Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2016-004

Certain Fabricated Industrial Steel Components

Finding issued
Thursday, May 25, 2017

Reasons issued
Friday, June 9, 2017

Canada

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

CERTAIN FABRICATED INDUSTRIAL STEEL COMPONENTS ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF KOREA AND THE KINGDOM OF SPAIN

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of fabricated structural steel and plate-work components of buildings, process equipment, process enclosures, access structures, process structures, and structures for conveyancing and material handling, including steel beams, columns, braces, frames, railings, stairs, trusses, conveyor belt frame structures and galleries, bents, bins, chutes, hoppers, ductwork, process tanks, pipe racks and apron feeders, whether assembled or partially assembled into modules, or unassembled, for use in structures for: 1. oil and gas extraction, conveyance and processing; 2. mining extraction, conveyance, storage, and processing; 3. industrial power generation facilities; 4. petrochemical plants; 5. cement plants; 6. fertilizer plants; and 7. industrial metal smelters; but excluding electrical transmission towers; rolled steel products not further worked; steel beams not further worked; oil pump jacks; solar, wind and tidal power generation structures; power generation facilities with a rated capacity below 100 megawatts; goods classified as "prefabricated buildings" under HS Code 9406.00.90.30; structural steel for use in manufacturing facilities used in applications other than those described above; and products covered by *Certain Fasteners* (RR-2014-001), *Structural Tubing* (RR-2013-001), *Carbon Steel Plate* (III) (RR-2012-001), *Carbon Steel Plate* (VII) (NQ 2013-005) and *Steel Grating* (NQ-2010-002); originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain, and the subsidizing of the above-mentioned goods originating in or exported from the People's Republic of China, have caused injury or are threatening to cause injury.

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated April 25, 2017, that the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea and the Kingdom of Spain have been dumped and that the above-mentioned goods from the People's Republic of China have been subsidized, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping of the above-mentioned goods originating in or exported from the People's Republic of China, the Republic of Korea (excluding those goods exported by Hanmaek Heavy Industries Co., Ltd.) and the Kingdom of Spain (excluding those goods exported by Cintasa, S.A.), and the subsidizing of the above-mentioned goods from the People's Republic of China, have caused injury to the domestic industry.

Furthermore, the Canadian International Trade Tribunal excludes from its finding goods imported within the 2017 calendar year by Andritz Hydro Canada Inc. from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

Jean Bédard
Jean Bédard
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Rose Ritcey
Rose Ritcey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	May 1 to 5 and 8, 2017
Tribunal Panel:	Jean Bédard, Presiding Member Serge Fréchette, Member Rose Ritcey, Member
Support Staff:	Peter Jarosz, Lead Counsel Courtney Fitzpatrick, Counsel Shawn Jeffrey, Lead Analyst Joseph Long, Analyst Mylène Lanthier, Analyst

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Supermetal Structures Inc.	M. Drew Tyler
Supreme Group LP	Anne-Marie Oatway
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Parties that Requested Product Exclusions	**Counsel/Representatives**
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Fluor Canada Ltd.	Darrel Pearson Jesse Goldman Laura Murray Sabrina A. Bandali Jacob Mantle
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STATEMENT OF REASONS

INTRODUCTION

1. The mandate of the Canadian International Trade Tribunal (the Tribunal) in this inquiry[1] is to determine whether the dumping and subsidizing of certain fabricated industrial steel components (FISC) (the subject goods) has caused injury or is threatening to cause injury to the domestic industry.

2. The Tribunal has determined, for the reasons that follow, that the dumping of the subject goods originating in or exported from the People's Republic of China (China), the Republic of Korea (Korea) (excluding those goods exported by Hanmaek Heavy Industries Co., Ltd. (Hanmaek)) and the Kingdom of Spain (Spain) (excluding those goods exported by Cintasa, S.A. (Cintasa)), and the subsidizing of the subject goods from China, have caused injury to the domestic industry. The Tribunal excludes from its finding goods imported within the 2017 calendar year by Andritz Hydro Canada Inc. (Andritz) from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

RESULTS OF THE CBSA'S INVESTIGATION

3. This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on July 22, 2016, by Supermetal Structures Inc. (Supermetal), Supreme Group LP (Supreme) and Waiward Steel LP (Waiward) and the subsequent decision of the CBSA on September 12, 2016, to initiate an investigation into the alleged injurious dumping and subsidization.

Supermetal Structures Inc.

4. Supermetal is a producer of FISC. In addition, Supermetal provides modularization and erection services and fabricates structural steel components for bridges and commercial buildings. Supermetal's main production facility is in Lévis, Quebec. It has two other production facilities in Canada—one in Sherbrooke, Quebec, and the other in Leduc, Alberta. Over the Tribunal's period of inquiry (POI) Supermetal primarily produced FISC for oil and gas extraction, conveyance and processing, industrial power generation facilities, fertilizer plants and industrial smelters.[2]

Supreme Group LP

5. Supreme is headquartered in Edmonton, Alberta. It has nine separate operating companies, four of which primarily produce FISC under the Supreme Steel LP banner in Edmonton, Alberta, Winnipeg, Manitoba, Saskatoon, Saskatchewan, and Delta, British Columbia. As well, over the POI it operated another entity in Edmonton, Alberta, which could produce FISC when required. Supreme's fabrication business focuses primarily on the fabricated structural steel sector, which includes FISC. Supreme also fabricates structural steel components for bridges, commercial projects and provides steel erection services. Over the POI approximately 85 percent of its steel fabrication was of FISC for oil and gas and mining projects.[3]

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1. The inquiry is conducted pursuant to section 42 of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 [*SIMA*].
2. Exhibit NQ-2016-004-A-03 at para. 11, Vol. 11.
3. Exhibit NQ-2016-004-B-03 at para. 13, Vol. 11.

Waiward Steel LP

6. Waiward has a main facility located in Edmonton, Alberta, and a second facility in Spruce Grove, Alberta. Waiward is a producer and erector of FISC and also offers module assembly and general construction services. Over the POI, Waiward produced FISC primarily for the oil and gas industry and, to a lesser extent, for the mining and petrochemical industries.[4]

7. The CBSA's investigation triggered the initiation of a preliminary injury inquiry by the Tribunal. The Tribunal issued its preliminary determination on November 10, 2016, and determined that the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury or was threatening to cause injury to the domestic industry.

8. On April 25, 2017, the CBSA made a final determination of dumping and subsidization. The CBSA determined the following margins of dumping and amounts of subsidy:

Exporters	**Margin of Dumping***	**Amount of Subsidy (Renminbi per Metric Tonne)**	**Amount of Subsidy***
China			
Baosteel Construction Co., Ltd.	32.9%	151.70	0.8%
Modern Heavy Industries (Taicang) Co., Ltd.	45.8%	607.66	3.3%
United Steel Structures Ltd.	45.8%	675.47	4.6%
All other exporters in China	45.8%	11,656.06	70.2%
Total - China	**41.0%**	N/A	**34.6%**
Korea			
SK Engineering & Construction Co., Ltd.	2.4%	N/A	N/A
Hanmaek Heavy Industries Co., Ltd.	1.9%	N/A	N/A
All other exporters in Korea	45.8%	N/A	N/A
Total - Korea	**3.1%**	N/A	N/A
Spain			
Cintasa, S.A.	0.0%	N/A	N/A
All other exporters in Spain	45.8%	N/A	N/A
Total - Spain	**42.4%**	N/A	N/A

*Expressed as a percentage of export price

4. Exhibit NQ-2016-004-C-03 at para. 11, Vol. 11.

PRODUCT

Product Definition

9. The subject goods are defined as:

> fabricated structural steel and plate-work components of buildings, process equipment, process enclosures, access structures, process structures, and structures for conveyancing and material handling, including steel beams, columns, braces, frames, railings, stairs, trusses, conveyor belt frame structures and galleries, bents, bins, chutes, hoppers, ductwork, process tanks, pipe racks and apron feeders, whether assembled or partially assembled into modules, or unassembled, for use in structures for: 1. oil and gas extraction, conveyance and processing; 2. mining extraction, conveyance, storage, and processing; 3. industrial power generation facilities; 4. petrochemical plants; 5. cement plants; 6. fertilizer plants; and 7. industrial metal smelters; but excluding electrical transmission towers; rolled steel products not further worked; steel beams not further worked; oil pump jacks; solar, wind and tidal power generation structures; power generation facilities with a rated capacity below 100 megawatts; goods classified as "prefabricated buildings" under HS Code 9406.00.90.30; structural steel for use in manufacturing facilities used in applications other than those described above; and products covered by *Certain Fasteners* (RR-2014-001), *Structural Tubing* (RR-2013-001), *Carbon Steel Plate* (III) (RR-2012-001), *Carbon Steel Plate* (VII) (NQ-2013-005) and *Steel Grating* (NQ-2010-002).

Product Information

10. The CBSA provided the following additional product information[5]:

> [35] With regards to fabricated industrial steel components, "industrial" is not a technical term, but a reference to the seven end uses identified in the product definition. FISC is used in the construction industry for support frameworks and integrated basic processing equipment traditionally fabricated by FISC suppliers. FISC are inherently structural. They are components specifically designed to be assembled into a particular structure. In their simplest form, they are custom structural components that form the skeleton of a structure. These components are custom fabricated into pieces that precisely fit together to form support structures. Structures may include an enclosed structure, such as a building, or a structure that is open to the elements... FISC includes walkways, ladders and handrails that form part of the steel structure.
>
> [36] In some cases, FISC will include the skeleton framework and integrated structural objects supported by the framework, such as hoppers, chutes and bins. These objects are typically constructed from steel plate and are closely related to the structure or are integrated as part of it . . .
>
> . . .
>
> [38] FISC also includes structural components of heavy equipment, such as conveyance machinery. In mining and oil sands extraction, ore and other raw materials are carried along large, heavy conveyance systems. FISC producers will fabricate the galleries, trusses, and apron feeder components for these pieces of machinery. These FISC are structural frameworks designed to support a particular piece of integrated machinery.
>
> . . .
>
> [48] Goods that are not covered by the subject goods definition include steel components for electrical transmission towers, pre-fabricated metal buildings falling under HS Code 9406.00.90.30, goods subject to specified existing Canadian International Trade Tribunal orders or findings, power plants with a rated capacity of less than 100 megawatts, and solar, wind and tidal power generation

5. Exhibit NQ-2016-004-04A, Vol. 1 at paras. 35-36, 38, 48-49.

> structures. Also excluded are structural steel components for use in structures for manufacturing or processing, other than the seven end uses specified in the product definition.
>
> [49] Structural steel components for use in "commercial" structures, such as warehouses, commercial buildings, high rises, hospitals, and cultural buildings (e.g. arenas, theatres, etc.) are not covered by the product definition.

Purchase/Sale of FISC

11. In its statement of reasons, the CBSA has described the uses and purposes of FISC as follows:[6]

> [65] In industrial settings, FISC is used to construct a variety of structures including buildings and structures that support processing facilities, equipment and systems and parts used for conveyancing and material handling, including but not limited to conveyor belt frame structures and galleries and bents, bins, chutes, hoppers, silos, storage and process tanks, and pipe racks.
>
> [66] FISC for buildings and process structures is used to construct a skeleton that fulfills the load bearing function required for the erection of the building or process. Structures composed of FISC are diverse. They include modest structures requiring several hundred tons of steel to multistory complexes or large support structures such as pipe racks used in oil and gas facilities or giant structures to hold a hopper for processing mining resources and requiring thousands of tons of steel.

