



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2017-003

Polyethylene Terephthalate Resin

*Finding issued
Friday, March 16, 2018*

*Reasons issued
Tuesday, April 3, 2018*

TABLE OF CONTENTS

FINDING	i
STATEMENT OF REASONS	1
INTRODUCTION	1
BACKGROUND	1
RESULTS OF THE CBSA'S INVESTIGATIONS	2
PRODUCT	3
Product Definition	3
Product Information	3
LEGAL FRAMEWORK	3
LIKE GOODS AND CLASSES OF GOODS	4
DOMESTIC INDUSTRY	5
NEGLIGIBILITY, CUMULATION AND CROSS-CUMULATION	5
Negligibility and Insignificance	5
Cumulation	6
Cross-cumulation	8
INJURY ANALYSIS	9
Overview of the market for PET resin and the domestic industry in Canada	9
INJURY ANALYSIS REGARDING THE SUBJECT GOODS	11
Import Volumes of Subject Goods	11
PRICE EFFECTS OF SUBJECT GOODS	12
Tribunal's Approach to the Analysis of Price Effects	13
Price Undercutting	14
Price Depression	19
Resultant Impact on the Domestic Industry	21
Conclusion	24
THREAT OF INJURY	24
Time Frame for the Threat Analysis	26
Positions of the Parties	27
Tribunal's Analysis	28
CONCLUSION	32

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

POLYETHYLENE TEREPHTHALATE RESIN

FINDING

The Canadian International Trade Tribunal (the Tribunal), pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry into whether the dumping and subsidizing of polyethylene terephthalate resin (PET resin) having an intrinsic viscosity of at least 0.70 deciliters per gram but not more than 0.88 deciliters per gram, including PET resin that contains various additives introduced in the manufacturing process, as well as blends of virgin PET resin and recycled PET containing 50 percent or more virgin PET resin content by weight, originating in or exported from the People's Republic of China (China), the Republic of India (India), the Sultanate of Oman (Oman) and the Islamic Republic of Pakistan (Pakistan), have caused injury or are threatening to cause injury to the domestic industry.

Pursuant to subsections 42(4) and (4.1) of the *Special Import Measures Act*, the Tribunal finds that the volumes of subsidized goods originating in or exported from Oman and Pakistan are negligible. As such, the Tribunal hereby terminates its inquiry regarding the subsidizing of the above-mentioned goods originating in or exported from Oman and Pakistan.

Further to the Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated February 14, 2018, that the above-mentioned goods originating in or exported from China and India, have been dumped and subsidized and the above-mentioned goods originating in or exported from Oman and Pakistan have been dumped, the Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping and subsidizing of the above-mentioned goods originating in or exported from China and India, and the dumping of the above-mentioned goods originating in or exported from Oman and Pakistan, have not caused injury and are not threatening to cause injury to the domestic industry.

Jean Bédard
Jean Bédard
Presiding Member

Ann Penner
Ann Penner
Member

Rose Ritcey
Rose Ritcey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing: Ottawa, Ontario
Dates of Hearing: February 12, 13, 14, 15, and 20, 2018

Tribunal Panel: Jean Bédard, Presiding Member
Ann Penner, Member
Rose Ritcey, Member

Support Staff: Peter Jarosz, Lead Counsel
Mark Howell, Lead Analyst
Rhonda Heintzman, Analyst
Shiu Li, Analyst
Christiane Schuchhardt, Analyst
Jyotsna Venkatesh, Analyst
Michael Carfagnini, Student-at-law

PARTICIPANTS:**Domestic Producer**

Compagnie Selenis Canada

Counsel/Representatives

Benjamin P. Bedard
Paul Conlin
Linden Dales
Carly D. Haynes

Importers/Purchasers

ESKA Inc.
Ameriplas International Inc.
A. Lassonde Inc.
IPF Holdings (DBA Integrated Packaging Films)
Naya Waters
Cascades Canada ULC
Summum Plastiques Inc
Nu-B Inc.
Veo Springs
Polar Pak Inc.
Plastique Micron

Counsel/Representatives

Peter Clark
Golsa Ghamari

Foreign Producers

OCTAL SAOC FZC

Counsel/Representatives

Greg Tereposky
Vincent DeRose
Jennifer Radford
Daniel Hohnstein
Stephanie Desjardins
Chirani Mudunkotuwa
Samuel Zakhour

Foreign Producers

M/s G-Pac Corporation
Novatex Limited

Reliance Industries Ltd.

Counsel/Representatives

Jesse Goldman
Darrel Pearson
George Reid
Margaret Kim
Sabrina A. Bandali
Josh Scheinert
Margaret Shodeinde

Victoria Bazan

WITNESSES:

Adam Davis
Davis PET Resin USA, Inc.

Robert Larkins
Compagnie Selenis Canada
Site Director

Fahad Taimur
DAK Americas LLC
Engineer

Benoit Grégoire
Veo Springs
Chief Operating Officer

Brenda Mechar
Integrated Packaging Films

Mark Faber
Integrated Packaging Films
Co-owner

Edmund Chin
Polar Pak Inc.
Technical Director

François Fournier
Ameriplas International Inc.
President

Sylvain Mayrand
A. Lassonde Inc.
Executive Vice-President and General Manager of
Operations

Ricky Lane
DAK Americas LLC
Public Affairs, Trade Relations and Corporate
Communications

Katty Davila
DAK Americas LLC
Corporate Planning and Development

Simon Dionne
Plastique Micron
Buyer, Storekeeper

Danut Clicinschi
Naya Waters
Vice-President

Bill Mechar
Integrated Packaging Films

Anne-Marie Chronas
Nu-B Inc.
President

Jim Delsnyder
ESKA Inc.
President and CEO

Jean-Sébastien Héту
Cascades Canada ULC
Plant Manager

Syed Owais Ahmad
Novatex Limited
Canada, Country Representative

Rizwan Diwan
Novatex Limited
Executive Director

Yousuf A. Sattar
M/s G-Pac Corporation

Mohammad Pervaiz Anwar
Novatex Limited
Senior Manager, Finance Department

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7
Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

1. The mandate of the Canadian International Trade Tribunal (the Tribunal) in this inquiry¹ is to determine whether the dumping or subsidizing of polyethylene terephthalate (PET) resin originating in or exported from the People's Republic of China (China), the Republic of India (India), the Sultanate of Oman (Oman) and the Islamic Republic of Pakistan (Pakistan) (individually, in groupings or collectively referred to as the subject goods) have caused injury or are threatening to cause injury to the domestic industry.

2. The Tribunal has determined, for the reasons that follow, that the dumping and subsidizing of the subject goods have not caused injury and are not threatening to cause injury to the domestic industry.

BACKGROUND

3. This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on June 29, 2017, by Compagnie Selenis Canada (Selenis) and the subsequent decision by the CBSA on August 18, 2017, to initiate investigations into the alleged injurious dumping and subsidizing.²

4. The CBSA's investigations prompted the initiation of a preliminary injury inquiry by the Tribunal. The Tribunal issued a preliminary determination on October 17, 2017, finding that the evidence disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused injury.

5. The Tribunal issued a notice of commencement of inquiry on November 17, 2017. The Tribunal's period of investigation (POI) is from January 1, 2014, to December 31, 2016, as well as the interim period of January 1 to September 30, 2017. Selenis is the sole party in favour of a finding of injury or threat of injury.

6. The opposing parties are a) importers/purchasers: ESKA Inc., Ameriplas International Inc., A. Lassonde Inc., IPF Holdings (DBA Integrated Packaging Films), Naya Waters, Cascades Canada ULC, Summum Plastiques Inc, Nu-B Inc., Veo Springs, Polar Pak Inc. and Plastique Micron; b) foreign producers: OCTAL SAOC FZC (OCTAL) of Oman, M/s G-Pac Corporation (G-Pac) and Novatex Limited of Pakistan, and Reliance Industries Ltd. (Reliance) of India.

