



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## FINDING AND REASONS

Inquiry NQ-2023-001

Certain Wind Towers

*Finding issued  
Friday, November 17, 2023*

*Reasons issued  
Friday, December 1, 2023*

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

## CERTAIN WIND TOWERS

### FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act* (SIMA), has conducted an inquiry to determine whether the dumping and subsidizing of the following goods have caused injury or are threatening to cause injury, as these terms are defined in SIMA, and to determine such other matters as the Tribunal is required to determine under that section:

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. a minimum height of 50 metres 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.

Further to the Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated October 18, 2023, that the above-mentioned goods have been dumped and subsidized, the Tribunal finds, pursuant to subsection 43(1) of SIMA, that the said dumping and subsidizing have caused injury to the domestic industry.

Furthermore, the Tribunal excludes from its finding the above-mentioned goods imported for installation in energy projects located west of the Ontario-Manitoba border.

Serge Fréchette  
\_\_\_\_\_  
Serge Fréchette  
Presiding Member

Georges Bujold  
\_\_\_\_\_  
Georges Bujold  
Member

Susan Beaubien  
\_\_\_\_\_  
Susan Beaubien  
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	October 16, 17, 18, 19 and 20, 2023
Tribunal Panel:	Serge Fréchette, Presiding Member Georges Bujold, Member Susan Beaubien, Member
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Marmen Inc. and Marmen Énergie Inc.

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Buffalo Atlee 2 Wind LP, Buffalo Atlee 3 Wind  
LP, and Buffalo Atlee 4 Wind LP

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Partnership, by its general partner EDP  
Renewables SH Project GP Ltd.

Vestas Canadian Wind Technology, Inc.

Copenhagen Infrastructure Partners Inc.

EDF Renewables Development Inc.

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## STATEMENT OF REASONS

### INTRODUCTION

[1] The mandate of the Canadian International Trade Tribunal in this inquiry, pursuant to section 42 of the *Special Import Measures Act*<sup>1</sup> (SIMA), is to determine whether the dumping and subsidizing of certain wind towers or sections thereof originating in or exported from the People's Republic of China (China) (the subject goods)<sup>2</sup> have caused injury or are threatening to cause injury, as these terms are defined in SIMA, and to determine such other matters as the Tribunal is required to determine under that section.

[2] For the reasons that follow, the Tribunal has determined that the dumping and subsidizing of the subject goods have caused injury to the domestic industry. The Tribunal has also excluded from its finding of injury subject goods that are imported for installation in energy projects located west of the Ontario-Manitoba border.

### BACKGROUND

[3] This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on March 1, 2023, by Marmen Inc. and Marmen Énergie Inc. (Marmen). After reviewing that complaint, the CBSA subsequently decided, on April 21, 2023, to initiate investigations, pursuant to subsection 31(1) of the SIMA, into the alleged dumping and subsidizing of the subject goods.

[4] As a result of the CBSA's decision to commence investigations, the Tribunal initiated a preliminary injury inquiry pursuant to subsection 34(2) of SIMA, which began on April 24, 2023.

[5] On June 20, 2023, the Tribunal determined that evidence disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused injury to the domestic industry.<sup>3</sup>

[6] On July 20, 2023, the CBSA made preliminary determinations of dumping and subsidizing in respect of the subject goods.<sup>4</sup> It also considered that the imposition of provisional duties was necessary to prevent injury.<sup>5</sup>

[7] The Tribunal commenced this inquiry on July 21, 2023.<sup>6</sup>

[8] The Tribunal's period of inquiry (POI) was from January 1, 2018, to June 30, 2023, and included two interim periods: January 1, 2022, to June 30, 2022 (interim 2022), and January 1, 2023, to June 30, 2023 (interim 2023).

[9] As part of its inquiry, on July 21, 2023, the Tribunal asked known domestic producers, importers/purchasers, foreign producers, as well as trade unions believed to represent workers

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<sup>1</sup> R.S.C., 1985, c. S-15.

<sup>2</sup> The full product definition is set out at paragraph 30 of these reasons.

<sup>3</sup> *Certain Wind Towers* (20 June 2023), PI-2023-001 (CITT) [*Wind Towers PI*].

<sup>4</sup> Exhibit NQ-2023-001-01; Exhibit NQ-2023-001-01.A; Exhibit NQ-2023-001-02 (protected).

<sup>5</sup> Exhibit NQ-2023-001-01.A at 42.

<sup>6</sup> Exhibit NQ-2023-001-03.



employed in the production of subject goods to fill out questionnaires.<sup>7</sup> The deadline for the submission of replies to the questionnaires was August 11, 2023.

[10] On August 10, 2023, the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME) requested that the Tribunal direct the ministère de l'Économie, de l'Innovation et de l'Énergie (Ministry of Economy, Innovation and Energy) of Quebec (MEIE) and Hydro-Québec to provide certain information it considered relevant to the inquiry prior to the request for information (RFI) process.<sup>8</sup>

[11] The MEIE responded on August 17, 2023. It stated that Hydro-Québec, a Crown corporation, was independent from the MEIE and not an interested party to the inquiry. The MEIE further submitted that CCCME failed to establish the reasoning for requesting certain information prior to the normal RFI process.<sup>9</sup>

[12] For its part, Vestas Canadian Wind Technology, Inc. (Vestas) contended that the Tribunal should extend its information-gathering efforts on the future of the wind towers market to all provincial and territorial governments in Canada.<sup>10</sup>

[13] On August 21, 2023, the Tribunal denied the requests by CCCME and Vestas on the basis that they were premature. The Tribunal explained that, after the distribution of the record, it would carry out an RFI process for parties who demonstrate that they have a compelling need for supplementary information or relevant documents.<sup>11</sup>

[14] The Tribunal received one reply to the producers' questionnaire, four replies to the importers'/purchasers' questionnaire and two replies to the foreign producers' questionnaire from companies stating that they produced or imported/purchased wind towers and sections thereof during the Tribunal's POI.

[15] Using the questionnaire responses and other information on the record, staff of the Secretariat to the Tribunal prepared public and protected investigation reports, which were issued to the parties on September 8, 2023.<sup>12</sup> Revisions were subsequently made to the reports on September 28, October 16 and October 19, 2023.<sup>13</sup>

[16] On September 19, 2023, multiple exclusion requests were filed by several parties to the inquiry.

[17] Each of the following filed multiple and various exclusion requests: Vestas; the CCCME; Siemens Gamesa Renewable Energy Limited (Siemens); Buffalo Atlee 1 Wind LP (by its general partner, BA1 Wind GP Corp.), Buffalo Atlee 2 Wind LP (by its general partner, BA2 Wind GP Corp.), Buffalo Atlee 3 Wind LP (by its general partner, BA3 Wind GP Corp.), Buffalo Atlee 4 Wind LP (by its general partner, BA4 Wind GP Corp.) (collectively the Buffalo Atlee LPs); and Wild

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<sup>7</sup> The Tribunal did not receive responses to its trade unions' questionnaire.

<sup>8</sup> Exhibit NQ-2023-001-20.

<sup>9</sup> Exhibit NQ-2023-001-21.

<sup>10</sup> Exhibit NQ-2023-001-22.

<sup>11</sup> Exhibit NQ-2023-001-23.

<sup>12</sup> Exhibit NQ-2023-001-06; Exhibit NQ-2023-001-07 (protected).

<sup>13</sup> Exhibit NQ-2023-001-06.A; Exhibit NQ-2023-001-07.A (protected); Exhibit NQ-2023-001-06.B; Exhibit NQ-2023-001-07.B (protected); Exhibit NQ-2023-001-06.C; Exhibit NQ-2023-001-07.C (protected).

Rose 2 Wind LP (by its general partner, WR2 Wind GP Corp.) (collectively WR2 LP). Hereafter, the Buffalo Atlee LPs and WR2 LP are collectively referred to as the Capstone LPs.

[18] The above exclusion requests were accompanied by submissions in support of requests to exclude certain products, to exclude products used in certain energy projects and to exclude products for use in energy projects located in the Maritime provinces and west of the Ontario-Manitoba border.

[19] On September 19, 2023, the Tribunal received case briefs and witness statements from Marmen<sup>14</sup> and the MEIE<sup>15</sup> in support of a finding of injury or threat of injury.

[20] Siemens, Vestas, the Capstone LPs, CCCME and the Trade Remedy and Investigation Bureau of China's Ministry of Commerce (the Chinese Ministry of Commerce) filed case briefs and witness statements opposing a finding of injury or threat of injury, on September 27 and September 28, 2023.<sup>16</sup>

[21] Marmen and the MEIE filed reply case briefs and witness statements on October 6, 2023.

[22] Siemens, CCCME and Vestas also filed public and protected RFIs directed to Marmen and the MEIE. Those RFIs, as well as the RFIs from Marmen directed to Siemens and Vestas, were filed on September 18, 2023.

[23] Marmen, the MEIE and Siemens filed objections to the RFIs on September 21, 2023.

[24] After reviewing the RFIs and taking into account the rationale and objections for each of them, the Tribunal issued directions to Marmen, the MEIE, Siemens and Vestas on September 26, 2023, indicating which RFIs required responses.<sup>17</sup> The Tribunal also issued additional RFIs on its own motion to Marmen, Siemens and Vestas. The RFI responses were received on October 5, 2023.

[25] On October 6, 2023, the Tribunal issued subpoenas compelling the participation at the hearing, as Tribunal witnesses, to: Mr. Adam Sommer, Project Management Director of ENERCON Canada Inc. (ENERCON); and Mr. Evan Wilson and Mr. Fernando Melo, respectively Vice President of Policy and Federal Director at the Canadian Renewable Energy Association (CanREA).

[26] A hearing with public and *in camera* sessions was held in person in Ottawa from October 16 to October 20, 2023. The Tribunal heard testimonies from witnesses for Marmen, the MEIE, Siemens, Vestas, the Capstone LPs, CCCME, CanREA and ENERCON. Some of the witnesses appeared by videoconference. The Tribunal also heard closing arguments on the issue of injury and threat of injury and on the issue of the regional and product exclusions requested from Marmen, the MEIE, Siemens, Vestas, the Capstone LPs, CCCME and the Chinese Ministry of Commerce.

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<sup>14</sup> Exhibit NQ-2023-001-A-01; Exhibit NQ-2023-001-A-02 (protected); Exhibit NQ-2023-001-A-03; Exhibit NQ-2023-001-A-04 (protected); Exhibit NQ-2023-001-A-05; Exhibit NQ-2023-001-A-06 (protected).

<sup>15</sup> Exhibit NQ-2023-001-B-01; Exhibit NQ-2023-001-B-02 (protected); Exhibit NQ-2023-001-B-03.

<sup>16</sup> The Tribunal notes that it also received notices of participation from EDP Renewables SH Project Limited Partnership, by its general partner EDP Renewables SH Project GP Ltd.; Copenhagen Infrastructure Partners Inc.; and EDF Renewables Development Inc. No written submissions were filed by the aforementioned parties.

<sup>17</sup> Exhibit NQ-2023-001-RFI-01; Exhibit NQ-2023-001-RFI-01.A (protected).

[27] The Tribunal issued its finding on November 17, 2023.

## RESULTS OF THE CBSA'S INVESTIGATION

[28] The CBSA continued its investigation concerning dumping and subsidization concurrently with the Tribunal's inquiry, as described above. Pursuant to paragraph 41(1)(b) of SIMA, the CBSA made final determinations of dumping and subsidizing in respect of the subject goods, issuing its decision on October 18, 2023.<sup>18</sup>

[29] The CBSA's period of investigation for both the dumping and subsidy investigations covered the period from April 1, 2021, to March 31, 2023.<sup>19</sup> The margins of dumping specified by the CBSA in relation to each exporter ranged from 89.4% to 109.0%, with an "all others" dumping margin rate of 159.3%.<sup>20</sup> The amounts of subsidy specified by the CBSA in relation to each exporter ranged from 3.0% to 5.6%, with an "all others" subsidy rate of 21.9%.<sup>21</sup>

## PRODUCT

### Product definition

[30] The CBSA defined the subject goods as follows:<sup>22</sup>

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,

<sup>18</sup> Exhibit NQ-2023-001-04 at 1; Exhibit NQ-2023-001-05 (protected).

<sup>19</sup> Exhibit NQ-2023-001-04.A at 4.

<sup>20</sup> Exhibit NQ-2023-001-04 at 15.

<sup>21</sup> *Ibid.* at 16.

<sup>22</sup> *Ibid.* at 8–9.

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.

### **Additional product information**

[31] Although not reproduced here, a great deal of additional information with respect to the product, its uses and characteristics, and its production process was provided by the CBSA in its statement of reasons for its final determinations of dumping and subsidizing.<sup>23</sup> Additional information of this kind often provides the context necessary for the Tribunal to understand the scope of the subject goods, the extent to which they compete with domestically produced like goods, and some of the factors which may have a bearing on the state of the domestic industry.

[32] The product definition encompasses both wind towers and sections thereof. In these reasons, the term “wind towers” is intended to refer to both completed wind towers and sections thereof, except where the context indicates discussion of completed towers only.

### **LEGAL FRAMEWORK**

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

[34] Accordingly, the Tribunal must first determine what constitutes “like goods”. Once that determination has been made, the Tribunal must determine what constitutes the “domestic industry” for purposes of its injury analysis.

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<sup>23</sup> Exhibit NQ-2023-001-04.A at 7–8.

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

[36] The Tribunal can then assess whether the dumping and subsidizing of the subject goods have caused material injury to the domestic industry. Should the Tribunal arrive at a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.<sup>24</sup> As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.<sup>25</sup>

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

[38] If the Tribunal determines that the dumping and subsidizing of the subject goods have caused injury, the Tribunal will need to assess, pursuant to paragraph 42(1)(b) of SIMA, whether injury has been caused by a massive importation which could result in the application of retroactive duties on subject goods released during the period of 90 days before the CBSA's preliminary determination.<sup>26</sup>

[39] If the Tribunal determines that the dumping and subsidizing of the subject goods have caused injury or are threatening to cause injury to the domestic industry, it will need to decide whether to grant the exclusions that have been requested for certain projects, regions, wind tower types and towers with certain wall thicknesses.

## LIKE GOODS AND CLASSES OF GOODS

[40] In order for the Tribunal to determine whether the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.<sup>27</sup>

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<sup>24</sup> Injury and threat of injury are distinct findings; the Tribunal is not required to make a finding relating to the threat of injury pursuant to subsection 43(1) of SIMA unless it first makes a finding of no injury.

<sup>25</sup> Subsection 2(1) of SIMA defines "retardation" as "... material retardation of the establishment of a domestic industry".

<sup>26</sup> The Tribunal notes that paragraph 42(1)(c) of SIMA governs massive importations of subsidized goods in respect of which a specification has been made under clause 41(1)(b)(ii)(C) (i.e., prohibited subsidy). In its final determination, the CBSA did not make a finding that the subsidies in issue were prohibited under clause 41(1)(b)(ii)(C).

<sup>27</sup> Should the Tribunal determine that there is more than one class of goods in this inquiry, it must conduct a separate injury analysis and make a decision for each class that it identifies. See *Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd. and Anti-dumping Tribunal*, [1982] 2 F.C. 283 (F.C.).

## Like goods

[41] Subsection 2(1) of SIMA defines “like goods”, in relation to any other goods, as follows:

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

[42] In deciding the issue of “like goods” when goods are not identical in all respects to the other goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).<sup>28</sup>

[43] In the preliminary inquiry, the Tribunal found that Marmen produces wind towers that meet the product definition. The Tribunal also found that the domestically produced goods have uses and characteristics closely resembling the subject goods and were therefore like goods in relation to the subject goods.<sup>29</sup>

[44] In this inquiry, Marmen submitted that the Tribunal should affirm its conclusion on the issue of like goods made in the preliminary injury inquiry.<sup>30</sup> Marmen submitted that it produces wind towers that meet the product definition provided by the CBSA, given that these towers have the same uses as the subject goods and have characteristics that are identical to, or closely resemble, the characteristics of the subject goods.<sup>31</sup> It also noted that Siemens and Vestas, in their questionnaire responses, affirmed that domestically produced wind towers and the subject goods were always interchangeable, while ENERCON stated that they were usually interchangeable.<sup>32</sup>

[45] Marmen further submitted that wind towers, as custom goods,<sup>33</sup> are interchangeable and substitutable to the subject goods. Thus, wind towers produced *for a specific wind turbine* are interchangeable whether produced in China or in Canada, while wind towers designed for different projects would typically not be interchangeable with one another regardless of where they were produced.

[46] Siemens, Vestas and CCCME did not address this issue in their submissions. The Capstone LPs, for their part, acknowledged that the subject goods and domestic wind towers manufactured with the same specifications likely have the same physical characteristics and end uses.<sup>34</sup>

[47] The evidence and arguments of the parties support the view that both the subject goods and domestically produced wind towers are made to order, based on detailed specifications set by purchasers. They are produced by rolling and welding plates into sections, which are shipped to the

<sup>28</sup> See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

<sup>29</sup> *Wind Towers PI* at para. 47.

<sup>30</sup> Exhibit NQ-2023-001-A-01 at paras. 61–64.

<sup>31</sup> Exhibit NQ-2023-001-06.A at Table 8.

<sup>32</sup> Exhibit NQ-2023-001-12.16A at 15; Exhibit NQ-2023-001-12.14A at 13; Exhibit NQ-2023-001-12.17B at 13.

<sup>33</sup> Exhibit NQ-2023-001-A-03 at 7.

<sup>34</sup> See, for example, Exhibit NQ-2023-001-D-05 at para. 73.

installation site and then constructed into a tower.<sup>35</sup> Overall, the subject goods and domestically produced wind towers, designed for a specific project, are entirely substitutable for other towers fabricated with the same specifications.<sup>36</sup>

[48] Domestically produced wind towers and the subject goods also share similar market characteristics: they are sold via the same distribution channel, that is, directly from the tower manufacturer to the original equipment manufacturers (OEMs) that construct wind turbines for wind farm developers.<sup>37</sup> They also have the same end use, which is the production of wind-generated electricity.

[49] Accordingly, the Tribunal finds that the domestically produced wind towers are like goods to the subject goods.

### Classes of goods

[50] In addressing the issue of classes of goods, the Tribunal typically examines whether goods potentially included in separate classes of goods constitute “like goods” in relation to each other. If those goods are “like goods” in relation to each other, they will be considered as comprising a single class of goods.<sup>38</sup>

[51] In the preliminary inquiry, the Tribunal found a single class of goods. The Tribunal found that the various types of wind towers falling within the scope of the product definition essentially had similar physical and market characteristics and had similar end uses, and that they generally resembled one another. The Tribunal also noted that it was unclear how the concept of classes of goods may be relevant in a context where each tower is a custom-built product manufactured based on discrete OEM specifications and, as such, is by definition not fungible with towers produced to meet other OEM specifications. The Tribunal, however, noted that it may explore, through the questionnaire process in the context of a final injury inquiry, the factors which may distinguish wind towers into various classes of goods.<sup>39</sup>

[52] In this inquiry, CCCME submitted that the subject goods and like goods should be considered to comprise two separate classes of goods, namely onshore and offshore wind towers, due to differences in physical and market characteristics. According to CCCME, onshore and offshore towers have differences in composition and appearance, since offshore towers require different grades of steel<sup>40</sup> and different anti-corrosion coating.<sup>41</sup> The offshore towers are also bigger in diameter and in length.<sup>42</sup> CCCME also submitted that the offshore towers require non-standard flanges for the heavier sections,<sup>43</sup> as well as different foundations.<sup>44</sup>

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<sup>35</sup> Exhibit NQ-2023-001-04.A at paras. 25–29.

<sup>36</sup> Exhibit NQ-2023-001-12.16A at 15; Exhibit NQ-2023-001-12.14A at 13; Exhibit NQ-2023-001-12.17B at 13.

<sup>37</sup> Exhibit NQ-2023-001-A-03 at 7–8, 10.

<sup>38</sup> *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) [*Aluminum Extrusions*] at para. 115; see also *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.

<sup>39</sup> *Wind Towers PI* at paras. 49–51.

<sup>40</sup> Exhibit NQ-2023-001-I-07 at 117–132.

<sup>41</sup> Exhibit NQ-2023-001-I-01 at para. 50.

<sup>42</sup> *Transcript of Public Hearing* at 306–307.

<sup>43</sup> Exhibit NQ-2023-001-I-01 at para. 60.

<sup>44</sup> *Ibid.* at paras. 62, 64–66, referring to *Wind Towers PI*, Exhibit PI-2023-001-06.01 at 412–417, 451–468.

[53] CCCME further submitted that, due to differences in diameter size and in length, offshore towers are manufactured in specialized facilities,<sup>45</sup> and they require the use of bigger and heavier machinery.<sup>46</sup> With respect to transportation, onshore and offshore towers are transported differently, respectively horizontally and vertically.<sup>47</sup>

[54] For its part, Marmen submitted that the market for offshore wind towers does not exist in Canada and it would therefore be premature for the Tribunal to consider whether offshore wind towers are a separate class of goods. To the extent that the Tribunal engages in classes of goods analysis, Marmen also submitted that any differences in the physical and market characteristics of offshore and onshore towers mean that they simply exist at different points along a continuum.

[55] First, the Tribunal agrees with Marmen that it is premature to consider whether offshore towers are a separate class of goods from onshore towers, as there is no evidence indicating the existence of past or expected imports of offshore wind towers or that a Canadian market for offshore wind towers exists. Determining whether offshore wind towers constitute a separate class of goods requires an analysis of the physical and market characteristics of such towers imported in the Canadian market. The Tribunal therefore does not consider that there currently exists a factual basis to make a finding on this issue.

[56] That said, based on the evidence on the record regarding offshore wind towers used outside the Canadian market, the Tribunal would not be persuaded that offshore wind towers constitute a separate class of goods, for the following reasons.

[57] The evidence before the Tribunal indicates that onshore and offshore wind towers have similar physical and market characteristics. In terms of physical characteristics, the Tribunal finds credible Mr. Patrick Pellerin's testimony that offshore towers have similar appearance and composition and can only be distinguished by their steel thickness and size.<sup>48</sup> Although the Tribunal accepts that offshore towers are generally larger than onshore towers, which may necessitate thicker walls, the testimony of Mr. Jian Min Zhao also indicated that offshore towers may not always necessarily be bigger in size and thickness than onshore towers.<sup>49</sup> Notably, when reviewing visual evidence of sections for onshore and offshore towers located together, it is not obvious to the Tribunal which sections are which.<sup>50</sup>

[58] The Tribunal is also unpersuaded by CCCME's argument that differences in coating applications used for onshore and offshore towers indicate that they are separate classes of goods. The uncontradicted evidence on the record is that the production process for all wind towers generally includes painting and coating.<sup>51</sup> The Tribunal has seen no evidence that offshore may require a specific coating, which then results in significant differences in the production process or in physical characteristics of the tower produced. Further, the Tribunal finds credible the testimony from Mr. Pellerin that, although different coatings are required for the higher salinity environment in

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<sup>45</sup> Exhibit NQ-2023-001-I-03 at 7; Exhibit NQ-2023-001-24.01 (Blue Island Offshore video).

