



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2006-004

Disposable Adult Incontinence
Briefs

*Finding issued
Wednesday, June 20, 2007*

*Reasons issued
Thursday, July 5, 2007*

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

**THE DUMPING OF DISPOSABLE ADULT INCONTINENCE BRIEFS
ORIGINATING IN OR EXPORTED FROM FRANCE**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of all-in-one (one piece) disposable adult incontinence briefs, which provide absorbent protection against urinary and fecal incontinence and are held in place during use by means of a fastening system, originating in or exported from France, has caused injury or retardation or is threatening to cause injury.

This inquiry is pursuant to the issuance by the President of the Canada Border Services Agency of a preliminary determination dated February 20, 2007, and of a final determination dated May 22, 2007, that the aforementioned goods have been dumped, that the margins of dumping from the subject country are not insignificant and that the volume of dumped goods is not negligible.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods has not caused injury and is not threatening to cause injury to the domestic industry.

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James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	May 22 to 24, 2007
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STATEMENT OF REASONS

1. The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*,¹ has conducted an inquiry to determine whether the dumping of all-in-one (one piece) disposable adult incontinence briefs, which provide absorbent protection against urinary and fecal incontinence and are held in place during use by means of a fastening system, originating in or exported from France (the subject goods), has caused injury or retardation or is threatening to cause injury.
2. On November 22, 2006, the President of the Canada Border Services Agency (CBSA), following a complaint filed by SCA North America – Canada, Inc. (SCA), initiated an investigation into whether the subject goods had been dumped.
3. On November 23, 2006, pursuant to subsection 34(2) of *SIMA*, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury or retardation or was threatening to cause injury. On January 22, 2007, the Tribunal made a preliminary determination of injury stating that there was evidence that disclosed a reasonable indication that the dumping of the subject goods had caused injury to the domestic industry.
4. On February 20, 2007, the CBSA issued a preliminary determination of dumping. It was satisfied, as a result of its preliminary investigation, that the subject goods had been dumped, that the margins of dumping were not insignificant and that the volume of dumped goods was not negligible.
5. On February 21, 2007, the Tribunal issued a notice of commencement of inquiry. The period of inquiry covered three full years from January 1, 2004, to December 31, 2006. As part of the inquiry, the Tribunal sent questionnaires to the only known domestic producer, 16 importers, 31 purchasers and 4 foreign producers. The Tribunal received three unsolicited purchasers' responses. From the replies to the questionnaires and other information on the record, the Tribunal's research staff prepared public and protected pre-hearing staff reports.
6. On May 22, 2007, the CBSA issued a final determination of dumping, which confirmed that the margins of dumping were not insignificant and that the volume of dumped goods was not negligible.
7. A hearing, with public and in camera testimony, was held in Ottawa, Ontario, from May 22 to 24, 2007. SCA filed a submission in support of a finding of injury or threat of injury and was present at the hearing. Tyco Healthcare Group Canada, Inc. (Tyco), Tyco Healthcare Group AG, Tyco Healthcare France SAS, Tyco Healthcare Manufacturing France SAS and Tyco Group S.a.r.l. (Tyco France) opposed a finding of injury or threat of injury and were present at the hearing.
8. The record of this inquiry consists of all Tribunal exhibits, including the public and protected record of the preliminary injury inquiry (PI-2006-003), public and protected replies to questionnaires, requests for information and replies thereto, witness statements and all exhibits filed by the parties throughout the inquiry, as well as the transcript of the hearing. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and confidentiality undertaking with the Tribunal in respect of confidential information.
9. The Tribunal issued its finding on June 20, 2007.

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

RESULTS OF THE CBSA'S INVESTIGATION

10. The CBSA determined that the margins of dumping, expressed as a percentage of the export price, were 65.3 percent for Tyco Healthcare Group AG and 92.0 percent for all other exporters and that 100 percent of the subject goods released into Canada from October 1, 2005, to September 30, 2006, were dumped.

PRODUCT

Product Description

11. The product is commonly referred to as “disposable adult incontinence briefs”.

12. Disposable adult incontinence briefs come in a range of absorbency levels and sizes to fit a range of different body shapes from small (waist size of 22 in. to 36 in.) to extra large (waist size of 60 in. to 64 in.). They incorporate a fastening system, such as a glue-type tape, that connects the front portion of the brief to the back and helps to keep the brief in place. Although the glue-type tape is a common form of fastening system, other forms are also used, including the hook and loop type of fastening system (such as Velcro).

13. The product definition excludes incontinence products described as “step-in underwear” or “protective underwear”, products into which a person must step and pull up to the waist. It also excludes goods described commonly as “belted briefs”, a two-piece system that consists of a belt that is fastened around the waist of an individual and used with a diaper folded through the crotch. It also excludes incontinence products commonly described in the industry as “pads” or any other self-standing absorbent core products that must be worn with a separate garment, such as a mesh or cotton undergarment.

14. The individual disposable adult incontinence briefs are packed in inner packs of varying quantity, usually 10 to 12 per pack, and in outer cases of 6 to 8 packs. Each case usually contains 72 to 96 briefs. Sales are made on either a case quantity or a pallet quantity basis.

15. The disposable adult incontinence briefs offered on the Canadian market are sold under various brand names and lines of products. For example, the products offered by SCA carry the brand “TENA®” and the lines of products are identified as “TENA® Classic Plus”, “TENA® Ultra” and “TENA® Super”. They are differentiated essentially on the basis of size and level of absorbency.

Production Process

16. Adult incontinence briefs are manufactured by Canadian and foreign producers generally in the same manner. Raw material cellulose pulp sheet is fiberized, then combined with superabsorbent powder to produce a mix of fibres and powder that is formed into a shaped (typically hourglass or similar) absorbent core. This process is conducted on a pocket-forming drum. The core is then combined with an impervious backsheet, made of polyethylene plastic sheet (to prevent leakage), in combination with a liquid-pervious topsheet. The liquid-pervious topsheet, which allows for the absorption of fluids, is a nonwoven material produced from polypropylene fibres. The absorbent core is glued in place onto the impervious backsheet and then the pervious topsheet is glued in place over both the core and the backsheet to form a continuous web in which the individual absorbent cores are separated by the topsheet and backsheet layers. Before the core is applied to the backsheet, the leg elastics are stretched and then glued in place on the backsheet.