7. The Tribunal received one request to exclude products from its finding. This request was by Markas Inc. for a particular type of PET resin for hot-fill applications.³ Given the finding, the Tribunal does not need to decide on this request.

8. The Tribunal received requests for information (RFI) from most parties made to other parties for various supplementary evidence. Many of the RFIs were consented to and the Tribunal made a decision to allow or disallow other RFIs. As in most injury inquiries, the Tribunal in this case accorded parties the opportunity to notify it of matters arising by February 8, 2018, just prior to the public hearing. Multiple requests to file documents were received from parties. These and other concerns were all dealt with at a

1. The inquiry is conducted pursuant to section 42 of the *Special Import Measures Act*, R.S.C., 1985, c. S-15 [SIMA].

2. The CBSA did not initiate an investigation into the alleged dumping of the subject goods from Turkey: Exhibit PI-2017-02-05, Vol. 1H at 32.

3. Exhibit NQ-2017-003-24.01, Vol. 1.3.

prehearing teleconference held by the Tribunal on February 9, 2018. The Tribunal held its hearing starting on February 12, 2018. It heard witnesses from the domestic industry, importers/purchasers and foreign exporters.

9. On February 15, 2018, the last scheduled day of the hearing, counsel for Selenis submitted important revisions to Selenis's questionnaire response on the record. While the Tribunal receives information revising questionnaire responses throughout the hearing, it agreed with counsel for Reliance, speaking on behalf of the parties opposed, that the nature and impact of the revisions submitted by Selenis at such a late time were such that it would be appropriate to adjourn the hearing in the interest of fairness to parties opposed. Accordingly, the Tribunal adjourned the hearing in accordance with Rules 6, 24.1 and 26(1) of the *Canadian International Trade Tribunal Rules*⁴ and held oral arguments on February 20, 2018.

RESULTS OF THE CBSA'S INVESTIGATIONS

10. The CBSA's period of investigation for both its dumping and subsidizing investigations covered April 1, 2016, to March 31, 2017.

11. On February 14, 2018, the CBSA made final determinations of dumping and subsidizing:

Margins of Dumping and Amounts of Subsidy by Exporter

Country of Origin or Export	Margins of Dumping Expressed as a Percentage of Export Price	Amounts of Subsidy Expressed as a Percentage of Export Price
China All exporters	30.6%	8.7%
India Reliance Industries Limited All other exporters	22.1% 30.6%	4.0% 35.2%
Oman OCTAL SAOC FZC	7.2%	0.1%
Pakistan Novatex Limited All other exporters	5.5% 28.0%	0.2% 0.1%

12. The CBSA terminated the subsidizing investigation concerning goods exported by OCTAL, the sole exporter from Oman, and goods exported by all exporters from Pakistan because the amounts of subsidy were insignificant.⁵

4. SOR/91-499.

5. Pursuant to *SIMA*, an amount of subsidy of less than 1% of the export price of the goods is insignificant for a developed country and of less than 2% of the export price of the goods for a developing country.

PRODUCT

Product Definition

13. The subject goods are defined as:

Polyethylene terephthalate resin (PET resin) having an intrinsic viscosity of at least 0.70 deciliters per gram but not more than 0.88 deciliters per gram, including PET resin that contains various additives introduced in the manufacturing process, as well as blends of virgin PET resin and recycled PET containing 50 percent or more virgin PET resin content by weight, originating in or exported from the People's Republic of China, the Republic of India, the Sultanate of Oman and the Islamic Republic of Pakistan.

Product Information

14. The CBSA provided the following product information:⁶

- PET is a clear, strong and lightweight plastic belonging to the polyester family. PET is typically called polyester when used for fibers or fabrics and PET or PET resin when used for bottles, jars, containers and packaging applications.
- One of the most important characteristics of PET is referred to as intrinsic viscosity (IV). The IV of the material is measured in decilitres per gram (dl/g) and it is a measure of the polymer's molecular chain length and molecular weight.
- PET resin may contain some recycled material, although PET resin for packaging end uses (i.e. meeting the product definition parameters of 0.70 to 0.88 IV) is generally limited to a recycled content of 20%, and in any case, would not exceed a recycled content of 50%, which is a threshold included in the product definition.
- The subject goods are typically used in the production of plastic beverage bottles, in packaging for food and manufactured products, in containers for household and automotive products, and in industrial strapping. The most common use for PET resin containers is to package carbonated soft drinks and bottled water.

LEGAL FRAMEWORK

15. 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 retardation⁷ 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".

16. 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.

17. Next, the Tribunal will need to make decisions regarding cumulation and cross-cumulation.

6. Exhibit NQ-2017-003-01A, Vol. 1 at 28-30.

7. 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.

- The subject goods in this inquiry originated in or were exported from more than one country. The Tribunal must thus determine whether it will conduct a single cumulated injury analysis or separate analyses. 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 combined if the prerequisite conditions allowing the Tribunal to make a cumulative assessment are met;⁸ where the conditions for cumulative assessment are not met, the assessment will be on a decumulated basis in separate injury analyses. Furthermore, as discussed below, the most recent amendments to *SIMA* mean changes for the Tribunal's approach in assessing negligibility.
- Given that the CBSA has determined that the subject goods originating in or exported from China and India have been both 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 from those two countries (i.e. whether it will cross-cumulate the effects) in this inquiry.

18. Once those framework 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. Should the Tribunal make a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.⁹ 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, as the case may be, caused by such factors is not attributed to the effects of the dumping and subsidizing.

LIKE GOODS AND CLASSES OF GOODS

19. 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.

20. In order for the Tribunal to determine whether the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.¹⁰

21. 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).¹¹

8. *SIMA*, subsection 42(3).

9. 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.

10. 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.).

11. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

22. In its preliminary injury inquiry, the Tribunal found that the PET resin produced in Canada that is of the same description as the subject goods is “like goods” in relation to the subject goods and that there is one class of goods.¹² The Tribunal did not receive any submissions challenging these findings and maintains its earlier conclusions on these two issues.

DOMESTIC INDUSTRY

23. Subsection 2(1) of *SIMA* defines the domestic industry as:

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

24. In the preliminary injury inquiry, the Tribunal found that Selenis is the only producer in Canada of PET resin.¹³ The Tribunal did not receive any submissions challenging these findings. The Tribunal is therefore satisfied that Selenis represents the entire domestic production of the like goods and finds accordingly.

NEGLIGIBILITY, CUMULATION AND CROSS-CUMULATION

25. 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 and cumulation is appropriate taking into account conditions of competition between the goods of each country or between them and the like goods.¹⁴ Additionally, subsection 42(4.1) of *SIMA* directs that, if the volume of dumped or subsidized subject goods from a country is negligible, the Tribunal must terminate its inquiry in respect of those goods.

Negligibility and Insignificance

26. As a result of the most recent amendments to *SIMA*, the CBSA can only assess whether goods of specific exporters or groups of exporters are insignificantly dumped or subsidized. The CBSA can terminate its investigation as to specific exporters or all other exporters but cannot terminate investigations as to a country. It falls to the Tribunal to go on to assess negligibility on a country basis even when the CBSA finds insignificant margins/amounts for all exporters from that country.

27. Generally, subsection 2(1) of *SIMA* provides for volumes of less than 3% of all imports to be negligible. However, the threshold of 3% of total imports is increased to 4% for subsidized imports from developing countries.

12. *PET Resin* (17 October 2017), PI-2017-002 (CITT) [*PET Resin PI*] at 19.

13. *Ibid.* at 21.

14. 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.