<sup>46</sup> *Transcript of Public Hearing* at 308.

<sup>47</sup> *Transcript of Public Hearing* at 309, 328–330.

<sup>48</sup> *Transcript of Public Hearing* at 101–102.

<sup>49</sup> *Transcript of Public Hearing* at 320–324; Exhibit NQ-2023-001-I-03 at 23–25.

<sup>50</sup> *Transcript of Public Hearing* at 320–324; Exhibit NQ-2023-001-I-03 at 25.

<sup>51</sup> Exhibit NQ-2023-001-04.A at 9.



which offshore wind towers operate, onshore wind towers may have similar requirements depending on their location.<sup>52</sup>

[59] Regarding how other aspects of the production process may relate to physical characteristics, the Tribunal also finds credible the testimony from Mr. Pellerin that, although larger and thicker tower sections may require larger equipment to manufacture, the manufacturing process is otherwise the same and uses the same equipment for painting and coating regardless of tower size.<sup>53</sup>

[60] In terms of market characteristics, the Tribunal also accepts the uncontradicted written and oral testimony of Marmen's witnesses that onshore and offshore wind towers in other jurisdictions are sold through the same channels of distribution to the same purchasers, that is, OEMs.<sup>54</sup> They also have the same end use, which is providing the structure for a wind turbine to generate electricity from wind power.

[61] Based on the above, the Tribunal finds no basis to conclude that any differences between onshore and offshore wind towers are so great as to distinguish them as separate classes of goods. In the Tribunal's view, the factors outlined above which might distinguish onshore and offshore wind towers in terms of physical characteristics, production process and market characteristics, reflect differences of degree, not of type. In this respect, the Tribunal agrees with Marmen that, to the extent that there are differences between onshore and offshore wind towers, they indicate that these goods fall along a continuum of like goods that comprise a single class of goods.<sup>55</sup>

[62] Accordingly, the Tribunal finds that there is a single class of goods and will conduct its analysis on this basis.

## DOMESTIC INDUSTRY

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

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

[64] The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.<sup>56</sup>

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<sup>52</sup> *Transcript of Public Hearing* at 102.

<sup>53</sup> *Transcript of Public Hearing* at 103, 108.

<sup>54</sup> *Transcript of Public Hearing* at 39; Exhibit NQ-2023-001-A-13 at 30.

<sup>55</sup> See *Certain Upholstered Domestic Seating* (2 September 2021), NQ-2021-002 (CITT) at paras. 72–74.

<sup>56</sup> The term "major proportion" means an important, serious or significant proportion of total domestic production of like goods and not necessarily a majority: *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A.); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); Panel Report, *China – Automobiles (US)*, WT/DS440/R, at para. 7.207; Appellate Body Report, *EC – Fasteners (China)*, WT/DS397/AB/R, at paras. 411, 412, 419; Panel Report, *Argentina – Poultry (Brazil)*, WT/DS241/R, at para. 7.341.

[65] As in the *Wind Towers PI*, the uncontradicted evidence before the Tribunal indicates that Marmen is the only Canadian producer of like goods.<sup>57</sup> The Tribunal therefore finds that Marmen constitutes the domestic industry for the purposes of this inquiry. As such, the Tribunal will consider the issues of injury or threat of injury in relation to Marmen alone.

## CROSS-CUMULATION

[66] As noted above, since the CBSA determined that the subject goods were both dumped and subsidized, the Tribunal must decide whether to assess the cumulative effect of the dumping and subsidizing of those goods (i.e., whether to cross-cumulate).

[67] There are no legislative provisions that directly address the issue of cross-cumulation of the effects of both dumping and subsidizing. However, as noted in previous cases,<sup>58</sup> the effects of dumping and subsidizing of the same goods from a particular country are manifested in a single set of price effects and it is not possible to isolate the effects caused by the dumping from the effects caused by the subsidizing. In reality, the effects are so closely intertwined as to render it impossible to allocate discrete portions to the dumping and the subsidizing respectively.

[68] Therefore, the Tribunal will make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods.

## INJURY ANALYSIS

[69] Subsection 37.1(1) of the *Special Import Measures Regulations*<sup>59</sup> (Regulations) identifies factors that the Tribunal may consider in determining whether the dumping and subsidizing have caused material injury to the domestic industry.

[70] These factors include: the volume of the dumped and subsidized goods, their effect on the price of like goods in the domestic market, and their resulting impact on the state of the domestic industry. The Tribunal will also consider whether a causal relationship exists between the dumping and subsidizing of the goods and the injury on the basis of the factors listed in subsection 37.1(1) of the Regulations and whether any factors other than the dumping and subsidizing of the goods have caused injury.

[71] Marmen and the MEIE argue that Marmen was squeezed out of the Canadian market over the course of the POI. During this period, there was a significant shift in the construction of wind farm projects, from Eastern to Western Canada, which had a bearing on the demand for wind towers and the location for their delivery. Marmen and the MEIE allege that the significant loss of market share by Marmen, and the ensuing financial and other impacts, were caused by the loss of sales to the subject goods, arising from undercutting by the dumped and subsidized subject goods, which captured most of the Canadian market during that time.

[72] The opposing parties essentially argue that any injury suffered by Marmen resulted because Marmen was, and remains, unable to compete due to factors other than dumping and subsidizing.

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<sup>57</sup> See Exhibit NQ-2023-001-04.A at para. 44.

<sup>58</sup> See, for example, *Copper Rod* (28 March 2007), NQ-2006-003 (CITT) at para. 48; *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at para. 76; *Aluminum Extrusions* at para. 147.

<sup>59</sup> SOR/84-927.

More particularly, Marmen faces comparatively high transportation costs to Western Canada, which became the main geographical location of sales during the POI. In addition, the manner in which Marmen quotes its pricing is allegedly incompatible with OEM procurement practices.

[73] As further set out below, the assessment of causality and other factors is key in this case, both with respect to past injury and any threat of injury.

[74] The Tribunal finds that there has been a significant increase in the volume of imports of the subject goods during the POI, in both absolute and relative terms, and that the subject goods have significantly undercut the prices of domestically produced like goods over the POI. It also finds that Marmen suffered injury in the form of lost sales and market share, which, in turn, had a negative impact on domestic production, profitability, employment and investments.

[75] However, based on the evidence on the record, the Tribunal finds that factors other than dumping and subsidizing contributed to Marmen's injury. More specifically, variables relevant to transportation and logistics in shipping the wind towers from Marmen's production facilities in Quebec to Western Canada and, to a degree, certain aspects of Marmen's quotation practices and competition from non-subject goods, all contributed to Marmen's injury.

[76] For reasons set out below, the Tribunal finds that these factors contributed to Marmen's injury, arising from lack of sales for wind energy projects in Western Canada (defined as west of the Ontario-Manitoba border), to such an extent as to disrupt any causal link between Marmen's injury and the dumping and subsidizing of the subject goods. The Tribunal therefore finds that Marmen was not injured by the subject goods in respect of projects in Western Canada. As there is no evidence of any likely change to factors supporting that finding in the near term, the request of Siemens and Vestas to exclude goods imported for installation in projects west of the Ontario-Manitoba border is granted, on the basis that this exclusion will not injure the domestic industry.

[77] However, the Tribunal further finds that there is no evidence that any of the above-mentioned other factors played a role in Marmen's inability to win the contract for the Apuiat project, which the Tribunal concludes had a strong causal link with the dumping and subsidizing of the subject goods. The Tribunal therefore finds that Marmen suffered material injury from the loss of the Apuiat project caused by the dumping and subsidizing of the subject goods.

[78] As the Tribunal has concluded that the dumping and subsidizing of the subject goods caused injury to the domestic industry, it does not need to address the question as to whether the subject goods are threatening to cause injury. However, it considers it worth noting that the same dynamics underlying its injury finding would apply in an analysis of the issue of threat of injury as well.

### **Import volume of dumped and subsidized goods**

[79] Paragraph 37.1(1)(a) of the Regulations identifies the volume of the dumped and subsidized goods (and, in particular, whether there has been a significant increase in the volume, either in absolute terms or relative to the production or consumption of the like goods) as a factor which the Tribunal may consider.

[80] There were no imports of subject goods in 2018.<sup>60</sup> Beginning in 2019 and throughout the remainder of the POI except for the interim periods, there was a year-over-year increase in import volumes of subject goods in absolute terms. Imports of subject goods increased by 3% in 2020, by 23% in 2021, and by 109% in 2022. Between interim periods 2022 and 2023, total imports of subject goods decreased by 60%.<sup>61</sup>

[81] Subject goods accounted for the majority of imports in all periods except for 2018, capturing a generally increasing share of total imports through interim period 2023. The share of total imports held by non-subject imports from the grouping “Other Countries” (i.e., all countries but Germany, Turkey and the United States) constituted the second-largest source of imports during the POI but saw the opposite trend as subject imports, decreasing from its highest share of total imports in 2019 to its lowest share of total imports in interim period 2023.<sup>62</sup>

[82] Relative to domestic production, the volume of subject imports increased beginning in 2019 and in every period of the POI except for interim 2023, with the most significant increase in 2022. An increasing trend is seen for the ratio of imports of subject goods relative to domestic sales of domestic production for the two periods after 2019 where domestic sales existed.<sup>63</sup>

[83] Based on the evidence, the Tribunal finds that there has been a significant increase in the volume of imports of the subject goods during the POI, in both absolute and relative terms.

### **Price effect of dumped and subsidized goods**

[84] According to paragraph 37.1(1)(b) of the Regulations, the Tribunal will consider the effect of the dumped and subsidized goods on the price of like goods and, in particular, whether the dumped and subsidized goods have significantly undercut or depressed the price of like goods, or suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred. In this regard, the Tribunal will distinguish the price effect of the dumped or subsidized goods from any price effects that have resulted from other factors affecting prices.

[85] Before addressing the effect of the dumped and subsidized goods on the price of like goods, it is useful to first discuss the general procurement practices in the wind towers market and the relative importance of price in purchasing decisions for wind towers.

#### General procurement practices in the wind towers market

[86] The procurement of wind towers is part of a larger sequence of events that goes into the development of new wind energy developments (wind power projects), also known as wind turbine facilities or wind farms. The demand for, and viability of, wind power projects are influenced by market and regulatory conditions in each province.<sup>64</sup> The Tribunal notes the evidence that these

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<sup>60</sup> Exhibit NQ-2023-001-06.B at tables 1, 2.

<sup>61</sup> *Ibid.* at Table 16.

<sup>62</sup> Exhibit NQ-2023-001-07.B (protected) at Table 16.

<sup>63</sup> Exhibit NQ-2023-001-06.B at Table 1; Exhibit NQ-2023-001-07.B (protected) at Table 18.

<sup>64</sup> Exhibit NQ-2023-001-09.01 at 8–9; Exhibit NQ-2023-001-12.07 at 5; Exhibit NQ-2023-001-12.13 at 4–5; Exhibit NQ-2023-001-12.14C at 5; Exhibit NQ-2023-001-12.15 at 5; Exhibit NQ-2023-001-12.16A at 5; Exhibit NQ-2023-001-12.17B at 5; Exhibit NQ-2023-001-12.18 at 5; Exhibit NQ-2023-001-24.03 at 20 (para. 13).

government policies and programs, both provincial and federal, have had a tremendous impact on the geographical distribution of wind power projects in Canada over the POI.<sup>65</sup>

[87] The creation of wind projects is the responsibility of developers. The business model of the developer is to undertake upfront procurement of the land, engineered equipment, construction services and permits required to build and operate a wind turbine facility. The developer will also secure the market allocation of electricity sales necessary to ensure a reasonable rate of return on investment over the project's lifetime. Some developers will become the Independent Power Producer that will then operate the wind turbine facility and sell power to purchasers on provincial energy grids.<sup>66</sup>

[88] Once a developer decides to undertake a wind project, it will proceed with a procurement process to select its turbine manufacturer, an OEM, which will provide the wind turbines for the wind power project. Each wind turbine comprises the wind tower, nacelle and rotor. The wind tower provides structural support for the turbine and the nacelles. The design, configuration and specifications for the wind turbine, and its constituent parts, are customized to meet the requirements of the project.

[89] The cost of a wind tower is typically an important parameter that is weighed by the OEM in preparing its bid for submission to the developer. The OEM will draw upon its knowledge of the cost for a wind turbine either arising from a specific procurement process involving wind tower producers or based on previous knowledge of comparable tower specifications from prior procurement processes or general requests made to wind tower producers.<sup>67</sup> The Tribunal notes that the wind tower procurement process and the price and non-price factors considered in these processes vary from one OEM to another. It may also vary from one wind tower procurement process to another, even where the same OEM is involved.<sup>68</sup>

[90] As a general rule, the total cost of ownership (TCO) is the predominant factor considered by the OEM when procuring wind towers. The TCO is comprised of the ex-works price of manufacturing the wind tower (conversion costs and input costs) and the cost of transporting the towers from the manufacturing facility of the wind tower producer to the installation site.<sup>69</sup>

[91] The wind tower producer is solely responsible for determining the conversion costs which are based on its costs of converting the inputs (materials and components) into the final manufactured product. The wind tower inputs may be procured either by the OEM or the wind tower producer,

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<sup>65</sup> See, for example, the discussion by the witnesses for the Capstone LPs and CanREA: *Transcript of Public Hearing* at 287, 292, 397–406.

<sup>66</sup> The Capstone LPs are examples of such producers. See *Transcript of Public Hearing* at 273, 275, 284; Exhibit NQ-2023-001-24.03 at 19–20 (paras. 10–11).

<sup>67</sup> *Transcript of Public Hearing* at 91, 182; Exhibit NQ-2023-001-12.16A at 5–6; Exhibit NQ-2023-001-12.17D at 5–6; Exhibit NQ-2023-001-12.19A at 6.

<sup>68</sup> *Transcript of Public Hearing* at 179–183; Exhibit NQ-2023-001-12.16A at 5–6; Exhibit NQ-2023-001-12.17D at 5–6; Exhibit NQ-2023-001-12.19A at 6.

<sup>69</sup> *Transcript of Public Hearing* at 183–184; Exhibit NQ-2023-001-12.16A at 5–6; Exhibit NQ-2023-001-12.17D at 5–6; Exhibit NQ-2023-001-12.19A at 6.

depending on the specific procurement agreements. Alternatively, the procurement of inputs could be shared by the OEM and the wind tower producer, with the total input costs borne by the OEM.<sup>70</sup>

[92] The OEM is also responsible for the cost of transporting the wind towers, from the wind tower production facility to the installation site in Canada, wherever it may be.<sup>71</sup> As such, non-price factors such as practical logistical considerations including routing complications and levels of risk (timing, safety considerations, etc.) are also relevant to the OEM's wind tower procurement decision.<sup>72</sup>

[93] The evidence on the record indicates that there is generally no formal feedback process from the OEMs to wind tower producers with respect to procurement outcomes and that the feedback that is available may be rather limited, having regard to concerns about protecting confidential or proprietary information.<sup>73</sup> The evidence therefore indicates that the Canadian wind towers market is somewhat opaque in terms of producers' ability to understand why they did or did not win a contract.

#### Project-by-project approach

[94] The Tribunal's investigation indicated that wind towers are produced to particular specifications customized to the requirements of a particular wind power project. This results in pricing that is typically specific to the wind power project's procurement process.

[95] Marmen suggested that the Tribunal should avoid using average and aggregate data and should instead conduct its price effects analysis using a project-by-project approach.<sup>74</sup> The Tribunal observed that Siemens used this approach when conducting the pricing analysis in its response to the account-specific lost sales allegations made by Marmen.<sup>75</sup> No other party suggested a different methodology. The Tribunal agrees that a project-by-project approach is more reliable in the circumstances and avoids serious product mix issues that would otherwise occur.

[96] Using questionnaires issued at the outset of this inquiry, the Tribunal collected both cumulative pricing data as well as pricing data on a per-project basis. Regarding the latter, the Tribunal collected wind tower procurement process information from Marmen, the OEMs and foreign producers pertaining to wind tower projects that occurred during the POI. The data collected included the scope of the wind power project, the wind tower specifications requested in the procurement process, procurement details concerning inputs, bid details received from the wind

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<sup>70</sup> *Transcript of Public Hearing* at 93; *Transcript of In Camera Hearing* at 47; Exhibit NQ-2023-001-13.16A (protected) at 22–51; Exhibit NQ-2023-001-13.17D (protected) at 23–54.

<sup>71</sup> *Transcript of Public Hearing* at 43, 188–190, 261, 279–280, 304, 372, 474; Exhibit NQ-2023-001-12.16A at 11; Exhibit NQ-2023-001-12.14A at 9.

<sup>72</sup> *Transcript of Public Hearing* at 185–186, 188–194, 198–199, 216–217, 263, 354–355, 484; Exhibit NQ-2023-001-12.16A at 5, 11; Exhibit NQ-2023-001-12.17D at 5.

<sup>73</sup> Exhibit NQ-2023-001-13.16A (protected) at 19; Exhibit NQ-2023-001-13.17D (protected) at 20. See also *Transcript of Public Hearing* at 37–38.

<sup>74</sup> Exhibit NQ-2023-001-A-01 at paras. 85–90.

<sup>75</sup> Exhibit NQ-2023-001-C-07 at paras. 87–91.

tower producers, and the details of the contracts awarded to the wind tower producers.<sup>76</sup> In addition, the Tribunal also requested that Marmen, the OEMs and the foreign producers provide the names and details of future wind power projects, either pending or contemplated, for which no contract had yet been awarded.

[97] On the basis of the questionnaire data received,<sup>77</sup> as well as a list of wind power projects obtained from CanREA, an association representing member firms in the wind energy, solar energy and energy storage solutions industries,<sup>78</sup> the Tribunal developed as complete a list as possible of the wind power projects in Canada from 2018 to 2025. Further, to supplement the wind power project-specific pricing data that the Tribunal gathered through its questionnaires, the Tribunal used project and pricing data included in Marmen's lost sales allegations,<sup>79</sup> responses to the requests for information, the case briefs and witness statements, and testimony provided during the hearing. The Tribunal considered 77 projects in total, of which 44 had ex-works pricing available and 14 had sufficient pricing information to assess price undercutting.

[98] The projects incorporated into the Tribunal's project-by-project approach to its pricing analysis, in alphabetical order, are as follows: Amherst Island Wind Project,<sup>80</sup> Apuiat Wind Farm,<sup>81</sup> Benjamins Mill Wind Project,<sup>82</sup> Bekevar,<sup>83</sup> Blue Hill Wind Project,<sup>84</sup> Bow Lake Rebuild,<sup>85</sup> Buffalo

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<sup>76</sup> For further details, the project-specific information consisted of project details (name of project, location, developer, date of issuance, date of delivery, number of wind tower producers asked to participate and number of wind tower producers that participated); the scope of the project (type of towers installed, tower model description, quantity, generation capacity and height of tower); the goods requested in the procurement process (section level by type, quantity, steel grade, diameter and wall thickness); procurement of inputs by type; bids received during the procurement process (name of firm, source/country of firm, final bid values and volumes); and the awarded contract (name of firm or firms, source/country of firm or firms, awarded date, final awarded volumes and values).

<sup>77</sup> Exhibit NQ-2023-001-10.01C (protected) at 3–4; Exhibit NQ-2023-001-12.13 at 3; Exhibit NQ-2023-001-12.15 at 19; Exhibit NQ-2023-001-12.16A at 4, 21; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.14H (protected) at 61–86; Exhibit NQ-2023-001-13.15 (protected) at 20, 22–27; Exhibit NQ-2023-001-13.16A (protected) at 20–51; Exhibit NQ-2023-001-13.17D (protected) at 21–54.

<sup>78</sup> The list was initially drawn from Marmen's complaint in the *Wind Towers PI*; Exhibit PI-2023-003-02.01 at 347–349. For a more recent list, see Exhibit NQ-2023-001-39 at 5–7, 11–12.

<sup>79</sup> Exhibit NQ-2023-001-10.01C (protected) at 2–3. For confidentiality reasons, this exhibit is not cited in the footnotes for projects which Marmen did not also name in public; however, it was considered by the Tribunal.

<sup>80</sup> Exhibit NQ-2023-001-39 at 6.

<sup>81</sup> Exhibit NQ-2023-001-39 at 11; Exhibit NQ-2023-001-RI-04B at 5; Exhibit NQ-2023-001-RI-04C (protected) at 5; Exhibit NQ-2023-001-A-05 at paras. 67–73; Exhibit NQ-2023-001-A-06 (protected) at paras. 67–73; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-B-12 at 2–7; Exhibit NQ-2023-001-B-27 at 5–8; Exhibit NQ-2023-001-B-37 (protected) at para. 28, at 60–67; Exhibit NQ-2023-001-B-03 at paras. 19, 22; Exhibit NQ-2023-001-F-01 at paras. 72–73; *Transcript of In Camera Hearing* at 31–45.

<sup>82</sup> Exhibit NQ-2023-001-39 at 11.

<sup>83</sup> Exhibit NQ-2023-001-39 at 8; Exhibit NQ-2023-001-A-05 at paras. 74–77; Exhibit NQ-2023-001-A-06 (protected) at paras. 74–77; Exhibit NQ-2023-001-10.01C (protected) at 2, 4.

<sup>84</sup> Exhibit NQ-2023-001-39 at 7; Exhibit NQ-2023-001-A-05 at para. 132; Exhibit NQ-2023-001-A-06 (protected) at para. 132; Exhibit NQ-2023-001-10.01C (protected) at 3; Exhibit NQ-2023-001-12.13 at 3; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 22–23; Exhibit NQ-2023-001-C-09 at para. 98; Exhibit NQ-2023-001-C-10 (protected) at para. 98.

<sup>85</sup> Exhibit NQ-2023-001-A-03 at para. 35; Exhibit NQ-2023-001-10.01C (protected) at 4.