17. Other manufacturing operations follow, such as the application of the fastening system, the shaping of the product into a body-fitting form by cutting out a leg area, the folding of the outer edges of the product into a narrower shape to facilitate the cutting of the product, the cutting of the product into individual units, and the trifolding or bifolding of the product to facilitate packaging.

DOMESTIC PRODUCER

18. SCA is the only known producer of like goods in Canada.

19. In 1929, 10 Swedish forest industry companies came together under the name “Svenska Cellulosa Aktiebolaget”. In 1975, Svenska Cellulosa Aktiebolaget acquired Mölnlycke, a leading producer of disposable hygiene products, and became Svenska Cellulosa Aktiebolaget Mölnlycke. The first disposable adult incontinence brief was produced by it in 1975.

20. In 1996, Svenska Cellulosa Aktiebolaget Mölnlycke acquired Cascades PSH Inc.’s Drummondville, Quebec, incontinence care products manufacturing facility, which operated with 85 employees. In 1998, Svenska Cellulosa Aktiebolaget Mölnlycke became SCA Hygiene Products AB (Sweden), a supplier of incontinence products that are known globally as TENA[®] products.

21. SCA produces disposable adult incontinence briefs at its facility in Drummondville. During the period from 2000 to 2003, SCA installed two new state-of-the-art machines for manufacturing disposable adult incontinence briefs and, in the following two years, installed a third one. SCA maintains sales and marketing offices in Drummondville and in Oakville, Ontario.

IMPORTERS AND EXPORTERS

22. The Tribunal sent four foreign producers’ questionnaires to members of the Tyco family of companies. Tyco Healthcare Group AG, the exporter, and Tyco Healthcare Manufacturing France SAS, the foreign producer, responded separately to the foreign producers’ questionnaire. The Tribunal staff combined the information and considered it as one response on behalf of Tyco France.

23. The Tribunal sent seven importers’ questionnaires and nine short-form importers’ questionnaires.

24. The Tribunal received five completed importers’ questionnaires from Kimberly-Clark Inc., Paper Pak Canada Inc., Quality Life Services Inc., Shandex Sales Group Limited and Tyco. From among the recipients of the short-form importers’ questionnaire, Schaan Healthcare Products Inc. and The Stevens Company Ltd. responded to the questionnaire. In addition, seven companies replied that they had not imported disposable adult incontinence briefs from France or any other country for the years 2004 to 2006, and two did not respond.

25. The Tribunal directed 12 importers to respond to the supplemental question for importers and received 6 replies.

PURCHASERS

26. The parties to this inquiry identified purchasers involved in the Canadian market for disposable adult incontinence briefs.

27. The 29 purchasers that provided usable responses to the purchasers' questionnaire on market characteristics were divided into different categories, namely, buying groups, wholesalers/distributors and institutional/hospital buyers, depending on each responding firm's principal activity.

28. Buying groups are organizations that are mandated to purchase medical products for institutions such as hospitals, long-term care facilities and nursing homes.

29. Wholesalers/distributors are private firms that specialize in the distribution of medical products. These firms negotiate with suppliers for the right to distribute their disposable adult incontinence briefs to health care institutions using distribution agreements and distributors' price lists.

30. Finally, institutional/hospital buyers are hospitals and health care centres that negotiate directly with suppliers for their purchases of disposable adult incontinence briefs.

MARKET SEGMENTS AND DISTRIBUTION CHANNELS

31. The Canadian market for disposable adult incontinence briefs can be divided into two distinct segments: institutional and retail.

32. In the institutional segment of the market, which is the most important segment for the domestic producer and represents a major proportion of sales by other suppliers of disposable adult incontinence briefs, the goods are sold largely under contract and used in a variety of clinical settings, including hospitals, rehabilitation centres and long-term care facilities. An important feature of this segment of the market is the participation of buying groups and large distributors. In this segment, a significant proportion of sales by the Canadian producer are made through a Request for Proposal (RFP) process. The process is typically initiated by end users such as provincial or regional health authorities or medical group buying organizations and, in some instances, by individual institutions. Sales in this segment may also be made through direct negotiation between the end user and the seller.

33. In Quebec, there are 11 procurement organizations, referred to as "*groupes d'approvisionnement en commun*" (joint procurement groups), and, in general, these organizations are mandated as purchasing agents to issue calls for tenders and negotiate prices and other terms of sale. Purchases for the institutional segment of the market in Quebec are usually made on a regional and combined basis, i.e. requirements for both hospitals and long-term care facilities within a particular region are aggregated and put out for tender together.

34. In the retail segment of the market, purchases are usually not made using an RFP process but by means of price lists or negotiations based on market intelligence. The retail segment of the market accounts for a relatively small proportion of the total Canadian market and a relatively small percentage of SCA's sales. Most of the sales of imports in the retail segment are of products from the United States; none are of products from France.

PRICING

35. The RFP process, which accounts for a large proportion of sales to the institutional segment of the market, results in a contract between the end-user customer (long-term care institutions and buying groups) and the supplier. An RFP is issued with detailed specifications for a full list of products that include the subject and non-subject goods. The suppliers respond by submitting pricing to the tendering authority. Part

of the process may involve the conduct of clinical tests that require some time to complete and, as a result, contracts are usually awarded several months after the deadline for submissions.

36. Contracts resulting from the RFP process may range in length from three to eight years and are not all tendered at the same time. The prices, which are based on individual products, are set for the whole term of the contract or are renegotiable at stipulated times during the term of the contract. Bidders may be required to include in their bids a discount fee payable to the buying group.

37. In Quebec, but not necessarily in the rest of Canada, the RFP process is transparent. The parties involved may have access to the bid pricing information of the competitors at various times and sometimes prior to the award of the contract, but not necessarily before bidding on the tenders. The institution issuing the RFP decides when it will provide the results of the bids and discloses the prices offered by bidders.² Thus, in some instances, bidders are bidding “blind”.

38. In some instances, purchases of disposable adult incontinence briefs in the institutional segment of the market are made through contracts without an RFP process. The direct negotiation that takes place in these circumstances often involves a single supplier.

39. In other cases, smaller institutions purchase disposable adult incontinence briefs on a “spot” basis. When the Canadian manufacturer is a party to this transaction, the purchases are made at its “suggested resale” price or for less.

40. In the retail segment of the market, retailers usually purchase disposable adult incontinence briefs at prices determined by their suppliers’ established price lists or for less. Sometimes, the briefs are sold through wholesalers/distributors.