12. As can be seen from the CBSA's description, FISC is purchased as part of a larger effort to procure and construct a capital project. It may also be purchased to fulfill ongoing operational needs (typically in smaller quantities). FISC is a custom product; it is not sold through distributors or retailers.[7] The purchaser of FISC may be the owner or developer of a project. More commonly, however, an engineering firm will be engaged to engineer the product, procure the supplies and construct the product. These firms are referred to as "EPCs" (Engineering, Procurement and Construction).[8]

13. FISC producers generally pursue project opportunities through EPC/developer relationships, customer prequalification, web portals, industry networking, referrals, market research, and industry publications. Upon identifying projects, fabricators generally seek to develop relationships with key stakeholders within the target customer organization.[9]

14. Purchases of FISC are made primarily through a request for proposal (RFP) or request for quotation (RFQ) process. FISC may also be sole-sourced directly from a producer.[10] Either of these procurement processes may involve some negotiation with the owner/developer or the EPC. A common example of this would be design or technical changes taking place following the receipt of bids.[11] The timing of the RFP or RFQ process varies from project to project. The evidence suggests, however, that FISC producers typically bid on projects three to six months in advance of a contract award.[12]

15. FISC is typically purchased on the basis of total price as the purchaser is buying a complete set of custom fabricated components that fit together into a custom structure which is unique.[13] FISC is shipped

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6. *Ibid.* 1 at paras. 65-66.
7. Exhibit NQ-2016-004-D-03 at para. 49, Vol. 11A.
8. Exhibit NQ-2016-004-B-03 at para. 28, Vol. 11.
9. *Ibid.* at para. 31; Exhibit NQ-2016-004-12.07 at 7, Vol. 3B.
10. Exhibit NQ-2016-004-D-03 at para. 52, Vol. 11A.
11. Exhibit NQ-2016-004-B-03 at para. 35, Vol. 11.
12. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 66-67; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 314-315.
13. Exhibit NQ-2016-004-C-03 at para. 39 Vol. 11.

either unassembled or partially assembled from the fabricating facility to the construction site. Once they are at the construction site, structural components are placed and connected by an erector. The erector may be either an independent company or an operation related to the fabricator.[14] Delivery of individual components requires coordination between the fabricator and the erector. FISC may also be delivered to a modular yard, where it is assembled or partially assembled into modules and then shipped to the construction site.[15]

16. Delivery schedules to a project site vary significantly based on the size and complexity of the project. Most often delivery begins 16 to 20 weeks from the date of contract and can occur over a few months or over one or two years, sometimes more.[16] FISC, whether unassembled (referred to in the industry as "sticks") or in modules, is produced and then delivered to the job site in a deliberate sequence by the fabricator in order to allow the erector to proceed efficiently.[17]

LEGAL FRAMEWORK

17. 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[18] 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".

18. 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.

19. Given that the subject goods are originating in or exported from more than one country, the Tribunal must also determine whether it will conduct a single, cumulated injury analysis or a separate analysis for each subject country. If the prerequisite conditions allowing the Tribunal to make a cumulative assessment are met,[19] the Tribunal will make its assessment of the effect on the domestic industry of the dumping and subsidizing of the subject goods from all the subject countries, or some of them as the case may be, on a cumulative basis.

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

14. Exhibit NQ-2016-004-04A, Vol. 1 at para. 68.
15. Exhibit NQ-2016-004-B-03 at para. 44, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 142-144.
16. *Ibid.* at 49-50; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 314-315; Exhibit NQ-2016-004-04A, Vol. 1 at para. 69.
17. *Ibid.*
18. Subsection 2(1) of *SIMA* defines "retardation" as ". . . material retardation of the establishment of a domestic industry". As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.
19. *SIMA*, subsection 42(3).

21. Once those key determinations have been made, the Tribunal can then assess whether the dumping and, where applicable, the subsidizing of the subject goods have caused material injury to the domestic industry.[20]

22. 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.

Procedural Issues and Notes

Treatment of Confidential Information

23. In its submission, the Delegation of the European Union to Canada (the EU Delegation) recalled Article 6.5.1 and referred to Articles 12.2.1 and 12.2.1(iv) of the World Trade Organization (WTO) *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.[21] The EU Delegation submitted, specifically, that the public investigation report lacked information on import volumes from subject countries, that injury indicators, such as profitability, investments, cost of production or capacity utilization were not provided in aggregated or indexed form and urged the Tribunal to provide a meaningful investigation report allowing interested parties to exercise their rights of defence.

24. The WTO Appellate Body has held that Article 6.5.1 of the *WTO Anti-dumping Agreement* serves to balance the goals of protecting confidentiality while ensuring the transparency of the investigation process.[22] As a result, any non-confidential summaries must protect the confidential information at issue, while at the same time contain sufficient detail to permit other parties a reasonable understanding of the substance of the information, so that they may respond and defend their interests.[23]

25. The Tribunal has a statutory responsibility to protect information designated by parties as confidential, which must be balanced with the procedural fairness protections available under Canadian law. The Tribunal believes that it has met its transparency obligations by placing as much information on the public record as possible, and by providing non-confidential summaries of information which is by nature confidential. The Tribunal is satisfied that more than sufficient information was publicly available to allow parties to gain an understanding of the claims made against them and to respond fully. The Tribunal also notes that under the *Canadian International Trade Tribunal Act* and the *Canadian International Trade Tribunal Rules*, confidential information may be disclosed in its entirety to counsel who have provided a

20. Injury and threat of injury are distinct findings; the Tribunal is not required to make a finding relating to threat of injury pursuant to subsection 43(1) of *SIMA* unless it first makes a finding of no injury.
21. https://www.wto.org/english/docs_e/legal_e/19-adp.pdf [WTO *Anti-dumping Agreement*]. Article 6.5.1 provides as follows: "The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of reasons why summarization is not possible must be provided."
22. WTO Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R [*EC – Fasteners*] at para. 542; see, also, WTO Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R at para. 7.380.
23. *EC – Fasteners* at para. 542; see, also, WTO Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R at para. 6.38.

declaration and undertaking.[24] Providing access to confidential information in this way allows the Tribunal to obtain maximum voluntary participation from interested parties, ensure transparency and, at the same time, protect confidential information.

26. With respect to the allegation made by the EU Delegation based on Article 12.2.1(iv) of the *WTO Anti-dumping Agreement*, the Tribunal notes that the investigation report is not a preliminary or final determination, nor does it impose provisional measures or give notice of the conclusion of an investigation. As such, Article 12.2 of the WTO *Anti-dumping Agreement* is not relevant to the content of the investigation report. Even if this provision were applicable to the investigation report, it explicitly provides that "due regard be[ing] paid to the requirement for the protection of confidential information". This is what the Tribunal has done with the contents of the investigation report as with the entirety of its record.

27. Regarding the arguments from the Embassy of Spain that there is a contradiction between adopting anti-dumping measures against Spanish imports of FISC and the recently concluded *Comprehensive Economic and Trade Agreement* (*CETA*) between Canada and the EU, the Tribunal sees no such contradiction. *CETA* explicitly reaffirms parties' rights and obligations under Article VI of the *General Agreement on Tariffs and Trade 1994*, the *Anti-dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). It also commits Canada and the EU member states to applying trade remedies pursuant to a fair and transparent process that ensures full and meaningful disclosure of all essential facts, which, as explained above and throughout these reasons, the Tribunal has done in this inquiry.

Section 33 of the *CITT Act*

28. Member Ritcey was unable to attend days four through six of the Tribunal's public hearing. As all three panel members were not present, the Chairperson of the Tribunal directed himself to receive the remaining evidence relating to this inquiry on behalf of the Tribunal under the authority of section 33 of the *CITT Act*. Member Fréchette, though not the designated member, participated in the process throughout the hearing.

29. In accordance with subsection 33(2) of the *CITT Act*, Member Bédard made a report to the Tribunal, in the form of a letter attaching the transcript of the public and in camera hearings held on May 4-5 and 8, 2017, copies of which were made available to parties. After receiving and reviewing these reports, the Tribunal made its finding as if the evidence received by Member Bédard had been received by the Tribunal, in accordance with subsection 33(3) of the *CITT Act*. As such, despite Member Ritcey's absence during a portion of the public hearing phase, Members Bédard, Ritcey and Fréchette constitute the quorum of three members required by section 13 of the *CITT Act* to exercise the Tribunal's powers and perform the Tribunal's duties and functions for the purposes of this inquiry.

LIKE GOODS AND CLASSES OF GOODS

30. 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

24. The filing and disclosure of confidential information on the record of this proceeding is governed by sections 45 and 46 of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*] and rule 16 of the *Canadian International Trade Tribunal Rules*, S.O.R./91-499.

Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.[25]

Like Goods

31. 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.

32. 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).[26]

33. In the present case, like goods are particularly difficult to describe briefly due to the complex definition of the subject goods; however, the Tribunal notes that

- the subject goods can be unassembled, or "assembled or partially assembled into modules";
- the subject goods have seven specific end uses.[27]

The Tribunal was aware of issues created by these definitions as early as its preliminary injury inquiry and had to take adequate measures to safeguard against their potential impact on the data that it collected. This will be discussed further in the reasons below.

Assembled or Partially Assembled FISC and Modules

34. The product definition includes unassembled FISC, as well as assembled FISC including FISC "partially assembled into modules" (the French version of the product definition equivalent to "assembled or partially assembled into modules" refers to "*soit assemblés ou partiellement assemblés en modules*" [underlining added for emphasis]).

35. There was a significant dispute and much argument about this terminology as contained in the English product definition and the nature of the modules that are covered by the product definition. Overall, the parties agreed that FISC assembled with other FISC into assemblies or "FISC-only modules" (or simple modules) were like goods.[28] Parties also agreed that completed modules composed of significant amounts of non-FISC, such as manufactured process equipment with a FISC base (complex modules), were not like goods.[29] However, parties disagreed whether FISC incorporated into the more complex modules were still

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25. 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.).
26. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.
27. The French version of the product definition states that the subject goods include those "*. . . assemblés ou partiellement assemblés en modules*". This will be discussed further below.
28. Exhibit NQ-2016-004-H-01 at paras. 19, 28, Vol. 13; Exhibit NQ-2016-004-I-01 at para. 20, Vol. 13A; *Transcript of Public Hearing*, Vol. 6, 8 May 2017, at 594-595.
29. Exhibit NQ-2016-004-H-01 at para. 28, Vol. 13; Exhibit NQ-2016-004-I-01 at para. 25, Vol. 13A; Exhibit NQ-2016-004-A-06 at para. 95, Vol. 11B; *Transcript of Public Hearing*, Vol. 6, 8 May 2017, at 558; Exhibit NQ-2016-004-28.01D, Vol. 1.3A at 118.10.

subject and like goods. The domestic industry argued that the FISC incorporated into such complex modules were subject and like goods, while parties opposing submitted that they should not be so considered. The basis for this difference in viewpoint is that the addition of non-FISC material to FISC changes the character of the good under consideration.

36. To the extent that the Tribunal agrees that the subject goods' definition lacks clarity, the Tribunal has jurisdiction to interpret it.[30] As such, in conducting its inquiry, the Tribunal must ascertain the scope of the goods to which the preliminary determination applies (i.e. the subject goods). While the Tribunal must not *redefine* the subject goods, it "must endeavour to ascertain the meaning of the words" in the CBSA's definition, including by permitting those knowledgeable in the industry to adduce evidence.[31]

37. The Tribunal finds that simple modules (i.e. FISC assembled with other FISC) are certainly subject and like goods. This is supported by the ordinary meaning of FISC ". . . whether assembled or partially assembled into modules, or unassembled . . .". To the extent that FISC is incorporated into complex modules and may be transformed into a new product through the modularization process, the Tribunal is not convinced whether or not the FISC falls within the scope of the subject goods' definition. There are too many differing compositions, purposes and other characteristics within this general description of such goods for the Tribunal to accurately assess the issue.

38. For these reasons, the Tribunal's questionnaires instructed respondents to report subject and like goods data on unassembled FISC and FISC assembled into modules, as long as such assembly does not include non-FISC components and is done prior to delivery to the customer. The investigation report was also completed on this basis.