28. The question of negligible import volumes arises in this inquiry with respect to subsidized subject goods from Oman and Pakistan.¹⁵ In its final determination, the CBSA determined the amount of subsidy for subject goods from Oman by OCTAL to be 0.1% and the amount of subsidy of subject goods from Pakistan by Novatex to be 0.2% and therefore insignificant.¹⁶ The CBSA thus terminated the subsidy investigation in respect of goods by OCTAL and Novatex as well as all other exporters from Pakistan.¹⁷

29. The Tribunal typically relies on volume data collected for the CBSA's period of investigation to determine negligibility¹⁸ and it did so in this inquiry as well. As a result of the CBSA's termination of the subsidy inquiry against OCTAL and Novatex and other exporters from Pakistan, the volumes of subsidized subject goods from Oman and Pakistan are nil.

30. The Tribunal therefore determines that subsidized subject goods originating in or exported from Oman and Pakistan are negligible within the meaning of subsection 2(1) of *SIMA*.

31. Accordingly, the Tribunal terminates its inquiry as to *subsidized* subject goods originating in or exported from Oman and Pakistan pursuant to subsection 42(4.1) of *SIMA*. In its injury analysis, the Tribunal will consider subject goods originating in or exported from Oman and Pakistan as dumped only.

32. The volumes of dumped or subsidized goods from other subject countries, i.e. China and India, are not negligible.

Cumulation

33. This inquiry involves imports from Oman and Pakistan that are dumped and imports from China and India that are dumped and subsidized. 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.

34. In this final injury inquiry, imports from China and India are subject to both an anti-dumping and a countervailing duty investigation, whereas imports from Oman and Pakistan are subject only to an anti-dumping investigation.

15. The Tribunal considers Pakistan to be a developing country for the purposes of its negligibility analysis: see subsections 2(1) and 42(4) of *SIMA* and articles 27.10 and 27.12 of the *WTO Agreement on Subsidies and Countervailing Measures [SCM Agreement]*. Developing countries are usually identified in Canada by reference to the OECD List of Official Development Assistance Recipients available at <http://www.oecd.org/dac/stats/daclist.htm> – Pakistan is on that list but Oman was removed in 2011.

16. Exhibit NQ-2017-003-04, Vol. 1 at 158.2, 158.23.

17. *Ibid.* at 158.2, 158.22.

18. *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* (28 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.

35. As noted in a number of previous decisions, the Tribunal is cognizant of the WTO panel and Appellate Body reports in *U.S. – Carbon Steel (India)* on the issue of cumulation.¹⁹ 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 *SCM Agreement*].”²⁰ The Tribunal is also cognizant of the more recent WTO panel finding in *Canada – Welded Pipe*²¹ 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.

36. 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.

37. A well-established principle of statutory interpretation is that Canadian legislation will be presumed, and thus be construed, to conform with international law obligations unless the wording of the statute clearly compels a different result.²² Accordingly, for the reasons above, assessing the effects of imports from China and India, which are both dumped and subsidized, cumulatively with the effects of dumped imports from Oman and Pakistan would not be appropriate. The Tribunal will therefore assess the effects separately of dumped and subsidized imports from those of imports that are only dumped.

38. Exporters from Oman and Pakistan argued that the Tribunal should decumulate these countries within their group. The Tribunal sees no reason to do so and received evidence to the contrary.

39. PET resin is a commodity product and the subject goods are interchangeable between themselves and with the like goods; the subject goods and the like goods compete directly in the same geographic markets and are distributed through the same channels.²³

19. Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R [*U.S. – 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 anti-dumping 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.

20. *U.S. – 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.” *U.S. – Carbon Steel (India)* at para. 4.579.

21. 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*, (21 December 2016), WTO Doc. WT/DS482/R [*Canada – Welded Pipe*].

22. *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.

23. *PET Resin PI* at 25.

40. Some of the goods originating in Pakistan are warehoused in Canada by G-Pac, which is related to the Pakistani exporter Novatex. In the circumstances of this case, the mere existence of a warehouse for some of the subject goods from Pakistan does not sufficiently distinguish them from the subject goods from Oman. The Tribunal is mindful that, over its POI, the majority of the Pakistani-origin goods were shipped directly from Pakistan, i.e. without warehousing.²⁴ The Tribunal is also not convinced that the warehoused goods command any price premium which could be argued to distinguish them from other subject goods.

41. The Tribunal therefore finds that the conditions of competition between goods from Oman and Pakistan 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. The same applies for goods from China and India.

42. Accordingly, the Tribunal will assess the effects of the dumped and subsidized goods from China and India separately from the dumped goods from Oman and Pakistan.

Cross-cumulation

43. This inquiry involves subject goods from two countries (China and India) that are both dumped and subsidized. 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,²⁵ 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.

44. In terms of the treatment of the dumped goods from China and India versus the subsidized goods from China and India, as these practices concern the same goods, the Tribunal finds that it is not necessary or practicable to disentangle their effects. As explained above, the recent WTO panel report in *Canada – Welded Pipe* strongly indicates that such an approach is correct.²⁶ The Tribunal will therefore assess the impact of the dumped and subsidized goods from China and India on the domestic industry cumulatively in this inquiry.

45. Subsection 37.1(1) of the *Regulations* prescribes that, in determining whether the dumping and subsidizing have caused material injury to the domestic industry, the Tribunal may 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 permits 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.

24. Exhibit NQ-2017-003-18.02, Vol. 6.1 (data compiled from the response by Novatex to the Foreign Producers' Questionnaire and various confidential responses to Importers' Questionnaires).

25. 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* (17 March 2009), NQ-2008-003 (CITT) at para. 147.

26. *Canada – Welded Pipe* at paras. 7.99-7.103.

INJURY ANALYSIS

Overview of the market for PET resin and the domestic industry in Canada

46. The Tribunal gathered extensive evidence about Canada's PET resin market. This evidence provides a backdrop for the Tribunal's analyses of whether the domestic industry was injured or threatened with material injury by the subject goods as opposed to other unrelated factors and market realities.

Pricing of PET Resin

47. As noted above, PET resin is a commodity. The prices of PET resin vary depending on the price of raw materials. The two principal raw materials used to make PET resin are purified terephthalic acid (PTA) and monoethylene glycol (MEG). Global consultants, such as IHS, publish monthly index pricing by region for these two raw materials as well as a guidance price for PET resin, which is composed of the sum of 85.5% of the index price of PTA and 35.5% of the index price of MEG, and is referred to as "raws".²⁷

48. When prices are negotiated, raws is the typical starting point.²⁸ Although domestic prices for PET resin in Canada are reflective of North American pricing indices for raws, final prices are the result of negotiation and can be below, at, or above raws.²⁹

49. In general, the degree of price transparency in the Canadian market for PET resin is not high. While prices are negotiated with raws as a basis, the final outcome of these negotiations is not publicly known. There is no price index or other formal or informal repository of price information specifically covering only the Canadian market.

Purchases of PET Resin

50. Purchasers of PET resin in the Canadian market use the resin to produce a diverse range of goods, including water bottles, sheet and strapping, soft drink and juice bottles and food containers.³⁰ Many purchasers use PET resin to produce packaging for goods destined for human consumption. As such, the quality of the PET resin they buy is of great importance to their businesses. Producers and suppliers of PET resin must satisfy a purchaser's approval criteria before they can win a sale. This approval process can take weeks or months to conclude, as purchasers need to be confident that any supply will be right for their operations.³¹

51. PET resin is, therefore, purchased on the basis of a combination of equally determinative quantitative and qualitative factors. Purchasers who testified at the hearing were unequivocal that price is a very important factor in their purchasing decisions given theirs is a "pennies business" and they cannot pass on any price increases to their customers.³² As such, they are extremely price-sensitive and reluctant to accept price increases from their suppliers, including Selenis.

27. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 8.