Atlee,<sup>86</sup> Buffalo Plains<sup>187</sup> and 2,<sup>88</sup> Bull Trail Wind,<sup>89</sup> Burchill,<sup>90</sup> Cap Pelé,<sup>91</sup> Castle Rock Ridge Phase 2,<sup>92</sup> Cypress Wind Power 1 and 2,<sup>93</sup> Des Cultures (Parc Éolien),<sup>94</sup> Eastern Fields,<sup>95</sup> Ellershouse 3 Wind,<sup>96</sup> Forty Mile Wind Power Project – Granlea Phase,<sup>97</sup> Garden Plains,<sup>98</sup> Golden South Wind Energy Facility,<sup>99</sup> Grizzly Bear,<sup>100</sup> Halkirk Wind 2,<sup>101</sup> Hand Hills,<sup>102</sup> Henvey Inlet,<sup>103</sup>

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<sup>86</sup> Exhibit NQ-2023-001-A-05 at paras. 118–119; Exhibit NQ-2023-001-A-06 (protected) at paras. 118–119; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 50–51; Exhibit NQ-2023-001-C-09 at paras. 91–92; Exhibit NQ-2023-001-C-10 (protected) at paras. 91–92.

<sup>87</sup> Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 40–41; Exhibit NQ-2023-001-C-09 at paras. 100–102; Exhibit NQ-2023-001-C-10 (protected) at paras. 100–102.

<sup>88</sup> Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 42–43; Exhibit NQ-2023-001-C-09 at paras. 100–102; Exhibit NQ-2023-001-C-10 (protected) at paras. 100–102.

<sup>89</sup> Exhibit NQ-2023-001-39 at 11.

<sup>90</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 45–46.

<sup>91</sup> Exhibit NQ-2023-001-39 at 6.

<sup>92</sup> *Ibid.* at 5; Exhibit NQ-2023-001-A-05 at paras. 95–98; Exhibit NQ-2023-001-A-06 (protected) at paras. 95–98; Exhibit NQ-2023-001-12.15 at 19; Exhibit NQ-2023-001-13.14H (protected) at 61–62; Exhibit NQ-2023-001-13.15 (protected) at 20, 24–25; Exhibit NQ-2023-001-F-01 at paras. 76–78; Exhibit NQ-2023-001-F-02 (protected) at paras. 76–78; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4.

<sup>93</sup> Exhibit NQ-2023-001-39 at 5–6; Exhibit NQ-2023-001-A-05 at paras. 122–123; Exhibit NQ-2023-001-A-06 (protected) at paras. 122–123; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 30–31; Exhibit NQ-2023-001-C-09 at paras. 85–86; Exhibit NQ-2023-001-C-10 (protected) at paras. 85–86.

<sup>94</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-A-05 at para. 55; Exhibit NQ-2023-001-10.01C (protected) at 4.

<sup>95</sup> Exhibit NQ-2023-001-C-07 at 239.

<sup>96</sup> Exhibit NQ-2023-001-39 at 11.

<sup>97</sup> *Ibid.* at 5; Exhibit NQ-2023-001-A-05 at paras. 104–108; Exhibit NQ-2023-001-A-06 (protected) at paras. 104–108; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 26–27; Exhibit NQ-2023-001-C-09 at paras. 74–77; Exhibit NQ-2023-001-C-10 (protected) at paras. 74–77.

<sup>98</sup> Exhibit NQ-2023-001-A-05 at paras. 78–80; Exhibit NQ-2023-001-A-06 (protected) at paras. 78–80; Exhibit NQ-2023-001-10.01C (protected) at 2; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 32–33; Exhibit NQ-2023-001-C-09 at paras. 80–83; Exhibit NQ-2023-001-C-10 (protected) at paras. 80–83.

<sup>99</sup> Exhibit NQ-2023-001-39 at 7; Exhibit NQ-2023-001-A-05 at paras. 109–112; Exhibit NQ-2023-001-A-06 (protected) at paras. 109–112; Exhibit NQ-2023-001-10.01C (protected) at 2, 4.

<sup>100</sup> Exhibit NQ-2023-001-A-05 at paras. 120–121; Exhibit NQ-2023-001-A-06 (protected) at paras. 120–121; Exhibit NQ-2023-001-F-01 at para. 85; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 63–64.

<sup>101</sup> Exhibit NQ-2023-001-39 at 11; Exhibit NQ-2023-001-RI-04B at 5; Exhibit NQ-2023-001-RI-04C (protected) at 5.

<sup>102</sup> Exhibit NQ-2023-001-A-05 at paras. 90–94; Exhibit NQ-2023-001-A-06 (protected) at paras. 90–94; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 34–35; Exhibit NQ-2023-001-C-09 at paras. 65–73; Exhibit NQ-2023-001-C-10 (protected) at paras. 65–73.

<sup>103</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-A-03 at para. 35; Exhibit NQ-2023-001-A-05 at para. 56; Exhibit NQ-2023-001-F-03 at para. 27; Exhibit NQ-2023-001-13.14H (protected) at 65–66.



Higgins Mountain Wind Farm Expansion<sup>104</sup> and II,<sup>105</sup> Hilda,<sup>106</sup> Inuvik Wind Generation Project,<sup>107</sup> Jenner Wind Power Projects 1,<sup>108</sup> 2<sup>109</sup> and 3,<sup>110</sup> Kent Hills 3,<sup>111</sup> La Dune-du-Nord aux Îles-de-la-Madeleine,<sup>112</sup> Lanfine North and South Wind Farms,<sup>113</sup> Le Projet Éoliennes Belle-Rivière (Val-eo),<sup>114</sup> Mont Sainte-Marguerite,<sup>115</sup> Moose Lake,<sup>116</sup> Nation Rise Wind Farm,<sup>117</sup> Nicolas-Riou Wind Project,<sup>118</sup> North Kent Wind Farm,<sup>119</sup> Oinpegitjoig Wind Project (Richibucto),<sup>120</sup> Otter Creek,<sup>121</sup> Paintearth,<sup>122</sup> Parc du Nickel,<sup>123</sup> Pihew Wacy Wind Project,<sup>124</sup> Raglan 2,<sup>125</sup> Rattlesnake Ridge Wind Project,<sup>126</sup> Riplinger Wind Farm,<sup>127</sup> Riverhurst Wind Farm,<sup>128</sup> Riversdale Wind

<sup>104</sup> Exhibit NQ-2023-001-39 at 11.

<sup>105</sup> *Ibid.* at 11.

<sup>106</sup> Exhibit NQ-2023-001-A-05 at paras. 130–131; Exhibit NQ-2023-001-A-06 (protected) at paras. 130–131; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 36–37; Exhibit NQ-2023-001-C-09 at paras. 87–88; Exhibit NQ-2023-001-C-10 (protected) at paras. 87–88.

<sup>107</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 43–44.

<sup>108</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 47–52.

<sup>109</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-10.01C (protected) at 4; Exhibit NQ-2023-001-13.17D (protected) at 21, 47–52.

<sup>110</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 47–52.

<sup>111</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-13.14H (protected) at 67–68; Exhibit NQ-2023-001-13.14H (protected) at 83–84.

<sup>112</sup> Exhibit NQ-2023-001-39 at 7; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 35–36.

<sup>113</sup> Exhibit NQ-2023-001-39 at 5, 11; Exhibit NQ-2023-001-A-05 at paras. 128–129; Exhibit NQ-2023-001-A-06 (protected) at paras. 128–129; Exhibit NQ-2023-001-F-01 at para. 86; Exhibit NQ-2023-001-F-02 (protected) at para. 86; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 69–70.

<sup>114</sup> Exhibit NQ-2023-001-39 at 7.

<sup>115</sup> *Ibid.* at 6.

<sup>116</sup> *Ibid.* at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–24.

<sup>117</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-A-05 at para. 133; Exhibit NQ-2023-001-A-06 (protected) at para. 133; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 39–40.

<sup>118</sup> Exhibit NQ-2023-001-39 at 6.

<sup>119</sup> *Ibid.* at 6; Exhibit NQ-2023-001-12.16 at 4.

<sup>120</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 29–30.

<sup>121</sup> Exhibit NQ-2023-001-C-08 at 239.

<sup>122</sup> Exhibit NQ-2023-001-A-05 at paras. 126–127; Exhibit NQ-2023-001-A-06 (protected) at paras. 126–127; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 48–49; Exhibit NQ-2023-001-C-09 at paras. 93–94; Exhibit NQ-2023-001-C-10 (protected) at paras. 93–94.

<sup>123</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 53–54.

<sup>124</sup> Exhibit NQ-2023-001-39 at 11.

<sup>125</sup> Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 27–28.

<sup>126</sup> Exhibit NQ-2023-001-A-05 at paras. 99–103; Exhibit NQ-2023-001-A-06 (protected) at paras. 99–103; Exhibit NQ-2023-001-10.01C (protected) at 2; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 24–25; Exhibit NQ-2023-001-C-09 at paras. 78–79; Exhibit NQ-2023-001-C-10 (protected) at paras. 78–79.

<sup>127</sup> Exhibit NQ-2023-001-39 at 12.

<sup>128</sup> *Ibid.* at 7; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21, 41–42.

Project,<sup>129</sup> Riverview Wind Power Plant,<sup>130</sup> Romney Wind Energy Center,<sup>131</sup> Schuler Wind Farm,<sup>132</sup> Sharp Hills,<sup>133</sup> Spring Lake Wind Project,<sup>134</sup> Stirling,<sup>135</sup> Strong Breeze Wind Project,<sup>136</sup> Sukunka Wind Energy Project,<sup>137</sup> Sundance Wind,<sup>138</sup> Taylor Wind Project,<sup>139</sup> Tempest Wind,<sup>140</sup> Upper Afton,<sup>141</sup> WEB Weavers Mountain Wind,<sup>142</sup> Wedgeport Wind Farm Project,<sup>143</sup> Westchester Wind Project,<sup>144</sup> Western Lily,<sup>145</sup> Wheatland WAGF Project,<sup>146</sup> Whitla Wind 1,<sup>147</sup> 2<sup>148</sup> and 3,<sup>149</sup> Wild Rose

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<sup>129</sup> Exhibit NQ-2023-001-39 at 11.

<sup>130</sup> *Ibid.* at 6; Exhibit NQ-2023-001-A-05 at paras. 95–98; Exhibit NQ-2023-001-A-06 (protected) at paras. 95–98; Exhibit NQ-2023-001-10.01C (protected) at 3; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 73–74.

<sup>131</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 81–82.

<sup>132</sup> Exhibit NQ-2023-001-39 at 11.

<sup>133</sup> Exhibit NQ-2023-001-A-05 at paras. 116–117; Exhibit NQ-2023-001-A-06 (protected) at paras. 116–117; Exhibit NQ-2023-001-F-01 at para. 84; Exhibit NQ-2023-001-F-02 (protected) at para. 82; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 75–76.

<sup>134</sup> Exhibit NQ-2023-001-39 at 11.

<sup>135</sup> Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 38–39; Exhibit NQ-2023-001-C-09 at paras. 89–90.

<sup>136</sup> Exhibit NQ-2023-001-C-07 at 239.

<sup>137</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 33–34.

<sup>138</sup> Exhibit NQ-2023-001-39 at 11.

<sup>139</sup> *Ibid.* at 11.

<sup>140</sup> *Ibid.* at 11.

<sup>141</sup> *Ibid.* at 11.

<sup>142</sup> *Ibid.* at 12.

<sup>143</sup> *Ibid.* at 12.

<sup>144</sup> *Ibid.* at 12.

<sup>145</sup> *Ibid.* at 7; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 25–26.

<sup>146</sup> Exhibit NQ-2023-001-39 at 5; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20–21, 28–29; Exhibit NQ-2023-001-C-09 at para. 99; Exhibit NQ-2023-001-C-10 (protected) at para. 99.

<sup>147</sup> Exhibit NQ-2023-001-39 at 5; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 77–78.

<sup>148</sup> Exhibit NQ-2023-001-39 at 5; Exhibit NQ-2023-001-A-05 at paras. 81–83; Exhibit NQ-2023-001-A-06 (protected) at paras. 81–83; Exhibit NQ-2023-001-10.01C (protected) at 4; Exhibit NQ-2023-001-F-01 at paras. 74–75; Exhibit NQ-2023-001-F-02 (protected) at paras. 74–75; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 79–80.

<sup>149</sup> Exhibit NQ-2023-001-39 at 5; Exhibit NQ-2023-001-A-05 at paras. 81–83; Exhibit NQ-2023-001-A-06 (protected) at paras. 81–83; Exhibit NQ-2023-001-10.01C (protected) at 4; Exhibit NQ-2023-001-F-01 at paras. 74–75; Exhibit NQ-2023-001-F-02 (protected) at paras. 74–75; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4; Exhibit NQ-2023-001-13.14H (protected) at 79–80.

2 Wind Farm,<sup>150</sup> Windrise,<sup>151</sup> Wisokolamson Energy Wind Project (Albert Wind),<sup>152</sup> Wocawson Energy Project Phase 1,<sup>153</sup> Yorkshire Renewable Energy<sup>154</sup> and Zonnebeke Wind Energy Project.<sup>155</sup>

### Importance of price in purchasing decisions

[99] Marmen and the MEIE submitted that price is a key factor in customers' purchasing decisions. Marmen also asserted that conversion costs and input costs (which make up the purchase price) as well as transportation costs all factor into that purchase decision.<sup>156</sup> In contrast, the Chinese Ministry of Commerce submitted that, for OEMs, price is not necessarily the primary consideration in selecting a supplier, because the OEM is more concerned about the delivery time and sales mode and that, in those respects, the subject goods are more competitive.<sup>157</sup>

[100] Siemens went into further detail and submitted that, even if the Tribunal finds that the prices of subject goods undercut prices offered by Marmen for sales to Siemens, that price differential arose from Marmen's lack of competitiveness due to high transportation costs, high raw material costs and lack of competitiveness generally, including against wind towers from non-subject countries.<sup>158</sup> Vestas also argued that Marmen was not a viable supplier due to transportation and logistics reasons.<sup>159</sup>

[101] The Tribunal found that responses to the importer/purchasers' questionnaire supported the view that, while the overall price is an important consideration, so are its individual components, namely, ex-works (conversion costs and input costs) price and delivery and transportation costs. All respondents indicated that conversion costs, input costs and delivery and transportation costs were either "very important" or "somewhat important" factors.<sup>160</sup> In addition, the Tribunal notes that three of four respondents indicated that the lowest net price "usually" wins the sale or contract despite the importance placed on the individual components of the overall price.<sup>161</sup>

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<sup>150</sup> Exhibit NQ-2023-001-39 at 12; Exhibit NQ-2023-001-A-05 at paras. 114–15; Exhibit NQ-2023-001-A-06 (protected) at paras. 114–115; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 44–45; Exhibit NQ-2023-001-C-09 at paras. 95–97; Exhibit NQ-2023-001-C-10 (protected) at paras. 95–97.

<sup>151</sup> Exhibit NQ-2023-001-39 at 5; Exhibit NQ-2023-001-A-05 at paras. 84–89; Exhibit NQ-2023-001-A-06 (protected) at paras. 84–89; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20, 46–47; Exhibit NQ-2023-001-C-09 at paras. 58–64; Exhibit NQ-2023-001-C-10 (protected) at paras. 58–64.

<sup>152</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-13.14H (protected) at 85–86; Exhibit NQ-2023-001-RI-04B at 2–4; Exhibit NQ-2023-001-RI-04C (protected) at 2–4.

<sup>153</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 37–38.

<sup>154</sup> Exhibit NQ-2023-001-39 at 11.

<sup>155</sup> Exhibit NQ-2023-001-39 at 6; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–22, 31–32.

<sup>156</sup> Exhibit NQ-2023-001-A-05 at 6.

<sup>157</sup> Exhibit NQ-2023-001-J-01 at 5; Exhibit NQ-2023-001-06.B at Table 10.

<sup>158</sup> Exhibit NQ-2023-001-C-07 at para. 88.

<sup>159</sup> Exhibit NQ-2023-001-F-01 at paras. 74, 76.

<sup>160</sup> Exhibit NQ-2023-001-06.B at Table 10.

<sup>161</sup> *Ibid.* at Table 9.

[102] The evidence indicates that OEMs make their decisions based on the TCO, which includes the ex-works price (conversion cost and input costs) and the transportation cost. The Tribunal heard testimony that each of these three components plays a role in the OEM's consideration. A shortcoming or challenge in one area places pressure in the other two areas for a wind tower producer to remain competitive.<sup>162</sup> As such, and as heard by the Tribunal<sup>163</sup>, the lowest ex-works price for the wind tower does not always win the sale.

[103] The Tribunal heard testimony that challenges and shortcomings concerning logistics may even outweigh other pricing considerations.<sup>164</sup> For example, some witnesses described how purchasing decisions can be influenced by the risk of routing complications and the level of risk (timing, damages, etc.) arising from transportation logistics and its geography. The Tribunal also heard evidence describing real-life experiences of cost overruns arising from unexpected complications despite a rigorous logistics plan being in place.<sup>165</sup>

[104] In light of these factors, based on the evidence on the record, the Tribunal finds that, while the total price is an important consideration in purchasing decisions for wind towers, consideration of individual components of total price including conversions costs, input costs and especially transportation costs (including those arising from logistical complexity and risk) all play a significant role within that total price consideration. The role of these price components is also discussed further below in the context of other factors that contribute to causation of injury.

#### Price undercutting

[105] The basis of Marmen's complaint is tied to lost sales allegations resulting from price undercutting. Marmen alleges that, due to price undercutting resulting from the dumping and subsidizing of subject goods, Marmen was ignored for certain procurement opportunities, both in situations where it bid on projects in competition with subject goods and in others where it was not invited to compete for projects at all.

[106] In its examination of these allegations, the Tribunal gathered the available pricing data to examine the details of the TCO for each wind tower producer considered by an OEM for those wind power projects for which this data was made available to the Tribunal.<sup>166</sup>

[107] For wind power projects where subject goods and like goods competed, and where the subject goods were awarded the contract, the data showed that on an ex-works basis, the prices of the subject goods significantly undercut the prices of the like goods with respect to both conversion costs and input costs.

[108] The data further showed that the subject goods significantly undercut the like goods when the Tribunal considers the net delivered price for those same wind power projects, that is, on a TCO basis which included transportation costs. In other words, the Tribunal observes significant

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<sup>162</sup> *Transcript of Public Hearing* at 200.

<sup>163</sup> *Transcript of In Camera Hearing* at 160.

<sup>164</sup> *Transcript of Public Hearing* at 185–186.

<sup>165</sup> *Transcript of Public Hearing* at 185–186, 204–205, 333–349; 499–500.

<sup>166</sup> The Tribunal notes that this analysis is based on best data available and that not all projects have pricing at a TCO level or for every price component of the TCO.

undercutting at both the ex-works and TCO levels for the subject goods, ranging from 10% to 36% and 16% to 45% respectively.<sup>167</sup>

[109] The wind power project pricing data also demonstrated that the non-subject goods also undercut the prices of the like goods. This occurred in almost every instance where non-subject goods also participated in the procurement process with subject goods. The undercutting by non-subject goods was reflected in both ex-works prices and net delivered prices (i.e., at a TCO basis which includes the transportation costs).<sup>168</sup> The Tribunal noted that, in one case, the prices of non-subject goods were lower than those of the subject goods on a TCO basis. The non-subject goods won that contract, even though the subject goods had the lowest ex-works price. The Tribunal also observed widespread undercutting of the prices of the like goods by some non-subject goods at both the ex-works and TCO levels as well, ranging from 11% to 58% and 5% to 41% respectively. There were only two instances where the ex-works price did not undercut the prices of the like goods.<sup>169</sup>

[110] Considering the foregoing, the Tribunal concludes that, on a project-by-project basis, where the subject goods and the like goods competed during the POI, the subject goods significantly undercut the prices of the like goods.<sup>170</sup>

#### Price depression and suppression

[111] Having regard to the customized nature of wind tower projects, traditional price depression and suppression analyses<sup>171</sup> do not yield meaningful results. Due to variance in the projects

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<sup>167</sup> Exhibit NQ-2023-001-A-05 at paras. 66–133; Exhibit NQ-2023-001-A-06 (protected) at paras. 66–133; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20–51; Exhibit NQ-2023-001-C-09 at paras. 58–102; Exhibit NQ-2023-001-C-10 (protected) at paras. 58–102; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–54; Exhibit NQ-2023-001-13.14H (protected) at 61–86; Exhibit NQ-2023-001-RI-04C (protected) at 2, 5; Exhibit NQ-2023-001-39 at 5–7.

<sup>168</sup> Exhibit NQ-2023-001-A-05 at paras. 66–133; Exhibit NQ-2023-001-A-06 (protected) at paras. 66–133; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20–51; Exhibit NQ-2023-001-C-09 at paras. 58–102; Exhibit NQ-2023-001-C-10 (protected) at paras. 58–102; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–54; Exhibit NQ-2023-001-13.14H (protected) at 61–86; Exhibit NQ-2023-001-RI-04C (protected) at 2, 5; Exhibit NQ-2023-001-39 at 5–7.

<sup>169</sup> Exhibit NQ-2023-001-A-05 at paras. 66–133; Exhibit NQ-2023-001-A-06 (protected) at paras. 66–133; Exhibit NQ-2023-001-10.01C (protected) at 2, 4; Exhibit NQ-2023-001-12.16A at 21; Exhibit NQ-2023-001-13.16A (protected) at 20–51; Exhibit NQ-2023-001-C-09 at paras. 58–102; Exhibit NQ-2023-001-C-10 (protected) at paras. 58–102; Exhibit NQ-2023-001-12.17D at 19; Exhibit NQ-2023-001-13.17D (protected) at 21–54; Exhibit NQ-2023-001-13.14H (protected) at 61–86; Exhibit NQ-2023-001-RI-04C (protected) at 2, 5; Exhibit NQ-2023-001-39 at 5–7.

<sup>170</sup> The Tribunal also notes that, where non-subject goods also participated in the procurement process, the price of non-subject goods also undercut the price of the like goods. The role of non-subject goods as a potential other factor causing injury is discussed further below.

<sup>171</sup> The Tribunal typically examines trends in average prices as well as benchmark prices over the course of its POI. In examining price depression, the Tribunal usually compares the domestic industry's selling price with that selling price of the subject goods and other market prices to determine whether the price of like goods has decreased at a greater rate to other prices in the market. In examining price suppression, the Tribunal usually compares the domestic industry's unit price of the cost of goods sold to the changes in the weighted average selling price of the like goods to determine whether the price of like goods has remained in step with the cost of goods sold.

themselves (for example, the size or number of towers, as well as variance in the procurement of the material inputs within the industry), the average costs per project are of little utility in establishing trend lines through the POI.