39. However, the Tribunal finds that the issue of whether more complex modules or the FISC incorporated into them are subject goods is somewhat academic for the purposes of the Tribunal's inquiry. This is because the evidence gathered through questionnaire responses and over the course of the public hearing shows that over the POI most subject imports were of unassembled FISC.[32] Further evidence shows that importation of complex modules is a prospective concept and not yet a significant reality in the Canadian market.[33] As unassembled FISC and FISC-only modules appear to have been the forms of the goods that were most common in the marketplace during the POI, the Tribunal finds it appropriate that its inquiry focused on these forms of the subject and like goods. Moreover, there is no evidence that the minor amounts of FISC typically incorporated into process equipment would change the data in the investigation report in any meaningful manner.[34] The main impact would be on the volume data in the investigation report, since average pricing data is of limited use in this case.

40. To the extent that complex modules containing FISC are imported in the future, the Tribunal need not engage in other speculative interpretations of the product definition at this time. Such an issue, should it arise, is best dealt with in subjectivity proceedings set out in sections 56 to 61 of *SIMA*.

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30. See, for example, *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) [*Aluminum Extrusions*] at para. 57, and *Bicycles* (July 3 1997), RR-97-003 (CITT).
31. *DeVilbiss (Canada) Limited, Phelan and Smith Limited and Waffle's Electric Limited v. Anti-dumping Tribunal*, [1983] 1 F.C. 706 [*DeVilbiss*].
32. Exhibit NQ-2016-004-16 (collective protected exhibit containing the replies to the Importers'/Owners'/EPC's Questionnaire).
33. Exhibit NQ-2016-004-H-05 at para. 7, Vol. 13A; see also Exhibit NQ-2016-004-16.43A (protected), Vol. 6P.
34. *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 387-388; *Transcript of Public Hearing*, Vol. 5, 5 May 2017, at 495-496.

41. The Canadian producers also submitted that modularization is a construction method and that modules constructed for FISC are not finished, manufactured "commercial goods" in their own right (although they concede that, in theory at least, there may be rare exceptions to this).[35] They submitted that a module is not a functional, finished good until it is connected with other modules or erected portions of the final structure.

42. As to the assembly of FISC into 'FISC-only' modules, the Tribunal's questionnaires captured these costs separately but they have been included in the domestic industry's financial results as have the revenues from selling the assembled FISC. The resulting costs and revenues, which include assembled FISC, show a complete picture of the industry's financial performance. Thus, the domestic industry's data includes the production of assembled modules, i.e. FISC assembled with other FISC, prior to the delivery to the customer.[36]

43. Similarly, the Tribunal is convinced that domestic production of complex modules is not the primary consumption method of FISC and that it is at best a recent phenomenon.[37] As set out above, the Tribunal's data shows that most FISC is sold unassembled. Further evidence is that FISC is not commonly supplied through acquisition of more complex modules but is independently sourced from fabricators such as the complainants and "free issued" by the purchaser to the module builder. Accordingly, the FISC-only financial statements of the domestic industry accurately represent the impact of the subject goods on the production of the like goods, both in fact primarily composed of unassembled FISC. Any addition of FISC incorporated into complex modules would not change these conclusions.

44. For those reasons, the Tribunal views its data as comprising the vast majority of the subject and like goods.

Non-Listed End Uses

45. At the preliminary injury inquiry phase of this matter, the Tribunal conducted its analysis on the basis that domestically produced FISC, limited to the end uses listed in the product definition, were like goods in relation to the subject goods. The Tribunal also signalled that it would continue to gather evidence as to which goods produced and sold in Canada are like goods, on the basis of the principle, established in WTO reports, that the scope of the like goods must be co-extensive with the scope of the subject goods.[38]

46. During this final phase of the injury inquiry, there were some arguments advanced by opposing parties that structural steel for certain end uses other than those specified in the product definition (including structural steel for commercial buildings) should be considered like goods. According to these parties, goods for other end uses, such as for commercial buildings, forestry or bridge-building, can be produced on the same equipment, by the same producers, using the same inputs, and, therefore, should be considered like goods. However, as it did in its preliminary injury inquiry, and for the reasons outlined below, the Tribunal considers that fabricated structural steel components are not like goods to subject FISC if they are destined

35. Exhibit NQ-2016-004-A-06 at para. 72, Vol. 11B.
36. It was acknowledged, by Fluor Canada Ltd. (Fluor), in NQ-2016-004-H-01 at para. 80, Vol. 13, that it agrees with this approach.
37. Exhibit NQ-2016-004-H-05 at para. 7, Vol. 13A; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 207-208; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 306.
38. WTO Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R at 7.156-7.158 (as modified by WTO Appellate Body Report WT/DS264/AB/R). See also *Unitized Wall Modules* (12 November 2013), NQ-2013-002 (CITT) [*Unitized Wall Modules*] at para. 34.

for end uses not listed in the definition or are fabricated structural steel components used in commercial buildings.

47. As noted above, the Tribunal starts from the principle that the like goods must be coextensive with the subject goods. As such, the Tribunal must ascertain the scope of the subject goods before it can determine the scope of the like goods. The product definition clearly covers fabricated *industrial* structural components. The Tribunal finds that the inclusion of the word "industrial" in the product definition differentiates the structural steel components that are included in the definition from other types of non-industrial structural steel components, such as those used in commercial and institutional buildings.

48. Accordingly, the Tribunal finds that domestically produced structural steel components used in commercial and institutional buildings are not like goods to the subject goods. The Tribunal's questionnaires and investigation report were designed and completed on this basis. This interpretation finds support in the evidence that was gathered over the course of this inquiry, which demonstrates that FISC is more complex to fabricate than non-industrial structural steel components. In particular, the Tribunal heard that equipment designed for FISC and employees skilled in FISC may be much less economical in the context of fabricating non-industrial structural steel components.[39]

49. Turning next to the question of fabricated structural steel components for forestry and bridge-building, the Tribunal finds that the product definition clearly enumerates seven specific end uses. As such, the Tribunal can only analyze injury to the domestically produced goods having the same end uses. Once again, the Tribunal's questionnaires and investigation report were designed and completed on this basis.

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 regarded as comprising a single class of goods.[40]

51. The Tribunal will analyze injury to one class of goods as it did in the preliminary injury inquiry. The few arguments to the contrary were not convincing and essentially were a repetition of the arguments for exclusion requests (addressed below in these reasons). The Tribunal is of the view that the like goods cover a spectrum of products, which have uses and characteristics that closely resemble each other and are produced in Canada by the domestic industry.

52. For the same reasons as set out in its determination in the preliminary injury inquiry, the Tribunal finds that domestically produced FISC are like goods to the subject goods and that there is only one class of goods.[41]

39. *Transcript of Public Hearing*, Vol. 2, 2 May 2017 at 163-165, 172, 180 and 225-226.
40. *Aluminum Extrusions* at para. 115; see, also, *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.
41. *Certain Fabricated Industrial Steel Components* (10 November 2016), PI-2016-003 (CITT) [*FISC PI*] at para. 23.

DOMESTIC INDUSTRY

53. 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.

54. 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.[42]

55. The Tribunal collected data from 16 domestic producers.[43] Having reviewed this data, the Tribunal finds that the domestic producers who supplied complete responses including detailed production, sales and financial information[44] constitute a major proportion of the total production of like goods.

Domestic Production

56. At the questionnaire design phase of this inquiry, questions were raised as to which types of production constitute "domestic production" of like goods. This included production by subcontractors to, and tolling providers for, the complainants.

57. The Tribunal asked subcontractors to report their production in a domestic producers' questionnaire, but FISC produced pursuant to a tolling arrangement was reported by the domestic producer who procured the FISC, i.e. the producers who ordered the tolling service.

58. As a result, the "Firm Activities Schedule" of the producers' questionnaire asked domestic producers to indicate whether they produced FISC for final sale, produced FISC for another producer, provided FISC production services under a tolling arrangement for another producer, or procured FISC from a third-party service provider through a tolling arrangement.

59. In addition, Schedule 2 of the producers' questionnaire asked domestic producers to provide their domestic production of FISC. The production volume reported in this schedule includes FISC produced for other firms under a subcontracting arrangement and FISC procured from a third-party service provider through a tolling arrangement. Schedule 2 does not include goods produced for other firms under a tolling

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42. 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.); WTO Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R at para. 7.207; *EC – Fasteners* at paras. 411, 419, 430; WTO Panel Report, *Argentina – Definitive Anti-dumping duties on poultry (Brazil)*, WT/DS241/R at paras. 7.341-7.344.
43. Specifically one domestic producer, Andritz, indicated that it was both a domestic producer of FISC as well as an importer of FISC from China. As such, there is a question as to whether Andritz should be excluded from the "domestic industry" because it imports subject goods. The Tribunal will typically treat a domestic producer of the like goods as if it were not part of the domestic industry if the domestic producer is primarily a conduit for the importation of the subject goods. In deciding whether to exclude a domestic producer, the Tribunal's practice is to take into account various structural and behavioural factors. Given Andritz's low volume of subject imports and the specific and limited purpose for which those imports were used, Andritz has been treated as a domestic producer for the purposes of this inquiry.
44. See NQ-2016-004-07A (protected), Table 25 and Schedule 1, Vol. 2.1A.

arrangement. The Tribunal also asked domestic producers to separately report any FISC purchased from another domestic producer (i.e. goods purchased under a subcontracting arrangement).

60. Organizing the questionnaire in this way removed any distinction between domestic producers and so-called subcontractors and avoided any "double counting" of production.

61. This also allowed the Tribunal to distinguish between the volume of FISC actually produced by a domestic producer on its own equipment and the volume of FISC that was produced for that domestic producer by someone else, and to more accurately capture each domestic producer's capacity utilization rate.

62. The financial information for the domestic industry in the present case includes tolling fees, i.e. costs, and the revenues from selling the goods by the producer who ordered the tolling service. In this case, the Tribunal has included in its injury analysis the minor volume of FISC that is made from tolled production or purchased.

NEGLIGIBILITY, CUMULATION AND CROSS-CUMULATION

63. Subsection 42(3) of *SIMA* directs the Tribunal to make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods if it is satisfied that the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant, the volumes of dumped and subsidized goods from each subject country is not negligible,[45] and cumulation is appropriate taking into account conditions of competition between the goods of each country or between them and the like goods.[46] Additionally, subsection 42(4.1) of *SIMA* directs that, if the volume of the subject goods from a country is negligible, the Tribunal must terminate its inquiry in respect of those goods.

Negligibility

64. The Tribunal typically relies on volume data collected during the CBSA's period of investigation to determine negligibility.[47] Volumes from Spain were small but are not negligible when analyzed over the

45. Subsection 2(1) of *SIMA* defines "negligible" as meaning "in respect of the volume of goods of a country, less than 3% of the total volume of goods that are released into Canada from all countries and that are of the same description as the goods. However, if the total volume of goods of three or more countries — each of whose exports of goods into Canada is less than 3% of the total volume of goods that are released into Canada from all countries and that are of the same description — is more than 7% of the total volume of goods that are released into Canada from all countries and that are of the same description, the volume of goods of any of those countries is not negligible".
46. The Tribunal usually considers that some of the relevant factors relating to the conditions of competition could include interchangeability, quality, pricing, distribution channels, modes of transportation, timing of arrivals and geographic dispersion. See, for example, *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 16; see, also, *Waterproof Footwear* (25 September 2009), NQ-2009-001 (CITT) at note 28.
47. *Concrete Reinforcing Bar* (9 January 2015), NQ-2014-001 (CITT) at para. 92; *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (6 January 2016), NQ-2015-001 (CITT) at para. 84; *Circular Copper Tube* (2 January 2014), NQ-2013-004 (CITT) at footnote 41; *Hot-rolled Carbon Steel Plate* (4 June 2014), NQ-2013-005 (CITT) at para. 64; *Copper Pipe Fittings* (6 March 2007), NQ-2006-002 (CITT) at para. 71. This approach is also consistent with Canada's notification to the WTO Committee on Anti-Dumping Practices that it would normally make this assessment on the basis of the CBSA's period of investigation. See Canada, *Notification concerning the time-period for determination of negligible import volumes* (27 January 2003), G/ADP/N/100/CAN. See also WTO Committee on Anti-Dumping Practices, *Recommendation concerning the time-period to be considered in making a determination of negligible import volumes* (29 November 2002), G/ADP/10.