28. *Ibid.*

29. *Ibid.*

30. Exhibit NQ-2017-003-01A, Vol. 1 at 30.

31. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 174; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 267, 273; Exhibit NQ-2017-003-I-03, Vol. 13B at paras. 29, 34-35; Exhibit NQ-2017-003-21.12, Vol. 6.2 at 164; Exhibit NQ-2017-003-06A, Vol. 1.1, Table 9.

32. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 123, 150-151, 164, 174-175; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 208-209, 211, 213, 237.

52. Nevertheless, purchasers cannot purchase from only one producer or supplier; diversity and reliability of supply are imperative for ready access to a pre-approved supply of quality resin. They do not purchase strictly on the basis of the lowest price. Witnesses including Nu-B, ESKA Inc. and A. Lassonde Inc. testified that they tend to source from two or three suppliers, one of which has been (and, according to their testimony, will remain) Selenis, as they prefer to source locally to the greatest degree possible.³³ Some testified that they only began to import as their businesses grew and Selenis could not keep up with their needs.³⁴

53. Further, witnesses testified that it is not easy to find reliable sources of supply that meet their technical requirements or short turnaround time for orders. Delivery delays lasting longer than a matter of days cause significant operational and customer service issues.³⁵

54. Purchases are made both through spot sales and contracts. Purchasers that responded to the Tribunal's questionnaire indicated that the average contract length was six months.³⁶ However, several witnesses testified that three-month contracts were the norm in the market for most of the POI.³⁷ In the fall of 2017, however, that changed as many purchasers felt pressured by Selenis to conclude full-year contracts. A. Lassonde Inc. and ESKA Inc. did agree to full-year contracts for 2018 notwithstanding their reticence to source from just one supplier for that length of time.³⁸

History of Selenis

55. Selenis began its PET resin operations in 2011 (when it converted from polytrimethylene terephthalate to PET resin production) in its production facility in Montreal.³⁹

56. From 2011 to 2016, Selenis was owned by a Portuguese company, Control PET, S.A.⁴⁰ In August 2016, however, DAK Americas Exterior, S.L. acquired a majority interest in Selenis, even though its U.S.-based affiliate was (and remains) a competitor of Selenis in the Canadian market.⁴¹ Since 2016, DAK has offered its Canadian customers the choice of switching to Selenis. Some of DAK's customers, including Nestle, switched to Selenis, while others remained with DAK because of their specific technical needs and qualification processes.⁴²

57. Notwithstanding the ownership changes, Selenis has marketed its product through an exclusive selling agent, Adam Davis of Davis PET Resin USA Inc. (Davis PET). Davis PET has identified customers

33. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 179, 185; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 202, 206, 266, 271-272.

34. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 176, 178; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 202.

35. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 149-150, 162, 177-178, 193; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 225-226, 292.

36. Exhibit NQ-2017-003-06A, Vol. 1.1, Table 9.

37. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 26; *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 127-128; *Transcript of In Camera Hearing*, Vol. 1, 14 February 2018, at 202.

38. *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 216, 273-274.

39. Exhibit NQ-2017-003-A-03, Vol. 11 at para. 2.

40. *Ibid.* at para. 3.

41. DAK Americas Exterior, S.L. is the parent company of DAK Americas LLC and both are ultimately owned by Alfa SAB de C.V. of Mexico: Exhibit NQ-2017-003-A-03, Vol. 11 at para. 2. The DAK companies are referred to collectively as DAK unless otherwise indicated.

42. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 23, 46-47.

(including end users and distributors), negotiated preliminary prices and otherwise interacted with most of Selenis's Canadian customers.

58. Prior to 2011, the Canadian market for PET resin was served exclusively from imports. Selenis was the first and is still the only Canadian manufacturer of the like goods. Between 2011 and 2015, as it was trying to gain a foothold in the Canadian market, Selenis was heavily focused on the U.S. market. In the years 2014 to 2015, for example, it "predominantly focused" on the U.S. market and only served a comparatively small part of the Canadian market.⁴³

59. Selenis's focus on the U.S. market was put in jeopardy in late 2015. After a petition from three U.S. producers of PET resin (including DAK Americas LLC), U.S. authorities initiated an anti-dumping and countervailing case against Canada, China, India and Oman. Selenis was found to have been dumping and final anti-dumping duties were imposed on its exports to the U.S. in April 2016. Its U.S. sales were greatly reduced in 2016 and onwards, as a result.

60. Significantly fewer exports to the U.S. compounded Selenis's financial difficulties. With the resulting decreased production, the fixed costs of like goods produced in Canada would have increased significantly. The loss of these sales resulted in cash flow shortages, which meant Selenis could not acquire the raw materials it needed to maintain production commitments in Canada, which by then was its only remaining market. As a result, Selenis was forced to curtail output and could not supply some of its Canadian customers in the spring of 2016. At least one significant Canadian customer, Polar Pak, cancelled a contract with Selenis during this period.⁴⁴ Other users had concerns about Selenis's reliability during this time, as well.⁴⁵

61. For the most part, however, these purchasers have continued to purchase from Selenis, viewing the DAK purchase of Selenis as a mitigating factor in the financial stability of Selenis and the consequent reliability of its operations. They confirmed their plans to continue purchasing from Selenis in the foreseeable future.

INJURY ANALYSIS REGARDING THE SUBJECT GOODS

62. It is within this context that the Tribunal will conduct its injury analysis by, first, examining the volume of imports from the two groups of subject countries; second, analyzing their price effects; and third, determining what impact the two groups of subject goods, in and of themselves, had on Selenis's performance.

Import Volumes of Subject Goods

63. Paragraph 37.1(1)(a) of the *Regulations* directs the Tribunal to consider the volume of the dumped and subsidized goods as a factor in determining injury 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.

43. *Ibid.* at 42.

44. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 193; Exhibit NQ-2017-003-O-04 (protected), Vol. 14A at para. 20.

45. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 166, 178; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 202, 274.

64. Selenis argued that there has been a significant increase of goods from all subject countries while opposing parties argued that volumes from neither group increased in absolute or relative terms.

Dumped and Subsidized Goods from China and India

65. Evidence demonstrates that there was no significant increase in volumes of subject goods from China and India in either absolute or relative terms over the POI. In fact, with the exception of interim 2017, the absolute volume of this group of subject imports decreased in every period of the POI.⁴⁶

66. Volumes declined from 26,871 metric tonnes (MT) in 2014 to 20,385 MT in 2015 to their lowest level of 12,578 MT in 2016.⁴⁷ Imports from this group of countries then rebounded to 18,617 MT in interim 2017.⁴⁸

67. Relative to domestic production, this group of subject goods declined slightly between 2014 and 2016, and then increased in interim 2017.⁴⁹ In regard to the ratio of imports to domestic sales of domestic production, it declined by 35 percentage points between 2014 and 2016, then increased 7 percentage points in interim 2017.⁵⁰

68. As such, the Tribunal finds that there has not been a significant increase in the volume of imports from China and India, either in absolute or relative terms.

Dumped Goods from Oman and Pakistan

69. The absolute volume of subject imports from Oman and Pakistan increased every year from 2014 to 2016, before decreasing in interim 2017 as compared to interim 2016.⁵¹ Imports increased from 14,286 MT in 2014 to 22,989 MT in 2015 to their highest level of 33,868 MT in 2016.⁵² Imports from Oman and Pakistan then dropped to 16,394 MT in interim 2017.⁵³

70. Relative volumes followed the same pattern.⁵⁴ Imports of these goods relative to domestic production increased significantly over the POI, and then dropped by half in interim 2017. Likewise, relative to domestic sales of domestic production, they increased substantially between 2014 and 2016, and then dropped to their lowest level in interim 2017.

71. On this basis, the Tribunal finds that there was a significant increase in the volume of imports from Oman and Pakistan, both in absolute and relative terms.