[112] The Tribunal also notes that Marmen's arguments regarding injury rely much more heavily on lost or unrealized sales due to undercutting by the subject goods than on price depressing and suppressing effects of the subject goods. Although Marmen's witnesses stated that Marmen had to reduce its offered prices in an (unsuccessful) effort to win sales,<sup>172</sup> the Tribunal found no data that would confirm this proposition. Marmen's lack of sales prevents an assessment of depression or suppression of prices actually realized.

[113] Based on these observations, and the evidence that any injury suffered by Marmen would most likely flow from the absence of sales generally instead of price depression or suppression, the Tribunal finds no evidence of price depression or suppression.

### Conclusion

[114] The Tribunal finds that the subject goods have significantly undercut the prices of domestically produced like goods over the POI. The Tribunal finds no evidence for price depression or suppression.

### **Resulting impact on the domestic industry**

[115] The Tribunal now turns to consider the resulting impact of the dumped and subsidized goods on the state of the domestic industry. In particular, the Tribunal will examine all relevant economic factors and indices that have a bearing on the state of the domestic industry.<sup>173</sup> These effects are to be distinguished from the effect of other factors also having a bearing on the domestic industry.<sup>174</sup>

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<sup>172</sup> Exhibit NQ-2023-001-A-04 at 18–19 at paras. 51–52. The Tribunal notes that these limited statements form the entire basis of Marmen's arguments in support of price depression and that it simply infers price suppression based on its allegations of price depression.

<sup>173</sup> 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, growth or the ability to raise capital; (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods; and (iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support program.

<sup>174</sup> Paragraph 37.1(3)(b) of the Regulations directs the Tribunal to consider whether any factors other than dumping or subsidizing of the subject goods have caused injury. The factors which are prescribed in this regard are: (i) the volumes and prices of imports of like goods that are not dumped or subsidized; (ii) a contraction in demand for the goods or like goods; (iii) any change in the pattern of consumption of the goods or like goods; (iv) trade-restrictive practices of, and competition between, foreign and domestic producers; (v) developments in technology; (vi) the export performance and productivity of the domestic industry in respect of like goods; and (vii) any other factors that are relevant in the circumstances.

[116] Having regard to paragraph 37.1(3)(a) of the Regulations, the Tribunal will consider whether a causal relationship exists between the dumping or subsidizing of the goods and the injury, retardation or threat of injury, with reference to the volume and price effects of the dumped or subsidized goods and their impact on the domestic industry.

[117] Marmen and the MEIE submitted that the subject goods have had significant negative impacts on Marmen's performance over the POI, including its production, sales, capacity utilization, employment and return on investment.<sup>175</sup>

[118] The parties opposing a finding did not contest the evidence regarding Marmen's economic performance. Rather, they focused on the issue of causation by arguing that any injury suffered by Marmen was due to factors other than dumping and subsidizing.

[119] In this section, the Tribunal will first describe Marmen's performance over the POI. It will then discuss whether any declines in performance observed were caused by the subject goods further below.

#### Market share

[120] The Canadian wind towers market, comprising sales from both domestic production and imports, increased in every year of the POI. The rate increased modestly in 2019 (4.0%), steadily in both 2020 (23.0%) and 2021 (20.0%), and then substantially in 2022 (77.0%), although there was a contraction of 63.0% in interim period 2023 when compared to the same period in 2022. Sales of subject goods increased substantially over this period, at an increasing rate, although they declined alongside the overall market in interim 2023.<sup>176</sup>

[121] The market share of domestically produced like goods declined significantly over the POI, with a corresponding increase in the market share of subject goods. Although non-subject goods were present in the market throughout the POI, their market share peaked and then declined, whereas subject goods remained (and indeed became increasingly) dominant throughout the POI.<sup>177</sup>

#### Sales volume, production and capacity utilization

[122] The data concerning Marmen's domestic sales from domestic production are consistent with the above-noted data regarding its market share.<sup>178</sup> Marmen's lost sales allegations are central to its arguments on the impact of dumping and subsidizing.<sup>179</sup>

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<sup>175</sup> Given that the evidence regarding impact pertains to a single company, Marmen, the data underlying the analysis are almost entirely confidential. The following discussion therefore necessarily discusses overall trends and conclusions in this regard in somewhat general terms.

<sup>176</sup> Exhibit NQ-2023-001-06.B at Table 20.

<sup>177</sup> Exhibit NQ-2023-001-07.B (protected) at Table 21.

<sup>178</sup> Exhibit NQ-2023-001-06.B at Table 19.

<sup>179</sup> See, for example, *Transcript of In Camera Hearing* at 10.

[123] Marmen's overall production capacity remained relatively stable. Overall capacity utilization declined over the POI, although this decline did not coincide precisely with the increase in subject imports.<sup>180</sup> Marmen submits that, from 2019 to 2021, it maintained production levels for wind towers by exporting to the United States, which is consistent with the evidence on record.<sup>181</sup> The same evidence further indicates significant impacts on Marmen's production and capacity utilization following changes in its ability to access the United States market.<sup>182</sup> Notwithstanding this shift to relying on exports to the United States during parts of the POI, Marmen argued that it maintained efforts to sell in Canada throughout the POI.<sup>183</sup>

### Financial performance

[124] Marmen's financial results from domestic sales are also largely consistent with the evidence on record regarding its market share, sales volumes and production.<sup>184</sup> The testimony of Marmen's witnesses provided context on the relationship between Marmen's net income and its domestic sales during certain parts of the POI.<sup>185</sup> Marmen maintained that sales lost to subject goods had a significant negative impact on gross revenues and net income from domestic sales.

[125] Marmen also argued that declining sales have adversely affected returns on investments made in its production facilities in Trois-Rivières and Matane, Quebec. These negative effects pertain not only to the level of investment in these facilities over the POI but also to the potential for future investments in the event of a positive finding or lack thereof.<sup>186</sup>

[126] Based on the evidence, the Tribunal finds that Marmen suffered declining financial performance over the POI.

### Employment

[127] Marmen alleged that the above impacts of lost sales have significantly affected its employment levels, which have been reduced from several hundred employees working in its wind tower division at the beginning of the POI to zero by the end of the POI.<sup>187</sup>

[128] The MEIE generally reiterated Marmen's submissions regarding the impact of lost sales on the domestic industry, such as decreases in production, employment and hours worked. The MEIE

<sup>180</sup> *Transcript of In Camera Hearing* at 19; Exhibit NQ-2023-001-07.B (protected) at tables 17, 18, 19, 20, 21, 32. The Tribunal does not accept the allegations by the Chinese Ministry of Commerce that Marmen's capacity reporting was inaccurate or inconsistent, and the Tribunal accepts that the alleged discrepancy between Marmen's stated weekly and annual production capacity is easily explained by the context provided by Marmen's description of its production process, when read together with the answer to Question 2 in Marmen's questionnaire response. See Exhibit NQ-2023-001-A-01 at 15; Exhibit NQ-2023-001-10.01 (protected) at 1.

<sup>181</sup> Exhibit NQ-2023-001-06.B at Table 1; Exhibit NQ-2023-001-07.B (protected) at tables 29, 32.

<sup>182</sup> The role of United States policy and legislation, shifting to favour wind towers produced in the United States, in affecting Marmen's ability to access that market is addressed further below in the consideration of other potential factors causing injury.

<sup>183</sup> *Transcript of Public Hearing* at 5.

<sup>184</sup> Exhibit NQ-2023-001-07.B (protected) at Table 27.

<sup>185</sup> See Exhibit NQ-2023-001-A-04 (protected) at 20–22; see also *Transcript of In Camera Hearing* at 10.

<sup>186</sup> *Transcript of In Camera Hearing* at 22–23; Exhibit NQ-2023-001-A-04 (protected) at 27–28. See also Exhibit NQ-2023-001-07.B (protected) at Table 32.

<sup>187</sup> *Transcript of In Camera Hearing* at 39; Exhibit NQ-2023-001-07.B (protected) at Table 32. Marmen noted these confidential figures in its public arguments: see *Transcript of Public Argument* at 13.



especially emphasized the negative effect of employment impacts on the communities in which Marmen's production facilities are located, especially in Matane.

#### Magnitude of the margin of dumping and amount of subsidy

[129] The margins of dumping calculated by the CBSA in relation to each exporter ranged from 89.4% to 109.0%,<sup>188</sup> with an "all others" dumping margin rate of 159.3%.<sup>189</sup> The amounts of subsidy specified by the CBSA in relation to each exporter ranged from 3.0% to 5.6%, with an "all others" rate of 21.9%.<sup>190</sup> While these combined levels of dumping and subsidizing might generally support the view that the subject goods had a negative impact on the domestic industry, the Tribunal does not consider that these margins of dumping and amounts of subsidy necessarily correspond to the level of the injurious effects caused by actual prices of the subject goods in Canada. Accordingly, the Tribunal placed little weight on this factor in the present injury analysis.

[130] In its written submissions and at the hearing, the Chinese Ministry of Commerce argued that the CBSA's calculations of the dumping margins and amount of subsidy were inflated and incorrect.<sup>191</sup> Canada's legislative framework for dumping and subsidy investigations comprises a bifurcated process. The jurisdiction for determining dumping margins is assigned exclusively to the CBSA. The Tribunal has no authority to review or amend the CBSA's conclusions by way of appeal or otherwise. Any challenge to the CBSA's determination of the margin of dumping and amount of subsidy must be made by way of judicial review to the Federal Court of Appeal.

[131] Therefore, the Tribunal cannot consider the arguments by the Chinese Ministry of Commerce challenging the CBSA's determination of the margin of dumping and amount of subsidy.

#### Conclusion

[132] On the basis of the factors above, the Tribunal finds that the domestic industry suffered injury during the POI in the form of lost sales and market share. In turn, this had a negative impact on domestic production, profitability, employment and investments.

[133] The Tribunal must now determine to what extent this injury was caused by the subject goods.

#### **Other factors and causation**

[134] In order to assess whether a causal relationship exists between the dumping or subsidizing of the goods and the injury and the adverse effects on the domestic industry, the Tribunal must distinguish the impact of the subject goods from that of other factors also affecting the state of the domestic industry.<sup>192</sup> In other words, the Tribunal must determine whether the subject goods, *in and of themselves*, caused injury to the domestic industry. The Tribunal cannot assume that the mere presence and availability of the subject goods in the Canadian market necessarily resulted in material injury to the domestic industry.<sup>193</sup>

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<sup>188</sup> When expressed as a percentage of the export price of the goods.

<sup>189</sup> Exhibit NQ-2023-001-04 at 15.

<sup>190</sup> *Ibid.* at 16.

<sup>191</sup> Exhibit NQ-2023-001-J-01 at 6–8; *Transcript of Public Argument* at 167–170.

<sup>192</sup> See paragraph 37.1(3)(b) of the Regulations.

<sup>193</sup> *Silicon Metal* (19 November 2013), NQ-2013-003 (CITT) at para. 109.

[135] In this case, Siemens, Vestas, the Capstone LPs and the CCCME alleged a significant number of “other” factors affecting Marmen’s ability to secure sales over the POI. Most significantly, these parties stressed that alleged logistical challenges affect the feasibility of shipping goods from Marmen’s facilities in Quebec to projects in Western Canada, where most sales took place during the POI. They also alleged that other factors contributed to Marmen’s injury, including its loss of access to the United States wind towers market and alleged mismatches between Marmen’s business practices and the expectations or preferred practices of OEM purchasers. These issues were described as mainly relating to quotation processes and pricing commitments, Marmen’s capacity relative to accessible demand, high material input costs in Canada, and non-price factors, such as capacity commitments, operating to incentivize purchasers to buy from foreign producers.<sup>194</sup>

[136] Marmen submitted that there is little or no evidence of these alleged other factors playing a role in its injury.

[137] In particular, Marmen argued that the assessment of injury should be based on the Canadian market as a whole, and not be split into a separate analysis on a regional basis. It contended that transportation of wind towers from Marmen’s facilities to project sites located in Western Canada is both feasible and cost-effective. Marmen asserts that it was interested in supplying Western Canada during the POI and that the loss of access to the United States market did not negate its injury but simply made Marmen more vulnerable to injury. Marmen rejects the premise that it is competitively disadvantaged with respect to input costs and says that claims regarding its quotation practices are unsubstantiated.

#### Shift of demand to Western Canada

[138] Marmen, Siemens, Vestas and the Capstone LPs agreed that demand for wind energy projects declined in Ontario, Quebec and New Brunswick between 2018 and 2022, and it shifted dramatically to the Western provinces of Alberta, British Columbia and Saskatchewan.<sup>195</sup> The Tribunal finds that this is consistent with the information gathered in its investigation<sup>196</sup> and is corroborated by the information provided by Tribunal witnesses from ENERCON and CanREA.<sup>197</sup>

[139] Marmen claims that it has consistently sought sales in Canada, including Western Canada, but that it was unable to compete with subject imports.<sup>198</sup>

[140] Based on the above, the Tribunal has no difficulty accepting that, during the POI, market demand shifted from being focused in Eastern Canada (especially Ontario and Quebec) to Western Canada, primarily Alberta.

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<sup>194</sup> The Tribunal notes that these parties’ arguments and evidence regarding other factors overlapped to a considerable extent, especially as they largely depended on the evidence given by witnesses for Siemens, Vestas and the Capstone LPs. For the sake of brevity, the Tribunal has not reproduced the arguments made by every party where they were duplicative of those made by others and has attempted to focus its analysis on those arguments and evidence it found most persuasive.

<sup>195</sup> *Transcript of Public Hearing* at 187–188, 471. See also Exhibit NQ-2023-001-C-10 (protected) at 5–7, 53–57; Exhibit NQ-2023-001-A-03 at 14.

<sup>196</sup> Exhibit NQ-2023-001-07.B (protected) at tables 42, 43.

<sup>197</sup> Exhibit NQ-2023-001-39 at 5–6.

<sup>198</sup> Marmen explains that it bid on six specific projects in Western Canada: Bekevar, Garden Plain, Whitla Wind 2 and 3, Windrise, Hand Hills and Forty Mile. See Exhibit NQ-2023-001-A-05 at 24–26, 28, 30.

[141] However, in the Tribunal's view, and consistent with its understanding of the parties' arguments, this geographic shift in market demand was not a factor, in and of itself, which caused injury to Marmen. Rather, this regional shift in demand provides context for the transportation and logistical factors to which the Tribunal will next turn its attention.

### Transportation and logistics

[142] There is no dispute between the parties that the large size of wind tower sections creates challenges for overland transportation.<sup>199</sup> Indeed, the evidence on record indicates that the cost to transport wind towers can often be greater than the cost of the tower itself.<sup>200</sup>

[143] Siemens, Vestas, the Capstone LPs and the CCCME all argued that transportation costs and logistical constraints were and remain a major factor that renders Marmen uncompetitive in Western Canada. Marmen submits that transportation from its facilities in Eastern Quebec to Western Canada is both feasible and cost-effective when compared to shipping wind towers to Alberta from Asia. Accordingly, Marmen contended that transportation and logistics considerations were not responsible for its inability to make sales in Western Canada during the POI.

[144] Siemens argued that Marmen's manufacturing facilities are disadvantaged for transportation of wind towers to Western Canada due to a lack of available routes, risks relating to logistical complexity, schedule delays and their associated costs, lack of available qualified transportation carriers in Canada, road permit requirements and weather constraints.<sup>201</sup>

[145] In both his witness statement and at the hearing, Siemens' witness Mr. Domenico Barger testified that Marmen was consistently the least competitive option, according to Siemens' TCO analyses for projects in Western Canada (the only region in Canada where Siemens had projects) over the POI. Transportation and logistics costs were a major factor in those TCO analyses.<sup>202</sup> Indeed, Mr. Barger noted that logistics can in many cases be the most significant portion of a TCO analysis due to the size of wind tower sections and related challenges in transporting them.<sup>203</sup>

[146] Mr. Barger outlined challenges with multimodal transport (i.e., using a combination of truck, rail or vessel transportation). Each time a tower section is loaded or unloaded from a given mode of transport, there is an increase in the logistical complexity, as well as the cost and the risk of damage or delay.<sup>204</sup> Mr. Barger emphasized that the risk and cost imposed on OEMs by logistical complexity and delays in delivery can result in financial penalties under the contract with their customers (i.e., project developers).<sup>205</sup>

[147] Although Mr. Barger acknowledged that shipment by rail to Alberta from Marmen's Quebec facilities, and then transportation by truck to the installation site, would theoretically require

<sup>199</sup> See, for example, Exhibit NQ-2023-001-24.03 at 52; Exhibit NQ-2023-001-A-03 at 15.

<sup>200</sup> Exhibit NQ-2023-001-24.02 at 14; Exhibit NQ-2023-001-25.02 (protected) at 16–17, 19–21.

<sup>201</sup> Exhibit NQ-2023-001-24.02 at 11–14, 24–33.

<sup>202</sup> *Transcript of Public Hearing* at 187; *Transcript of In Camera Hearing* at 75–76. Siemens submitted the contemporaneous TCO analysis cost comparisons in its written submissions, including those for which it did and did not consider Marmen. See Exhibit NQ-2023-001-C-10 (protected) at 181–186; Exhibit NQ-2023-001-25.02 (protected) at 18–21.

<sup>203</sup> *Transcript of Public Hearing* at 185.

<sup>204</sup> *Transcript of Public Hearing* at 193–194, 204–205.

<sup>205</sup> *Transcript of Public Hearing* at 190–191.

relatively few such transitions, he indicated that any other multimodal arrangement would involve more such transitions (and associated risks) than Siemens' established method of shipping directly by truck from the west coast of the United States to Alberta.<sup>206</sup>

[148] In its written submissions, Siemens also referred to comments made by Mr. Pellerin, President of Marmen (and a witness in this proceeding), to the United States International Trade Commission in 2020 regarding geographic and transportation constraints on shipping from Marmen's Quebec facilities to sites in the central United States, which Siemens emphasized is still closer to those facilities (by truck) than is Western Canada. For example, Mr. Pellerin's witness statement in that proceeding described how investments in rail siding at its production facilities, and their access to nearby ports, "were still not enough to compensate for the significant transportation disadvantage [Marmen] faced" and that "transportation costs are everything."<sup>207</sup>

[149] The Tribunal notes that these arguments overlap considerably with those submitted by Siemens and Vestas in support of their requests to exclude subject goods imported for use in projects west of the Ontario-Manitoba border. Essentially, Siemens and Vestas argued that any injury suffered by Marmen with respect to projects in that region was due to factors other than dumping and subsidizing and, therefore, excluding such projects from a finding of injury or threat of injury would not injure Marmen for the same reason.<sup>208</sup>

[150] Marmen challenged much of the evidence submitted by opposing parties regarding transportation costs. It argued that wind towers can be affordably shipped from its production facilities in Quebec to both the Maritimes and Western Canada, by rail or a combination of rail, boat or truck. Marmen asserted that the transportation cost estimates in Siemens' contemporaneous TCO analyses should receive little weight, as they were based on a general cost-per-mile assumption, without actual quotes having been obtained.<sup>209</sup> For some projects, actual transportation costs differed from those in the TCO analysis.<sup>210</sup> At the hearing, Marmen's witness, Mr. Guillaume Angers, testified that the furthest distance that wind towers had ever been shipped (using various modes of transport) from Marmen's Quebec facilities was: by truck to Brandon, South Dakota; by rail to Sudbury, Ontario; by barge (as distinguished from larger vessels)<sup>211</sup> to locations in Quebec; and by larger vessels to Duluth, Minnesota, via the Great Lakes and to Houston, Texas, by sea.<sup>212</sup>

[151] Regarding Marmen's arguments casting doubt on the accuracy of Siemens' TCO analyses, Siemens argued that it would be unreasonable to ignore the actual cost estimates it used contemporaneously to inform its choice of wind tower supplier, even if these were simply estimates. Siemens explains the variance between actual delivery costs and the forecast as being attributable to supply disruptions related to the COVID-19 pandemic. These served to inflate normal shipping, freight and loading/unloading costs, while transportation costs across projects varied as a result of normal fluctuations in freight rates over time and size differences in towers which affect co-loading

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<sup>206</sup> *Transcript of Public Hearing* at 195–196, 242–246.

<sup>207</sup> Exhibit NQ-2023-001-24.02 at 45–47.

<sup>208</sup> Siemens' arguments and evidence regarding transportation and logistics focused primarily on shipping by truck, Siemens' established method, while those of Vestas focused on shipment by rail, which is its established transportation method. See *Transcript of Public Hearing* at 195–196, 242–246, 362.

<sup>209</sup> Exhibit NQ-2023-001-24.02 at 18.

<sup>210</sup> Exhibit NQ-2023-001-25.02 (protected) at 20–21.

<sup>211</sup> See *Transcript of Public Hearing* at 28–29.

<sup>212</sup> *Transcript of Public Hearing* at 44–47.

efficiencies.<sup>213</sup> Finally, Siemens suggested that Marmen’s alleged unwillingness to provide “turn-key” quotes inclusive of shipping indicates that Marmen is aware of how challenging and costly the logistics are for transporting wind towers.<sup>214</sup>

[152] The Tribunal will next discuss the evidence pertaining to transportation by truck, rail and vessel before concluding its analysis on the relevance of transportation and logistics as a potential other factor causing injury.

### Shipment by truck

[153] As noted above, Siemens has established a route to ship wind towers directly by truck from the west coast of the United States to Alberta.<sup>215</sup> However, Siemens submitted that truck transport across Canada faces significant weather-related restrictions, particularly road frost ban restrictions in Ontario, Manitoba, Saskatchewan and Alberta, which limit the ability to transport wind towers from Eastern Canada (or from Thunder Bay after ship transport via the Great Lakes) to Western Canada, during the period from March through to May or June.

[154] In contrast, Siemens states that it can ship wind towers inland from the ports of Longview and Vancouver, Washington, throughout the year. After crossing the Canada-United States border, the Alberta road frost ban can be circumvented by using alternate equipment allowing Siemens to meet the weight restrictions and deliver via this route year-round except in cases of particularly bad weather.<sup>216</sup>

[155] Marmen submitted that road frost bans have never been an issue inhibiting its ability to ship towers from Quebec. However, at the hearing, Mr. Angers acknowledged that Marmen had never shipped wind towers by truck to Western Canada.<sup>217</sup> Although Mr. Angers testified that road frost bans also apply in the Midwest region of the United States, where Marmen has shipped,<sup>218</sup> the Tribunal finds the evidence of the OEM witnesses more persuasive on this issue, given Mr. Angers’ acknowledgment that Marmen has never arranged logistics on any projects.<sup>219</sup>

[156] Mr. Barger also outlined the challenges of truck transportation from Eastern Canada arising from the requirement to use police escorts within Ontario and Quebec, the availability of which can

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<sup>213</sup> Exhibit NQ-2023-001-28.02 at 22–23; see also Exhibit NQ-2023-001-C-09 at 18. See also *Transcript of In Camera Hearing* at 116.

