used several metrics in estimating import volumes, namely the number of towers, the number of tower sections and metric tonnes.[53] For each metric, Marmen estimated that there were no imports of subject goods in 2018. Imports of subject goods and overall market demand both declined from 2019 to 2020 and then increased significantly in both 2021 and 2022. Further, Marmen submitted that, while the domestic industry's market share had dropped from 2018 to 2022, the subject goods market share had risen over the same period.[54]

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48 Exhibit PI-2023-001-06.01 at 13.

49 Exhibit PI-2023-001-02.01 at 301–302, 309, 311.

50 *Ibid.* at 312.

51 Exhibit PI-2023-001-07.02A (protected) at 2, at paras. 2–9.

52 Exhibit PI-2023-001-03.01 (protected) at 588–589, 618–619, 628–633, 1271–1278.

53 *Ibid.* at 25–26. Marmen was unable to determine the country of origin for certain wind tower sales, which it did not include in its estimate of import volumes of subject goods, and therefore submitted that actual import volumes of subject goods are likely higher than its estimates. Marmen used the number of tower sections is its analysis of import volumes.

54 *Ibid.* at 392.

[71] The CBSA conducted its own estimate of import volumes in terms of metric tonnes for the period from 2019 to 2022.[55] As noted above, while there are discrepancies between the CBSA's estimates for this period and those of Marmen, the Tribunal typically relies on CBSA estimates at this stage.[56]

[72] Despite discrepancies in the estimated import volumes, the trends observed by the CBSA are consistent with those in Marmen's estimates. According to the CBSA, the volume of imports of subject goods decreased by 59% in 2020 over 2019, increased by 73% in 2021 over 2020 and increased by 345% in 2022 over 2021. Overall, the volume of subject goods increased from 24,192 tonnes in 2019 to 77,312 tonnes in 2022—an increase of 220%.[57] The CBSA noted that the domestic industry was able to capture a small share of the Canadian market in 2021 and that share declined in 2022, in which year the CBSA estimated that subject goods represented 97% of the Canadian market.[58]

[73] Having considered the evidence on the record, and in particular the CBSA's estimates of import volumes, the Tribunal finds that the evidence supports a finding that there is a reasonable indication that the volume of subject goods increased significantly over the period from 2019 to 2022.

Effects on prices of like goods

[74] The Tribunal must also consider whether the evidence reasonably indicates that significant adverse price effects are associated with the subject goods.

[75] At this preliminary stage, the evidence generally indicates that, while wind towers are capital goods which require customization on a project-by-project basis, their procurement and purchase are largely driven by price. Specifically, wind towers are largely sold through competitive bidding processes in which both domestic and foreign producers participate. The evidence therefore suggests that Marmen and the subject goods compete for the same sales and, once project specifications are met, produce goods that are sufficiently substitutable and compete on price in bids to OEMs.[59]

[76] Marmen submitted that the pricing of the subject goods has undercut and depressed prices of wind towers. In support of these allegations, Marmen described account-specific allegations of lost sales.[60] These comprised instances where Marmen alleged that, after the completion of competitive bidding processes, the bids were won by firms offering subject goods at prices lower than domestically produced goods offered by Marmen.

[77] The Tribunal finds that the pricing data and lost sales allegations provided by Marmen are sufficient to disclose a reasonable indication of price undercutting by the subject goods. While the Tribunal acknowledges that this evidence is imperfect and largely anecdotal in nature, it considers it understandable that Marmen had to rely on mostly anecdotal evidence given that, in the Canadian

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55 Exhibit PI-2023-001-05 at 11.

56 For a discussion of how the CBSA was able to refine the available data in this case, see Exhibit PI-2023-001-03.04 (protected) at 58–60.

57 Exhibit PI-2023-001-05 at 11.

58 *Ibid.* at 23.