CBSA's entire period of investigation.[48] Therefore, the Tribunal will not terminate its investigation as to Spain. As will be discussed below, Spanish imports will be cumulated with Korean imports.

Cumulation

65. This inquiry involves imports from Korea and Spain that are dumped and imports from China that are subsidized and dumped. The Tribunal must now determine if there are imported goods that it will assess cumulatively or whether there are any imports from countries that should be assessed separately.

66. As noted in a number of previous decisions, the Tribunal is cognizant of the panel and Appellate Body reports in *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* on this issue.[49] In particular, the Tribunal notes the Appellate Body's finding that ". . . being subject to simultaneous countervailing duty investigations 'is a necessary precondition for a cumulative assessment to be undertaken consistently with [Article 15.3 of the *WTO Agreement on Subsidies and Countervailing Measures*]."[50] The Tribunal is also cognizant of the more recent WTO panel finding in *Canada – CSWP (Taiwan)*[51] and considers this decision to be confirmation that it is permissible to cumulatively assess the effects of dumping and subsidizing of the same goods from a single country.

67. The Tribunal is of the view that, read together, the above WTO reports permit the cumulative assessment of the effects of dumping and subsidizing of goods from a single country but do not permit a cumulative assessment of the effects of goods from a country that have been dumped and subsidized with the effects of goods from another country that are only dumped or only subsidized. By necessary extension, the WTO reports also make it impermissible to cumulate the effects of goods that are dumped from a country with the effects of goods that are subsidized from another country and vice versa.

68. In the context of this final injury inquiry, similar to that in *US – Carbon Steel (India)*, the Tribunal observes that imports from China are subject to both an antidumping and a countervailing duty investigation, whereas Korean and Spanish imports are subject only to an antidumping investigation.

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48. See NQ-2016-004-07B (protected), Table 7, Vol. 2.1A. Further to the WTO decision in WTO Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1 [*Canada – CSWP (Taiwan)*], negligibility was determined without the volume of imports from exporters with zero or *de minimis* margins of dumping. While the Tribunal's POI was from January 1, 2013, to December 31, 2016, the CBSA's period of investigation was from January 1, 2014, to June 30, 2016.
49. WTO Appellate Body Report, WT/DS436/AB/R [*US – Carbon Steel (India)*]. In this dispute, India challenged the imposition of countervailing duties by the United States on imports of certain steel products from India, arguing that the U.S. International Trade Commission had acted inconsistently with Article 15.3 of the *SCM Agreement* by cumulating the effects of imports from five countries subject to countervailing duties (including India) with imports from six other countries that were subject to antidumping investigations *only* (India's imports were both subsidized and dumped). India argued that, under the terms of Article 15.3 of the *SCM Agreement*, its imports should not have been cumulated with goods that were subject to a dumping investigation *only*.
50. *US – Carbon Steel (India*) at para. 4.589. The WTO Appellate Body agreed with the WTO Panel that Article 15.3 of the *SCM Agreement* ". . . refers to imports 'simultaneously subject to countervailing duty investigations'", such that the authorization to cumulatively assess the effects of "such imports" requires that the imports be "subject to countervailing duty investigations". Conversely, ". . . the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3". *US – Carbon Steel (India*) at para. 4.579.
51. The WTO Panel Report was not appealed.

69. The fact that the Tribunal can conduct a separate analysis is contemplated by *SIMA*. Subsection 42(3) of *SIMA* states that the Tribunal shall make an assessment of the cumulative effect of the dumping or subsidizing of goods that are imported from more than one country if it is satisfied that "... (b) an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the preliminary determination applies that are imported into Canada from any of those countries and . . . goods to which the preliminary determination applies that are imported into Canada from any other of those countries . . .". Conversely, where the Tribunal is not satisfied that an assessment of the cumulative effects is appropriate, the Tribunal may proceed with separate (or de-cumulated) assessments of the effects of the dumping or subsidizing of goods imported from more than one country.

70. The Supreme Court of Canada, in *R. v. Hape*, stated that "[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[52] Given the WTO findings discussed above and the Tribunal's obligation to interpret and apply *SIMA* in a manner that is in conformity with Canada's international obligations (except where *SIMA* clearly conveys a contrary intent, which is not the case here), the Tribunal is of the view that assessing the effects of imports from China, which are both dumped and subsidized, cumulatively with the effects of dumped imports from Korea and Spain would not be appropriate.

71. The Tribunal also finds that the conditions of competition between the Korean and Spanish goods, and between those goods and the domestic like goods, are sufficient to warrant a cumulative assessment of the effects of the dumped goods from those countries. As discussed below, FISC is a custom product that is typically sold via a competitive RFP process. There are examples on the record of producers from Korea and Spain competing head to head with each other and with Canadian producers on RFPs.[53] As bids must meet strict technical and scheduling requirements, the Tribunal is of the view that the FISC bid by these producers in response to a particular RFP is largely interchangeable in terms of quality, timeliness and, most likely, distribution. Furthermore, these examples show competition in both Eastern and Western Canada, which demonstrates geographic dispersion. For these reasons, the Tribunal will assess the effects of the dumped and subsidized goods from China separately from the dumped goods from Korea and Spain.

Cross-Cumulation

72. There are no legislative provisions in *SIMA* that directly address the issue of cross-cumulation of the effects of both dumping and subsidizing. However, as noted in previous cases,[54] the effects of dumping and subsidizing of the same goods from a particular country are manifested in a single set of injurious 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 of each to the dumping and the subsidizing respectively.

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52. *R.* v. *Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII) at para. 53; See also *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 SCR 1324.
53. See, for example, Exhibit NQ-2016-004-50A; Exhibit NQ-2016-004-50C; Exhibit NQ-2016-004-I-04 at para. 64, Vol. 14B; Exhibit NQ-2016-004-16.30 at 256-260, Vol. 6N.
54. 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.

73. In terms of the treatment of the dumped goods from China versus the subsidized goods from China, as these practices concern the same goods the Tribunal finds that it is not necessary or practicable to disentangle their effects. As set out above, *Canada – CSWP (Taiwan)* strongly confirms previous WTO reports on this issue and indicates that this approach is correct.[55] Therefore, the Tribunal will make a cross-cumulative assessment of the effects of the dumping and subsidizing of the subject goods from China.

INJURY ANALYSIS

74. Subsection 37.1(1) of the *Special Import Measures Regulations*[56] prescribes that, in determining whether the dumping and subsidizing have caused material injury to the domestic industry, the Tribunal is to consider the volume of the dumped and subsidized goods, their effect on the price of like goods in the domestic market, and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the injury on the basis of the factors listed in subsection 37.1(1), and whether any factors other than the dumping and subsidizing of the goods have caused injury.

Methodology for the Injury Analysis

The Period of Inquiry

75. Both the EU Delegation and the Embassy of Spain made submissions as to the appropriateness of the investigation period and submitted that the investigation should have been limited to a 12-month period. The EU Delegation suggested that a 30-month investigation period was chosen in order to include countries whose import volumes, according to the EU Delegation, would have been negligible. The EU Delegation and the Embassy of Spain referred to the *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* by the WTO Committee on Anti-Dumping Practices as their authority on the subject.[57]

76. It is not clear whether these submissions refer to the Tribunal's POI (covering four years, being the calendar years 2013 to 2016) or the CBSA's period of investigation (which covers 30 months, from January 1, 2014, to June 30, 2016). With regard to the CBSA's period of investigation, the Tribunal has already noted that the CBSA has exclusive jurisdiction over investigations regarding the dumping or subsidizing of any goods, which includes establishing the period of investigation.

77. In the event that these submissions refer to the Tribunal's POI, the Tribunal notes that the length of the POI is chosen at the discretion of the Tribunal in the circumstances of the particular case, since it is not set out in *SIMA* or the *Anti-dumping Agreement*, nor is there case law indicating what should be an

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55. *Unitized Wall Modules* at para. 54; *Canada – CSWP (Taiwan)* at para. 7.100 provides as follows: "The text of [Article 3.5] focuses the injury analysis on the effect of the dumped imports, rather than on the effects of the dumping *per se*. . . . The focus on the dumped imports continue in the non-attribution provision in the third sentence of Article 3.5, which requires investigating authorities to examine any known factors "other than the dumped imports" which at the same time are injuring the domestic industry, and ensure that any injury caused by such other factors is not attributed "to the dumped imports". Logically, the imports subject to the [dumping and countervailing duty] investigation cannot simultaneously be both the "dumped imports" referred to in these provisions **and** factors "other than the dumped imports" referred to in the third sentence of Article 3.5." See also WTO Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1 at paras. 264, 268.
56. S.O.R./84-927 [*Regulations*].
57. G/ADP/6, 16 May 2000, online: <http://docsonline.wto.org>.

appropriate duration or how far back the starting point of an investigation may be. Moreover, the Tribunal fails to see how an injury inquiry covering only 12 months would be appropriate in view of the recommendation of the WTO Committee on Anti-Dumping Practices that "the period of data collection for injury investigations normally should be at least three years. . . ".[58] Since the three-year period in the Committee's guidelines is the recommended minimum period, the four-year period selected by the Tribunal for this investigation is not only consistent with the three-year *minimum* period recommended by the Committee's guidelines, but exceeds it and therefore leads to a higher degree of adherence with the recommendation.

The Importance of Price

78. FISC is not a commodity product.[59] As discussed above, FISC is used to construct large-scale capital projects (for the end uses specified in the product definition) and, in lesser volumes, to fulfill the ongoing operational needs of these projects. As such, demand for FISC is heavily influenced by capital spending, which is in turn heavily influenced by commodity prices.[60] Because FISC is procured on a project by project basis, and orders for FISC can often be quite large, the loss (or gain) of a single project can significantly impact a producer's profitability.[61]

79. Unlike purchases of commodity products, which are often based primarily on price, the evidence indicates that there are non-price considerations which play a significant role in a purchaser's decision-making process. When asked about the importance of price in purchasing decisions, 14 out of 23 respondents to the Tribunal's questionnaire ranked the lowest delivered net price as "very important".[62] However, factors such as product quality, meeting technical specifications, delivery time and terms, and the ability to meet schedules ranked higher, with between 21 and 23 respondents indicating that these factors are "very important".[63] In addition, the Tribunal heard testimony that acceptance of commercial terms and conditions are key considerations for some purchasers.[64] Further, for purchases with lower lead times, the ability to deliver the product on time may figure prominently into the decision.[65]

80. Nonetheless, the Tribunal finds generally that, as FISC is typically purchased as part of a competitive RFQ process, price is determinative in deciding among bids that are technically compliant.[66] This is true whether it is the project owner or an EPC procuring the goods. The Tribunal heard evidence that project owners/developers and EPCs are increasingly price sensitive due to low commodity prices, particularly the price of oil.[67] In addition, some EPCs are employing a lump sum turnkey business model,