41. The Canadian manufacturer and importers may use distribution services. Some distributors provide only the physical distribution of the goods. In other instances, distributors provide a full line of distribution services, including purchasing disposable adult incontinence briefs at prices established through a distribution price list, reselling to end users, and billing and collection.³

42. Finally, suppliers (including distributors) offer a variety of volume discounts, rebates and incentive programs, which also affect their final net price.

ANALYSIS

43. In the present case, pursuant to subsection 42(1) of *SIMA*, the Tribunal is required to inquire as to whether the dumping of the subject goods has caused injury or retardation or is threatening to cause injury. “Injury” is defined in subsection 2(1) of *SIMA* as “. . . material injury to a domestic industry”. “Domestic industry”, in turn, is described as “. . . the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods . . .”

44. The Tribunal must therefore first determine what constitutes “like goods”. It will then determine what constitutes the “domestic industry” for the purpose of its injury analysis.

2. *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 188.

3. *Ibid.* at 198-99.

45. The Tribunal will next determine whether the dumping of the subject goods has caused injury to the domestic industry. Finally, should the Tribunal arrive at a finding of no injury, it will then determine whether there exists a threat of injury.⁴ Because a domestic industry is already established, the Tribunal will not consider the question of retardation.⁵

Like Goods

46. Given that the Tribunal must determine whether the dumping of the subject goods has caused or is threatening to cause injury to the domestic producers of like goods, the Tribunal must first determine which domestically produced goods, if any, constitute like goods to the subject goods.

47. Subsection 2(1) of *SIMA* defines “like goods” as “... (a) goods that are identical in all respects to the other goods, or (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods”.

48. The Tribunal notes that, in initiating its investigation, the CBSA defined the subject goods as all-in-one (one piece) disposable adult incontinence briefs, which provide absorbent protection against urinary and fecal incontinence and are held in place during use by means of a fastening system, originating in or exported from France. The Tribunal also notes that SCA submitted that the subject goods and the goods produced by the domestic industry are directly substitutable and compete directly with each other in the Canadian market.⁶ The other participants did not challenge SCA’s submissions that the goods produced by the domestic industry are like goods to the subject goods.

49. In considering the issue of like goods, the Tribunal typically looks at a number of factors, such as the physical characteristics of the goods, their market characteristics, such as substitutability, pricing and distribution, and whether the domestic goods fulfill the same customer needs as the subject goods. The evidence indicates that disposable adult incontinence briefs produced in Canada and the subject goods are very similar in appearance, principal components and construction. Both are available in a range of different absorbency levels suitable for different requirements and in different sizes. In short, they are of similar quality and fulfill the same end uses. Further, disposable adult incontinence briefs produced in Canada and the subject goods are sold through the same channels of distribution, for the most part, under a pricing regime characterized by an RFP process and long-term contracts that include rebates, discounts and incentive programs. They compete directly with each other in the institutional segment, which is the largest segment of the market for disposable adult incontinence briefs.⁷

50. In view of the evidence, the Tribunal finds that disposable adult incontinence briefs produced in Canada closely resemble the subject goods in terms of physical and market characteristics (substitutability, similar pricing regime and channels of distribution) and end uses. Therefore, the Tribunal concludes that disposable adult incontinence briefs produced in Canada constitute like goods to the subject goods.

4. Injury and threat of injury are distinct findings; the Tribunal is not required to make a finding relating to threat of injury under subsection 43(1) of *SIMA* unless it first makes a finding of no injury.

5. Subsection 2(1) of *SIMA* defines “retardation” as “... material retardation of the establishment of a domestic industry”.

6. Manufacturer’s Exhibit A-03 at para. 6, Administrative Record, Vol. 11.

7. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 48; *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 45, 48.

51. In considering whether there is more than one class of like goods, the Tribunal typically looks at the same factors as it does in considering like goods, including those listed above, and applies them to the like goods. SCA submitted that there were two “tiers” or “bands” of goods distinguished by quality, which, in turn, was largely determined by absorbency.⁸ It further submitted that it competed directly with Tyco only in the upper tier. However, it did not argue for more than one class of goods. On the contrary, in its oral argument, SCA explicitly took the position that the like goods and the subject goods were directly substitutable and that there was only one class of goods.⁹ Similarly, Tyco did not argue that there were separate classes of goods. However, Tyco disputed SCA’s argument that there were two “tiers” of goods based on quality and stated that there is an economic model or continuum which includes price on one side and quality, absorbency, comfort, fit and performance of the tabs on the other side.¹⁰

52. The Tribunal recognizes that there are different quality levels among disposable adult incontinence briefs coming from various sources. In particular, the evidence indicates that the products from the United States are generally of lower absorbency than those from either SCA or Tyco France. The Tribunal agrees with the continuum argument and is therefore of the view that, rather than falling on one side or the other of a distinct dividing line, disposable adult incontinence briefs, including the subject goods and the like goods, fall at various points along a continuum of quality within a single class of goods.

53. Accordingly, the Tribunal concludes that there is a single class of goods.

Domestic Industry

54. 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.

55. The Tribunal must determine whether there has been injury against the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.

56. As indicated above, SCA is the sole Canadian manufacturer of disposable adult incontinence briefs and, as such, the producer of the total domestic production. On this basis, the Tribunal determines that SCA represents the domestic industry for the purposes of its inquiry.

INJURY

57. Subsection 37.1(1) of the *Special Import Measures Regulations*¹¹ prescribes that, in determining whether the dumping has caused injury to the domestic industry, the Tribunal consider the volume of the dumped goods, their effect on the price of like goods and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider factors other than the dumping to ensure that any injury or threat of injury caused by those other factors is not attributed to the effect of the dumped imports.

8. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 14-17.

9. *Transcript of Public Hearing*, Vol. 3, 24 May 2007, at 359-60.

10. *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 246-47.

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

58. In making its assessment of whether the dumping has caused or is threatening to cause injury to the domestic industry, the Tribunal will focus its injury analysis on the institutional segment, which accounts for approximately 90 percent of the market.¹² In doing so, it will combine RFP and non-RFP contracting processes. However, the materiality of any injury caused by the dumping must be assessed against the domestic industry's production of like goods as a whole, including production for export. The manner in which the Tribunal will assess the alleged injury to the domestic industry is consistent with the approach that it has taken in previous cases.¹³

Volume of Dumped Goods

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

60. The volume of imports of the subject goods decreased by 38 percent from 2004 to 2005 and then increased by 312 percent from 2005 to 2006. Thus, during the period of inquiry, the volume of imports of the subject goods more than doubled between 2004 and 2006. There was then a significant decrease in the first quarter of 2007, when the volume dropped to less than half of what it had been in the first quarter of 2006.¹⁴ During this whole period, imports of the subject goods were very modest compared with the size of the Canadian market.