59 Exhibit PI-2023-001-02.01 at 301–302, 311–312.

60 Exhibit PI-2023-001-03.01 (protected) at 317–324.

wind towers industry, there is very little, if any, chance that it would have had access to the actual pricing of its competitors.[61]

[78] Nonetheless, Marmen relies on more than mere assertions. There is at least one clear instance of apparent undercutting.[62] According to the witness statement of Patrick Pellerin, potential customers have also consistently told Marmen that price is the key factor giving Chinese producers of wind towers the advantage in competitive bidding processes.[63]

[79] In the absence of any contradictory pricing data and having regard to the relatively low evidentiary threshold at the stage of the preliminary injury inquiry and the extremely non-transparent nature of pricing in the industry, the Tribunal considers the evidence of price undercutting to be adequate. In the Tribunal's view, taken together, this evidence stands up to a somewhat probing examination. The Tribunal therefore finds that the evidence discloses a reasonable indication of price undercutting.

[80] Turning to price depression and price suppression, the Tribunal notes that Marmen's arguments regarding injury rely much more heavily on lost or unrealized sales than on price effects; therefore, the Tribunal observed limited evidence in the complaint concerning actual price depression and no specific allegation regarding price suppression.

[81] In light of the foregoing, the Tribunal finds that the evidence demonstrates a reasonable indication that the pricing of the subject goods has operated to undercut the price of domestically produced wind towers.

Impact on the domestic industry

[82] 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.[64]

[83] The Tribunal must also determine whether the evidence discloses a reasonable indication of a causal link between the dumping or subsidizing of the subject goods and 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*,[65] caused injury.

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61 Exhibit PI-2023-001-02.01 at 317.

62 *Ibid.* at 318–319; Exhibit PI-2023-001-03.01 (protected) at 318–319.

63 Exhibit PI-2023-001-02.01 at 317.

64 Such factors and indices include: "(i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity; (i.1) any actual or potential negative effects on employment levels or the terms and conditions of employment of the persons employed in the domestic industry, including their wages, hours worked, pension plans, benefits or worker training and safety; (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital; and (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods".

65 *Mattresses PI* at para. 49; *Gypsum Board* (5 August 2016), PI-2016-001 (CITT) at para. 44; *Copper Rod* (30 October 2006), PI-2006-002 (CITT) at paras. 40, 43.

[84] As outlined below, Marmen alleged that the subject goods have caused material injury to the domestic industry through lost market share, lost sales, reduced profitability, suppressed capacity utilization, reduction of employment and insufficient return on investment.

Lost sales, production and capacity utilization

[85] Marmen's domestic sales of wind towers fell significantly from 2018 to 2022,[66] resulting in massive reductions to production levels and capacity utilization for domestic sales. Notably, however, Marmen's overall production and capacity utilization rate do not follow the same trend as the data regarding import volumes of subject goods. Marmen submitted that this reflects its shift to relying on exporting to the United States as subject goods became increasingly dominant in Canada. This observation is discussed further below in the context of causation.

[86] As indicated in the discussion of price effects above, Marmen noted several account-specific instances of sales it alleged were lost to subject goods due to their unfairly low prices. Although these allegations are largely anecdotal and will warrant more scrutiny in the event of a final injury inquiry should the CBSA make a preliminary determination of dumping or subsidizing, the Tribunal considers them credible and consistent with the evidence suggesting the increasingly prominent market position held by subject goods from 2019 to 2022.[67]

[87] The evidence likewise indicates considerable changes to Marmen's capacity utilization rate from 2018 to 2022. Marmen submitted that its production capacity utilization rate for domestic sales was caused by sales lost to low-priced subject goods, which acquired a significant share of the Canadian market over the period of 2018 through 2022 by undercutting Marmen's selling price. Similarly, Marmen's overall production remained stable from 2018 to 2020, then declined significantly in both 2021 and 2022.