PRICE EFFECTS OF SUBJECT GOODS

72. Paragraph 37.1(1)(b) of the *Regulations* requires 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

46. Exhibit NQ-2017-003-08, Vol. 1.1, Tables 10, 11.

47. *Ibid.*, Table 10.

48. *Ibid.*

49. *Ibid.*, Table 13.

50. *Ibid.*

51. *Ibid.*, Tables 10, 11.

52. *Ibid.*, Table 10.

53. *Ibid.*

54. *Ibid.*, Table 13.

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. The Tribunal distinguishes the price effects of the dumped or subsidized goods from any price effects that have resulted from other factors affecting prices.

73. Selenis argued that it has not been able to make sales in Canada at prices needed to sustain its facility, and that the subject goods have demonstrated a consistent pattern of price undercutting over the POI. It submitted that its specific injury allegations demonstrate consistent price undercutting and price depression.

74. Novatex argued that the Tribunal should examine the benchmark products and consider the relative volumes of those benchmark products and the other events that were taking place in the market relative to Selenis, particularly in the first two quarters of 2016. It argued that there was significant price volatility for the indexed raw material prices and benchmark products within a given year, and that there was no discernable causal relationship between the price of the subject goods and the like goods for any of the benchmark products.

75. OCTAL argued that allegations of price depression against Oman are limited to the period of July to October 2016, i.e. the period when Selenis was facing supply issues and financial difficulties. It submitted that the aggregate data show no price undercutting from Oman in the market during 2014 and 2015 and that an analysis of the benchmark products for 2016 and 2017 demonstrates that the extent of undercutting exceeded the margin of dumping for OCTAL and it was therefore not the dumping that was causing injury.

76. Reliance argued that, at an aggregate level, there was price undercutting by China and India in 2014 and 2015, but not in 2016, when Selenis's sales declined the most, and there was no correlation between pricing from India and China and the prices of like goods. It argued that the benchmark product pricing is not conclusive of undercutting by China and India over the POI, as just over half of the points of comparison show undercutting, and that the allegations of price undercutting from China and India do not stand up to reasonable probing.

77. Finally, the PET Resin Users' coalition did not specifically address price undercutting or price depression but argued that any injury was due to factors other than the subject goods.

78. There was no evidence or argument submitted with regard to price suppression from either group of countries. Therefore, the Tribunal will not analyze price suppression.

Tribunal's Approach to the Analysis of Price Effects

79. In conducting its pricing analysis, the Tribunal typically starts by examining annual prices at the aggregate level for the domestic market. To provide additional insight into the market dynamics at play behind the aggregate unit values, it then examines benchmark product pricing data which enables a more detailed analysis of direct competition between specific products on a quarterly basis.

80. In this case, pricing data⁵⁵ were collected for eight quarters (Q4 2015 to Q3 2017) for four distinct market segments based on different end uses for PET resin: a) water bottle production (benchmark product 1), b) sheet and strapping production (benchmark product 2), c) soft drink and juice bottle production (benchmark product 3) and d) health and beauty, personal care and food applications (benchmark product 4).

55. Exhibit NQ-2017-003-09B (protected), Vol. 2.1, Tables 31-37; Exhibit NQ-2017-003-09 (protected), Vol. 2.1, Schedules 1-4; Exhibit NQ-2017-003-08B, Vol. 1.1, Table 38.

81. The sales volumes for these four benchmark products represent nearly all the sales of like goods and sales from imports reported by respondents to the Tribunal's questionnaires for 2016 and interim 2017, which makes the benchmark data very reliable indicators of pricing trends.⁵⁶

82. In view of the characteristics of the market for PET resin as discussed above, the Tribunal agrees with parties opposed that the annual aggregate data are of limited usefulness in understanding pricing trends. Because the subject and like goods were often priced in short-term three-month contracts and prices in the marketplace could significantly change more often than on an annual basis, the Tribunal focused its price effects analysis on the volume and pricing data regarding the benchmark products. Nonetheless, for the sake of completeness, the Tribunal also examined the annual aggregate values in its analysis of price undercutting and price depression.

83. The Tribunal often assesses the extent of price undercutting by considering the number of quarters in which the prices of the subject goods undercut the prices of the like goods. The Tribunal is of the view that, in this case, focusing simply on the number of quarters in which undercutting occurred as a measure of the extent and effect of undercutting on the prices of like goods would provide an incomplete picture of the situation. A simple count would not reveal the extent to which goods that undercut the like goods were present in the market as it does not take into account the volume of sales that occurred from the various sources in each quarter. However, again for the sake of completeness, the Tribunal examined this metric in its analysis of price undercutting.

Price Undercutting

Aggregate Unit Values

84. The average unit net delivered selling value (NDSV) of the subject goods from China and India undercut that of the like goods in 2014, 2015 and interim 2017.⁵⁷

85. The NDSV of the subject goods from Oman and Pakistan exceeded the NDSV of the like goods in 2014, but undercut the NDSV of the like goods in all remaining periods of the POI.⁵⁸

86. In comparison, the NDSV of PET resin from non-subject countries exceeded that of the like goods and the subject goods in all periods of the POI.⁵⁹

87. Although the aggregate data show that the NDSV of PET resin from both groups of subject countries undercut the NDSV of like goods for varying periods, as set out above, the Tribunal is of the view that these data are not reliable indicators of market trends or of the price effects of the subject goods.

56. For 2016 and interim 2017, respectively, the benchmark sales volumes covered 100% and 98% of total sales of like goods reported by Selenis and 98% and 100% of total sales of imports reported by importers that responded to the Tribunal's questionnaire. Compared to the total *estimated* sales of imports shown in Table 14 of the Investigation Report, the benchmark sales volumes for sales of imports were 65% and 52% of the total for 2016 and interim 2017, respectively.

57. Exhibit NQ-2017-003-09A (protected), Vol. 2.1, Table 25.

58. *Ibid.*

59. *Ibid.*

Unit Values of Benchmark Products

88. First, the Tribunal observes that the prices of the subject goods from China and India undercut the prices of the like goods in 23 of 33 points of comparison. In the case of Oman and Pakistan, there was undercutting in 14 of 26 points of comparison.⁶⁰ However, as discussed above, in this case, the Tribunal does not view these results as meaningful indicators of the extent of price undercutting by the subject goods.

89. The volume of subject goods from China and India sold at undercutting prices was less than 10% of the total sales of all four benchmarks in the eight quarters examined. For Oman and Pakistan, it was approximately 15%. In contrast, the combined volume of goods from subject countries *not* sold at undercutting prices and from non-subject countries represented one third of total benchmark sales.

90. The detailed analyses that follow show that there is a somewhat different situation for each benchmark product.

– Benchmark Product 1

91. There was no consistent price leader for benchmark product 1 over the eight quarters examined, with Selenis, the subject goods from China and India and those from Oman and Pakistan each assuming that role in different quarters, with no discernable pattern.

92. Until the end of 2016, imports from non-subject countries, mostly from the United States, accounted for by far the largest share of total sales of benchmark product 1, while Selenis accounted for the smallest. In the first three quarters of 2017, the situation entirely reversed as Selenis came to account for nearly all of the sales of benchmark product 1.

Imports from China and India

93. Sales of subject goods from China and India were present in seven of eight quarters as were sales of the like goods, resulting in six quarters of head-to-head competition. The NDSV of subject goods from China and India undercut that of the like goods in only two of these six quarters, the first in Q4 2015 and the second not until Q1 2017. The volume of subject goods sold at undercutting prices represented less than 7% of total reported sales of benchmark product 1 in the Canadian market over the eight quarters.

94. In light of the above, the Tribunal finds that, while there was some undercutting by subject goods from China and India for benchmark product 1, it was infrequent and intermittent and the relative volume of subject goods sold at undercutting prices was small; therefore, the price undercutting was not significant.