<sup>214</sup> Siemens submitted that conversations on this topic were usually by telephone but provided records of two email exchanges regarding the Hand Hills and Buffalo Plains projects: see Exhibit NQ-2023-001-C-10 (protected) at 223–224; Exhibit NQ-2023-001-29.02 (protected) at 66–71.

<sup>215</sup> *Transcript of Public Hearing* at 195–196, 242–246.

<sup>216</sup> *Transcript of Public Hearing* at 196, 216; Exhibit NQ-2023-001-24.02 at 13–14. Siemens’ written exclusion submissions indicate that this equipment may not be available in other provinces, as it is an Alberta-only exception; see Exhibit NQ-2023-001-28.02 at 22.

<sup>217</sup> *Transcript of Public Hearing* at 57.

<sup>218</sup> *Transcript of Public Hearing* at 128–129.

<sup>219</sup> Marmen’s witnesses noted one exception, where Marmen managed certain transportation arrangements for a project in South Dakota; however, the Tribunal notes that that example was not on the route used by Siemens and appears to have taken place over a decade before the beginning of the POI. See *Transcript of Public Hearing* at 48–50.

create significant risks of delay.<sup>220</sup> Mr. Arturus Espaillat, the witness for Vestas, contrasted this to the situation in Alberta where, in his words, “you just get private escorts, and let’s go.”<sup>221</sup>

[157] Regarding road permits, Mr. Barger’s witness statement outlined that road permits in the United States are easier to manage because carriers can obtain multi-state permits to cover all adjacent states. In contrast, he stated that Quebec, Ontario, Manitoba, Saskatchewan and Alberta all require separate permit applications. Mr. Barger stated that Siemens’ established route to Alberta from ports in Washington State requires only two permits: one for the United States and another one for Alberta.<sup>222</sup>

[158] At the hearing, Mr. Espaillat stated that “in Alberta ... I can go and get a permit tomorrow, it’s a very different set of challenges as moving a tower in Quebec ...”.<sup>223</sup> In response, counsel for Marmen referred to Mr. Angers’ witness statement that wind tower orders are placed six months prior to delivery and that therefore, even if permits for Quebec take longer to obtain, this should not pose issues for trucking from Marmen’s facilities.<sup>224</sup> Mr. Espaillat stated that, in his experience, shipping from Marmen has consistently involved delays but acknowledged that his experience shipping from Marmen for Canadian projects was several years ago. He noted that more recent experience with Marmen’s products, for a project in the United States in 2022, involved significant delays in obtaining Quebec road permits, although counsel for Marmen referred to evidence in Mr. Angers’ confidential witness statement that those specific delays were related to a strike going on in Quebec at the time, as well as other potential factors unrelated to road permits in Canada.<sup>225</sup>

[159] At the hearing, Mr. Espaillat discussed the importance of Houston, Texas, as a major industrial and shipping hub, from which wind turbine OEMs can “piggyback” from the transportation corridor already established by the oil and gas industry to move equipment between Houston and northern Alberta.<sup>226</sup> According to Mr. Espaillat, the high level of industrial development in the Houston area makes it a major destination for cargo shipped from Europe and Asia, resulting in high availability and low cost of shipping goods from overseas using that route. He stated that Houston’s large ports and numerous terminals provide extensive unloading and storage capacity. This allows many trains to be loaded in a short period of time, while high availability of trucks and drivers, relative ease of permitting and well-established routes also make trucking from Houston an attractive option.<sup>227</sup> Mr. Espaillat further testified that these advantages provide Houston and the surrounding area<sup>228</sup> with significant advantages as a port of entry into North America, notwithstanding that it is geographically farther from Asia than the west coast. In his opinion, Houston is superior to the Pacific Northwest (PNW) in this regard but he acknowledged that trucking from the PNW can also

<sup>220</sup> *Transcript of Public Hearing* at 198–199.

<sup>221</sup> *Transcript of Public Hearing* at 368–369.

<sup>222</sup> Exhibit NQ-2023-001-24.02 at 11.

<sup>223</sup> *Transcript of Public Hearing* at 368–369.

<sup>224</sup> Exhibit NQ-2023-001-A-13 at 11.

<sup>225</sup> *Transcript of Public Hearing* at 370–372; Exhibit NQ-2023-001-A-14 (protected) at 11, 46–48.

<sup>226</sup> *Transcript of Public Hearing* at 383–384.

<sup>227</sup> *Transcript of Public Hearing* at 385–386. In his witness statement, Mr. Angers submitted that shipping wind towers inland by rail from Houston presents its own challenges, giving the example of a bridge in Ashland, Nebraska, with narrow dimensions that pose a problem for the passage of large tower sections. See Exhibit NQ-2023-001-A-05 at 15; Exhibit NQ-2023-001-F-01 at 9, 15. See also Exhibit PI-2023-001-A-03 at 5.

<sup>228</sup> Mr. Espaillat discussed how the broader Gulf Coast region of Texas is characterized by this advantageous level of logistical infrastructure development, referring to the ports of Brownsville, Corpus Christi and Beaumont in addition to Houston proper.

be an effective logistical solution. In the Tribunal's view, Mr. Espaillat's testimony in this regard is consistent with his statements regarding Siemens' trucking route from Washington State.<sup>229</sup>

[160] Mr. Espaillat also commented on the route used by Siemens for shipping wind towers by truck, via Washington State to Alberta. In his view, this is the optimal route for shipping from the west coast.

[161] According to Mr. Espaillat, trucking wind towers through British Columbia is not an option due to lack of passage through the Rocky Mountains.<sup>230</sup> The state of Oregon has insufficient port facilities, and California is even more logistically difficult than Quebec, though for reasons on which Mr. Espaillat did not elaborate. This leaves the ports of Vancouver, Washington, and Longview, Washington, as the only practical options due to the size clearances available at these two locations.<sup>231</sup> Mr. Espaillat stated that many OEMs had invested extensively in "lay-down yards" in the PNW region, which provide logistical advantages to shipping via that route (which is already desirable due to relatively light road traffic). He emphasized that Siemens, in particular, had established a very effective strategy in this regard.<sup>232</sup>

[162] Mr. Espaillat has not been qualified as an expert witness, and his opinions are therefore not admissible as expert evidence. That said, the Tribunal found his testimony on these matters to be forthright and credible, especially in light of his professional experience.<sup>233</sup> It considers these comments at the very least to indicate why Siemens would likely have initially chosen to use trucks to ship wind towers to Alberta from Washington State via the PNW route and, once having invested in establishing that route, why it would make business sense for Siemens to continue using it.

### Shipment by rail

[163] Siemens submitted that there is no financially viable rail route from Quebec to Western Canada, given the sizes of tower sections Siemens requires for its turbines.<sup>234</sup> However, Marmen provided transportation quotes it received in 2022 to ship wind towers by rail from its facilities to Alberta.<sup>235</sup> Marmen submitted that these rail quotes demonstrate not only the feasibility of rail transport but its clear superiority to truck transport in terms of price, when compared to contemporaneous and more recent truck transportation quotes.<sup>236</sup>

[164] Siemens asserted that OEMs must consider additional logistical and contractual factors than the considerations used by railroads to produce rail transportation quotes when it estimates the costs of door-to-door transportation. These additional factors include: the cost of acquiring and sufficiently

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<sup>229</sup> See *Transcript of Public Hearing* at 386–387.

<sup>230</sup> See also Exhibit NQ-2023-001-24.03 at 52.

<sup>231</sup> *Transcript of Public Hearing* at 383.

<sup>232</sup> *Transcript of Public Hearing* at 384–385.

<sup>233</sup> Mr. Espaillat's witness statement indicates that he was a senior manager working in transportation and logistics for the Vestas group, since which time he has worked as a consultant providing logistics and transportation advice to OEMs in the wind turbine industry. See Exhibit NQ-2023-001-F-03 at 2.

<sup>234</sup> This appears consistent with Marmen's confidential evidence regarding certain projects on which it was not asked to quote. See Exhibit NQ-2023-001-27.02 (protected) at 110–111.

<sup>235</sup> Exhibit NQ-2023-001-27.02 (protected) at 81, 139–140.

<sup>236</sup> *Ibid.* at 78–79, 172–177.

equipping rail cars;<sup>237</sup> minimum volume requirements to secure a contract; additional railway tariffs on smaller connecting lines;<sup>238</sup> loading/unloading costs at either end; and last mile truck delivery.<sup>239</sup> However, Marmen confirmed that its rail cost estimates included line haul costs for connecting lines, offloading costs, last mile truck delivery, fuel surcharges and the cost to acquire and equip rail cars, while Marmen provides loading services at its facility.<sup>240</sup>

[165] The Tribunal accepts that Marmen's rail cost estimates were generally comprehensive in terms of what would need to be included. However, the Tribunal notes that the rail quotes relied upon by Marmen were not provided by an actual railway and did not actually confirm clearance or the availability of rail cars.<sup>241</sup> The Tribunal also notes that most of the projects in Siemens' questionnaire replies had tower diameters greater than the towers used for the purpose of Marmen's calculations which purported to show that rail transportation from Quebec would be cheaper than Siemens' actual transportation costs for subject goods from China over the POI.<sup>242</sup> As such, the Tribunal considers this evidence to be reasonably probative of relative costs of shipping by rail and truck, but less useful in assessing the feasibility of shipping larger wind tower sections by rail.

[166] Regarding Siemens' argument that not all rail lines or routes from Eastern Canada to Western Canada would be able to accommodate the size of its wind tower sections, Marmen submitted that towers of certain diameters have previously been cleared on railway lines from Trois-Rivières, Quebec, to points in Ontario, and other diameters have been cleared from Thunder Bay, Ontario, to Alberta.<sup>243</sup> Marmen noted that these clearances are greater than the tower diameters in several of the projects listed in Siemens' questionnaire response.<sup>244</sup> Further, Marmen referred to other evidence indicating that wind towers of other widths have previously received rail clearance all the way from Marmen's production facilities to delivery in Alberta, including the time it took to receive that clearance.<sup>245</sup>

[167] At the hearing, Mr. Barger acknowledged that, for one project, Siemens obtained rail clearances all the way from Trois-Rivières to a location in Alberta. However, he emphasized that clearances may or may not be available for a given project at a given time depending on project details, delivery location and the carrier's availability.<sup>246</sup>

[168] The Tribunal also takes note of the testimony of Mr. Sommer that, during the POI, ENERCON did not ship any wind towers from the port of Trois-Rivières by rail. Mr. Sommer noted that ENERCON's only rail experience during the POI from Eastern Canada to Western Canada was to Alberta from the port of Thunder Bay, where the wind towers arrived by boat.<sup>247</sup>

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<sup>237</sup> Siemens submitted that it is also unclear whether Canadian railways would have enough "public" rail cars available. See Exhibit NQ-2023-001-29.02 (protected) at 14, 28. See also *Transcript of In Camera Hearing* at 109.

<sup>238</sup> *Transcript of Public Hearing* at 197.

<sup>239</sup> *Transcript of Public Hearing* at 193–194, 196; *Transcript of In Camera Hearing* at 93.

<sup>240</sup> *Transcript of Public Hearing* at 53–56.

<sup>241</sup> Exhibit NQ-2023-001-27.02 (protected) at 139–140.

<sup>242</sup> Exhibit NQ-2023-001-13.16A (protected) at 22–50.

<sup>243</sup> Exhibit NQ-2023-001-27.02 (protected) at 127–128, 130.

<sup>244</sup> See Exhibit NQ-2023-001-13.16A (protected) at 22–50.

<sup>245</sup> Exhibit NQ-2023-001-27.02 (protected) at 130; Exhibit NQ-2023-001-29.02 (protected) at 50.

<sup>246</sup> *Transcript of Public Hearing* at 224.

<sup>247</sup> *Transcript of Public Hearing* at 501–502.



[169] Mr. Espaillat stated that Vestas is the only OEM whose primary approach is to ship wind towers by rail, indicating that Vestas has invested in a pool of rail cars that it controls.<sup>248</sup> He also referred to factors other than price that affect the feasibility of shipping wind towers by rail from Eastern to Western Canada. For example, the rail network between Quebec and Western Canada passes through heavily populated areas that also have significant commuter traffic. This can result in delays as the shipment awaits permission to actually move (what Mr. Espaillat described as “operational approval”) despite having already received clearance for the shipment size.<sup>249</sup> In his words, “the railroad looks at pricing as one thing, and at clearances as one thing, and at operations as another thing ... So, a lot of the time, you might have pricing but not necessarily an ability to execute it.”<sup>250</sup>

[170] At the hearing, counsel for Marmen objected to Mr. Espaillat’s evidence on the issue of operational approval, arguing that it was largely new evidence to which Marmen’s witnesses did not have the opportunity to respond. The Tribunal notes that Mr. Espaillat’s witness statement mentioned the challenge of shipping wind towers by train out of Quebec, including through Ontario, “due to the nature of the infrastructure and rail corridors.” His statement specifically mentioned difficulties relating to the Henvey Inlet project.<sup>251</sup> The Tribunal further notes that, during cross-examination, counsel for Vestas directly questioned Marmen’s witnesses regarding delays affecting the rail shipment of towers to the Henvey Inlet project, and Mr. Pellerin responded that he had no recollection of any such delays.<sup>252</sup>

[171] The Tribunal’s role in SIMA matters takes the form of an inquiry, as opposed to being a purely adversarial proceeding. As a quasi-judicial administrative body, the Tribunal’s procedures are “more flexible than those of a court. This flexibility allows it to accommodate complex proceedings under SIMA”,<sup>253</sup> in which the Tribunal’s usual practice is to take a liberal approach with respect to the admissibility of evidence. This approach flows from the well-established common law principle that administrative tribunals are masters of their own procedure and are not strictly bound by the rules of evidence.<sup>254</sup> The Tribunal is statutorily mandated to conduct its hearings “... as informally and expeditiously as the circumstances and considerations of fairness permit.”<sup>255</sup>

[172] Although a party is expected to put its best foot forward when presenting its case, this does not mean that it is required to anticipate the evidence and arguments of the opposing party fully and pre-emptively. In this case, Mr. Espaillat’s testimony was the first opportunity for him to address the specifics of the Henvey Inlet project following the filing of his witness statement. Between those two events, Marmen adduced additional arguments and evidence regarding that project.<sup>256</sup> In the Tribunal’s view, it is not unreasonable for Vestas to seek from Mr. Espaillat further logistical details

<sup>248</sup> Mr. Angers also stated that this was his understanding. See *Transcript of Public Hearing* at 52, 373.

<sup>249</sup> *Transcript of Public Hearing* at 348, 375, 388.

<sup>250</sup> *Transcript of Public Hearing* at 390. Although Mr. Espaillat did not explicitly refer to the concept of “operational approval” prior to the hearing, the Tribunal considers this to be a reasonable expansion of the comments in his witness statement.

<sup>251</sup> Exhibit NQ-2023-001-F-03 at 5–6.

<sup>252</sup> *Transcript of Public Hearing* at 84–85.

<sup>253</sup> See, for example, *Decorative and Other Non-structural Plywood* (19 February 2021), NQ-2020-002 (CITT) at para. 58.

<sup>254</sup> *Heavy Plate* (5 February 2021), NQ-2020-001 (CITT) [*Heavy Plate*] at para. 28, citing *Carbon and Alloy Steel Line Pipe* (19 January 2016), NQ-2015-002 (CITT) at paras. 24–27, at note 14.

<sup>255</sup> Section 35 of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.).

<sup>256</sup> See Exhibit NQ-2023-001-A-14 at 13–16.

of that project at the hearing, or to relate those observations to his views on issues affecting rail shipment generally.

[173] Therefore, the Tribunal considers it procedurally fair to consider Mr. Espaillet's testimony as to the significance of operational approvals as a factor affecting the shipment of wind towers by rail, which is relevant to the Tribunal's assessment of transportation and logistics as potential other factors causing injury to the domestic industry.

### Shipment by vessel (boat)

[174] Siemens and the Capstone LPs disputed the feasibility of shipping tower sections on the Great Lakes because its shipping lanes close during the winter, from roughly December through March, depending on weather.<sup>257</sup> On the other hand, Siemens can ship turbines from overseas to the PNW year-round. Specifically, Siemens argued that transportation by marine vessel (while generally the safest and most efficient option) would be costly and inefficient from Quebec due to the additional distance, lost efficiency due to the inability to co-load other wind turbine components on the vessel<sup>258</sup> and lesser availability of qualified ocean carriers for that route.

[175] In his witness statement, Mr. Angers stated that Marmen has shipped towers by vessel to Quebec, New York, Pennsylvania, Ohio, Illinois, Indiana, Minnesota and Texas.<sup>259</sup> He provided evidence that ENERCON has recently transported wind towers (for the Jenner project)<sup>260</sup> across eastern Canada via the Great Lakes to Thunder Bay, and thereafter by rail to Alberta.<sup>261</sup>

[176] At the hearing, Mr. Espaillet acknowledged that one Vestas project involved shipping towers from China inland as far as the port of Windsor, Ontario, using ocean vessels specially fitted to access the Great Lakes.<sup>262</sup>

[177] Marmen argued that this demonstrates both the feasibility of inland water transportation to locations closer to the final destination, as well as the logic of moving tower sections part of the way by barge<sup>263</sup> as opposed to entirely by truck. It submitted transportation quotes indicating that using a vessel for a portion of the trip, which would entail lower costs, followed by the use of trucking for only the second leg of the trip, would provide substantial savings over trucking the entire distance.<sup>264</sup> However, the Tribunal notes that comments by Mr. Sommer in the *in camera* hearing appear to be

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<sup>257</sup> *Transcript of Public Hearing* at 194. See also Exhibit NQ-2023-001-C-09 at 17; Exhibit NQ-2023-001-A-05 at 12; Exhibit NQ-2023-001-24.02 at 12–13.

<sup>258</sup> In contrast to Siemens' ability to co-load shipments from China. See Exhibit NQ-2023-001-24.02 at 9–10.

<sup>259</sup> Exhibit NQ-2023-001-A-05 at 10.

<sup>260</sup> This was confirmed by Mr. Sommer of ENERCON, who noted that some sections for that project were also transported to Alberta by truck after unloading at Thunder Bay, whereas others were shipped from the West Coast. See *Transcript of Public Hearing* at 489–492, 501–503; *Transcript of In Camera Hearing* at 218.

<sup>261</sup> *Transcript of Public Hearing* at 31–32; Exhibit NQ-2023-001-A-05 at 12–14, 57, 62–64.

<sup>262</sup> *Transcript of Public Hearing* at 379–380.

<sup>263</sup> At the hearing, Marmen's witnesses distinguished between barges and larger vessels/ships, stating that barges are smaller, often not self-propelled (requiring a tugboat to move them) and have much lower transport capacity than larger vessels, which are self-propelled and can carry 40 to 60 wind tower sections each. These terms were used consistently with this explanation throughout the hearing. See *Transcript of Public Hearing* at 28–29, 46, 189, 337, 339, 341–346, 385, 474.

<sup>264</sup> See Exhibit NQ-2023-001-27.02 (protected) at 82–83, 197–198.

more consistent with the issues raised by Siemens and Vestas with regard to this route, as well as shipping by inland waterway generally.<sup>265</sup>

[178] Marmen also submitted photographic evidence that Siemens has used inland water transportation for wind tower sections. This occurred, for the Windrise project, with wind tower sections being shipped to Alberta from Asia by river barge from the port of Vancouver, Washington, to Lewiston, Idaho, and thereafter by truck.<sup>266</sup> At the hearing, Mr. Barger described this as a unique solution used under special circumstances, in order to achieve timely delivery, which came at an “exorbitant” cost.<sup>267</sup> Mr. Sommer also testified that, in his (albeit limited) experience with barging wind towers, it is a relatively expensive option.<sup>268</sup>

### **Tribunal analysis of transportation and logistics factors**

[179] The evidence indicates that OEMs (particularly Siemens and Vestas) have developed routes which have proved advantageous for shipping wind towers to western Canada: by truck from ports in Washington State (in the case of Siemens) and by rail or truck from the Gulf Coast region of Texas (in the case of Vestas). In the Tribunal’s view, this makes inherent sense from a business perspective. As noted above, these companies have made significant investments in establishing these transportation routes. Siemens’ investment in a network of lay-down yards is one example. Vestas’ investment in a fleet of rail cars is a further example. Having taken these steps, the selected routes are familiar and well established, which has its own value from a risk management perspective. In this regard, the Tribunal is persuaded by the credible testimony of the witnesses for Siemens, Vestas and ENERCON regarding the potential financial impacts of both delays in shipment and the challenge of implementing new routes on an *ad hoc* basis.

[180] Regarding shipment by truck, the Tribunal is persuaded by the evidence that this method of transportation from Marmen’s facilities to Alberta is both relatively expensive and suffers from a variety of challenges beyond price, when compared to those required for Siemens’ established route from the West Coast. These challenges include seasonal limitations imposed by road frost bans, scheduling challenges arising from the need for police escorts in Ontario and Quebec, limited availability of carriers as compared to the United States, and the logistical complexity of needing road permit requirements for multiple jurisdictions.

[181] Marmen made arguments casting doubt on the accuracy of Siemens’ TCO analyses. The Tribunal agrees with Siemens that it would be unreasonable to ignore the actual cost estimates used contemporaneously to inform Siemens’ choice of wind tower supplier, notwithstanding that they were simply estimates. Regarding their actual accuracy, the Tribunal accepts the uncontradicted evidence of Siemens that the variability of transportation costs between projects in Siemens’ TCO analyses, and certain discrepancies between the TCO analysis and the actual shipping costs for a given project, are explained by the fact that many of the projects in question were planned and/or

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<sup>265</sup> *Transcript of In Camera Hearing* at 222.

<sup>266</sup> Exhibit NQ-2023-001-26.02 at 108–111, 160–165. Evidence on the confidential record indicates that ENERCON may have also made use of this route, but also in what appears to have been an exceptional circumstance. See *Transcript of In Camera Hearing* at 216–218; Exhibit NQ-2023-001-13.17D (protected) at 3.

<sup>267</sup> *Transcript of Public Hearing* at 204–205, 246.

<sup>268</sup> *Transcript of Public Hearing* at 498–500.

delivered during the COVID-19 pandemic, during which logistics costs and timelines to ship goods from Asia varied considerably.