Financial results

[88] Consistent with Marmen's declining domestic sales, the evidence indicates substantial declines in Marmen's net sales revenues from domestic sales from 2018 to 2022. Although there is fluctuation in net profit margins over the period, in the Tribunal's view this does not contradict Marmen's argument of declining financial results, given the corresponding levels of net sales revenues in absolute terms.[68]

[89] Marmen submitted that the loss of domestic wind tower sales has impacted the return on investments in its production facilities. For example, Marmen pointed to the investment it made to install rail siding access at its production facility in Matane, Quebec, which allows the shipment of wind tower sections directly from its facility by rail, rather than having to first transport sections to a rail yard by truck. Marmen referred to the effects on capacity utilization and employment at the Matane facility, discussed above, in outlining the impact of the alleged lost sales on its return on investments.[69]

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66 Exhibit PI-2023-001-03.01 (protected) at 83, 397.
67 Exhibit PI-2023-001-05 at 22–23.
68 Exhibit PI-2023-001-03.01 (protected) at 83, 397.
69 Exhibit PI-2023-001-02.01 at 331.

Employment

[90] With regard to employment, the evidence similarly indicates significant changes over the same period, consistent with the timing and direction of change in Marmen's production and capacity utilization rates.[70] Marmen specifically highlighted the impact on employment at its facility in Matane, Quebec.[71]

Causation

[91] Furthermore, the evidence discloses a reasonable indication of a causal relationship between: the significant increase in the volume and the market share of subject imports and the evidence of price undercutting; and the deterioration of the economic performance of the domestic industry during the period of 2018 to 2022. Regarding the apparent discrepancy between the timing of the importation of subject goods and the timing of changes in Marmen's performance indicators, Marmen submitted that, while it remained committed to the Canadian market over the period, it supplied the U.S. market to the extent possible in order to sustain production at its facilities.

[92] Marmen submitted that this defensive measure does not negate the injury caused by imports of subject goods. The Tribunal finds that the evidence disaggregating capacity utilization for domestic and export sales over the period is consistent with this explanation.[72] As such, Marmen's argument that it turned to the U.S. market to sustain production as a defensive measure given the impact of the subject goods in the Canadian market is credible based on the evidence available on the record.

[93] Moreover, even if the Tribunal were to accept that the decline in Marmen's sales in 2021 and 2022 was largely attributable to decreasing export sales, it would consider that there is a reasonable indication that the dumping and subsidizing of the subject goods prevented Marmen from replacing those export sales with domestic sales, leading to the impacts on financial results, capacity utilization, employment and return on investments described above.

[94] The Tribunal notes that Vestas and CCCME raised certain factors other than dumping and subsidizing which they argued resulted in injury to Marmen, namely transportation infrastructure constraints, certain market pricing practices, and the imposition of anti-dumping measures against Canadian wind towers by the United States International Trade Commission in 2020. Marmen responded in detail to these allegations with contradictory and credible evidence in the form of a witness statement. Therefore, it is only at the stage of an eventual final injury inquiry that the Tribunal will be able to determine whether and to what extent these other factors have contributed to the deterioration of the economic performance of the domestic industry.

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70 Exhibit PI-2023-001-03.01 (protected) at 402–404.

71 See Exhibit PI-2023-001-03.01 (protected) at 331.

72 *Ibid.* at 327–330, 401.

Conclusion

[95] 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, employment and capacity utilization. There is evidence to support Marmen's allegations that the subject goods gained and have subsequently maintained market share at the expense of the domestic industry.

[96] 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

[97] Marmen alleged that it is very likely that, if SIMA duties are not imposed, exporters of subject goods will continue to target Canada's wind tower market with dumped and subsidized subject goods, resulting in significant and continued injury to Marmen in the form of lost sales volumes, lost revenue, depressed prices, diminished profitability, unused production capacity and limits on its ability to invest in its production facilities. It claims that this would also have a significant impact on Marmen's wind tower employees.

[98] Marmen submitted evidence of forecast demand for wind towers in Canada, including upcoming projects which it submitted may be lost to subject goods in the absence of SIMA duties.[73] Although many identified projects do not yet have scheduled installation dates beyond 2023, Marmen submitted that many of these will be announced and many orders will be placed in the coming 18 to 24 months. Marmen also submitted that the rate of increase in import volumes of subject goods indicates a strong likelihood of increased imports of subject goods over the next 12 to 24 months. The Tribunal finds this credible in light of the trends in import volumes discussed in the above injury analysis.