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58. *Ibid.*
59. Exhibit NQ-2016-004-B-03 at para. 82, Vol. 11; Exhibit NQ-2016-004-H-01 at para. 110, Vol. 13.
60. Exhibit NQ-2016-004-15.09, Vol. 5 at 90; Exhibit NQ-2016-004-V-03 at para. 13, Vol. 11A; Exhibit NQ-2016-004-A-03 at para. 91, Vol. 11; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 316, 348.
61. Exhibit NQ-2016-004-B-03 at para. 137, Vol. 11; Exhibit NQ-2016-004-C-04 (protected) at para. 71, Vol. 12; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 227; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 86.
62. Exhibit NQ-2016-004-06A, Table 9, Vol. 1.1A.
63. *Ibid.*
64. *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 328; *Transcript of Public Hearing*, Vol. 4, 4 May 2017, at 437, 442.
65. *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 323, 325; *Transcript of In Camera Hearing*, Vol. 1, 1 May 2017, at 42-43; *Transcript of In Camera Hearing*, Vol. 2, 2 May 2017, at 88.
66. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 102; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 327-328; *Transcript of Public Hearing*, Vol. 4, 4 May 2017, at 408, 443.
67. Exhibit NQ-2016-004-B-03 at para. 82, Vol. 11; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 329-330.

whereby they are paid a single amount to carry out the engineering and procurement activities for a project.[68] In that context, the price of procuring FISC for the project directly impacts an EPC's profitability.[69] In the words of the Tribunal's witness from Canadian Natural Resources Limited, once an EPC is awarded a contract to procure goods "it's their lump sum", meaning that any cost overruns or savings accrue to the EPC.[70]

Use of RFP Data

81. Given the nature of the subject and like goods, parties on both sides urged the Tribunal to consider RFP-specific information in its analysis rather than using average prices and volumes, as is usually the case in other inquiries.[71] This is because each project is unique, leading to specifications of FISC used to construct a particular project which may not be comparable to FISC used in other projects.[72] As well, FISC is a general category of goods within which the price per tonne varies significantly even within a project scope (usually due to the labour-intensive nature of particular pieces, such as intricate plate work).[73]

82. The Tribunal agrees with the parties on both sides who submitted that average pricing is not useful in this case.[74] Accordingly, the Tribunal's analysis has focused on approximately sixty RFPs regarding which it gathered information. The Tribunal's finding and factual conclusions are anchored primarily in an analysis of these RFP situations which specify what products are being procured in terms of their scope, value and volume.[75] When analyzing RFP data, the Tribunal relied on the clearest illustrations of competition between what were admittedly subject and like goods, i.e. FISC or FISC assembled with other FISC, consistently with the Tribunal's comments on the scope of the product definition.

83. It is important to note that in its assessment of injury, the Tribunal did not consider the RFP data related to projects awarded in 2013 for which the subject goods also entered Canada in 2013. In the Tribunal's view, 2013, the first year of its POI, is the baseline or comparison year for such awards and importations.

68. *Ibid.*, at 380; *Transcript of Public Hearing*, Vol. 4, 4 May 2017, at 435.
69. *Ibid.* at 435-436.
70. *Ibid.* at 412.
71. *FISC PI* at para. 42; Exhibit NQ-2016-004-H-01 at paras. 86, 89, Vol. 13; Exhibit NQ-2016-004-A-01 at para. 8, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 52-53; Exhibit NQ-2016-004-J-01 at paras. 20-21, Vol. 13A.
72. Exhibit NQ-2016-004-A-01 at para. 70, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 52-53.
73. *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 226; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 52-53; Exhibit NQ-2016-004-C-03 at paras. 38-46, Vol. 11; Exhibit NQ-2016-004-A-01 at para. 70, Vol. 11.
74. The Tribunal notes that it has adopted a similar approach, for similar reasons, in previous inquiries related to capital goods, or goods that share the characteristics of capital goods. See, for example, *Liquid Dielectric Transformers* (20 November 2012), NQ-2012-001 (CITT) at para. 65; *Unitized Wall Modules* at paras. 80-81.
75. This information was provided in response to Schedule 8 of the Importers'/Owners'/EPC's Questionnaire as well as the Tribunal's RFI process.

Exclusion of Insignificantly Dumped or Subsidized Imports

84. Undumped or insignificantly dumped imports cannot be part of the Tribunal's injury analysis per the *Canada – CSWP (Taiwan)* and previous WTO decisions,[76] and investigations as to exporters of such goods must be terminated.[77]

85. According to the aforementioned WTO decisions, the entire volume of imports from exporters with a zero or less than two percent margin of dumping are not considered to be dumped for the purposes of assessing injury. The WTO Panel, in *Canada – CSWP (Taiwan)*, stated that "[a]rticle 5.8 effectively means that there is no legally cognizable dumping by an exporter with a final *de minimis* margin of dumping. As a result, imports from that exporter should not be treated as "dumped" for the purposes of the analysis and final determinations of injury and causation."[78]

86. While currently *SIMA* does not expressly address this issue in its continued references to "dumped or subsidized goods", the Tribunal has conducted its injury inquiry to comply with these WTO decisions. The Tribunal has, in the past, excluded exporters with zero margins from its injury analysis even though some of their export transactions may have been dumped.[79] In this case, the Tribunal has applied the same principle to exporters with insignificant margins of dumping.[80]

87. Parties also argued that sales which would have been lost even if the margin of dumping or subsidy was eliminated (i.e. where the underselling exceeded the dumping and subsidization) were not injurious. Without taking a position on the validity of this concept, the Tribunal believes that it would be inappropriate to conduct this analysis using the average exporter margins of dumping calculated by the CBSA, particularly in the context of a case where parties on both sides have stressed the difficulties in relying on average data.

88. Nevertheless, the Tribunal conducted such an analysis for those projects for which the CBSA provided project-specific normal values and export prices. The result of this analysis was that only one of approximately 60 projects may have been lost anyway after taking into account the project-specific margin of dumping and the domestic premium.[81] Accordingly, the Tribunal is satisfied that the injury suffered by the domestic industry was caused by the dumping and subsidizing of the subject goods and was material in either scenario.

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76. WTO Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R at para. 7.628. See also WTO Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW (as modified by Appellate Body Report WT/DS141/AB/RW) at para. 6.131, and WTO Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R at paras. 7.300-7.303.
77. *Canada – CSWP (Taiwan)* at paras. 7.21 and 7.37. Please see a full discussion of the exclusion of insignificantly dumping exporters in the "Exclusions" section of these reasons.
78. *Canada – CSWP (Taiwan)* at para. 7.83. See also para. 7.88.
79. *Oil Country Tubular Goods* (2 April 2015), NQ-2014-002 (CITT) at paras. 94-104; *Carbon Steel Welded Pipe* (11 December 2012), NQ-2012-003 (CITT) at paras. 83-85.
80. There were no Chinese exporters who had insignificant margins of dumping and amounts of subsidy. Where such exporters had insignificant amounts of subsidy, together with a significant margin of dumping, they were included in the Tribunal's cross-cumulated injury analysis.
81. Exhibit NQ-2016-004-49, at 292-298, Vol. 2A; Exhibit NQ-2016-004-07B, Tables 34-38, 42, Vol. 2,1A; Exhibit NQ-2016-004-07C, Tables 39-41, Vol. 2.1A; Exhibit NQ-2016-004-C-06 at para. 32, Vol. 12A; Exhibit NQ-2016-004-A-03 at para. 40, Vol. 11; Exhibit NQ-016-004-B-03 at para. 83, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 61-62; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 197-198.

Import Volumes of the Subject Goods

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

90. The parties argued that there are problems with the volume (and by extension with the unit value) data in this case. Parties were concerned that import volumes and values included non-FISC in addition to FISC. In fact, very few importers of subject goods indicated that their reported imports included non-FISC items, and the shares of import volumes held by these particular importers were very minor.[82] As well, parties expressed concern that some data in the investigation report relied on estimates and extrapolations by Tribunal staff. However, in the final version of the investigation report, there was only one importer for which its volume of imports from the U.S. was estimated and this estimated volume amounted to a very minor volume over the whole POI.[83]

91. In addition, parties were concerned that, in its investigation, the CBSA collected only value data and that the Tribunal used this data to determine negligibility. However, it must be noted that the CBSA's final determination included volume data, and it is this data that the Tribunal relied on for its conclusions on the issue of negligibility.

92. The volume data used by the Tribunal in its analysis below is actual volume data taken directly from responses to the Tribunal's questionnaires.

Chinese Import Volumes

93. In absolute terms, the total volume of imports of subject goods from China rose significantly in 2014 and peaked in 2015, decreasing in 2016 following the same trend as total imports.[84]

94. For China, from 2013-2015, imports of subject goods increased relative to domestic production and domestic sales of domestic production to owners/EPCs. This number dropped in 2016 but remained higher than in 2013 and 2014.[85]

Korean/Spanish Import Volumes

95. In absolute terms, the total volume of imports of subject goods from Korea and Spain[86] dropped in 2014, but rose significantly to a peak in 2015, and then dropped in 2016 although the volume in 2016 remained higher than in 2013 or 2014.[87]

96. The imports from Korea and Spain, taken together, decreased relative to domestic production and domestic sales of domestic production to owners/EPCs between 2013 and 2014, increased in 2015 and decreased in 2016 but remained higher than in 2013 and 2014.[88]

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82. Exhibit NQ-2016-004-16.10 (protected), Vol. 6 at 69; Exhibit NQ-2016-004-16.10F (protected), Vol. 6M at 275.10; Exhibit NQ-2016-004-16.32B (protected), Vol. 6O at 1; Exhibit NQ-2016-004-06A, Vol. 1.1A at 19.
83. Exhibit NQ-2016-004-16.65 (protected), Vol. 6Q at 172; *Ibid.* at 229.2.
84. Exhibit NQ-2016-004-07B (protected), Table 1, Vol. 2.1A.
85. *Ibid.*, Tables 1, 4; Exhibit NQ-2016-004-07A (protected), Schedule 1, Vol. 2.1A.
86. Such volumes exclude goods exported by Cintasa and Hanmaek, as set out earlier in these reasons. All other exporters and imports therefrom are referred to as "subject imports" and "subject companies".
87. Exhibit NQ-2016-004-07B (protected), Table 1, Vol. 2.1A.
88. *Ibid.*, Tables 1, 4; Exhibit NQ-2016-004-07A (protected), Schedule 1, Vol. 2.1A.

Conclusion

97. All evidence indicates that there was a significant increase in the volume of subject imports from China and a significant increase in the volume of subject imports from Korea and Spain throughout the POI until 2015.

Price Effects of the Dumped and Subsidized Goods[89]

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

99. The complainants reported price undercutting by subject goods in the range of 20 to 35 percent below the domestic price.[90] As discussed above in connection with the import volumes, the Tribunal does not view average pricing data as being determinative in view of the particular circumstances of this case. For this reason, the Tribunal analyzed price undercutting on a project basis by comparing domestic industry bids against winning bids secured with dumped and/or subsidized imports. However, the Tribunal notes that the average pricing data shows some confirmatory trends which support the complainants' claims regarding price undercutting and the Tribunal's project-specific analysis.

Price Undercutting—China

– Bids/Awards

100. A price undercutting analysis was conducted for the projects awarded to a Chinese producer during the Tribunal's POI for which one or more Canadian producers bid.[91] In order to calculate the magnitude of price undercutting on a project-specific basis, the net delivered selling value of the winning bid was compared to the net delivered selling value of the Canadian bids on that same project.

101. On specific projects which were awarded to subject goods from China, there was significant price undercutting by Chinese bids in 2014 and 2016.[92] The exact numbers are confidential but can be characterized as very high.

89. Pursuant to paragraph 37.1(1)(b) of the *Regulations.*

90. Exhibit NQ-2016-004-B-03 at para. 138, Vol. 11; Exhibit NQ-2016-004-C-03 at para. 70, Vol. 11; Exhibit NQ-2016-004-A-03 at para. 39, Vol. 11.

91. This assessment was made using the RFP information provided by the importers/owners/EPCs for the projects where the award date was during the POI. This information was provided in response to the Tribunal's questionnaires as well as the Tribunal's requests for information (RFI) process.