[182] With respect to rail-only shipment, the Tribunal is not persuaded by Marmen's argument that it should focus on technical feasibility as opposed to commercial feasibility. The Tribunal has seen no evidence that wind towers have ever been shipped by rail from Marmen's facilities farther west than Sudbury, Ontario. Although Marmen did submit evidence that clearance has previously been granted for shipping from its Quebec facilities to Alberta, the Tribunal notes that two of these examples appear not to have been confirmed by a railroad and were for towers of relatively narrow diameters.<sup>269</sup> Mr. Barger credibly explained that the last example provided by Marmen was a special situation whose logistics would not necessarily be available for other projects.<sup>270</sup>

[183] The Tribunal accepts that obtaining rail clearance from Marmen's facility to Alberta is possible, but it is not persuaded that this fact can be generalized to reach the conclusion that shipping by rail via that route would be an effective or reliable long-term strategy. Overall, the Tribunal accepts the persuasive and credible testimony of the witnesses for Siemens and Vestas that factors beyond notional price or clearance for rail transport (such as delays or complications relating to operational approvals) do not make rail shipment from Marmen's facilities to Alberta an attractive alternative to transportation routes and methods otherwise established by OEMs such as Siemens and Vestas.<sup>271</sup>

[184] Marmen took the position that Siemens did not actually put a great deal of effort into exploring the feasibility of rail shipment from Marmen's facilities. However, the Tribunal agrees with Siemens that it is not incumbent on OEMs to repeatedly seek out every possible logistical option for each project. Although OEMs are generally responsible for transportation, it is still open to producers to propose or take responsibility for transportation and logistics in order to win a sale.<sup>272</sup>

[185] As an example, Marmen referred to an instance where Vestas shipped wind towers inland via the Great Lakes (the Romney project). The project site was located quite close to the port of unloading, in Chatham-Kent and Lakeshore, Ontario.<sup>273</sup>

[186] For the Henvey Inlet project in Ontario, the project site was located relatively close to the railhead at Sudbury, Ontario. Vestas shipped towers by rail from Marmen's facilities to Sudbury, and then by truck to the project site despite the difficulty posed by mountainous terrain in reaching the project site from the railhead. In that project, Vestas did transport its other (non-subject) tower components from overseas via Trois-Rivières, Quebec. However, Mr. Espaillat noted that this occurred because there was no feasible route to get from Vestas' preferred port of Houston, Texas, to the project location, or to get there from the port of Thunder Bay, Ontario, by truck. In addition, Vestas needed to use additional rail car volume to justify the high cost of working with the railroad to clear a path to the project site with sufficient rail clearance through mountainous terrain.<sup>274</sup>

<sup>269</sup> One of which was also quite old. See Exhibit NQ-2023-001-27.02 (protected) at 128, 130, 139–140.

<sup>270</sup> *Transcript of Public Hearing* at 224, 226–227.

<sup>271</sup> The Tribunal notes Mr. Barger's comment at the hearing that, even assuming Siemens received full clearance to ship wind towers from Quebec to Western Canada by rail, it would likely not be an appealing option, although Siemens would consider all options presented to it. See *Transcript of Public Hearing* at 263–264.

<sup>272</sup> See *Transcript of In Camera Hearing* at 72–73, 116–117.

<sup>273</sup> Exhibit NQ-2023-001-RI-04B at 3.

<sup>274</sup> *Transcript of Public Hearing* at 338–340.

[187] The feasibility of shipping the widest tower sections by vessel via the Great Lakes to the port of Thunder Bay appears to be more strongly supported by the evidence that ENERCON recently did so in 2021, 2022 and 2023.<sup>275</sup> However the record indicates that these shipments, at least in 2022 and 2023, were limited to the Jenner project.<sup>276</sup> The Tribunal is not persuaded that the example of that project alone suggests that this route may be desirable compared to Siemens' and Vestas' established routes, in light of Mr. Sommer's confidential testimony noted above. The Tribunal further notes the general comments in Mr. Sommer's will-say statement, observing: that "[i]t is extremely difficult and costly to transport towers from the Canadian producer of towers to most worksites in Canada"; that there is "generally much greater difficulty and cost of transporting towers from the Canadian site of production to the site where they will be erected"; and that "[i]t is generally much cheaper, much easier and much more reliable to have towers transported to and into Canada by ship from Europe or Asia."<sup>277</sup>

[188] Given these factors, the Tribunal is not persuaded that there is convincing evidence that wind towers can be efficiently shipped to Western Canada, and particularly Alberta, either by a combination of vessel (inland via the Great Lakes) and rail or by continuous rail from Marmen's facilities in Quebec. The Tribunal particularly notes Mr. Espaillat's comments on the cost to Vestas of its logistical approach to the Henvey Inlet project, in terms of both schedule and budget.<sup>278</sup> These comments confirm the significant logistical challenges and risks faced by OEMs seeking to transport towers from Marmen's facilities to Western Canada.

[189] Overall, the specific evidence of projects using inland water transport to transport wind towers to Western Canada (in the case of the Windrise and Jenner projects) has, in the Tribunal's view, been credibly explained as representing *ad hoc* logistical solutions for specific projects. The evidence referable to these specific projects and the general benefit of minimizing the number of times goods are loaded and unloaded for transportation does not persuade the Tribunal that these routes were chosen because they are an inherently reliable or cost-effective method of shipping wind towers to Western Canada.

[190] In both his witness statement and at the hearing, Mr. Barger also described the benefits of transporting wind tower sections from overseas on the same vessel as other (non-subject) components such as nacelles and rotor blades. This is known as "co-loading". It achieves efficiencies leading to a lower net transport cost for a complete wind turbine. As Marmen does not produce nacelles, blades or other wind turbine components other than wind towers, Siemens submits that shipping wind towers from Quebec while still having to import the other wind turbine components would not provide the same efficiencies through co-loading as shipping from overseas.<sup>279</sup>

[191] Mr. Barger acknowledged that these savings can only be obtained for the leg of the journey where the wind turbine components are being transported by sea, because components cannot be co-loaded onto individual trucks. The Tribunal accepts that co-loading could be expected to provide some cost efficiencies for the overseas portion of transportation, which would most likely be necessary on all projects in some form due to the necessity of importing wind turbine components

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<sup>275</sup> *Transcript of Public Hearing* at 489; *Transcript of In Camera Hearing* at 216–219.

<sup>276</sup> *Transcript of Public Hearing* at 490–492.

<sup>277</sup> Exhibit NQ-2023-001-37 at 2.

<sup>278</sup> *Transcript of Public Hearing* at 340–346.

<sup>279</sup> *Transcript of Public Hearing* at 185–186, 189; Exhibit NQ-2023-001-24.02 at 9–10.

other than towers.<sup>280</sup> Overall, the Tribunal is persuaded that efficiencies from co-loading are a relevant factor in explaining why Siemens would prefer to ship wind towers to Alberta (together with other wind turbine components from Asia) via the PNW, even if Siemens did not use co-loading for every project where it imported subject goods during the POI.<sup>281</sup>

[192] The Tribunal does not accept Marmen's argument (made in the context of exclusion requests) that OEM assertions about the cost of transportation are essentially "public interest" arguments pertaining to the economic consequences of a finding or exclusion for the opposing parties. The Tribunal agrees that the economic effects of a finding of injury on the development costs of new wind projects or on downstream consumers of electricity is not a consideration in an inquiry under section 42 of SIMA and that there is a separate process provided by section 45 for dealing with such effects. However, the foregoing is not predicated on considering what effect transportation costs would have in the event of a finding, but on assessing what role this variable played in OEMs' decisions not to purchase wind towers from Marmen during the POI.<sup>282</sup> In the Tribunal's view, this is an entirely proper factor to consider in an analysis of factors which may have caused injury to the domestic industry, apart from the dumping and subsidizing of the subject goods.

[193] For the same reason, the Tribunal does not consider it reasonable to restrict its consideration to the ex-works price in OEM purchasing decisions as proposed by Marmen, although it appreciates that a producer which *sells* on an ex-works basis would emphasize that factor. Procurement processes in the Canadian wind towers market are characterized by limited transparency in terms of the reasons underpinning purchasing decisions. As noted above and confirmed by multiple witnesses, including Marmen's, purchasers are almost always responsible for transportation and logistics.<sup>283</sup> Therefore, many of the factors discussed above may not have been apparent to Marmen prior to this inquiry, at least in terms of their significance to the execution and ultimate cost of projects and the resulting weight given to them by OEMs when making purchasing decisions.<sup>284</sup>

[194] Nonetheless, the evidence indicates that these transportation and logistical factors create a significant geographical disadvantage for Marmen's ability to supply wind towers to Western Canada (particularly to project sites in Alberta) from its production facilities in Quebec. These factors result in an inherent competitive disadvantage for Marmen in its attempts to supply the Western Canadian market, irrespective of the availability of the subject goods.

[195] Viewing Marmen's lost sales allegations in the context of the heavy concentration of overall market activity in Western Canada over the POI, the Tribunal is persuaded that this inherent geographic disadvantage was a significant other factor contributing to Marmen's inability to secure sales during the POI. It therefore finds that this geographic disadvantage was, on a balance of

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<sup>280</sup> The Tribunal is also persuaded that these efficiencies likely grow with the scale of the project or when co-loading is used to source multiple projects. See *Transcript of Public Hearing* at 236–237; Exhibit NQ-2023-001-24.02 at 10.

<sup>281</sup> Marmen submitted evidence to this effect for two projects, Paintearth and Cypress. See: Exhibit NQ-2023-001-A-11 at 1; Exhibit NQ-2023-001-A-12 (protected) at 102–104.

<sup>282</sup> Indeed, as discussed further below, it appears likely that these factors, among others, would have impaired Marmen's ability to supply Western Canada even in the absence of subject goods.

<sup>283</sup> *Transcript of Public Hearing* at 23, 43, 49.

<sup>284</sup> That said, the Tribunal again notes that Marmen conveyed at least some awareness of the impact of transportation constraints in its comments to the United States International Trade Commission in 2020.

probabilities, a cause of injury suffered by Marmen during the POI in respect of wind power projects in Western Canada and is not attributable to the dumping and subsidizing of subject goods.

Loss of access to the United States market

[196] Siemens, CCCME and the Capstone LPs argued that Marmen was export-oriented during the POI, and that any injury or threat of injury resulting from Marmen strategically devoting production capacity to export markets which then became inaccessible cannot be attributed to the dumping and subsidizing of subject goods.

[197] In its reply, Marmen acknowledged that these arguments pertained to its declining exports to the United States. It argued that using its production capacity to export to the United States was a defensive measure to mitigate its injury as subject goods took over the Canadian market.<sup>285</sup> Mr. Pellerin discussed how United States government policies contributed to a surge in United States market demand from 2019 to 2021, but thereafter demand for foreign wind towers was curtailed through the imposition of a tax credit for wind towers produced in the United States.<sup>286</sup> For practical purposes, foreign-made (including Canadian) wind towers became uncompetitive in the United States.<sup>287</sup>

[198] At first glance, loss of access to the United States market might appear to have contributed to Marmen's injury, in the sense that Marmen appears to have been performing quite well by exporting to United States market, even as subject goods became dominant in Canada. Had it been able to continue exporting to the United States, Marmen may not have suffered the adverse effects discussed above, regardless of the market position of subject goods in Canada (or indeed regardless of whether it ever made another Canadian sale).

[199] However, and as indicated in the preliminary inquiry, even if the Tribunal were to accept that the decline in Marmen's sales in 2021 and 2022 was directly attributable to decreasing and lost export sales, this fact alone does not negate the possibility that the dumping and subsidizing of the subject goods could have caused injury by preventing Marmen from replacing its export sales with domestic sales.<sup>288</sup> Although declining exports to the United States may have put Marmen in the position of depending on domestic sales, there is no evidence that declining export sales were somehow a cause of Marmen's inability to actually make sales in Canada. The inability to make sales

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<sup>285</sup> *Transcript of Public Hearing* at 21. See also *Transcript of In Camera Hearing* at 26; Exhibit NQ-2023-001-A-03 at 15–18. As noted above in the discussion of impact, exports appear to have played a key role in Marmen's performance even as subject goods acquired an increasingly dominant share of the Canadian market.

<sup>286</sup> This timeline is consistent with Siemens' submissions that the United States market paused in 2022 pending the announcement of new incentives after the previous ones expired in 2021, which included the domestic content tax credit when announced in the *Inflation Reduction Act* in August 2022. These successive developments coincided with Marmen's reduced exports to the United States in each of 2021, 2022 and 2023, such that by the first half of 2023, Marmen's export sales declined by 93% from the same period in 2022, while its production for export sales decreased by 100%. See Exhibit NQ-2023-001-06.B at Table 33.

<sup>287</sup> Exhibit NQ-2023-001-A-03 at 15–18.

<sup>288</sup> See *Wind Towers PI* at para. 93.

in Canada is the crux of Marmen's injury allegations, and the Tribunal is not persuaded that a lack of access to the United States market was a relevant other factor causing loss of domestic sales.<sup>289</sup>

[200] As discussed above, Marmen's inability to make sales in Canada is rather primarily a function of demand in the domestic market shifting to Western Canada during the POI and the geographic disadvantage, transportation challenges and logistical challenges faced by Marmen in attempting to participate in projects located in that region. That said, the loss of access to the United States market does appear to have contributed to Marmen's overall levels of sales and production, and therefore its financial situation, and clearly cannot be attributed to the dumping and subsidizing of subject goods.

#### Marmen's quotation practices

[201] Siemens submitted that Marmen consistently fails to provide advance price quotes that are valid for a reasonable period of time. Siemens also contends that Marmen does not respond to requests for price quotes in a manner that is both transparent<sup>290</sup> and timely.<sup>291</sup> Rather, Marmen prefers to only provide quotes after receiving specific project details such as engineering specifications, even where non-project-specific requests for quotation are made by Siemens.<sup>292</sup>

[202] Siemens also stated that Marmen's unattractiveness as a supplier was related to its apparent unwillingness to participate in capacity agreements under which suppliers would be required to reserve volume and/or purchasers would be required to purchase volume.<sup>293</sup> Mr. Barger testified that both price and capacity commitments are factors considered during Siemens' procurement process and that these considerations were applicable for projects in Canada during the POI.<sup>294</sup>

[203] Vestas explained that its procurement practices are, in large part, governed by its corporate group, which does not normally issue requests for proposals for wind towers. Instead, Vestas seeks price commitments from producers which are then used to develop quotes to developers for specific wind projects. In some instances, project-specific price commitments may be sought as an exception to this general practice.<sup>295</sup> Vestas submits that Marmen's quotation practices are inconsistent with

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<sup>289</sup> Further, evidence submitted by Siemens, but referred to by Marmen, demonstrates that Marmen was interested in projects in Canada (including those in western Canada) during the POI. See Exhibit NQ-2023-001-C-10 (protected) at 232–233, 238–242, 249–251.

<sup>290</sup> *Transcript of In Camera Hearing* at 77–79.

<sup>291</sup> Exhibit NQ-2023-001-C-10 (protected) at 203–204, 223–224.

<sup>292</sup> These allegations are based mainly on Mr. Barger's witness statement and oral testimony. See Exhibit NQ-2023-001-C-09 at 10, 19–20. See also: *Transcript of In Camera Hearing* at 77–79; Exhibit NQ-2023-001-C-10 (protected) at 10–11, 19–20, 203–204, 235–243.

<sup>293</sup> Exhibit NQ-2023-001-C-09 at 11–13. See also: *Transcript of In Camera Hearing* at 87–88; Exhibit NQ-2023-001-C-10 (protected) at 11–13, 260–262.

<sup>294</sup> *Transcript of Public Hearing* at 179. See also *Transcript of In Camera Hearing* at 66–67.

<sup>295</sup> Vestas adduced no documentary evidence or witness testimony to support these descriptions of its business practices, although it did discuss them in certain correspondence with the Tribunal and, to a limited extent, in its questionnaire responses, although the Tribunal specifically advised Vestas that it considered these responses to be an insufficient description of its procurement process. See Exhibit NQ-2023-001-F-01 at 23–25.



this approach, in that Marmen refuses to provide firm price commitments and insists on providing project-specific quotes which Vestas claims take weeks to arrive.<sup>296</sup>

[204] The ability of Marmen's witnesses to respond to these allegations by Siemens and Vestas were somewhat circumscribed by the limited disclosure process, given the confidential nature of many of the allegations made by the parties to this inquiry. At the hearing, Mr. Angers testified that this proceeding was the first time Marmen was made aware of any dissatisfaction from OEMs with respect to its quotation practices.<sup>297</sup>

[205] In their confidential written submissions and during oral testimony, Marmen's witnesses explained the underlying business rationale for its bid quotation practices.<sup>298</sup> However, in the Tribunal's view, further cross-examination suggested inconsistencies in this explanation and generally raised questions as to whether this explanation was fully consistent with evidence referable to other aspects of Marmen's bid preparation.<sup>299</sup>

[206] The Tribunal finds that Siemens' arguments on this issue were substantiated, to some extent. For reasons just noted, the duration of Marmen's price quotes and the reasons for quoting prices that are valid for only a limited period of time raised issues that are not clearly resolved by the evidence.

[207] In addition, the evidence suggests that both producers and purchasers may seek to secure capacity commitments from each other. Nothing indicates that this is an unreasonable business practice.<sup>300</sup> The Tribunal accepts Mr. Barger's written and oral testimony that Marmen's alleged reluctance to provide price and capacity commitments undermined Siemens' ability to maintain up-to-date pricing information for Marmen on file. This could well have put Marmen at somewhat of a disadvantage in the TCO process, given Mr. Barger's testimony that Siemens first looks at any price and capacity commitments it may have with potential suppliers before potentially reaching out to request project-specific quotes.<sup>301</sup>

[208] That said, the Tribunal is less persuaded by the evidence regarding Marmen's alleged lack of timeliness or responsiveness in providing quotes. In the Tribunal's view, the evidence is either ambiguous<sup>302</sup> or reflects relatively minor delays while also suggesting Marmen's willingness to participate in requests for quotation.<sup>303</sup> The Tribunal also fails to see why it is unreasonable for Marmen to seek project-specific information when requested to quote<sup>304</sup> but not for Siemens to seek details regarding conversion costs or other factors underlying Marmen's ex-works quotes.<sup>305</sup>

[209] Based on the above, the Tribunal finds the evidence submitted by Siemens regarding Marmen's quotation practices to be somewhat mixed. Much of the evidence was, in the Tribunal's

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<sup>296</sup> Vestas referred only to the description of Marmen's quotation process in Mr. Angers' witness statement in support of these allegations, appearing to imply that the length of that description demonstrates the challenges of working with Marmen.

<sup>297</sup> *Transcript of Public Hearing* at 69–70.

<sup>298</sup> *Transcript of In Camera Hearing* at 28–31; Exhibit NQ-2023-001-A-06 (protected) at 73–74.

<sup>299</sup> *Transcript of In Camera Hearing* at 32–33, 44–47; Exhibit NQ-2023-001-A-06 (protected) at 73–74, 81–82.

<sup>300</sup> *Transcript of In Camera Hearing* at 67; Exhibit NQ-2023-001-C-10 (protected) at 236–243, 251, 260.

<sup>301</sup> *Transcript of Public Hearing* at 179–180.

<sup>302</sup> Exhibit NQ-2023-001-C-10 (protected) at 203–204, 249–251.

<sup>303</sup> *Ibid.* at 223–224.

<sup>304</sup> *Ibid.* at 189–191, 254–255, 260–262.

<sup>305</sup> *Transcript of In Camera Hearing* at 77–79.

view, ambiguous. However, the Tribunal accepts that Marmen's resistance to providing price and capacity commitments may have undermined its attractiveness as a supplier to Siemens. The Tribunal also accepts that Marmen's quotation practices likely somewhat undermined its ability to win sales from Siemens over the POI. While this factor appears to have contributed to Marmen's injury to some degree, the Tribunal is not persuaded that this was a major factor causing injury.

[210] With respect to Vestas' allegations regarding Marmen's business practices, Vestas referred only to the description of Marmen's quotation process found in Mr. Angers' witness statement. In doing so, Vestas appeared to imply that the length of that description demonstrates the challenges of working with Marmen. The Tribunal finds nothing in the portions of Mr. Angers' witness statement referred to by Vestas<sup>306</sup> to support these assertions and therefore rejects this argument as made by Vestas.

[211] As noted above, the *in camera* cross-examination of Marmen's witnesses did suggest some potential inconsistency in Marmen's explanation for the limited validity period of its bids. However, cross-examination also yielded an extensive discussion of a particular project which suggested that, if anything, it was Vestas that was being unresponsive and non-transparent, despite repeated efforts by Marmen to make the sale. In that case, any limitation on the validity period of Marmen's quote was not a factor that caused Marmen to lose the sale.<sup>307</sup> There was no probative documentary evidence or witness testimony from Vestas on this issue, while the testimony of Marmen's witnesses was uncontested. Having weighed the evidence, the Tribunal is not persuaded that Marmen's quotation or other business practices were a significant factor in its failure to secure sales with Vestas over the POI.

#### Input costs

[212] Siemens argued that Marmen does not have access to competitive prices for steel plate due to ongoing Canadian anti-dumping measures on steel plate.<sup>308</sup> Accordingly, Marmen is therefore less competitive compared to Chinese suppliers who are able to source plate and materials that are not subject to trade remedy measures. Siemens submitted that its comparative estimates of prices confirm its position regarding Marmen's input cost competitiveness.<sup>309</sup>

[213] The Tribunal does not find any of the authorities cited by the Marmen or Siemens on this issue to be dispositive. The Tribunal agrees with Marmen that the Tribunal's 2008 decision regarding carbon steel welded pipe (CSWP) from China does not, as suggested by Siemens, stand for the proposition that comparatively higher steel costs imposed by anti-dumping duties represent a non-dumping injury factor. In that case, the Tribunal found that increasing material costs were not a cause of injury because they were a "global phenomenon ... that should have increased

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<sup>306</sup> See Exhibit NQ-2023-001-A-05 at 3–9, 32.

<sup>307</sup> *Transcript of In Camera Hearing* at 35–44.

<sup>308</sup> Siemens cites: *Heavy Plate; Hot-rolled Carbon Steel Plate* (8 January 2013), RR-2012-001 (CITT); *Hot-rolled Carbon Steel Plate* (9 August 2018), RR-2017-004 (CITT); *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (31 October 2019), RR-2018-007 (CITT); *Hot-rolled Carbon Steel Plate* (13 March 2020), RR-2019-001 (CITT); and *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (10 November 2020), RR-2019-004 (CITT).