61. In contrast, the volume of imports of disposable adult incontinence briefs from the United States was much more significant than the volume of imports from France.¹⁵ In terms of percent share of total imports into the Canadian market, even when the share of the subject goods tripled between 2004 and 2006, it was still between 10 and 20 times smaller than the share of all the imports from the non-subject countries, which were dominated by imports from the United States.¹⁶ Tyco, the sole importer of the subject goods into Canada,¹⁷ argued that the volume of imports of the subject goods was minuscule compared with imports of disposable adult incontinence briefs from the United States.

62. The total apparent market for disposable adult incontinence briefs grew by more than 4 percent in volume over the period of inquiry. During the same period, sales from domestic production, which account for the majority of the apparent market, increased by 6 percent. However, the Tribunal notes that, while sales of the subject goods increased more than sixfold during the period of inquiry, sales of imports from non-subject countries decreased by 4 percent. During the period of inquiry, SCA's market share remained stable, while the market share of imports from the United States decreased to the advantage of imports from France.¹⁸

12. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 48.

13. *Copper Rod* (28 March 2007), NQ-2006-003 (CITT) at para. 50; see also *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 13.

14. *Pre-hearing Staff Report*, revised 14 May 2007, Tribunal Exhibit NQ-2006-004-06A, Administrative Record, Vol. 1.1 at 120; *Protected Additional Staff Analysis*, 14 May 2007, Tribunal Exhibit NQ-2006-004-07B (protected), Administrative Record, Vol. 2.1 at 128.

15. *Protected Pre-hearing Staff Report*, revised 14 May 2007, Tribunal Exhibit NQ-2006-004-07A (protected), Administrative Record, Vol. 2.1 at 120.

16. *Ibid.*

17. Tribunal Exhibit NQ-2006-004-04, Administrative Record, Vol. 1 at 65.13.

18. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 40.

63. During the period of inquiry, sales of disposable adult incontinence briefs in the institutional segment of the market represented approximately 90 percent of the total apparent market.¹⁹ Sales of imports from France occurred only in that segment of the market.²⁰ SCA argued that there was a rapid increase in the volume of imports from France, solely in the institutional segment of the market.²¹ Indeed, sales of the subject goods to institutions increased by more than six times between 2004 and 2006, in this growing and predominant segment of the market.²² However, the Tribunal is of the view that the significance of these fluctuations is minimal, since they occurred on a very small base and the total volume of sales from imports of the subject goods constituted a minuscule proportion of the total market.²³

64. The Tribunal notes that, although, proportionally, sales of the subject goods increased dramatically, their market share was still insignificant in 2006 compared to the domestic industry's share of the market or even the non-subject countries' market share. Furthermore, sales from domestic production increased by a greater amount than the increase in the total apparent market between 2004 and 2006, and their market share was slightly higher in 2006 than in 2004.²⁴

65. The Tribunal is of the view that, although the rates of change in import volume, market share and sales of the subject goods are quite significant, the absolute changes are small relative to the base on which they are calculated and that, therefore, it is possible for all these proportional changes to take place without exerting a serious impact on the domestic industry.

66. Basing its conclusion on the foregoing, the Tribunal is of the view that, during the period of inquiry, the volume of imports of dumped goods was not significant and that there was not a significant increase in the volume of such dumped imports, relative to the production and consumption of the like goods in either absolute or relative terms.

Effect of the Dumped Goods on the Price of Like Goods

67. Pursuant to paragraph 37.1(1)(b) of the *Regulations*, the Tribunal must consider the effects of the dumped goods on the price of like goods and, in particular, whether the dumped 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.

68. As previously indicated, the net price at which disposable adult incontinence briefs are sold in the domestic market is the result of a variety of volume discounts, rebates and incentive programs that are applied to the prices established during contract negotiations or through established price lists. In the discussion that follows, references to price are to this net price.

19. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 48.

20. *Ibid.* at 74.

21. Manufacturer's Exhibit A-01 at para. 33, Administrative Record, Vol. 11; Manufacturer's Exhibit A-03 at para. 8, Administrative Record, Vol. 11; Manufacturer's Exhibit A-09 at paras. 18-19, Administrative Record, Vol. 11.

22. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 45.

23. *Ibid.* at 40.

24. *Ibid.*

69. In assessing prices on an aggregate level, the Tribunal notes that the average unit selling values of like goods decreased over the period of inquiry, but by a very small amount. The decrease amounted to less than 1 percent between 2004 and 2005 and then 1 percent between 2005 and 2006.²⁵ The Tribunal further notes that, again on an average basis, prices of the subject goods appear to have been consistently higher than those of like goods during the Tribunal's period of inquiry.²⁶

70. SCA argued that it suffered price-related injury²⁷ due to the presence of dumped imports from France, and it presented injury allegations for 14 accounts to support its submission. It presented these allegations as a representative sample of the injury that it suffered.²⁸ However, on the basis of both written and oral submissions, the Tribunal concludes that these are in fact the only instances in which the evidence supports the general claim of injury resulting from competition between the like goods and the subject goods. Further, the Tribunal views the accounts relating to the 14 allegations as a small percentage of total market,²⁹ and it also notes that they were geographically concentrated in Quebec rather than being distributed evenly across Canada.

71. SCA argued that "full market average unit prices" are an inappropriate basis for determining injury and causality arising from the dumped imports. SCA argued that the Tribunal should focus on specific accounts within the institutional segment of the market for which pricing information for both SCA and Tyco was submitted. In SCA's submissions, the evidence on the record for this sample of accounts demonstrates that SCA had to discount its prices to retain sales and that such price erosion, caused by competition with the subject goods, resulted in material injury to the domestic industry. Tyco responded that, to the extent that SCA's case was based on those examples, it must fail because SCA had not shown causality. Further, Tyco argued that, if SCA had suffered any injury (which Tyco denied), it would have been self-inflicted.

72. In some previous decisions, the Tribunal has determined that average pricing data are not persuasive when inconsistent with more specific pricing evidence on the record. In *Copper Pipe Fittings*,³⁰ it stated as follows:

...