92. Exhibit NQ-2016-004-16.31 (protected), Vol. 6O at 53; NQ-2016-004-C-06 (protected), Vol. 12A at paras. 35-36; Exhibit NQ-2016-004-16.40 (protected), Vol. 6O at 358; Exhibit NQ-2016-004-B-04, Vol. 12 at para. 106; Exhibit NQ-2016-004-16.51E, Vol. 6Q at 70.17.

– Average Import Pricing

102. The average unit value data in the investigation report shows that, in 2014 and 2015, there was price undercutting in the range alleged by the complainants.[93] The range disclosed by the investigation report was significant. This supports the claims made by the domestic industry against Chinese subject goods.

– Conclusion

103. Therefore, on the basis of the RFP analysis, the Tribunal finds that there was significant price undercutting by the subject goods from China. The Tribunal also finds that the average pricing data is supportive of this conclusion.

Price Undercutting—Korea and Spain

– Bids/Awards

104. A price undercutting analysis was conducted for the projects awarded to Korean and Spanish producers during the Tribunal's POI for which one or more Canadian producers bid.[94] In order to calculate the magnitude of price undercutting on a project-specific basis, the net delivered selling value of the winning bid was compared to the net delivered selling value of the Canadian bids on that same project.

105. On specific projects that were awarded to subject companies from Korea and Spain, there was significant price undercutting by the subject goods in 2015.[95] The exact amounts are confidential but are comparable to undercutting by Chinese bids.

– Average Import Pricing

106. The average unit value data in the investigation report shows that with Korean and Spanish imports aggregated in 2014 there is average price undercutting of similar or higher amounts as found above for Chinese imports.[96]

– Conclusion

107. Therefore, on the basis of the RFP analysis, the Tribunal finds that there was significant price undercutting by the subject goods from Korea and Spain. The Tribunal also finds that the average pricing data is supportive of this conclusion.

Price Depression and Suppression

108. The supporting parties alleged project-specific price depression. They submitted that the domestic industry reduced its prices on numerous bids to remain competitive against imports.

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93. Exhibit NQ-2016-07B (protected), Table 11, Vol. 2.1A. A comparison of Chinese average pricing against 'complainants' only' average unit prices follows the same trends.
94. In the same manner as above, this assessment was made using the RFP information provided by the importers/owners/EPCs for the projects where the award date was during the POI. This information was provided in response to the Tribunal's questionnaires as well as the Tribunal's RFI process.
95. Exhibit NQ-2016-004-16.63, Vol. 6Q at 163.42-163.43; Exhibit NQ-2016-004-50C (protected), Vol. 2B at 27.
96. Exhibit NQ-2016-004-07B (protected), Table 11, Vol. 2.1A.

109. In order to determine whether price depression has occurred, the Tribunal typically examines trends in average prices as well as benchmark prices over the course of its POI. In examining price suppression, the Tribunal usually compares the domestic industry's $/tonne cost of goods sold (COGS) 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 COGS.

110. The standard indicators for price depression are present in this case, as the domestic industry experienced a 'straight line' average price decrease from $5,785/MT in 2013, to $4,589/MT in 2014, further to $4,450/MT in 2015 and then to $3,982/MT in 2016.[97] Given the above significant increases in the volumes of lower-priced subject imports, the existence of price depression would normally be established.

111. However, given the concerns about average pricing data expressed by parties on both sides, a traditional price depression and price suppression analysis may not yield meaningful results in the context of this case.

112. Regarding project-specific price effects, there are examples on the confidential record of the domestic industry bidding with reduced margins *and* winning the bid against subject goods, which may be indicative of price depression or suppression.[98] These project-specific examples demonstrate a connection between the pricing of the subject goods and certain negative price effects experienced by the domestic industry. However, the Tribunal notes the limited number of examples that are available. As a result of this, the Tribunal is unable to conclude that these are indicative of significant price depression or suppression.

113. There is no requirement, however, that the Tribunal arrive at a positive finding of price depression and price suppression before it can find that the subject goods caused material injury to the domestic industry. In this case, the Tribunal finds that the subject goods significantly undercut the like goods. The Tribunal will therefore assess whether the significant increase in the volume of subject imports together with the effect of the significant price undercutting resulted in material injury to the domestic industry.

Resultant Impact on the Domestic Industry

114. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped and subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry.[99] These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.[100]

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97. Exhibit NQ-2016-004-06B, Table 11, Vol. 1.1A.
98. Exhibit NQ-2016-004-U-04 (protected) at para. 28, Vol. 12A; *Transcript of in Camera Hearing*, Vol. 3, 3 May 2017, at 170; Exhibit NQ-2016-004-A-04 (protected) at paras. 42-46, 88-90, Vol. 12.
99. Such factors and indices include (i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and (iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support programme.
100. 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.

Paragraph 37.1(3)(a) of the *Regulations* requires the Tribunal to consider whether a causal relationship exists between the dumping or subsidizing of the goods and the injury, retardation or threat of injury, on the basis of the volume and the price effects of the dumped and subsidized goods and the resultant impact on the domestic industry.

115. The domestic industry's production and sales volumes fell substantially in 2014, improved in 2015, and fell again in 2016 to below 2013 levels.[101] In addition, financial performance deteriorated over the POI, although 2015 results were much better than 2014, driven in part by cost reductions.[102]

116. In terms of other performance indicators between 2013 and 2015, capacity utilization was low, employment was flat despite large market increases in 2015, and market share decreased from 71 percent in 2013 to 46 percent in 2015.[103] 2016 was an exceptionally bad year for the domestic industry in almost every respect but must be viewed with the understanding that there was a substantial market decline in that year.[104]

117. To understand the impact of price undercutting and consequent lost sales on the indicators of performance by the domestic industry as noted above, the Tribunal's analysis was based on project-specific information, in particular the RFP information provided by the importers/owners/EPCs in response to the Tribunal's questionnaires as well as responses to questions raised during the Tribunal's RFI process. The Tribunal also considered the allegations submitted by the domestic industry.

118. With this information, the Tribunal determined which lost sales experienced by the domestic industry had been caused by the subject goods. These lost sales, in turn, were assessed in view of the undisputed evidence that FISC-related capital projects are expenditures of more than one billion dollars and involve millions of dollars of FISC purchases.[105] The Tribunal heard evidence that being outbid on one of these major projects or successfully bidding on one, can be the difference between a profitable and an unprofitable year for a FISC producer.[106] The Tribunal agrees with this undisputed testimony and finds accordingly.

119. To determine the impact of subject goods on the Canadian producers, the volume and value of all projects awarded to subject country producers during the Tribunal's POI, as provided in the RFPs, was aggregated. (The analysis focused exclusively on purchases of FISC from subject countries other than those from exporters with an insignificant or zero margin of dumping.) This analysis included both projects that the Canadian producers bid on and projects that the Canadian producers were not asked to bid on.

120. The analysis of all the RFPs for which the Tribunal had data covered a volume exceeding a hundred thousand tonnes with a value of several hundred million dollars.

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101. Exhibit NQ-2016-004-07A (protected), Table 22, Vol. 2.1A.
102. *Ibid.*
103. Exhibit NQ-2016-004-06A, Table 17, Vol. 1.1A; Exhibit NQ-2016-004-07A (protected), Table 25, Vol. 2.1A.
104. Exhibit NQ-2016-004-06A, Table 16, Vol. 1.1A; Exhibit NQ-2016-004-07A (protected), Tables 22, 25, Vol. 2.1A. In 2016, the domestic industry's market share improved over 2015, but remained below or near 2013 levels.
105. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 45; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 370-371; *Transcript of Public Hearing*, Vol. 4, 4 May 2017, at 397.
106. Exhibit NQ-2016-004-B-03 at para. 137, Vol. 11; Exhibit NQ-2016-004-C-04 (protected) at para. 71, Vol. 12; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 227; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 86.

121. Situations where bidders included Canadian, non-subject companies, i.e. Cintasa and Hanmaek, and subject companies (three-way bids) represented approximately a quarter of the RFPs analyzed by the Tribunal. In those competitive situations, the domestic industry won a very small portion of the bids. Subject companies were awarded the overwhelming majority of these by volume and value—the details of these awards are on the Tribunal's confidential record.[107] Of those bids that were awarded to subject companies, China[108] was awarded the majority by volume and value. Subject companies from Korea won a minor portion of the volume, but these bids represented a significant value. Subject companies from Spain won the rest, constituting a significant volume and value of awards.

122. Approximately half of the volume and value of all RFPs analyzed by the Tribunal was awarded directly to subject companies in RFPs where the domestic industry was never invited to bid. There are many instances where the domestic industry provided estimates (which were uncontroverted) of what their bids would have been, and concluded that the subject imports would have still been the lowest-priced of all the bids. The Tribunal's analysis of the actual awards in those RFPs confirms the allegations made by the domestic industry. Of those awards, approximately equal amounts by value were awarded to China and to subject companies from Korea and Spain.

123. A further separate summary of the impact of this injury analysis follows below.

Analysis of Chinese Awards

124. The Tribunal's RFP analysis with respect to head-to-head competitive situations shows that the domestic industry would have been the lowest-priced bidder and would have made those sales of FISC but were underbid by Chinese dumped and subsidized imports. Over the POI, the Canadian Producers lost several projects, on which they bid, to Chinese imports, for a material loss to the domestic industry of a total volume of thousands of tonnes and a value of tens of millions of dollars.[109]

125. Over the POI, many projects were also awarded to Chinese producers where the domestic industry did not bid.[110] The domestic producers alleged that they did not bid on these projects either because they were not invited to or because they knew they would lose out to suppliers of the subject goods. Nonetheless, the domestic producers were aware of these projects and provided specific injury allegations for many of them.[111] In that sense, they claimed that these were sales that they lost to the subject goods despite not bidding.[112]

126. The Tribunal has assessed the evidence substantiating these allegations and finds it credible and convincing. As part of its assessment, the net delivered selling unit value of the winning bid was compared

107. Exhibit NQ-2016-004-07A (protected), Tables 42-55, Vol 2.1A; Exhibit NQ-2016-004-07B (protected), Table 61, Vol. 2.1A.
108. All companies exporting from China are subject to the duties.
109. Exhibit NQ-2016-004-07A (protected), Tables 45, 47, 48, 51 and 55, Vol. 2.1A.
110. The Tribunal was able to confirm this fact by its own review of the confidential bid data: see Tables 31-61 of Exhibit NQ-2016-004-07B (protected), Vol. 2.1A.
111. Exhibit NQ-2016-004-A-04 (protected) at paras. 48-50, 54-59, Vol. 12; Exhibit NQ-2016-004-B-04 (protected) at paras. 96-100, 107-11, 116, 118-21, Vol. 12; Exhibit NQ-2016-004-C-06 (protected) at paras. 11-23, 28-33, Vol. 12A.
112. Exhibit NQ-2016-004-A-03 at paras. 37, 39, 55, 60, 73, Vol. 11; Exhibit NQ-2016-004-B-03 at paras. 89, 98, 110, 113, 133, 135, 138, 180, Vol. 11; Exhibit NQ-2016-004-C-05 at paras. 3, 21, 25, 39, Vol. 11A; Exhibit NQ-2016-004-C-03 at para. 66, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 139, 151; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 168-169.

to the net delivered selling unit value that the domestic industry estimates they would have offered, The Tribunal finds that the prices observed in connection with these projects were significantly low and that the potential price undercutting on these projects was material (the exact numbers are confidential).[113] The magnitude of this price pattern and the potential price undercutting indicates that these projects would indeed have been lost to the subject goods had the domestic industry been afforded an opportunity to bid on them. The total awarded volume for those projects was in the tens of thousands of tonnes and had a value of tens of millions of dollars. The Tribunal finds that these amounts are material and that their loss by the domestic industry constitutes a material loss to the domestic industry.