<sup>309</sup> Exhibit NQ-2023-001-C-10 (protected) at 166–179.

manufacturing costs equally for producers in other parts of the world.”<sup>310</sup> However, the Tribunal does not fully agree with Marmen that its 2019 decision regarding CSWP from Pakistan, the Philippines, Turkey and Vietnam clearly stands for the opposite proposition. Although the Tribunal in that case noted that trade measures on certain inputs would have an impact on available prices, it did so in assessing arguments that the domestic industry’s *decisions* on where to source inputs were a factor causing injury.<sup>311</sup>

[214] The present case can be distinguished from those decisions, as the question here is not the domestic industry’s choices of where to source inputs<sup>312</sup> or whether its input prices are in line with global trends. Rather, the question here is whether high input prices resulting from the domestic industry’s alleged lack of access to *any* inputs not subject to Canadian trade remedy measures should be considered a non-dumping injury factor.

[215] Ultimately, Siemens appears to be arguing that Marmen’s acquisition of steel plate inputs at fairly traded prices imposed by trade remedies is a cause of its injury. The Tribunal does not agree, for the simple reason that fairly traded prices should be the norm. Further, the CBSA took into account the fact that Chinese wind tower producers have access to cheap plate when making the final determinations that the subject goods in this case are dumped and subsidized.<sup>313</sup> The Tribunal is not prepared to accept that the comparatively higher cost of Marmen’s steel plate inputs (which might be more accurately described as the comparatively lower cost of unfairly traded steel plate inputs to which foreign producers have access) is an injury factor unrelated to the dumping and subsidizing of the subject goods.

[216] The Tribunal agrees with Marmen that the CCCME’s arguments concerning input costs<sup>314</sup> are speculative, depend on numerous inferences and assumptions about Marmen’s strategy for sourcing inputs, and appear (at times) contradictory and to conflate concepts such as plate costs and conversion price.<sup>315</sup> It is unclear what conclusions the Tribunal is supposed to draw from these submissions, and it therefore declines to make any finding in relation to them.

#### Non-subject goods

[217] Siemens, the Capstone LPs and the CCCME submitted that domestic wind towers are uncompetitive against both subject and non-subject imports. At the hearing, Mr. Barger stated that Marmen was consistently the least competitive supplier among competitors from both subject and

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<sup>310</sup> The Tribunal rejected a second argument about input costs based on a lack of evidence and the requirement to assess injury to the domestic industry as a whole, which is not at issue in this case. See *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at paras. 117–118.

<sup>311</sup> *Carbon Steel Welded Pipe* (15 February 2019), NQ-2018-003 (CITT) [*CSWP from Pakistan, the Philippines, Turkey and Vietnam*] at para. 152. The Tribunal also cited *Sucker Rods* (14 December 2018) NQ-2018-001 (CITT) [*Sucker Rods*] at paras. 94–95

<sup>312</sup> A similar distinction can be made between this case and *Sucker Rods* at paras. 94–95, also cited by Marmen, while a further distinction can be made from *Silicon Metal* (2 November 2017), NQ-2017-001 (CITT) at paras. 139–143, which considered high input costs arising from a strategy to purchase inputs from an affiliated company. Both cases were cited by the Tribunal in *CSWP from Pakistan, the Philippines, Turkey and Vietnam* at para. 152, at note 147.

<sup>313</sup> Exhibit NQ-2023-001-04.A.

<sup>314</sup> Exhibit NQ-2023-001-I-02 (protected) at 40–44.

<sup>315</sup> *Ibid.* at 41, at para. 98.

non-subject countries over the POI.<sup>316</sup> The Capstone LPs and the CCCME referred to the price of domestic goods against non-subject imports over the POI.<sup>317</sup>

[218] In response, Marmen argued that the relative import volumes of subject and non-subject goods make the latter of little relevance to the Tribunal's price comparison or as a potential cause of injury.<sup>318</sup> It also referred to the Tribunal's decision in 2021 in *Concrete Reinforcing Bar*, where the Tribunal found that, while non-subject goods had undercut the price of like goods, the resulting price effects were likely minimal given the relatively low market share held by the non-subject goods.<sup>319</sup> However, while this analysis may be reasonable in terms of assessing price effects, the Tribunal has also previously considered the availability of non-subject goods when assessing causality in the context of lost sales.

[219] In *Nitisinone Capsules*,<sup>320</sup> the Tribunal applied the "but for" test to assess causality in the context of lost sales allegations relating to competitive bidding processes. In other words, it assessed whether the domestic industry would have been injured *but for* the dumping of the subject goods. The Tribunal concluded, based on the balance of probabilities standard, that it was more likely than not that non-subject goods (for which there was no finding of dumping) would have been awarded the sale in the absence of dumping and therefore that a causal relationship did not exist between the dumping of subject goods and the injury suffered by the domestic industry.<sup>321</sup>

[220] In *Nitisinone Capsules*, the Tribunal was careful to point out that it chose to apply the "but for" test in the specific circumstances where the volume, price effects and impact on the domestic industry of the dumped goods all related to a single transaction, that is, a single call for tenders and subsequent award of a contract.<sup>322</sup> The facts of the present inquiry are not so clear, with allegations of lost sales covering dozens of projects over several years,<sup>323</sup> together with numerous factors other than dumping and subsidizing alleged as potential causes of injury.

[221] That said, the Tribunal has previously found (in *Nitisinone Capsules*) that the availability of lower-priced non-subject goods can be a factor causing injury and has (in *Unitized Wall Modules*) considered the "but for" test even in cases involving numerous lost sales allegations. In light of the transportation and logistics factors outlined above, coupled with the apparent availability of non-subject wind towers that would also have undercut Marmen's prices in many instances,<sup>324</sup> it is not a foregone conclusion that Marmen would have won any sales in Western Canada in the absence of subject goods.<sup>325</sup> Unlike the situation in *Unitized Wall Modules*, the evidence does not allow the

<sup>316</sup> *Transcript of Public Hearing* at 187; Exhibit NQ-2023-001-C-10 (protected) at 181–186.

<sup>317</sup> Exhibit NQ-2023-001-07.B (protected) at tables 23, 25. The CCCME also referred to certain questionnaire responses, though these were general statements as opposed to price data: Exhibit NQ-2023-001-13.13 (protected) at 13; Exhibit NQ-2023-001-13.17B (protected) at 13.

<sup>318</sup> Exhibit NQ-2023-001-07.B (protected) at Table 17.

<sup>319</sup> *Concrete Reinforcing Bar* (4 June 2021), NQ-2020-004 (CITT) at paras. 71–72.

<sup>320</sup> *Nitisinone Capsules* (18 April 2019), NQ-2018-005 (CITT) [*Nitisinone Capsules*].

<sup>321</sup> *Nitisinone Capsules* at paras. 102–116.

<sup>322</sup> *Nitisinone Capsules* at paras. 103–104.

<sup>323</sup> See *Unitized Wall Modules* (12 November 2013), NQ-2013-002 (CITT) at paras. 105, 166, where the Tribunal applied the "but for" test to determine that the domestic industry would likely have won 9 of 21 projects over the POI which were the subject of lost sales allegations if not for the dumping and subsidizing of subject goods, but ultimately found that past injury had not occurred.

<sup>324</sup> Exhibit NQ-2023-001-C-10 (protected) at 181–186.

<sup>325</sup> *Transcript of Public Hearing* at 187.

Tribunal to determine that Marmen would likely have won sales in a precise number of projects that were the subject of its lost sales allegations in Western Canada. However, there is also evidence of at least one example where non-subject goods won the sale in Western Canada, which cannot be attributed to the dumping and subsidizing of subject goods.<sup>326</sup> In this case, the Tribunal is thus persuaded that this “but for” test is relevant to its analysis. Accordingly, the market dynamic involving the availability of lower-priced non-subject goods for OEMs in many projects should, to some degree, factor into the Tribunal’s overall assessment of causality when assessed on a balance of probabilities.

#### Marmen’s capacity relative to accessible market demand

[222] Siemens argued that Marmen’s production capacity relative to total Canadian demand over the POI represents a source of injury other than dumping or subsidizing.<sup>327</sup> Much of this argument was underpinned by information designated as confidential.

[223] The Tribunal agrees with Marmen that this dynamic would not negate any injury suffered as a result of losing sales to dumped or subsidized goods. Simply put, even if Marmen’s capacity utilization never reached 100%, it would likely have suffered less injury if its capacity utilization had been higher than the levels observed during the POI.<sup>328</sup>

[224] Therefore, the Tribunal finds that Marmen’s production capacity relative to the size of the domestic market was not a relevant factor causing injury.

#### Long lead times

[225] Siemens submitted that long timelines from development scoping to installation makes adapting to market conditions difficult. It requires foresight and planning for negotiations in order to generate sales.<sup>329</sup> While the Tribunal acknowledges these comments as being generally descriptive of the wind towers industry, they appear to describe a market dynamic which would affect all players in the industry. The Tribunal therefore fails to see how this represents more than mere background for the other factors allegedly operating to cause the injury as described above. Therefore, the Tribunal is not persuaded that long lead times in the wind towers industry is a factor causing injury to the domestic industry.

#### Conclusion on other factors and causation

[226] As indicated above, the project-specific data demonstrate that the subject goods have significantly undercut the prices of the like goods, both on an ex-works basis and on a TCO basis. On that basis alone, one might normally be tempted to conclude that this undercutting may be a cause of

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<sup>326</sup> *Transcript of Public Hearing* at 262–263; *Transcript of In Camera Hearing* at 72–73; Exhibit NQ-2023-001-C-10 (protected) at 181.

<sup>327</sup> See Exhibit NQ-2023-001-C-08 (protected) at 24–25.

<sup>328</sup> See the above discussion regarding impact. See also *Transcript of In Camera Hearing* at 21–24; Exhibit NQ-2023-001-06.B at Table 33; Exhibit NQ-2023-001-07.B (protected) at Table 32.

<sup>329</sup> *Transcript of Public Hearing* at 256–257; Exhibit NQ-2023-001-C-10 (protected) at 8. Project lead times were also discussed at the hearing by Mr. Zhao and Mr. Wilson, and in the confidential witness statement of Mr. Patrick Leitch, witness for the Capstone LPs. See also *Transcript of Public Hearing* at 303, 305, 451–452, 453; Exhibit NQ-2023-001-25.03 (protected) at 31, 50.

the injury suffered by Marmen during the POI. However, the evidence demonstrates that the situation is not that simple.

[227] Responsibility for transportation and logistics is generally the responsibility of the OEM purchasers of wind towers. The extensive submissions on this issue, discussed above, have persuaded the Tribunal that OEMs, and particularly Siemens and Vestas, have established routes, methods and modes of transportation based on cost-effectiveness and reliability based on their evaluation of those parameters. In contrast to these established routes, witnesses for the OEMs have indicated that, from a costing point of view, Marmen is at a disadvantage due to the geographic location of its production facilities relative to wind projects in Western Canada.

[228] The evidence also indicates that, aside from the notional or prospective cost of transportation for a given project, logistical complexity and risk factors are extremely important. These variables can and often do cause additional costs arising from the need to find workarounds or reduce the impact of delay on project delivery schedules. The Tribunal is persuaded that these factors also put Marmen at a disadvantage, as they affect all the available routes from its production facilities to Western Canada.

[229] In the majority of instances where subject goods and like goods competed, the projects were situated in Western Canada. These geographic factors, including disadvantage associated with the location of Marmen's facilities when supplying Western Canada, made it difficult for Marmen to be competitive during the POI. The Tribunal accepts that the OEMs made purchasing decisions for that region in large part based on both the estimated transportation costs and the logistical complexity (and therefore potential additional cost) that sourcing those projects from Marmen were likely to create.

[230] In the Tribunal's view, these transportation and logistical factors contributed greatly to Marmen's inability to win sales in Western Canada and cannot be attributed to the dumping and subsidizing of subject goods. The Tribunal emphasizes that this finding applies to Western Canada based on the specific and extensive evidence regarding transportation and logistics when viewed in the context of the particular circumstances of this case.

[231] As discussed above, the evidence also indicates that the price of non-subject goods undercut the price of like goods where these were in competition with each other. For example, non-subject goods won the sale for at least one project by having a lower estimated TCO cost, based on transportation factors, than both like goods and subject goods that were considered for that project. This was the case even though the non-subject goods had a higher estimated ex-works cost than did the subject goods.<sup>330</sup>

[232] In view of the foregoing, the Tribunal considers it reasonable, in the context of examining the causes of Marmen's lack of sales during the POI, to consider the contemporaneous cost estimates on which basis OEMs made their purchasing decisions.

[233] The Tribunal reiterates that, based on the evidence, it considers the availability of low-priced non-subject goods to be a relevant factor in determining whether the subject goods caused Marmen's injury. The availability and price of non-subject goods suggest that, had the subject goods not undercut the price of the like goods in Western Canada, Marmen would still likely have lost the

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<sup>330</sup> *Transcript of In Camera Hearing* at 71–73; Exhibit NQ-2023-001-C-10 (protected) at 181.

contract in many instances. In short, the evidence indicates that the transportation and logistical factors discussed above also render Marmen uncompetitive vis-à-vis non-subject goods in Western Canada. As for the arguments and evidence relating to Marmen's quotation practices, again for the reasons outlined in the above discussion of that factor, although not sufficient on its own, the Tribunal finds it appropriate to afford to this factor some weight in the consideration of potential causes of injury when the relevant evidence is weighed on a balance of probabilities.

[234] However, having said all the above about non-attribution factors, there is one project where there is no evidence that any of the above such non-attribution factors played a role in the domestic industry losing a sale to the subject goods. This exception relates to the Apuiat project.

[235] According to the evidence,<sup>331</sup> in the Apuiat project, subject goods and like goods were in head-to-head competition. The evidence indicates that the ex-works price of the subject goods considered by the purchaser undercut the price of like goods by a significant amount.<sup>332</sup> There is no evidence that any non-subject goods were considered for that project, which was won by subject goods.<sup>333</sup> Although Vestas cancelled the contract with that supplier after the imposition of provisional duties,<sup>334</sup> the fact remains that Marmen lost the contract to subject goods during the POI.<sup>335</sup>

[236] There is no evidence that Marmen has since been awarded the contract. However, even if Vestas were to now reinitiate the project and award the contract to Marmen, the evidence indicates the contract for subject goods in this project was only cancelled due to the imposition of provisional duties. In that case, the Tribunal would still find injury on the basis that the dumping and subsidizing of the subject goods would have caused injury except for the fact that provisional duty was imposed.<sup>336</sup>

[237] There is no evidence that the causal factors, other than dumping and subsidizing, which the Tribunal identified as relevant in the preceding analysis were a factor in the Apuiat project. That project is situated in the province of Quebec, negating most if not all of the factors affecting transportation and logistics from eastern Quebec to Western Canada identified above.<sup>337</sup> Nor is there any probative evidence that criticisms or difficulties of Marmen's quotation practices played any significant role in the purchasing decision.<sup>338</sup>

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<sup>331</sup> See Exhibit NQ-2023-001-RI-04C (protected) at 5.

<sup>332</sup> The Tribunal notes that this price apparently considered by the purchaser differs from other evidence submitted by Marmen regarding its bid for that project; see Exhibit NQ-2023-001-A-06 (protected) at 74. In this case, the Tribunal considers it appropriate to rely on the evidence provided by the purchaser who actually assessed the bids, in light of both the contingent nature of certain pricing elements in Marmen's bid and the extensive efforts the Tribunal undertook to seek project-specific pricing information from Vestas.

<sup>333</sup> Again, the Tribunal considers it appropriate in this case to rely on the evidence provided by the purchaser, as opposed to certain comments made during the *in camera* hearing, which were in any case highly speculative. See: Exhibit NQ-2023-001-RI-04C (protected) at 5; *Transcript of In Camera Hearing* at 36, 40.

<sup>334</sup> Vestas publicly acknowledged awarding the contract to a Chinese supplier, although it cancelled the purchase order following the preliminary determination of dumping and subsidizing on June 20, 2023; see Exhibit NQ-2023-001-F-01 at 16.

<sup>335</sup> Marmen's uncontradicted evidence is that it learned that it was not awarded the contract on May 11, 2023, whereas the Tribunal's POI ended on June 30, 2023; Exhibit NQ-2023-001-06.B at 8; Exhibit NQ-2023-001-A-05 at 24.

<sup>336</sup> Subparagraph 42(1)(a)(ii) of SIMA.

<sup>337</sup> If anything, those factors would suggest a geographic *advantage* for Marmen in supplying this project.

<sup>338</sup> See *Transcript of In Camera Hearing* at 35–44.

[238] Based on the evidence, there is every reason to conclude that like goods would have been selected for the Apuiat project were it not for the dumping and subsidizing of the subject goods. In the Tribunal's view, the fact that the contract with the supplier was cancelled following the imposition of provisional SIMA duties adds support to this conclusion. The fact remains that Marmen suffered injury as a result of the loss of this sale during the POI. If it had not, there is every reason to think Marmen would be manufacturing those towers even now.

[239] For the foregoing reasons, the Tribunal finds that, in respect of projects in Western Canada, the causal link between the dumping and subsidizing of the subject goods and the injury suffered (or the injury that would have been suffered if not for the imposition of provisional duty) by Marmen is greatly complicated by factors other than dumping and subsidizing. More specifically, the factors affecting transportation and logistics from Marmen's production facilities in Quebec to Western Canada, and, to an extent, certain aspects of Marmen's quotation practices and competition from non-subject goods caused Marmen's lost sales on these projects.

[240] However, the Tribunal further finds that there is no evidence that any of these factors played a role in Marmen's inability to win the contract for the Apuiat project during the POI, which is characterized by a strong causal link with the dumping and subsidizing of the subject goods.

### Materiality

[241] The Tribunal will now determine whether the effects of imports of the subject goods noted above are "material", as contemplated in the definition of "injury" under section 2 of SIMA. SIMA does not define the term "material". However, both the extent of injury during the relevant time frame and the timing and duration of the injury are relevant considerations in determining whether any injury caused by the subject goods is "material".<sup>339</sup>

[242] In the present case, the Tribunal has found that the subject goods have caused injury to Marmen through the loss of the Apuiat project. The Tribunal considers the causal link between the dumping and subsidizing of the subject goods and that injury to be clearly established. Moreover, based on the number of towers that were to be supplied in that project,<sup>340</sup> and the ex-works price considered by Vestas in its purchasing decision,<sup>341</sup> Marmen was denied substantial revenues from the award of this project, in the tens of millions of dollars. The Tribunal is therefore satisfied that Marmen's injury in respect of the Apuiat project can be said to be material.

[243] As the Tribunal has concluded that the dumping and subsidizing of the subject goods caused injury to the domestic industry, it does not need to address the question as to whether the subject goods are threatening to cause injury. However, it considers it worth noting that the same dynamics underlying its injury finding would apply in an analysis of the threat of material injury as well.

[244] The Tribunal notes the written and oral evidence indicating that, notwithstanding recent disruptions and a degree of uncertainty,<sup>342</sup> demand for wind towers is expected to remain robust in

<sup>339</sup> The Tribunal suggested, in *Certain Hot-rolled Carbon Steel Plate* (27 October 1997), NQ-97-001 (CITT) at 13, that the concept of materiality could entail both temporal and quantitative dimensions, "[h]owever, the Tribunal is of the view that, to date, the injury suffered by the industry has not been *for such a duration or to such an extent* as to constitute 'material injury' within the meaning of SIMA" [emphasis added].

<sup>340</sup> Exhibit NQ-2023-001-A-06 (protected) at 74. See also *Transcript of Public Hearing* at 27–28.

<sup>341</sup> Exhibit NQ-2023-001-RI-04C (protected) at 5.

<sup>342</sup> *Transcript of Public Hearing* at 279, 292, 437–438.



Western Canada and particularly Alberta.<sup>343</sup> In this regard, there is no evidence of an imminent change to the transportation and logistical constraints, discussed above, on shipping wind towers from Quebec to Western Canada. The Tribunal therefore sees no compelling rationale to underpin a finding that Marmen is threatened with injury in Western Canada, notwithstanding the likely continued demand in that region. This rationale also underlies the Tribunal's decision to grant the regional exclusion for Western Canada requested by Siemens and Vestas, as discussed below.

[245] However, there is evidence indicating that market demand is likely to be much more broadly distributed across Canada in the near future than was the case during the POI. Demand outside Western Canada is expected to increase in the relatively near future, based on evidence from the Tribunal witnesses for CanREA with respect to projects in the Maritimes, particularly Nova Scotia<sup>344</sup> and (albeit to a lesser degree and with less certainty) Ontario.<sup>345</sup> Furthermore, evidence from witnesses for Marmen<sup>346</sup> and CanREA,<sup>347</sup> and particularly the MEIE,<sup>348</sup> indicates significant upcoming demand in Quebec in the near future.

[246] The CCCME made submissions suggesting that local content requirements or incentives in Quebec will provide Marmen with an ample source of business in that province. However, the evidence of Marmen and the MEIE show that local content requirements in Quebec have generally been replaced by incentives, which are not applied to all projects but rather on a project-by-project basis. Moreover, the price of the electricity produced by the project is weighed more heavily than the local content, and local content requirements can also be satisfied by other aspects of the project, besides the manufacture and supply of wind towers itself, such as engineering or construction of supporting infrastructure such as roads.<sup>349</sup>

[247] The Tribunal further notes Mr. Pellerin's comments that any transportation advantage Marmen may enjoy for projects in Quebec would be more than cancelled out by the margin of dumping.<sup>350</sup> Additional *in camera* testimony corroborates the relationship between anti-dumping duties and impairment of Marmen's ability to compete in Quebec.<sup>351</sup>

[248] Given that future demand for wind towers appears much more likely to be higher outside of Western Canada than was the case during the POI, especially with regard to Quebec, any injury to Marmen would be much less likely to be the result of the transportation and logistical constraints affecting shipments from Marmen's facilities to Western Canada. All things being equal, the Tribunal expects that future market dynamics between like goods and subject goods are more likely to reflect those seen in the context of the Apuiat project.

[249] The Tribunal would necessarily have to conduct any analysis regarding the threat of injury in light of such factors as the rate of increase of imports,<sup>352</sup> freely disposable production capacity of

<sup>343</sup> *Transcript of Public Hearing* at 402–403, 404, 410, 417, 419, 435, 437–438, 439–442; Exhibit NQ-2023-001-39 at 8, 10–11.