133. First, as previously discussed in the Tribunal's analysis of price undercutting and price depression, the Tribunal recognizes that average pricing data in the pre-hearing staff report are inconsistent with other evidence on the record and, therefore, whether or not average dumped/subsidized and non-dumped/non-subsidized prices are higher or lower than domestic prices, on their own, is not persuasive.

...

73. Thus, the Tribunal does not always limit its analysis to average pricing data and may, in certain circumstances, decide to analyse more specific evidence on the record. In this inquiry, the Tribunal believes that a distinction may be made between full market average unit prices and average prices per account and that the evidence on the record demonstrates that average prices per account are relevant to the Tribunal's analysis and meaningful. Therefore, the Tribunal has reviewed average prices for the 14 accounts where

25. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 42.

26. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 42.

27. Tribunal Exhibit NQ-2006-004-09.01, Administrative Record, Vol. 3 at 21-26.

28. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 33.

29. Manufacturer's Exhibit A-04 (protected) at para. 38, Administrative Record, Vol. 12.

30. (19 February 2007), NQ-2006-002 (CITT).

SCA claimed injury in order to determine whether the dumped goods undercut or depressed the price of like goods, or suppressed the price of like goods. The following analysis refers to these average prices per account. The Tribunal notes however that this analysis is limited to the effects of the dumped goods on the price of like goods in a subset of one segment of the market, the institutional segment. In view of the foregoing, to assess the extent to which the subject goods have caused injury to SCA in the form of price depression or lost revenues in the case of those 14 accounts, the Tribunal will have to examine, after having considered all relevant factors, whether this injury meets the threshold of materiality. As stated above, the materiality of the injury caused by the dumping must be assessed against the domestic industry's production of like goods as a whole.

Price Undercutting and Price Depression

74. The Tribunal has carefully examined the evidence on the record provided by SCA, Tyco and, in some instances, the purchaser for a specific account where SCA alleged price undercutting, which, it submitted, led to price depression.

75. SCA's first allegation concerns a contract with Corporation Régionale des achats des établissements de santé et des services sociaux de la Côte-Nord (Côte-Nord). In 2004, Côte-Nord tendered an RFP for which both SCA and Tyco submitted bids. SCA was the incumbent supplier to Côte-Nord. This was the first instance in which it faced direct competition with the subject goods. In that competition, Tyco submitted a bid at prices below SCA's existing and offered price and bid with a new product line called "Lille" produced in France. As a result of the low prices offered by Tyco, SCA lost this contract.³¹

76. Tyco argued that, even though its prices offered on the Côte-Nord tender were lower than SCA's existing and offered prices, its prices were still higher than the established \$0.50 to \$0.55 average market price. However, the Tribunal believes that the difference between Tyco's offered prices and the established average market price on this particular contract is irrelevant because, as confirmed by the witness from Tyco, Côte-Nord is a small buying group and, as such, tends to attract bids with higher prices.³²

77. The evidence also shows that, following the loss of the Côte-Nord contract, SCA took Tyco's new presence in the market into account as it responded to subsequent RFPs. The Tribunal notes that, in its responses to subsequent RFPs, SCA offered prices that reflected this new awareness in the bids that it submitted to Corporation Approvisionnement—Montréal (Montréal) and Corporation d'approvisionnement Laurentides-Lanaudière, de l'Estrie, de l'Outaouais et de la Coopérative des services regroupés en approvisionnement de la Mauricie et du Centre-du-Québec (the Four Regions), among others.

78. For the Montréal contract, the evidence on the record indicates that SCA, Tyco and Paper Pak Products Inc. (Paper Pak) all bid on the disposable adult incontinence briefs requested in the RFP. SCA lowered its offer prices below the pricing in its existing contract with Montréal in order to retain the contract. Tyco bid higher than SCA's existing and offered prices. The evidence also shows that Paper Pak offered disposable adult incontinence briefs imported from the United States at significantly lower prices,

31. Manufacturer's Exhibit A-03 at paras. 22-26, Administrative Record, Vol. 11; Importer's Exhibit B-04 at paras. 29-30, Administrative Record, Vol. 13.

32. Importer's Exhibit B-04 at para. 30, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 21; *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 253-54, 259.

but these products were found to be unacceptable after product evaluation. The Tribunal notes that, in the end, SCA retained the Montréal contract, but at prices lower than those in its previous contract.³³

79. The Tribunal also reviewed the evidence on the record with respect to the account for the Four Regions, which shows that SCA was the only bidder for the disposable adult incontinence briefs requested in the RFP and that, again, SCA lowered its offer prices below the pricing of its existing contract in order to retain the business. According to Tyco, it did not bid on the RFP for the Four Regions, which was open for bids at the same time as the RFP for Montréal, because it could not supply both contracts at the same time³⁴ and it could not comply with requirements in the RFP, particularly personnel resources, discounts and free goods that would be required to service the member institutions. In the end, SCA retained the contract for the Four Regions but at lower prices.³⁵

80. Tyco argued that, with respect to the two allegations above, SCA had injured itself by submitting unnecessarily low bids on these contracts. However, the Tribunal is of the view that SCA was acting on the best intelligence available, which was the pricing for Côte-Nord, and that SCA was reasonable in trying to protect its market by pricing below anticipated competition pricing, given that information on the Côte-Nord pricing was widely shared within the institutional community. The evidence shows that the market for disposable adult incontinence briefs, particularly in Quebec, is unusual in that there is greater transparency in certain aspects of the bidding process that leads to a high degree of price knowledge among buyers. The Tribunal notes that bidders are “blind” at the start of the bidding process as to who their competitors might be and what the bid prices might be and they must rely on past experience, thus making it more difficult for individual bidders to differentiate their price offers.³⁶

81. In the Montréal tender, Tyco argued that SCA’s pricing decisions were also based on pricing pressure from imports from the United States. Again, the Tribunal is of the view that the same logic can be applied with respect to the pricing of imports from the United States as to pricing experienced with the subject goods. The Tribunal also believes that, in these cases, SCA was acting on the best intelligence available, which would consist of past bids from U.S. competition, such as U.S. products offered by Paper Pak and Tyco.³⁷ Accordingly, the Tribunal finds that SCA was subject to price depression on these three accounts.