127. These lost sales (both in instances of head-to-head competition and where the domestic industry did not bid) were lost to imports of subject goods from China primarily on the basis of price and resulted in material injury the domestic industry. If the domestic industry had been in a position to successfully bid on those projects, it would have seen a material improvement in output, sales and capacity utilization. It would also have seen a material improvement as high as 20 to 25 percent in net sales value, cost of goods manufactured and gross margin, and as high as 50 to 75 percent in net income before taxes.[114] The Tribunal also finds that these improvements would have had a consequential positive impact on the domestic industry's ability to maintain or increase staffing levels.[115]

Analysis of Korean/Spanish Awards

128. Similarly to the above, the Tribunal's analysis shows that the domestic industry would have been able to make significant sales from the lost sales and other situations where the winning bid was sourced from Korean or Spanish dumped imports.

129. Over the POI, the domestic industry lost projects to Korean and Spanish subject companies, for a total material loss to the domestic industry of a volume of thousands of tonnes and total value of tens of millions of dollars.[116]

130. Furthermore, over the POI, several projects were awarded to Korean or Spanish subject companies where the domestic industry did not bid.[117] In order to assess these projects, the net delivered selling unit value of the winning bid was compared to the net delivered selling unit value that the domestic industry estimate they would have offered, as submitted by the domestic producers in their questionnaire responses and submissions. The prices observed in connection with these projects were significantly low and the

113. As discussed elsewhere in these reasons, this assessment was made using the RFP information provided by the importers/owners/EPCs for the projects where the award date was during the POI and where the domestic producers did not bid. This information was provided in response to the Tribunal's questionnaires as well as the Tribunal's RFI process. In order to assess price undercutting on a project-specific basis, the net delivered selling unit value of the winning bid was compared to the net delivered selling unit value alleged by the Canadian producers.
114. Exhibit NQ-2016-004-07A (protected), Table 22, Vol. 2.1A.
115. Exhibit NQ-2016-004-A-04 (protected) at paras. 71-72, 80-81, Vol. 12; Exhibit NQ-2016-004-C-04 (protected) at paras. 88-91, Vol. 12; Exhibit NQ-2016-004-U-04 (protected) at para. 36, Vol. 12A; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 31.
116. Exhibit NQ-2016-004-07A (protected), Tables 53, 54, Vol. 2.1A.
117. Exhibit NQ-2016-004-07B (protected), Tables 34-43 and 57, Vol. 2.1A., Exhibit NQ-2016-004-A-03 at para. 55, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 139; Exhibit NQ-2016-004-B-03 at paras. 116, 120 135, Vol. 11; Exhibit NQ-2016-004-C-05 at paras. 17, 29, 32, Vol. 11A.

potential price undercutting on these projects was material (the exact numbers are confidential).[118] The magnitude of this price pattern and the potential price undercutting indicates that these projects would have been lost to the subject goods had the domestic industry been afforded an opportunity to bid on them and that they would have been subjected to significant price undercutting. This situation translated into a material loss to the domestic industry. As was the case for the Chinese imports, the total volume awarded to Korean and Spanish subject companies for those projects was in the tens of thousands of tonnes and for a value of tens of millions of dollars. The total value was in an amount comparable to the one lost to Chinese imports.[119] The domestic producers were aware of these projects and provided allegations for many of them.

131. These lost sales (both in instances of head-to-head competition and where the domestic industry did not bid) were lost to dumped imports from Korea and Spain primarily on the basis of price and resulted in material injury the domestic industry. If the domestic industry had been in a position to bid successfully on the above projects, it would have materially improved its results against those originally reported in the investigation report. In particular, the Tribunal finds that it would have seen a material improvement in output, sales and capacity utilization, as well as material improvement as high as 20 to 25 percent in net sales value, cost of goods manufactured and gross margin, and a material improvement as high as 60 to 70 percent in net income before taxes.[120] The Tribunal also finds that these improvements would have had a consequential positive impact on the domestic industry's ability to maintain or increase staffing levels.[121]

Factors Other Than the Dumping or Subsidizing

132. 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 are threatening to cause injury.

Undumped Imports

133. The investigation report shows that 2015 was the only year in the POI in which there were imports of undumped or insignificantly dumped goods from subject countries.[122] The volume of these imports was low as compared to the total volume of dumped or subsidized imports and the overall size of the market in 2015.[123] As such, while these imports may have had some impact on the domestic industry's performance, their presence was not significant enough to undermine the Tribunal's conclusion that the dumped or subsidized imports have caused material injury to the domestic industry.

134. Similarly, the Tribunal recognizes that there were imports of FISC from non-subject countries over the POI. However, the volume of these imports declined steadily over that period and the Tribunal is satisfied that these imports do not undermine the Tribunal's conclusion that the dumped or subsidized imports have caused material injury to the domestic industry, particularly in 2015 and 2016.[124]

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118. Exhibit NQ-2016-004-A-03 at paras. 37, 60, 73, 55, Vol. 11; Exhibit NQ-2016-004-B-03 at paras. 89, 133, 138, 180, Vol. 11; Exhibit NQ-2016-004-C-05 at paras. 3, 39, Vol. 11A; Exhibit NQ-2016-004-C-03 at para. 66, Vol. 11; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 168-169.
119. Exhibit NQ-2016-004-07B (protected), Tables 34-43 and 57, Vol. 2.1A.
120. Exhibit NQ-2016-004-07A (protected), Table 22, Vol. 2.1A.
121. Exhibit NQ-2016-004-A-04 (protected) at paras. 71-72, 80-81, Vol. 12; Exhibit NQ-2016-004-C-04 (protected) at paras. 88-91, Vol. 12; Exhibit NQ-2016-004-U-04 (protected) at para. 36, Vol. 12A; *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 31.
122. Exhibit NQ-2016-004-07B (protected), Tables 4 and 6, Vol. 2.1A.
123. *Ibid.*
124. *Ibid.*

Capacity Bottlenecks

135. The Tribunal's data shows that the domestic industry had significant underutilized capacity on average throughout the POI.[125] This was determined with reference to each producer's practical plant capacity, which was calculated with reference to plant size and the average amount of labour required to produce a tonne of FISC.[126] Allegations were made that annual averages are meaningless in this industry and that capacity was fully or near to full at specific times during the POI because of a backlog of production at a specific producer and the fact that individual producers may have occasionally chosen not to bid on specific projects because they did not have the available capacity to meet the delivery schedule.[127]

136. The Tribunal must measure capacity in some manner in order to conclude whether the domestic industry could have in fact taken on any additional production. The Tribunal's record shows evidence of abundant capacity.[128] It is plain to the Tribunal that the domestic industry could have produced more on average in every year of the POI and the Tribunal finds accordingly.

137. With regard to allegations as to specific times where there were production bottlenecks, they were vague and unsubstantiated and involved only one of several domestic producers.[129] There was no evidence that all of the domestic producers experienced such a backlog at a specific time. Moreover, the Tribunal heard testimony that domestic producers experiencing these bottlenecks often turn to other domestic FISC producers for assistance, either as subcontractors or on a tolling basis, because there is capacity available in the Canadian market.[130] No credible explanation was provided as to why subcontracting or tolling could not have been sufficient to alleviate any these alleged production bottleneck concerns if indeed such concerns were real as opposed to perceived.

Lack of Exports

138. Parties opposing argued that the domestic industry contributed to its own injury through its failure to seize upon export opportunities in the U.S. market.

139. However, opposing parties provided no cogent evidence as to how the Tribunal should assess these potential export opportunities and how this could affect the domestic industry, even if they were successfully and profitably converted into sales in the U.S. market.

140. More evidence would have been necessary to convince the Tribunal as to the accuracy of the allegations of export-related self-injury, especially given uncontroverted evidence that the domestic industry's Canadian operations were established with a view of servicing the local Canadian markets, particularly Alberta oil production.[131] In short, these allegations of potential export opportunities were not

125. Exhibit NQ-2016-004-07A (protected), Table 25, Vol. 2.1A.
126. Exhibit NQ-2016-004-13 (collective protected exhibit containing the replies to the Producer's Questionnaire); *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 80; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 179-180, 226.
127. *Ibid.* at 202-204.
128. Exhibit NQ-2016-004-07A (protected), Table 25, Vol. 2.1A.
129. *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 202-204.
130. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 25-26, 62-64, 89; *Transcript of In Camera Hearing*, Vol. 2, 2 May 2017, at 98.
131. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 42, 46, 48; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, 210.

substantiated or credibly supported. As a result, the Tribunal could only speculate as to the available market, the volumes involved and the financial viability of such exports.

141. Where parties raised the argument of the additional attractiveness of the U.S. market in view of a devaluated Canadian dollar, this only paints part of the portrait as it does not account for additional restrictions and costs related to shipping and handling of FISC over greater distances and to different jurisdictions.[132] Without a clearer picture of these potential export opportunities and the availability of actual data regarding the feasibility and costs of delivery of FISC to different regions of the United States, the Tribunal is not in a position to give credence to these unsubstantiated arguments.

142. The Tribunal's investigation report does set out protected information about historical domestic industry exports in 2013-2016. Even assuming that the domestic industry could have exported more in each year of the POI (for example, along the lines of its higher 2015 export levels), the Tribunal's analysis shows that this would not have removed the material injury caused by the subject goods and would not change the Tribunal's conclusions with respect to said injury.

Low Oil Prices

143. Parties also pointed to the effects of the crash in oil prices in late 2014 as the cause of any injury to the domestic industry. The parties alleged that the collapse of oil prices led to a lack of demand and corresponding lack of financial resources for owners to source from domestic production.[133] The evidence does not bear out this theory with respect to volume of demand, at least with respect to the 2014 and 2015 period.

144. On the contrary, the Canadian market was essentially the same in 2014 as in 2013 and largest in 2015.[134] The real impact of low oil prices did not materialize until 2016 when the market contracted radically.

145. The allegation as to the inability of owners to pay higher domestic prices is not only unproven but also contradictory to the opposing parties' position that price was not the determinative factor in purchasing decisions in the POI.

146. Witnesses testified that the crash in oil prices hit owners hard, as well as affecting all participants in the oil market.[135] The Tribunal finds that, after the new reality of low oil prices penetrated the collective behaviour of owners and EPCs, they became even more price sensitive. The testimony of the witness from Supermetal confirms that domestic producers were asked at times to "sharpen their pencil", i.e. compete more aggressively on price, in order to compete for the remaining business with the subject imports.[136] The domestic producers did not do so in 2014 and 2015 to retain their profit margins and they lost that business. In 2016, the domestic producers dropped their price and profit targets as is confirmed by the evidence of the

132. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 41; *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 188.
133. *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 316, 355.
134. Exhibit NQ-2016-004-06A, Table 24, Vol. 1.1A.
135. *Transcript of Public Hearing*, Vol. 1, 1 May 2017, at 115-116; *Transcript of Public Hearing*, Vol. 3, 3 May 2017, at 348, 352, 370.
136. *Transcript of Public Hearing*, Vol. 2, 2 May 2017, at 205.

domestic producers who have been bidding on projects with no profit margin; the amounts of undercutting by subject imports in 2016 are therefore significantly lower.[137]

147. These events confirm the Tribunal's conclusions on the continuing importance of price in the purchasing of FISC in the POI.

148. Overall, the low oil prices observed after 2014 did not have an impact on the demand for FISC. Accordingly, oil prices do not affect the Tribunal's conclusions as to the injury suffered by the domestic industry as a result of the dumped and, where applicable, the subsidized subject goods. The POI includes 2014, when oil prices were high, and subsequent periods following the decline of oil prices.

Conclusion

149. The Tribunal is of the view that any injurious effects that may be attributable to the above factors, whether taken individually or as a whole, do not negate its conclusion that the dumped goods from subject companies from Korea and Spain and the dumped and subsidized goods from China have, in and of themselves, caused material injury to the domestic industry.

EXCLUSIONS

150. The Tribunal received requests from six parties to exclude products from a potential finding of injury or threat thereof.[138] General principles of how the Tribunal analyzes such requests, as well a discussion of the specific requests made in this proceeding, are set out below.