[99] Marmen also submitted evidence of other factors which it argued support a finding of threat of injury, including excess wind tower capacity in China;[74] product shifting as Chinese steel plate subject to international trade remedies is diverted to wind tower production;[75] diversion of Chinese wind towers subject to international trade remedies to Canada;[76] global excess steel capacity, of

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73 *Ibid.* at 316, 391–396.

74 Exhibit PI-2023-001-02.01 at 582, 656; *Commission Implementing Regulation (EU) 2021/2239 of 15 December 2021 imposing a definitive anti-dumping duty on imports of certain utility scale steel wind towers originating in the People's Republic of China*, L 450/59, online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R2239> [*EU Wind Tower Determination*] at para. 428.

75 Exhibit PI-2023-001-02.01 at 1523.

76 The United States, Australia and the European Union all have trade remedies in place against Chinese wind towers or turbines. See U.S. International Trade Commission, *Utility Scale Wind Towers From China and Vietnam; Determinations (Review)*, 84 FR 20164 (May 8, 2019), online: <https://www.usitc.gov/publications/701_731/pub4888.pdf>; Australia Anti-Dumping Commission, *Wind Towers Exported from People's Republic of China and the Republic of Korea Findings in Relation to a dumping investigation*, Anti-Dumping Notice 2014/33 (16 April 2014), online: <https://www.industry.gov.au/sites/default/files/adc/public-record/041-adn-no201433-findingsinrelationtoadumpinginvestigation.pdf>; *EU Wind Tower Determination*.

which China accounts for a substantial proportion;[77] the weakened global economic outlook and demand for steel;[78] and Canadian market conditions, forecast growth in wind tower demand,[79] making Canada an attractive market for subject goods.

[100] CCCME argued that, contrary to Marmen's submissions, the Canadian wind towers industry is healthy and will provide ample demand for Marmen's production over the coming 12 to 18 months. CCCME referred to investments made by both Marmen and the Government of Quebec, which CCCME argued will facilitate the delivery of Marmen's products to both domestic and international markets, as well as substantial anticipated demand for wind towers in Canada and particularly Quebec. In response, Marmen emphasized consideration of the current state of its order book compared to the anticipated domestic demand for wind towers.[80]

[101] Although, as previously explained, there is evidence reasonably indicating that the domestic industry has already been injured by the importation of the subject goods at dumped and subsidized prices, the Tribunal also finds that the complainants have met the evidentiary threshold applicable at the preliminary inquiry stage to demonstrate a threat of injury. In the Tribunal's view, on balance, the evidence indicates that, at a minimum, the dumping and subsidizing of the subject goods are likely to cause injury to the Canadian industry in the next 12 to 24 months. This conclusion is based on the apparent established position of subject goods in the Canadian market, combined with the evidence of price undercutting submitted by Marmen, the evidence of anticipated demand for wind towers in Canada submitted by both Marmen and CCCME, and the margin of dumping and amount of subsidy found by the CBSA. Taken together, these factors suggest a likelihood of sustained or increased import volumes at unfairly low prices and sales of subject goods in the near to medium term, depriving Marmen of domestic sales without which its economic performance will continue to deteriorate.

[102] Therefore, the Tribunal finds that the evidence discloses a reasonable indication that the dumping and subsidizing of the subject goods are threatening to cause injury to the domestic industry.

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77 Exhibit PI-2023-001-02.01 at 1237, 1240, 1243–1244, 1248–1250.
78 *Ibid.* at 1279–1287, 1295–1303.
79 *Ibid.* at 1485–1486, 1488–1497; Exhibit PI-2023-001-03.01 (protected) at 324, 391–393.
80 Exhibit PI-2023-001-03.01 (protected) at 330.

CONCLUSION

[103] On the basis of the foregoing analysis, the Tribunal determines there is evidence that 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

Bree Jamieson-Holloway

Bree Jamieson-Holloway
Member

Serge Fréchette

Serge Fréchette
Member