82. By extension, given that SCA was bidding “blind” on each RFP, the Tribunal believes that the same rationale can be applied to the remaining injury allegations, with the exception of the Hôpital Santa Cabrini account, which was clearly lost for non-pricing reasons.³⁸ Basing its conclusion on the foregoing, the Tribunal is convinced that there was price-based competition between the subject goods and the like goods and that SCA felt compelled to lower its prices on certain specific accounts in order to meet what it anticipated would be the prices of the dumped subject goods.

33. Manufacturer’s Exhibit A-03 at paras. 33-43, Administrative Record, Vol. 11; Importer’s Exhibit B-04, Administrative Record, Vol. 13.

34. *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 257.

35. Manufacturer’s Exhibit A-03 at paras. 51-56, Administrative Record, Vol. 11; Importer’s Exhibit B-04 at paras. 36-37, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 257.

36. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 93-96; *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 188-89.

37. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 42.

38. Importer’s Exhibit B-04 at para. 38, Administrative Record, Vol. 13; Tribunal Exhibit NQ-2006-004-19.02B (protected), Administrative Record, Vol. 6.2 at 61.

Price Suppression

83. With respect to price suppression, the evidence on the record shows that, prior to 2004, SCA was successful in obtaining price increases to help recover the costs that it had incurred for new equipment and machinery upgrades.³⁹ This approach to price increases for new contracts was taken by SCA for the Côte-Nord bid. However, as a result of Tyco's pricing, SCA could not achieve its goal of increased prices and subsequently lost this contract. In considering this evidence, the Tribunal finds that prices in the Canadian institutional segment of the market were prevented from rising by the presence of dumped imports.

84. Given this, the Tribunal is of the view that SCA was subject to price suppression on its sales during the period of inquiry. However, the Tribunal believes that this evidence of price suppression can be ascribed only to the 14 allegations of injury put forward by SCA.

Impact of Dumped Imports on the Domestic Industry

85. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped goods in light of all relevant economic factors and indices that have a bearing on the state of the domestic industry.

86. The Tribunal will focus its injury analysis on the institutional segment of the market but, as required by the *Regulations*, will assess the materiality of the injury caused by the dumping against the domestic industry's production of like goods as a whole.

Impact on output, sales, market share, profits, productivity, return on investment or capacity utilization

87. SCA argued that there was a clear nexus between the dumped subject goods and price depression causing injury to the domestic production of disposable adult incontinence briefs. Tyco submitted that the state of the domestic industry appears sound. It stated that SCA increased its production of disposable adult incontinence briefs over the period of inquiry and that SCA's sales to institutions in terms of both volume and value increased over the period of inquiry. Furthermore, Tyco submitted that, with respect to domestic sales, SCA's income statement reflects a healthy financial situation, with increased volume of sales, net sales value and gross margin during the period of inquiry.

88. A witness for SCA claimed that the improvement in SCA's gross margin was due in part to improved production costs as a result of the weakened U.S. dollar, given that raw materials used in the production of disposable adult incontinence briefs are valued in U.S. dollars. Raw materials represent a substantial share of the cost of goods manufactured.⁴⁰ Furthermore, the improvement to the gross margin was a result of "product cost rationalization programs" put in place in 2006 to improve production costs. The witness further claimed that, after neutralizing the effects of the weakened U.S. dollar and product cost improvements, there was a decline in the gross margin in 2006.⁴¹ According to the witness, this decline in

39. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 19.

40. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 92-93.

41. *Transcript of In Camera Hearing*, Vol. 1, 22 May 2007, at 6.

gross margin arose from the lost accounts and lost sales due to the reduction of prices, as outlined in the specific allegations of loss.⁴²

89. The Tribunal notes that this witness, in estimating the degree of injury suffered by the domestic industry, based his calculation on the 14 allegations and applied it only to the domestic institutional segment of the market. However, the Tribunal must assess injury to domestic production as a whole. SCA experienced stable growth in the volume of production during the period of inquiry. Between 2004 and 2006, SCA experienced growth of 4 percent in overall production. Production destined for domestic sales grew each year during the period of inquiry, by 5 percent between 2004 and 2006. In addition, production destined for export sales grew by 3 percent between 2004 and 2006.⁴³

90. With respect to sales, the Tribunal notes that the volume of domestic and export sales from domestic production rose to some extent between 2004 and 2005 and even further between 2005 and 2006.⁴⁴ The Tribunal notes that the domestic industry lost a minor portion of its market share between 2004 and 2005, then in 2006 recovered that lost portion and increased its market share over the 2004 level, resulting in a net improvement over the period of inquiry.⁴⁵ Whereas the loss of market share in 2005 may be attributable to the subject goods, recovery in 2006 more than offset this loss, while market share held by the subject goods remained stable. The volume of sales to institutions from domestic production showed a similar growth trend. Between 2004 and 2005, SCA's volume of sales to institutions rose by 3 percent and, in 2006, by a further 5 percent.⁴⁶ The evidence on the record indicates that most of this increase was the result of a growth of sales through the non-RFP process. Sales volume through the RFP process compared to the non-RFP process grew by a much smaller degree between 2004 and 2006.⁴⁷ In terms of market share of the institutional segment of the market, SCA held a major share in 2004 that remained stable in 2005 and increased slightly in 2006.⁴⁸ The Tribunal observes that buyers exert very high levels of control over quality and establish exact specifications through product evaluation for goods being solicited.⁴⁹ SCA's witness stated that the transition time to run down previous inventory and train staff in the use of the newly introduced product may take from one to three months.⁵⁰ Therefore, the Tribunal is of the view that substitutions between the subject goods and the like goods can present certain transitional challenges, which may help to explain SCA's ability to maintain its share of this segment of the market.

91. The retail segment of the market represents approximately 10 percent of the total volume of the apparent market. SCA held a major share of that segment of the market in 2004, which decreased slightly in 2005 and remained stable in 2006.⁵¹ The changes in SCA's market share in this segment of the market were caused by its loss of 21 percent of its sales volume between 2004 and 2005 and its further loss of less than 1 percent between 2005 and 2006.⁵² Overall, however, SCA's market share in the retail segment is

42. Manufacturer's Exhibit A-04 (protected) at paras. 17-29, 36, Administrative Record, Vol. 12.

43. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 35.

44. *Ibid.* at 88-89.

45. *Ibid.* at 40.

46. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 45.

47. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 50.

48. *Ibid.* at 45.

49. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 100-102.