General Principles

151. *SIMA* implicitly authorizes the Tribunal to grant exclusions from the scope of a finding.[139] Exclusions may be granted at the Tribunal's discretion, i.e. when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry.[140] The rationale is that, despite the general conclusion that the dumping and/or subsidizing of the goods has caused injury to the domestic industry, there may be case-specific evidence that imports of particular products captured by the definition of the goods have not caused injury.

137. Exhibit NQ-2016-004-B-03 at para. 149, Vol. 11; Exhibit NQ-2016-004-A-01 at paras. 246-253, Vol. 11; Exhibit NQ-2016-004-C-03 at para. 86, Vol. 11.
138. These parties were: Cintasa, Lafarge Canada Inc. (Lafarge), Suncor Energy Inc. (Suncor), Fluor, and Andritz; multiple requests were submitted by some of these parties. The Tribunal also granted leave to LNG Canada Development Inc. (LNG Canada) to file its exclusion request after the deadline contemplated in the Tribunal's notice of inquiry.
139. *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA); *Sacilor Aciéries v. The Anti-dumping Tribunal* (1985) 9 C.E.R. 210 (FCA); 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.
140. See, for example, *Aluminum Extrusions* at para. 339; *Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.

152. 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.[141]

153. The onus is upon the requester to demonstrate that imports of the specific goods for which the exclusion is requested are not injurious to the domestic industry.[142] Thus, there is an evidentiary burden on the requester to file evidence in support of its request.[143] Furthermore, there is also a requirement on the domestic producers to file evidence in order to rebut the evidence filed by the requester.[144]

154. Within the above context, the Tribunal wishes also to address what it perceives to be an increasingly common practice by requesters where they ask the Tribunal to determine or otherwise 'clarify' the subjectivity of the goods described in the exclusion request. The Tribunal received multiple such requests in the current proceedings; it received both requests for what appeared to be non-subject goods grouped with subject goods, and for goods which were described as assemblies of FISC and "non-FISC". It appears to the Tribunal that most, if not all, of the exclusion requests were made as a precaution against enforcement by the CBSA of its finding on FISC incorporated into complex modules or into other equipment.

155. The Tribunal heard additional arguments that these requests were to clarify the scope of its inquiry and the consequent data in its investigation report. Any concerns about the data should have, and were, raised in consultations about the investigation report and in parties' submissions. The Tribunal has assessed the responses to its questionnaires and the investigation report and it is satisfied that the data is as accurate as is needed for its inquiry.

156. The Tribunal also heard repeatedly that an exclusion request was made as an alternative to the requester's position that the goods were non-subject or under the assumption that the Tribunal will treat them as subject.[145]

157. It is undisputed that section 42 of *SIMA* authorizes the Tribunal to exclude only goods which are subject goods. In an injury inquiry, the Tribunal does not have the jurisdiction to exclude non-subject goods, to review the propriety of CBSA normal values, nor to issue any binding subjectivity rulings.[146]

158. 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. Consents as to

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141. *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) [*Fasteners*] at para. 245.
142. *Fasteners* at para. 243.
143. *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) 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 goods 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.
144. While there is no reverse onus, a failure by the domestic producers (or at least one of them) to provide adequate and credible rebuttal evidence could result in the requested exclusions being granted. In any case, much like its conclusion on the issue of whether the dumping and/or subsidizing of the subject goods has caused 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.
145. *Transcript of Public Hearing*, Vol. 6, 8 May 2017, at 737; Exhibit NQ-2016-004-26.04, Vol. 1.3 at 200; Exhibit NQ-2016-004-26.05, Vol. 1.3 at 215.
146. *Carbon and Alloy Steel Line Pipe* (22 January 2016), NQ-2015-002 (CITT), Orders and Reasons—Procedural and Others, at para. 35.

particular exclusions, or lack thereof, are not evidence, and cannot in any event fetter the Tribunal's discretion in making such a determination.

159. As it is a jurisdictional prerequisite to the Tribunal considering an exclusion request, the available evidence must positively establish that the goods are subject to the CBSA's investigation. If the requester does not admit or specifically denies that the goods are subject goods, it follows that this will significantly impede the Tribunal from granting their request. Parties are to be mindful that if there is a true dispute as to the subject nature of the goods, the requester should always proceed through the subjectivity appeal process established in sections 56 to 61 of *SIMA*. The Tribunal cannot pronounce on the subjectivity of goods in the abstract, i.e. when, as in this case, there are extensive inherent uncertainties associated with the goods which are the subject of these exclusion requests.

Specific Exclusion Requests

Lafarge Canada Inc. and Suncor Energy Inc.

160. The evidence submitted in support of the exclusion requests made on behalf of Lafarge and Suncor does not allow the Tribunal to conclude whether the products for which the request has been made are in fact subject goods. More specific information would be needed to decide whether or not these products could be considered as having been further processed to the extent that they no longer possess the nature and physical characteristics of FISC such that they would not be covered by the Tribunal's finding. This will be a matter for the CBSA to address upon each importation. Even though the domestic industry consented to Suncor's exclusion request, this in no way assists the Tribunal with its threshold jurisdictional issue regarding such a request. For this reason, the Tribunal denies these requests.

Fluor Canada Ltd. and LNG Canada Development Inc.

161. Regarding the exclusion requests made by Fluor and LNG Canada, both these requests concerned importations of complex modules for projects in coastal British Columbia. Due to the timing of these proposed projects,[147] these requests are highly speculative and overly general. For example, there is no EPC for the LNG Canada project proposed to be constructed at Kitimat, British Columbia, and there are no final engineering designs for the modules to be imported from China. Therefore, the Tribunal has no firm indication as to what it is being asked to exclude. For all these reasons, and the reasons cited with respect to the exclusion requests made by Lafarge and Suncor, the Tribunal denies these requests.

162. The Tribunal reminds requesters (including Suncor, Fluor, Lafarge and LNG Canada) that should imports actually occur, there is a wide variety of mechanisms to address potential or actual duties on such imports, all of them being more appropriate than addressing the subjectivity of future imports of goods of generic descriptions in an injury inquiry. If duties are imposed, there are mechanisms for appeal of the subjectivity rulings in *SIMA*,[148] remission of duties pursuant to the *Financial Administration Act*, or interim reviews under section 76.01 of *SIMA*. Additionally, parties who view their goods as subject can request a public interest inquiry within 45 days of this finding if they consider that the imposition of anti-dumping or countervailing duties in respect of those goods (or the imposition of such duties in the full amount) would not or might not be in the public interest.

147. *Transcript of Public Hearing*, Vol. 5, 5 May 2017, at 504-505; *Transcript of In Camera Hearing*, Vol. 5, 5 May 2017, at 318-320.

148. In addition, the proposed amendments to *SIMA* may provide for binding advance rulings as to subjectivity, referred to as "scope rulings": Bill C-44, *Budget Implementation Act, 2017* (1st Sess.), No. 1, 42nd Parliament, 2017, cl. 89.

Andritz Hydro Canada Inc.

163. An exclusion request was made by Andritz concerning certain hydro gates which Andritz determined were of a size and complexity which no domestic producer (including Andritz itself) could produce in Canada. These goods were purchased from a Chinese specialty producer prior to the filing of the complaint in this matter. The domestic industry admitted that, in these circumstances, the importation of the goods would not cause injury and it consented to the request. The Tribunal therefore grants an exclusion with respect to goods imported within the 2017 calendar year by Andritz from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

Cintasa, S.A.

164. Regarding a request for an exclusion with respect to goods exported by Cintasa, traditionally, the Tribunal has refused to grant producer exclusions for non-dumping exporters solely on the basis that this would allow the exporter a "licence to dump" in the future.[149] However, the WTO Panel Report in *Canada – CSWP (Taiwan*) has effectively dispensed with that line of reasoning by finding that investigations must be terminated against exporters with insignificant margins of dumping.[150] The WTO panel found that Canada was violating Article 5.8 of the WTO *Anti-dumping Agreement* by not providing for the termination of an investigation against individual exporters with *de minimis* margins of dumping by the time of the final determination. The Tribunal has noted this finding in a recent decision.[151]

165. As it currently reads, *SIMA* provides for the termination of an investigation for reason of insignificant margins of dumping or amount of subsidy by the CBSA only on a country-wide basis. Proposed amendments to *SIMA*, which would provide the CBSA with the ability to terminate against individual insignificantly dumping or subsidizing exporters, have been published and are presently before Parliament. Until the time these amendments come into force, the CBSA does not have the legal means to terminate investigations for individual exporters.

166. While *SIMA* is in the process of being amended to permit the CBSA to make such a termination in compliance with the WTO decision in *Canada – CSWP (Taiwan)*, the Tribunal can employ exporter/foreign producer exclusions as an interim measure to ensure that the final outcome substantially complies with this WTO decision. The impact of termination is the same as an exclusion, in that an exporter who has an investigation terminated against it cannot later be forced to pay duty if its pricing changes, unless a new investigation is brought. This WTO decision requires that, once an exporter is found to not have been dumping, that exporter cannot continue to be subject to the normal value regime and forced to participate in administrative reviews.

167. *SIMA*'s subsection 43(1) provides the Tribunal with broad discretion to make an order or finding "as the nature of the matter may require" and to exclude products and producers from its order or finding. Beyond that, subsection 43(1) does not require specific grounds or factors for excluding specific goods from a finding of injury or threat of injury. Note, however, that the Tribunal has found exclusions of the goods of specific producers or exporters to be appropriate only "in the most specific set of circumstances".

168. Within this set of circumstances are exclusions of goods of exporters with zero or insignificant margins of dumping or amounts of subsidy. Such exporters should be excluded from any injury or threat of

149. *Carbon Steel Welded Pipe* (11 December 2012), NQ-2012-003 (CITT) at paras. 181-184.
150. Both Cintasa, of Spain, and Hanmaek, of Korea, have zero or insignificant margins of dumping.
151. *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT) at paras. 191-204.

injury finding and the application of anti-dumping or countervailing duty. Such an outcome would conform to the conditions established by the WTO panel in *Canada – CSWP (Taiwan*), that is, complete termination for an exporter of the order establishing the duty. While the discretionary exercise of this authority will not eliminate the need to amend *SIMA*,[152] it does enable the Tribunal to treat the exporters' goods in a manner that is as consistent as possible with both *SIMA* and the *Anti-dumping Agreement*. In this regard, the Tribunal is mindful that it is obliged to interpret and apply *SIMA* in a manner that is in conformity with Canada's international obligations except where *SIMA* clearly conveys a contrary intent.[153] As is the case with the Tribunal's legislative mandate on cumulation, there is no such contrary intention here. In this context, the simple basis to grant this exclusion is the CBSA's finding that such an exporter's goods are not dumped. Therefore the Tribunal finds that such an exporter's goods cannot have caused injury.

169. Accordingly, the Tribunal grants an exclusion with respect to goods exported by Cintasa, from Spain, and goods exported by Hanmaek, from Korea.

CONCLUSION

170. The Tribunal hereby finds, pursuant to subsection 43(1) of *SIMA*, that the dumping of the subject goods originating in or exported from China, Korea (excluding those goods exported by Hanmaek) and Spain (excluding those goods exported by Cintasa), and the subsidizing of the subject goods from China, have caused injury to the domestic industry. Furthermore, the Tribunal excludes from its finding goods imported within the 2017 calendar year by Andritz from Sinohydro for the Muskrat Falls hydro project in the province of Newfoundland and Labrador.

Jean Bédard
Jean Bédard
Presiding Member

Serge Fréchette
Serge Fréchette
Member

Rose Ritcey
Rose Ritcey
Member

152. The WTO Panel determined that, for *SIMA* to be consistent with the *Anti-dumping Agreement*, it must require immediate termination by the CBSA in these circumstances on a non-discretionary basis.
153. *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII) at para. 53; See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324.