Imports from Oman and Pakistan

95. Sales of subject goods from Oman and Pakistan were present in all eight quarters, which resulted in seven quarters of head-to-head competition. However, the NDSV of subject goods from Oman and Pakistan undercut that of the like goods in only two of these seven quarters, once in Q4 2016 and again in Q2 2017. Moreover, the volume of the subject goods sold at undercutting prices represented less than 2% of total reported sales of benchmark product 1 in the Canadian market over the eight quarters.

96. In light of the above, the Tribunal finds that while there was some undercutting by subject goods from Oman and Pakistan for benchmark product 1, it was infrequent and intermittent and the relative

60. Exhibit NQ-2017-003-08B, Vol. 1.1, Table 38.

volume of subject goods sold at undercutting prices was very small; therefore, the price undercutting was not significant.

– Benchmark Product 2

97. In the first four quarters examined, imports from the non-subject countries, primarily from the United States, were generally the price leader in the Canadian market, undercutting the subject goods from both groups of countries and the like goods.

98. In the latter four quarters, imports from the non-subject countries all but disappeared from the market, as did the subject goods from both China and Oman. During this period, Selenis's share of the market increased approximately 10 percentage points compared to its share in the first four quarters, despite having the highest price in the market for three of the four quarters. This result indicates that purchasers of benchmark product 2 were motivated by factors other than just obtaining the lowest price.

99. In this regard, the Tribunal notes that Polar Pak, a major purchaser of benchmark product 2, terminated its contract with Selenis for the latter half of 2016 due to supply interruptions.⁶¹ The witness for Polar Pak testified that it has resumed purchases from Selenis in 2017, indicating a willingness to purchase like goods regardless of their higher price.⁶²

Imports from China and India

100. The NDSV of subject goods from China and India undercut that of the like goods in four of the four quarters where sales were present. However, the instances of undercutting were sporadic: one in Q4 2015, another in Q3 2016 and the last two in Q2 2017 and Q3 2017. The volume of the subject goods sold at undercutting prices represented approximately 15% of total reported sales of benchmark product 2 in the Canadian market over the eight quarters.

101. In light of the above, the Tribunal finds that while the undercutting by subject goods from China and India for benchmark product 2 was intermittent, it was frequent and the relative volume of subject goods sold at undercutting prices was not small; therefore the price undercutting was significant.

102. However, it is not apparent to the Tribunal that this significant price undercutting had injurious effects on Selenis. Although the subject goods from India (China was no longer in the market) increased their share of total sales of benchmark product 2 by approximately 10 percentage points in the second half of the period examined, as noted above, so did Selenis. Moreover, as discussed later in these reasons, there is no indication that fluctuations in the prices of any of the subject goods, including those from China and India, depressed the prices of the like goods.

Imports from Oman and Pakistan

103. The subject goods from Oman and Pakistan were present in all eight quarters and the NDSV undercut that of the like goods in seven of those quarters. The volume of goods sold at undercutting prices represented approximately 32% of total reported sales of benchmark product 2 in the Canadian market over the eight quarters. However, since the subject goods from Pakistan were not undercutting in Q3 2017, the volume of subject goods sold at undercutting prices was lower in the second half of the period examined than in the first half. Oman was no longer in the market by this point in the POI.

61. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 192-193.

62. *Ibid.* at 195.

104. While at first blush, the volume of subject goods from these two countries that undercut prices of the like goods appears to be a substantive share of the market for benchmark product 2, the quarterly data provides insight into major supply shifts occurring in the market in 2016.

105. In the first four quarters examined, the volume of goods for Oman and Pakistan, where the NDSV undercut that of the like goods, represented approximately 37% of the total reported sales for benchmark product 2 during those quarters. During this period, however, the goods from the non-subject countries, primarily from the United States, were the price leader in the Canadian market, undercutting both the subject goods and the like goods.

106. In the latter four quarters, however, following the acquisition of Selenis by DAK, goods from the non-subject countries all but disappeared as did subject goods from Oman. Sales of subject goods from Pakistan continued at variable volumes similar to those in the first four quarters. Sales of subject goods from Oman and Pakistan represented a smaller share of the total reported sales in these latter four quarters compared to the first four quarters examined. While there was an increase in sales of Pakistani goods in the last quarter (Q3 2017), these goods did not undercut the like goods.

107. After the acquisition of Selenis by DAK, Selenis's share of the total reported sales in the latter four quarters increased approximately 10 percentage points compared to its share in the first four quarters, despite having the highest price in the market. This occurred while the share of subject goods from Oman and Pakistan that undercut the like goods declined.

108. While the subject goods from Oman and Pakistan did undercut the like goods in most of the eight quarters examined, they were not the price leader in the Canadian market, nor did they gain market share as time passed. It is therefore not apparent to the Tribunal that the undercutting had significantly injurious effects on Selenis with respect to sales of benchmark product 2.

109. Finally, Polar Pak, a major purchaser of benchmark product 2, terminated its contract with Selenis for the latter half of 2016 due to supply issues.⁶³ The witness from Polar Pak testified that it has resumed purchases from Selenis in 2017, indicating a willingness to purchase like goods despite their higher price.⁶⁴

110. In light of the above, the Tribunal finds that there was consistent undercutting by subject goods from Oman and Pakistan for benchmark product 2, which resulted in a relatively large volume of subject goods sold at low prices; as such the Tribunal finds that this group of countries significantly undercut domestic prices for benchmark product 2.

111. However, as was the case for China and India, the Tribunal finds that this significant price undercutting did not have injurious effects on Selenis. Both the absolute and the relative volume of subject goods from Oman and Pakistan decreased in the second half of the period examined. Sales of subject goods from Oman and Pakistan lost 6 percentage points of its share of sales of benchmark product 2 in these latter four quarters compared to the first four quarters. As well, as will be discussed more fully below, there was no evidence that price undercutting led to price depression.

– Benchmark Product 3

112. Although the subject goods from both groups were the price leaders whenever they were in the market, Selenis's sales consistently accounted for the majority of sales of benchmark product 3 over the

63. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 192-193.

64. *Ibid.* at 195.

eight periods examined. Goods from the non-subject countries, i.e. the United States, represented by far the second largest share of the market, even though their prices were consistently the highest. This confirms that purchases are made not just on the basis of the lowest price, but rather according to a combination of quantitative and qualitative factors, as noted above.

Imports from India and China

113. Sales of subject goods from China and India were present in only three of eight quarters: Q4 2015 and then not again until Q4 2016 and Q1 2017. In these three quarters, they undercut the prices of like goods. Nevertheless, the volume of subject goods sold at undercutting prices represented only 6% of the total reported sales of benchmark product 3 in the Canadian market over the eight quarters.

114. In light of the above, the Tribunal finds that while there was some undercutting by subject goods from India and China for benchmark product 3, it was infrequent and intermittent and the relative volume of subject goods sold at undercutting prices was small; therefore, the price undercutting was not significant.

Imports from Oman and Pakistan

115. Sales of subject goods from Pakistan and Oman (represented entirely by Oman) were present in four quarters of the eight quarters examined. The subject goods were “in and out” of the market; they were present in alternating quarters beginning with Q4 2015. When the subject goods were present in the market, they undercut the like goods. However, the volume of subject goods sold at undercutting prices represented less than 8% of the total reported sales of benchmark product 3 over the eight quarters.

116. In light of the above, the Tribunal finds that while there was undercutting by subject goods from Oman and Pakistan for benchmark product 3, it was intermittent and the relative volume of subject goods sold at undercutting prices was small; therefore, the price undercutting was not significant

– Benchmark Product 4

117. The subject goods from Oman and Pakistan were the consistent price leaders for benchmark product 4. However, despite having the highest prices in seven of eight quarters, sales of goods from non-subject countries accounted for approximately half of total sales.