50. *Ibid.* at 135.

51. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 77; *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 74.

52. *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 74.

considerably less significant than its market share in the institutional segment.⁵³ In any event, SCA's losses in the retail segment cannot be attributed to the subject goods, as Tyco sold the subject goods only in the institutional segment.

92. With respect to profits, the Tribunal observes that, regarding domestic sales, SCA lost some ground on its net income in 2005 over 2004, then recovered substantially in 2006, though not to its 2004 level. However, its gross margin, which dipped in 2005, recovered in 2006 to a level above that of 2004. For domestic sales, general, selling and administrative expenses increased considerably in 2005 and increased again in 2006. When viewed on a per-unit basis, both gross margin and net income trended slightly downward from 2004 to 2006.⁵⁴ With respect to export sales, on the other hand, both gross margin and net income trended upward during the same period,⁵⁵ thus lending credibility to the argument that Tyco products had a negative impact in the domestic market.

93. The Tribunal also notes that SCA's productivity increased each year in the period of inquiry. Furthermore, SCA's capacity utilization improved from 2004 to 2005 and remained constant between 2005 and 2006.⁵⁶

94. With respect to return on investment, Tyco argued that SCA's claim that its return on investment was impaired by the dumping of the subject goods was barely credible, given the financial condition of the domestic industry. The Tribunal observes that SCA appeared to have met its corporate target threshold of 20 percent return on investment in recent years despite having made major capital investments during the period of inquiry.⁵⁷

Impacts on cash flow, inventories, employment, wages, growth or ability to raise capital

95. With respect to cash flow, the evidence on the record indicates that the retained earnings of SCA rose significantly in both 2005 and 2006.⁵⁸ Consequently, the Tribunal does not believe that there is injury to SCA's cash flow that can be demonstrated by the evidence available.

96. The industry functions in a system that provides what the Tribunal considers to be close to just-in-time delivery of the products.⁵⁹ Although the Tribunal has noticed fluctuations in the inventory figures provided, the Tribunal views these snapshots as being of questionable significance because of the short time that inventory is held.⁶⁰ Further, SCA did not complain of any impact on its inventory levels.

97. SCA's total employment numbers dropped from 2004 to 2005 and again from 2005 to 2006.⁶¹ Tyco claimed that SCA's decrease in the number of employees and hours worked is largely attributable to advances in the automation of its production processes arising from SCA's investments in "state-of-the-art

53. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 45, 74.

54. *Ibid.* at 88.

55. *Ibid.* at 89.

56. *Ibid.* at 95.

57. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 119; *Transcript of In Camera Hearing*, Vol. 1, 22 May 2007, at 36.

58. Tribunal Exhibit NQ-2006-004-10.01 (protected), Administrative Record, Vol. 4 at 87, 100, 113.

59. *Transcript of In Camera Hearing*, Vol. 1, 22 May 2007, at 50-51.

60. *Ibid.*; *Transcript of In Camera Hearing*, Vol. 2, 23 May 2007, at 124.

61. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-007 (protected), Administrative Record, Vol. 2.1 at 94.

machinery” in 2000. In the Tribunal’s view, the reduction in employment indicates improved productivity and operational efficiency rather than injury as a result of the dumping of the subject goods.

98. SCA did not claim injury with respect to other relevant factors. Therefore, the Tribunal will not consider these factors.

Magnitude of margin of dumping

99. Although the final margins of dumping were high, in the Tribunal’s view, this factor does not translate directly into either injury or a measure of the level of any injury that may have occurred. The Tribunal notes that, while the margins are relatively high, the price undercutting in the competitive market was low, which seems to indicate that Tyco exercised some discipline in its price competition. The magnitude of actual injury is influenced by the degree of price undercutting and the volume of subject goods to which that undercutting applies, not by the dumping margins themselves.

Conclusion on Injury

100. Although the dumped goods had an impact on the domestic industry’s performance through price depression and suppression in the institutional market, that impact has to be measured against domestic production as a whole, including production for export.

101. Injury is defined in *SIMA* as material injury. In the Tribunal’s view, the level of injury incurred by the domestic industry is not material in degree within the meaning of *SIMA*. The Tribunal recognizes that the presence of dumped imports during the period of inquiry caused a certain level of depression and suppression to SCA’s prices in the institutional segment of the market, which in turn affected SCA’s sales revenues. However, this effect on its sales revenues is not significant when assessed against domestic production and sales of like goods as a whole.

102. In summary, the Tribunal finds that, while the subject goods have caused some injury to the domestic industry in the form of price depression and lost sales revenues in the domestic institutional segment of the market, when assessed against total domestic production as required by *SIMA*, and in view of the Tribunal’s analysis of other relevant factors, any injury suffered by SCA fails to meet the threshold of materiality.

Threat of Injury

103. Having found that the dumping of the subject goods has not caused injury, the Tribunal must now consider whether the dumping of the subject goods is threatening to cause injury. The Tribunal is guided in its consideration of this question by subsection 37.1(2) of the *Regulations*, which prescribes factors to be taken into account for the purposes of its threat of injury analysis. Further, the Tribunal notes that subsection 2(1.5) of *SIMA* indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping of the goods would cause injury are clearly foreseen and imminent.

104. The Tribunal, in conducting its threat of injury analysis, typically considers a time frame of 18 to 24 months beyond the date of its finding with respect to injury. In the present case, the Tribunal’s focus will be on the period remaining in 2007 and 2008, as that is the period for which there is evidence on the record.