<sup>344</sup> *Transcript of Public Hearing* at 416, 419, 420, 440–442; Exhibit NQ-2023-001-39 at 8–9, 10, 11–12.

<sup>345</sup> *Transcript of Public Hearing* at 417–418, 458.

<sup>346</sup> *Transcript of Public Hearing* at 21.

<sup>347</sup> *Transcript of Public Hearing* at 417, 419, 439–442, 460; Exhibit NQ-2023-001-39 at 8.

<sup>348</sup> *Transcript of Public Hearing* at 147–148, 158–161, 162–163, 166–169, 172–173; Exhibit NQ-2023-001-B-03.

<sup>349</sup> *Transcript of Public Hearing* at 19–20, 63, 98–100, 144, 170–174.

<sup>350</sup> *Transcript of Public Hearing* at 100–101.

<sup>351</sup> *Transcript of In Camera Hearing* at 10–11.

<sup>352</sup> See, for example, Exhibit NQ-2023-001-06.B at Table 16.

exporters,<sup>353</sup> the magnitude and the margin of dumping, and the imposition of measures by other countries.<sup>354</sup> For reasons of judicial economy, the Tribunal makes no finding of threat of injury in this case. However, it offers these comments as they may be useful to assist parties in understanding the factual context and relevant factors that the Tribunal might have considered during such an exercise.

## MASSIVE IMPORTATIONS

[250] As the Tribunal has found that the dumping and subsidizing of the subject goods have caused injury, it will need to assess, pursuant to paragraph 42(1)(b) of SIMA, whether injury has been caused by a massive importation which could result in the application of retroactive duties on subject goods released during the period of 90 days before the CBSA's preliminary determination.<sup>355</sup>

[251] Marmen took no position on the issue of massive importation. Siemens submitted that the nature of wind towers as custom-built capital goods makes them particularly unsuited to stockpiling and that there is no evidence of such on the record. No other parties made submissions on this issue.

[252] For the purpose of assessing massive importations, the Tribunal's questionnaires gathered data in respect of imports and inventories of the subject goods in all four quarters of 2022 and in the first two quarters of 2023. In selecting representative periods for its analysis,<sup>356</sup> the Tribunal examined both the first quarter (Q1) of 2023 over Q1 2022 and the second quarter (Q2) of 2023 over Q2 2022. The evidence indicates that import volumes in both Q1 and Q2 of 2023 were lower than in the same respective periods in 2022. No inventories were reported in these time periods.<sup>357</sup>

[253] On the basis of the foregoing, the Tribunal finds that there is no evidence of massive importations and therefore no evidence that injury was caused by massive importations.

## EXCLUSIONS

[254] The Tribunal received 12 requests to exclude products from any finding, although 3 were ultimately withdrawn.<sup>358</sup>

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<sup>353</sup> See, for example, Exhibit NQ-2023-001-07.B (protected) at Table 45, at annexes 4, 5; Exhibit NQ-2023-001-A-01 at 269–273; Exhibit NQ-2023-001-A-02 (protected) at 189.

<sup>354</sup> See, for example, Exhibit NQ-2023-001-06.B at Table 46.

<sup>355</sup> As noted above, paragraph 42(1)(c) of SIMA governs massive importations of subsidized goods in respect of which a specification has been made under clause 41(1)(b)(ii)(C) (i.e., prohibited subsidy). In its final determination, the CBSA did not make a finding that the subsidies in issue were prohibited under clause 41(1)(b)(ii)(C).

<sup>356</sup> Paragraph 37.11(a) of the Regulations.

<sup>357</sup> Exhibit NQ-2023-001-06.B at Table 22.

<sup>358</sup> Vestas originally submitted exclusion requests for wind towers and sections thereof with walls of certain steel grades, wind towers and sections thereof of certain heights, and wind towers and sections thereof with certain diameters. It subsequently withdrew these exclusion requests in its response dated October 5, 2023. See Exhibit NQ-2023-001-28.04.

[255] SIMA implicitly authorizes the Tribunal to grant exclusions from the scope of a finding.<sup>359</sup> Exclusions are an extraordinary remedy that may be granted at the Tribunal's discretion, that is, when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry.<sup>360</sup> The rationale is that, despite the general conclusion that the dumping or subsidizing of the goods has caused or is threatening to cause injury to the domestic industry, there may be case-specific evidence that imports of particular products within the scope of the definition of subject goods have not caused or are not threatening to cause injury.

[256] In determining whether an exclusion is likely to cause injury to the domestic industry, the Tribunal considers such factors as whether the domestic industry produces, actively supplies or is capable of producing like goods in relation to the subject goods for which the exclusion is requested.<sup>361</sup>

[257] The onus is upon the requester to demonstrate that imports of the specific goods for which the exclusion is requested are not injurious or are not threatening to be injurious to the domestic industry.<sup>362</sup> Thus there is an evidentiary burden on the requester to file evidence in support of its request.<sup>363</sup> However, there is also an evidentiary burden on the domestic producers to file evidence in order to rebut the evidence filed by the requester.<sup>364</sup>

[258] Ultimately, the Tribunal must determine whether it will exercise its discretion to grant product exclusions on the basis of its assessment of the totality of the evidence on the record.

[259] The Tribunal will now address the product exclusion requests pertaining to the subject goods that it received from each of the requesters indicated above.

### Regional exclusion requests

[260] The parties referred to the test for granting a regional exclusion request in *Polyisocyanurate Thermal Insulation Board*,<sup>365</sup> more recently applied in 2015 in *Concrete Reinforcing Bar*

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<sup>359</sup> *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA); *Sacilor Aciéries v. Anti-dumping Tribunal* (1985) 9 C.E.R. 210 (CA); Binational Panel, *Induction Motors Originating in or Exported from the United States of America (Injury)* (11 September 1991), CDA-90-1904-01; Binational Panel, *Certain Cold-Rolled Steel Products Originating or Exported From the United States of America (Injury)* (13 July 1994), CDA-93-1904-09.

<sup>360</sup> See, for example, *Aluminum Extrusions* at para. 339; *Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.

<sup>361</sup> *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) at para. 245 [*Fasteners*].

<sup>362</sup> *Fasteners* at para. 243.

<sup>363</sup> *Aluminum Extrusions* at para. 192. The Tribunal will generally reject product exclusion requests where there is a lack of cogent case-specific evidence concerning the likely non-injurious effect of imports of particular products covered by the definition of the subject good in support of the requesters' claims. Indeed, a failure to provide sufficient information prevents the parties opposing the request from adequately responding and leaves the Tribunal in a position where it lacks evidence to find that imports of particular products for which exclusions are requested are not likely to cause injury to the domestic industry.

<sup>364</sup> A failure to do so could result in the requested exclusions being granted. In any case, much like its conclusion on the issue of whether the dumping and subsidizing of the subject goods has caused or is threatening to cause injury to the domestic industry, the Tribunal's decision on exclusion requests must be based on positive evidence, irrespective of the party that filed it.

<sup>365</sup> *Polyisocyanurate Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT).

(*Rebar I*).<sup>366</sup> In *Rebar I*, the Tribunal framed the test as whether the goods for which an exclusion is required “do not threaten to cause injury to the domestic industry because the domestic producers have no reasonable prospect of becoming active suppliers in [the region in question], even if anti-dumping and countervailing duties are imposed.”<sup>367</sup> The Tribunal sees no reason to depart from that approach to considering the regional exclusions requested in the present inquiry.

### Western Canada

[261] Siemens and Vestas have requested regional exclusions for all subject goods imported for installation in wind energy projects located in Western Canada, defined as the provinces and territories west of the Ontario-Manitoba border.

[262] As noted above, the arguments and evidence of the parties with regard to this exclusion request are essentially the same as those relating to the issue of transportation and logistics as a factor causing injury. Essentially, Siemens and Vestas argued that any injury suffered by Marmen with respect to projects in that region was due to factors other than dumping and subsidizing, and therefore that excluding such projects from a finding of injury or threat of injury would not injure Marmen for the same reason.

[263] The Tribunal agrees. In its view, the above finding that Marmen was not materially injured by the subject goods in respect of projects in Western Canada, and the absence of evidence of any likely change to factors supporting that finding in the near term, justify granting the exclusion on the basis that doing so will not injure the domestic industry.

[264] The Tribunal therefore grants the requested exclusion from its finding of goods meeting the product definition and imported for installation in energy projects located west of the Ontario-Manitoba border.

### Maritime provinces

[265] Vestas has further requested a regional exclusion for subject goods imported for installation in wind energy projects located in the Maritime provinces, defined as Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador.<sup>368</sup>

[266] Vestas provided only the following statement in support of its exclusion request for wind towers for use in the Maritime provinces:

Transportation and logistics difficulties are such that the transportation of wind towers from the domestic producer’s facility in Quebec to the Maritime provinces of Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland is unfeasible for a host of reasons

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<sup>366</sup> *Concrete Reinforcing Bar* (9 January 2015), NQ-2014-001 (CITT) [*Rebar I*].

<sup>367</sup> i.e., after having taken the impact of the dumping and subsidizing of the goods out of the equation. See *Rebar I* at para. 277.

<sup>368</sup> The Tribunal notes that the latter province’s full name is Newfoundland and Labrador and that this province may not typically be included in the phrase “Maritime provinces” or “the Maritimes”. As it was included in Vestas’ exclusion request, it is included here but with its full legal name; however, the Tribunal will retain the description “Maritime provinces” used in Vestas’ exclusion request, because that is how the request was described in its submissions and at the hearing. This definition will ultimately have no impact beyond this decision, as the requested exclusion was ultimately not granted.

including: rail car, train and barge availability, choke points on transportation routes, permitting and cargo movement limitations, weight and size limitations.<sup>369</sup>

[267] Marmen submitted that Vestas has not provided evidence to support its claims that transportation from Marmen's production facilities to the Maritime provinces is not feasible, nor identified any projects in that region that would face transportation or logistical issues in being supplied by Marmen, and that the request should be denied on that basis alone. Marmen argued that it is absurd for Vestas to claim that the Maritimes are accessible to goods from China but not from Marmen, whose facilities (especially Matane) are quite close to the Maritimes, and that in fact Marmen has a transportation advantage over subject goods because of this proximity. It maintained that it is able and willing to supply the Maritime provinces, including several specific upcoming or potential projects in that region, and that granting this exclusion request would therefore cause it injury.

[268] Unlike the extensive evidence adduced with regard to transportation between Marmen's facilities and western Canada, the Tribunal has been presented with no specific evidence that such factors are likely to undermine Marmen's ability to service the Maritime provinces. Indeed, the proximity of Marmen's facilities in Trois-Rivières and Matane to the Maritimes would, if anything, be expected to give it an advantage in supplying them.<sup>370</sup> There is no evidence that the transportation routes established by Vestas and Siemens for reaching Alberta would be of relevance in supplying the Maritimes.

[269] Of the transportation issues identified with regard to Western Canada, only the potential benefit to OEMs from co-loading shipments with non-subject wind turbine components would appear to conceivably give subject goods an advantage in the Maritimes. The Tribunal does not consider this to be sufficient to support a conclusion that Marmen has no reasonable prospect of actively supplying the region. In any case, such an analysis would be speculative, as the evidence regarding the benefits of co-loading was adduced in the context of the injury and exclusion arguments concerning Western Canada.

[270] Based on the foregoing, the Tribunal denies the request to exclude from its finding of injury goods imported for installation in energy projects located in the Maritime provinces.

### **Project-specific exclusion requests**

[271] The Capstone LPs requested exclusions related to specific projects, namely the Buffalo Atlee project and Wild Rose 2 project. Siemens also requested, in the event its requested exclusion for Western Canada is not granted, exclusions for the Buffalo Atlee project and Wild Rose 2 project, as well as for the Paintearth project and the Buffalo Plains project.

[272] The exclusion requests indicate that all the projects for which Siemens and the Capstone LPs requested exclusions are located in the province of Alberta. As such, the Tribunal considers them moot in light of the exclusion from its finding of goods imported for installation in Western Canada, that is, west of the Ontario-Manitoba border.

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<sup>369</sup> Exhibit NQ-2023-001-24.04 at 11.

<sup>370</sup> The Tribunal notes the confidential witness testimony concerning Marmen's access to nearby port facilities. See *Transcript of In Camera Hearing* at 11–12; Exhibit NQ-2023-001-A-14 (protected) at 53–55.

[273] For greater certainty, it is understood that the exclusion of goods imported for installation west of the Ontario-Manitoba border covers goods imported for use in the specific projects for which Siemens and the Capstone LPs requested exclusions.

## Product exclusion requests

### Offshore

[274] Vestas and the CCCME have both requested an exclusion request for offshore wind towers.

[275] The CCCME argued that offshore wind towers and sections thereof are a distinct category of goods meeting the product definition. This argument is essentially on the basis that offshore wind towers are larger, heavier and more expensive than onshore wind towers that have not been established to be dumped and have not been produced in Canada. It submitted that offshore and onshore wind towers are not substitutable for one another, as offshore towers require different production, transportation and installation processes and are designed for different environments, namely the ocean, characterized by wetness, high corrosion and significant structural stress.<sup>371</sup>

[276] Vestas submitted that Marmen does not have, nor does it intend to soon develop, the capability to produce towers of the diameter (above 6.9 metres), steel grades, or wall thickness (greater than 80 mm) needed for offshore wind towers. It submitted that Marmen therefore would have to pursue a claim of retardation but that such a claim would necessarily fail because the domestic industry does not produce like goods, and the complainant would have demonstrated no substantial commitment to the domestic industry.

[277] Marmen objected to the exclusion request. It argued that the exclusion is speculative and premature, since there is no Canadian offshore wind towers market, as reflected by Siemens' questionnaire response to the effect that Siemens is unaware of any offshore wind projects in Canada.<sup>372</sup>

[278] Marmen also refers to an industry publication forecasting that Canada's first offshore wind turbine will not be installed until 2031.<sup>373</sup> It referred to *Heavy Plate* and *Photovoltaic Modules and Laminates (Photovoltaic Modules RR)*,<sup>374</sup> where the Tribunal rejected exclusion requests on the basis that they were premature and speculative.<sup>375</sup> Marmen submitted that it will consider the business case for expanding its product offering in Canada if and when a domestic market for offshore wind towers materializes, as it currently intends to do in the United States,<sup>376</sup> but cannot be expected to imminently invest in production capabilities for a product that may not be purchased for at least another eight years.

[279] In the *Photovoltaic Modules RR*, the Tribunal emphasized that the key question in considering an exclusion request is whether granting the exclusion will cause injury to the domestic industry, which could occur "by the granting of exclusions covering products for which there has not

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<sup>371</sup> Exhibit NQ-2023-001-24.01 at 3–4.

<sup>372</sup> Exhibit NQ-2023-001-12.16A at 4.

<sup>373</sup> Exhibit NQ-2023-001-A-06 (protected) at 268.

<sup>374</sup> *Photovoltaic Modules and Laminates* (25 March 2021), RR-2020-001 (CITT) [*Photovoltaic Modules RR*].

<sup>375</sup> *Heavy Plate* at para. 191; *Photovoltaic Modules RR* at paras. 135–136, 149, 158–159.

<sup>376</sup> Exhibit NQ-2023-001-A-03 at 12.

been any domestic production of identical or substitutable products during this time.”<sup>377</sup> The Tribunal elaborated that it “must be mindful that granting an exclusion for recently developed technologically advanced products could essentially prevent the domestic producers from fulfilling an emerging demand for such products in the market and thereby cause injury.”<sup>378</sup> Ultimately, it denied the exclusion request on the basis that “the domestic industry will likely, in the near to medium term, be capable of producing goods that would compete with the Requested Products and there is sufficient evidence that it is actively planning for production.”<sup>379</sup>

[280] The Tribunal notes that the analysis in the *Photovoltaic Modules RR* was made in the context of an already existing Canadian market for the products subject of the exclusion request. This is not the case for offshore wind towers. In contrast, the Tribunal in *Heavy Plate* found an exclusion request to be premature and speculative without assessing whether the domestic industry was actively planning to become capable of producing products which would compete with the excluded goods.

[281] In the Tribunal’s view, the analysis in the *Photovoltaic Modules RR* was based on the specific factual circumstances of that case. The products for which an exclusion was being requested were “seemingly untested products” which were being sold in Canada but still “new for the Canadian market.”<sup>380</sup> The Tribunal does not accept that direct evidence of planned production by the domestic industry is a prerequisite for the Tribunal to determine an exclusion request as speculative or premature.

[282] Vestas’ evidence that “the first calls for bids will be in 2025”<sup>381</sup> appears to refer to bidding on “leases for offshore wind development” from the province of Nova Scotia and not necessarily for the actual construction of wind turbines or supply of wind towers. The Tribunal also notes the testimony of Mr. Melo from CanREA that no offshore wind projects are currently planned in Canada or indeed expected until 2030,<sup>382</sup> as well as the confidential witness statements and testimony of Marmen’s witnesses regarding the status and timeline for offshore wind development in Canada.<sup>383</sup>

[283] The Tribunal also finds Marmen’s confidential evidence regarding the steps it would take to gain the capacity to produce offshore wind towers, if a market for such products were to develop in Canada, to be persuasive and credible.<sup>384</sup>

[284] Based on the evidence, the Tribunal finds that there is currently no domestic market for offshore wind towers and that no such market is likely to develop for many years. This suggests that the Tribunal would have an opportunity to revisit such an exclusion, if requested, in the course of an expiry review.<sup>385</sup>

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<sup>377</sup> *Photovoltaic Modules RR* at paras. 135, 149.

<sup>378</sup> *Photovoltaic Modules RR* at para. 136.

<sup>379</sup> *Photovoltaic Modules RR* at paras. 158–159.

<sup>380</sup> Indeed, the Tribunal explicitly described the assessment of credible evidence of planned production by the domestic industry as dispositive “in the circumstances of this review, especially considering the nature of the products at issue.” See *Photovoltaic Modules RR* at paras. 136, 155, 158.

<sup>381</sup> Exhibit NQ-2023-001-A-03 at 33.

<sup>382</sup> *Transcript of Public Hearing* at 420, 443.

<sup>383</sup> *Transcript of In Camera Hearing* at 50–56; Exhibit NQ-2023-001-A-14 (protected) at 78.

<sup>384</sup> *Transcript of In Camera Hearing* at 62–63; Exhibit NQ-2023-001-RI-01A (protected) at 6.

<sup>385</sup> Or, if circumstances change sooner, in an interim review, as noted in Marmen’s submissions and by the Tribunal in *Heavy Plate* at para. 191.

[285] The request to exclude offshore wind towers from the Tribunal's finding of injury is therefore denied, on the basis that it is both speculative and premature.

### Thickness

[286] Vestas requested an exclusion for wind towers with wall thickness (in millimetres) equal to or greater than 80 mm.

[287] Marmen submitted that granting this exclusion would cause it injury because it intends to produce towers with this specification in the near future. Marmen asserts that it intends to invest in the machinery required to produce a product having a wall thickness of 80 mm to 89 mm, should the present inquiry result in a finding of injury or threat of injury, and to do so regardless of whether it receives a purchase order requiring steel plates of this thickness.<sup>386</sup>

[288] Marmen also contends that Vestas' questionnaire response indicates that Vestas did not purchase section walls using these steel grades and has no requests for proposals specifying a wall thickness of 80 mm or more.<sup>387</sup>

[289] In reply, Vestas argues that Marmen has adduced no evidence of a firm intention to begin producing a product with a wall thickness of 80 mm to 89 mm. If the Tribunal is persuaded of Marmen's intention, it should still consider granting an exclusion for wind towers with a wall thickness of 90 mm or more as Marmen has expressed no intention to develop a specific capacity to produce such sections.

[290] This exclusion request (as well as Vestas' apparent alternative request) appears to be closely related to the one for offshore wind towers, given that wall thicknesses of 80 mm or more form part of how offshore wind towers are defined. The Tribunal therefore finds this exclusion request to be speculative and premature, for the same reasons as those referable to offshore wind towers.<sup>388</sup>

[291] The request to exclude wind towers with wall thickness (in millimetres) equal to or greater than 80 mm is therefore denied.

## **OTHER MATTERS**

[292] The Tribunal wishes to comment briefly on the manner in which Vestas participated in the Tribunal's investigation. Although Vestas ultimately provided most of the information the Tribunal requested, receiving that information in a timely manner was much more difficult than should have been the case.<sup>389</sup>

[293] The Tribunal appreciates that its questionnaires may in some cases not correspond perfectly to the market realities or business practices of questionnaire recipients, especially where the Tribunal

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<sup>386</sup> Exhibit NQ-2023-001-26.02 at 131; Exhibit NQ-2023-001-A-04 (protected) at 28. See also Marmen's public questionnaire response, Exhibit NQ-2023-001-09.01D at 3.

<sup>387</sup> Exhibit NQ-2023-001-12.14C at 17.

<sup>388</sup> The Tribunal also considers Vestas' apparent alternative request to exclude goods with even greater wall thicknesses as supporting the view that these requests are merely speculative, bordering on opportunistic.

<sup>389</sup> See, for example: Exhibit NQ-2023-001-30, Exhibit NQ-2023-001-31; Exhibit NQ-2023-001-42. The Tribunal notes that many more follow-ups and requests for further information were addressed to Vestas in the course of this inquiry than those that are reflected in these formal letters.



is inquiring into the market dynamics of specific goods for the first time, as is the case in the present inquiry. Exchanges between questionnaire recipients and the Tribunal in an effort to resolve such discrepancies are a normal part of the Tribunal's data-gathering process, and the Tribunal in all cases appreciates the investment of time and resources this process can require of questionnaire recipients. However, the Tribunal wishes to emphasize that it is not appropriate for a questionnaire recipient, particularly in light of the strict time frames applicable to Tribunal inquiries, to attempt to defer the provision of information requested in the questionnaire until the time of its written case brief.

[294] As noted in the Tribunal's letter of September 22, 2023, the Tribunal relies on information collected during the questionnaire process to properly conduct its inquiry as mandated by SIMA, the *Canadian International Trade Tribunal Act* and related regulations. The right of parties to Tribunal proceedings to appear and to present arguments and evidence does not excuse them from the requirement to provide full responses to the Tribunal's questionnaires when so directed.

## CONCLUSION

[295] The Tribunal finds, pursuant to subsection 43(1) of SIMA, that the dumping and subsidizing of the subject goods have caused material injury to the domestic industry.

[296] Furthermore, the Tribunal excludes from its finding goods meeting the product definition imported for installation in energy projects located west of the Ontario-Manitoba border.

Serge Fréchette

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Serge Fréchette  
Presiding Member

Georges Bujold

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Georges Bujold  
Member

Susan Beaubien

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Member