Imports from India and China

118. Despite being present in every quarter, the NDSV of the subject goods from China and India (represented entirely by China) undercut that of the like goods in only two of eight quarters, once in Q2 2016 and again in Q4 2016. In fact, the volume of subject goods sold at undercutting prices represented approximately 2% of total reported sales of benchmark product 4 over the eight quarters.

119. In light of the above, the Tribunal finds that while there was some undercutting by subject goods from India and China for benchmark product 4, it was infrequent and intermittent and the relative volume of subject goods sold at undercutting prices was very small; therefore, price undercutting was not significant.

Imports from Oman and Pakistan

120. Sales of benchmark product 4 from Oman and Pakistan occurred in each of the eight quarters examined (albeit goods from Oman were only present in one quarter). The NDSV of the subject goods from Oman and Pakistan undercut that of the like goods in seven of eight quarters. Overall, the volume of subject

goods sold at undercutting prices represented less than 8% of total reported sales of benchmark product 4 over the eight quarters.

121. In light of the above, the Tribunal finds that while there was consistent undercutting by subject goods from Oman and Pakistan for benchmark product 4, the relative volume of subject goods sold at undercutting prices was small; therefore, the price undercutting was not significant.

Summary of Price Undercutting

122. As the above analysis shows, the actual extent of price undercutting by both groups of subject goods is much less than suggested by the Tribunal's more typical approach of comparing aggregate NDSVs and counting the number of quarters in which undercutting occurred.

123. In sum, for both groups of subject goods, the Tribunal finds that there was no significant price undercutting for benchmark products 1, 3 and 4, but that there was significant price undercutting for benchmark product 2. However, the Tribunal also finds that the significant price undercutting in relation to benchmark product 2 did not result in injurious effects for Selenis.

Price Depression

Aggregate Unit Values

124. Keeping in mind the caveats noted above with regard to the utility of annual aggregate prices, the Tribunal nonetheless began its analysis of price depression at this level.

125. At the aggregate annual level, the trends in NDSVs were as follows:

- Like goods: prices decreased 7% in 2015, decreased 9% in 2016, increased 6% in interim 2017;
- Subject goods from China and India: decreased 13% in 2015, increased 3% in 2016, decreased 5% in interim 2017;
- Subject goods from Oman and Pakistan: decreased 11% in 2015, decreased 13% in 2016, increased 9% in interim 2017;
- Goods from non-subject countries: decreased 6% in 2015, decreased 3% in 2016, increased 11% in interim 2017.

126. In the case of the subject goods from Oman and Pakistan and goods from non-subject countries, prices moved in the same direction as did prices of the like goods. As elaborated below, this is the result the Tribunal would expect given how prices for PET resin are determined. There is little that can be concluded from these trends in terms of whether the subject goods from Oman and Pakistan significantly depressed the prices of the like goods.

127. As the NDSV of like goods declined in 2016, the NDSV of subject goods from China and India increased and vice versa in interim 2017. These results definitely do not indicate that the subject goods from China and India depressed the prices of the like goods.

Benchmark Unit Values

128. The Tribunal finds that the quarterly prices of sales from like goods of each benchmark product (as well as all benchmark products on an aggregated basis) showed no price depression. The quarterly prices of like and subject goods rose and fell intermittently throughout the eight quarters.

129. The reasons for these variations are as follows. As set out above, selling prices of PET resin are typically established using a formula linked to the index price of PTA and MEG, two major raw materials used in the production of PET resin (major raws).

130. After calculating the average quarterly index value for major raws using evidence on the record,⁶⁵ the Tribunal examined the quarterly movement in prices of the like goods for each benchmark product compared to the quarterly movement in the value of North American major raws. For each benchmark product, the increase or decrease in quarterly prices of like goods followed closely the fluctuations in the value of major raws. The same was true for subject goods⁶⁶ and goods from non-subject countries.

131. As such, the Tribunal cannot conclude that prices of the subject goods from either group of countries depressed the prices of the like goods throughout the POI.

132. Selenis made a number of specific claims of price depression against subject goods from each group of subject countries.⁶⁷ For the most part, the allegations were limited to 2016. The allegations covered sales to a number of purchasers, some of whom responded to and refuted the allegations after receiving limited disclosure from Selenis.⁶⁸

133. In some instances, Selenis referred to suspected purchases of subject goods at prices that could be used to pressure Selenis to lower its prices on subsequent sales. However, no evidence was presented to substantiate those claims. Selenis did not provide any persuasive evidence that customers discussed the prices from their suppliers between each other or that they informed potential suppliers of the exact price they had been quoted for Chinese or Indian goods. Therefore, the Tribunal does not find these allegations to be convincing. Finally, the Tribunal has concluded, based on evidence referred to earlier, that getting the lowest price, especially for a large volume of subject or like goods, is not as important as the timeliness and reliability of that supply.⁶⁹

134. In sum, the Tribunal does not find the specific allegations of price depression persuasive.

Summary of Price Depression

135. For the above reasons, the Tribunal finds that neither the subject goods from China and India nor those from Oman and Pakistan caused price depression.

65. Exhibit NQ-2017-003-06A, Vol. 1.1, Table 58; Exhibit NQ-2017-003-F-02 (protected), Vol. 14A, Tab 2; Exhibit NQ-2017-003-09B (protected), Vol. 2.1, Tables 31-37. Unit value for major raws was calculated using a formula of $(0.855 \times \text{PTA} + 0.355 \times \text{MEG})$.

66. For the subject goods, the average combined unit value for Oman and Pakistan as well as China and India tracked the index for Asian prices of major raws even when sold in Canada.

67. Exhibit NQ-2017-003-12.01 (protected), Vol. 4 at 35-40; Exhibit NQ-2017-002-A-06 (protected), Vol. 12 at paras. 15-56.

68. Exhibit NQ-2017-003-H-04 (protected), Vol. 14A at paras. 32-34; Exhibit NQ-2017-003-D-06A, Vol. 14 at paras. 15-18, 21-23; Exhibit NQ-2017-003-D-06, Vol. 14, Tab 5; *Transcript of In Camera Hearing*, Vol. 3, 14 February 2018, at 180-182.

69. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 174; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 267, 273; Exhibit NQ-2017-003-I-03, Vol. 13B at paras. 29, 34-35; Exhibit NQ-2017-003-21.12, Vol. 6.2 at 164; Exhibit NQ-2017-003-06A, Vol. 1.1, Table 9; *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 179, 185; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 202, 206, 266, 271-272; *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 176, 178; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 202; *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 149-150, 162, 177-178, 193; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 225-226, 292.

Resultant Impact on the Domestic Industry

136. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resultant 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. These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry. 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, the price effect, and the impact on the domestic industry of the dumped or subsidized goods.

137. In determining whether one or both of the two groups of subject countries have caused material injury to Selenis, the Tribunal must also consider whether any factors other than the dumped and/or subsidized goods had a role to play in its performance. In other words, the Tribunal must consider the impact of the subject goods vis-à-vis the impact of other unrelated factors when determining the cause of the domestic industry's injury or threat thereof.

138. Selenis submitted that the subject goods caused it material injury, primarily in the forms of lost sales and price depression, resulting in deteriorating financial performance.

139. Parties opposed pointed to factors other than the subject goods as the reasons for any injury Selenis may have experienced, and in particular for its poor financial results. They pointed to the significant decrease in Selenis's export sales in 2016 to argue that Selenis neglected the Canadian market in favour of the larger U.S. market and, as such, Selenis was not (or had never been) well positioned to serve small and diverse Canadian customers. They also submitted that the drastic drop in U.S. sales forced Selenis to bear more costs on goods sold in Canada, thus impacting its bottom line.