105. Looking at the rate of increase of dumped goods imported into Canada during the period of inquiry, which may indicate a likelihood of substantially increased imports into Canada of the subject goods, the Tribunal notes that the volume of imports of the subject goods decreased by 38 percent in 2005 and rose by

312 percent in 2006. Imports of the subject goods during the first quarter of 2007 declined by more than half, when compared with the first quarter in 2006,⁶² but the Tribunal is of the view that this situation is due in part to a chill on importations resulting from the imposition of provisional duties by the CBSA on February 20, 2007.⁶³ Although the rate of change is quite significant, the base on which it is calculated is so small that the resulting volume of imports is not sufficiently large to lead to a conclusion of volume-based threat. Tyco's volume of imports from France relative to the size of the domestic market is quite small and Tyco has been unsuccessful in increasing its market share in the domestic market. The Tribunal does not believe that Tyco could, in the near future, increase its volume of imports at the rate experienced between 2005 and 2006 and make sales in the Canadian market to support that level, given Tyco France's limited unused plant capacity, the relatively small proportion of the institutional segment of the market covered by contracts up for renewal in the near future and Tyco's past performance in acquiring new business in the domestic market.⁶⁴

106. With respect to the existence of freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter as an indication of a likelihood of a substantial increase of dumped goods, SCA claimed overcapacity for production of the subject goods at Tyco France and negative growth in the French market for disposable adult incontinence briefs for the last two years. In addition, SCA argued that the rapid increase in import volumes from France and the possibility for Tyco to sell at dumped prices significantly below SCA prices, particularly through the RFP/contract process in the institutional segment of the market, lead to threat of injury from dumping. On the other hand, Tyco stated that nothing suggests that imports of the subject goods are likely to increase in the next few years, since the French market and the Western European market as a whole constitute the majority of Tyco France's total sales and are forecast to grow by 3 to 4 percent annually.⁶⁵ Neither SCA's submission on the recent decline in the French market nor Tyco's projection of growth in the Western European market was disputed. The Tribunal notes that Tyco France's plant was operating at a high proportion of its capacity between 2004 and 2006.⁶⁶ Even assuming that the currently unused capacity of Tyco France's plant were entirely devoted to manufacturing disposable adult incontinence briefs for the Canadian market, the increase in production would represent, at most, a small share of the Canadian market. However, the Tribunal considers this scenario unlikely, particularly given the anticipated growth of the market in Tyco France's home territory and, therefore, does not see the free capacity of Tyco France's plant as posing a significant threat to the domestic industry.

107. In examining the potential for product shifting, as neither SCA nor Tyco indicated that the machinery used to produce disposable adult incontinence briefs can be used to produce other goods, the Tribunal believes that the machinery used to produce the subject goods and like goods will continue to be exclusively dedicated to those goods.⁶⁷

62. *Pre-hearing Staff Report*, revised 14 May 2007, Tribunal Exhibit NQ-2006-004-06A, Administrative Record, Vol. 1.1 at 120; *Protected Additional Staff Analysis*, 14 May 2007, Tribunal Exhibit NQ-2006-004-07B (protected), Administrative Record, Vol. 2.1 at 128.

63. Tribunal Exhibit NQ-2006-004-01, Administrative Record, Vol. 1 at 2-3.

64. Manufacturer's Exhibit A-04 (protected) at para. 40, Administrative Record, Vol. 12; *Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-06, Administrative Record, Vol. 1.1 at 41.

65. Tribunal Exhibit NQ-2006-004-15.02, Administrative Record, Vol. 5.1 at 24; Importer's Exhibit B-02 at para. 33, Administrative Record, Vol. 13.

66. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-004-07 (protected), Administrative Record, Vol. 2.1 at 98.

67. *Ibid.* at 95, 98.

108. With respect to prices at which the subject goods would enter the domestic market and their effect on the price of like goods, Tyco submitted that, between 2004 and 2006 and for the foreseeable future, the subject goods have not been, on average, under-priced. Tyco argued that the subject goods in the institutional segment of the market were priced higher than domestically produced products in 2006. It further argued that its existing pricing trend does not suggest that the subject goods will be under-priced in the near future.⁶⁸ In addition, the witness submitted that Tyco has modified its marketing approach to concentrate on higher-priced non-hospital institutions, since the barrier to enter the Canadian hospital market for the subject goods was too high.⁶⁹ SCA argued that, in 2007, it will compete in the institutional segment of the market on contracts that are of considerable value over the next two years. SCA believes that it will suffer further price and income degradation, based on past experiences of price expectations established in the marketplace, with the availability of Tyco's imports at dumped prices.⁷⁰

109. To assess the threat of price-based injury, the Tribunal calculated the likely future pricing effects of the subject goods on the basis of evidence submitted by the parties. The Tribunal's projections for 2007 and 2008 took into account the continuing price effect of the subject goods on the existing 14 accounts which were the subjects of the allegations noted above and added the other accounts found on the record for which RFPs may be issued during the upcoming period. In taking this approach, the Tribunal applied the scenario presented by SCA and projected it through the period. To quantify the potential injury, the Tribunal applied the total additional potential losses in 2007 and 2008 on accounts for which there is evidence on the record (assuming the total loss of all contracts coming up for renewal) against the total value of domestic production in each of the years in question. The resulting calculation was below 5 percent of total sales for each of 2007 and 2008. In the Tribunal's view, prices at which the subject goods are entering the Canadian market are not likely to have a significant depressing or suppressing effect on the price of like goods in the future and, therefore, are not threatening to cause material injury to the domestic industry.

110. Although there was testimony by the domestic industry of a significant build-up of Tyco's inventories of the subject goods during 2005 and 2006,⁷¹ the Tribunal notes that data on the actual volumes of subject goods in the Canadian market were elusive. As previously mentioned, the Tribunal does not regard snapshots of inventories of this product to be particularly helpful in establishing trends or behaviour in the market. The Tribunal also notes that the subject goods represent a very small proportion of Tyco's total business.

111. Finally, the Tribunal is not aware of evidence of the imposition of anti-dumping measures by the authorities of a country other than Canada in respect of goods of the same description or in respect of similar goods.

112. Based on its analysis of the factors above, the Tribunal recognizes that the dumping of imports beyond the period of inquiry could cause a certain level of price depression to SCA in the institutional segment of the market, but believes that any such price depression will have a minimal effect on domestic production. Thus, the Tribunal is of the view that the level of threat to the domestic industry does not support a conclusion that the injury would be material. Therefore, the Tribunal concludes that the evidence on the record does not indicate that the dumped goods pose a clearly foreseen and imminent threat of injury to the domestic industry.

68. *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 251.

69. Importer's Exhibit B-04 at paras. 54, 57, 58, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 2, 23 May 2007, at 321-22.

70. Manufacturer's Exhibit A-04A (protected) at paras. 40, 41, Administrative Record, Vol. 12.

71. *Transcript of Public Hearing*, Vol. 1, 22 May 2007, at 24-25.

113. Accordingly, the Tribunal finds that the dumping of the subject goods is not threatening to cause injury to the domestic industry.

CONCLUSION

114. Therefore, pursuant to subsection 43(1) of *SIMA*, the Tribunal hereby finds that the dumping of disposable adult incontinence briefs originating in or exported from France has not caused injury and is not threatening to cause injury to the domestic industry.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member