140. The Tribunal assessed Selenis's performance over the POI by examining its production, capacity utilization, employment, investments, sales, market share and profitability to determine whether or not it was materially injured. At the same time, the Tribunal assessed whether any injury was caused by the subject goods from each group of countries, or whether other unrelated factors were at play. The Tribunal will discuss together the manner in which factors other than the subject goods impacted Selenis, as they apply equally to both groups of countries.

Production, Capacity Utilization and Employment

141. As noted above, Selenis predominantly focused on serving the U.S. market until late 2015. Upon being shut out of the U.S. market by the imposition of anti-dumping duties, Selenis's production, capacity and employment levels were directly impacted, a point acknowledged by Selenis's witnesses themselves.

142. The Tribunal finds that their admission corresponds directly to the evidence. Selenis's production, capacity utilization and employment levels declined steadily and substantially over the POI, and particularly in 2016.

143. In interim 2017, that changed, as production levels rose significantly; in fact, Selenis produced more in the first nine months of 2017 than it had in all of 2016, as it began to get back to on its feet after the DAK

acquisition and once it changed its focus to the Canadian market instead of the U.S.⁷⁰ Likewise, Selenis's capacity utilization rate and employment rose in interim 2017, as production increased and sales improved.

144. As such, the Tribunal finds that any declines in Selenis's production, capacity utilization and employment were not caused by either group of the subject countries, in and of themselves. While there is no doubt that Selenis faced competition from the subject goods as production, capacity and employment levels fell, those declines were directly tied to the fallout of the U.S. anti-dumping duties as opposed to imports from China and India or Oman and Pakistan.

Investments

145. Selenis increased its investments in 2016 as compared to 2014 and 2015.⁷¹ The Tribunal thereby finds that neither of the groups of the subject countries injured Selenis in this regard.

Sales and Market Share

146. In 2015, Selenis's domestic sales from domestic production rose 12% in comparison to 2014, while its market share stayed the same.⁷² In 2016, its domestic sales of domestic production dropped by 17% in comparison to 2015; its market share fell as well.⁷³

147. In the first nine months of 2017, however, its sales performance dramatically improved. Domestic sales from domestic production rose by 67% and reached a volume that was higher than in any other full year of the POI.⁷⁴ The same was true for its market share.⁷⁵

148. Over the POI, the vast majority of Selenis's domestic sales were purchased by end users as opposed to distributors.⁷⁶ Selenis's sales to end users increased consistently and steadily over the POI, and especially in interim 2017.⁷⁷ Sales to Canadian distributors, however, dropped significantly in 2016 as compared to 2014-2015, and disappeared completely in interim 2017.⁷⁸ Witnesses for Selenis explained that the DAK acquisition enabled it to establish new relationships with those end users that had previously purchased from distributors and, as such, it made a corporate decision to only sell to end users from 2017 onwards.⁷⁹

149. As noted above, parties opposed argued that any lost sales were the result of unrelated factors including Selenis's lack of focus on the Canadian market from 2011 to 2016; the impact that the U.S. anti-dumping duties had on Selenis's exports; and its supply disruptions in the spring of 2016. The Tribunal agrees.

150. There is no question that the U.S. anti-dumping duties injured Selenis, weakening its already poor financial performance in 2016 and interim 2017, a point that will be developed more fully below. The

70. Exhibit NQ-2017-003-09 (protected), Vol. 2.1, Table 14.

71. Exhibit NQ-2017-003-07 (protected), Vol. 2.1, Table 44.

72. Exhibit NQ-2017-003-08 (protected), Vol. 2.1, Table 15.

73. *Ibid.*

74. Exhibit NQ-2017-003-09 (protected), Vol. 2.1, Tables 14-15.

75. *Ibid.*, Table 16.

76. Exhibit NQ-2017-003-07A (protected), Vol. 2.1, Table 44.

77. *Ibid.*

78. Exhibit NQ-2017-003-07A (protected), Vol. 2.1, Table 44.

79. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 84.

Tribunal, therefore, finds that any injury related to these lost sales had nothing to do with either group of subject imports in and of themselves.

151. Selenis's witnesses testified that it could not be faulted for choosing the "lesser of two evils", i.e. selling significant volumes into a bad U.S. market or trying to sell in a worse Canadian one.⁸⁰ They alleged that prices in the Canadian market had been driven down by subject imports and Selenis had no choice but to "load" its Montreal plant with the volumes it sold into the U.S.⁸¹

152. The Tribunal does not question Selenis's decision to focus on the U.S. market, and recognizes the difficult choices it faced. Nevertheless, the Tribunal finds that its decisions relegated Selenis to a secondary player in the domestic market in the first half of the POI. Indeed, the evidence indicates that Selenis was neither focused on serving Canadian customers nor well prepared for a reversal of its fortunes in the U.S. market. There was no evidence of strategic planning for lost sales in the U.S. or of a systematic approach to growing the Canadian market prior to the DAK acquisition in mid-2016.⁸²

153. There is no evidence that Selenis worked aggressively to displace the existing foreign suppliers and establish itself in the Canadian market, until it had no choice but to try and do so after the U.S. dumping case in 2016. It would be simplistic for the Tribunal to accept that Canadian customers should have immediately abandoned existing relationships once a domestic producer had focused on serving them. Rather, the reality was that Selenis experienced the growing pains of establishing itself in the Canadian market.

154. Some witnesses testified that until the DAK acquisition, they had never been contacted by Selenis (and specifically by its sales agent Davis PET); instead, they had to initiate contact with Selenis to inquire about supply. Others testified that they had not received good customer service from Selenis and/or had supply and delivery issues. As noted above, one of its customers, Polar Pak, was forced to terminate a contract with Selenis in the spring of 2016 given Selenis's inability to honour its supply obligations. The Tribunal, therefore, understands why purchasers sought alternative sources of reliable supply.

155. That said, purchasers in Canada did not abandon Selenis altogether. As noted above, some witnesses testified that they prefer to source at least a portion of their needs locally, notwithstanding any issues they may have encountered. Even Polar Pak continued to purchase from Selenis after it was forced to terminate its contract. Witnesses from both Selenis and parties opposed agreed that Selenis's reputation as a stable supplier has been improving since the DAK acquisition. Its large sales volumes in interim 2017 substantiate their testimony, as do Selenis's sales projections for 2018, a fact that will be developed more fully below in the Tribunal's analysis of threat of injury.

Profitability

156. As a percentage of net sales value, Selenis's gross margin on domestic sales increased in 2015, then declined in 2016 to slightly below its 2014 level. In interim 2017 Selenis's gross margin was slightly lower than it was in interim 2016, but on par with the gross margin realized in full year 2016.⁸³

80. *Ibid.* at 93.

81. *Ibid.*

82. Exhibit NQ-2017-003-A-03, Vol. 11 at para. 30.

83. Exhibit NQ-2017-003-07B (protected), Vol. 2.1, Table 41.

157. At the net income level, Selenis's results as a percentage of net sales value improved somewhat in 2015, but deteriorated in 2016 to below 2014 levels. Its profit to sales ratio improved in interim 2017 but remained below 2014 performance.⁸⁴

Cash Flow

158. Selenis admitted that its customers, being unable to receive supply in the spring of 2016, could not be blamed for purchasing subject goods in that time frame.⁸⁵ Nevertheless, in spite of this admission, Selenis attributed its cash flow issues and profitability woes to the impact of both groups of subject goods.⁸⁶ The Tribunal disagrees.

159. Selenis's poor financial performance is directly tied to the loss of U.S. exports, a loss which not only caused cash flow problems, but losses in employment and reductions in capacity utilization as well. Confidential data on export sales presented in the Tribunal's Investigation Report demonstrate the devastating impact that lost U.S. sales revenues had on Selenis's cash flow between 2015 and 2016.

Conclusion

160. On the basis of the evidence, the Tribunal cannot establish a causal link between Selenis's poor financial performance and either group of the subject countries, in and of themselves.

161. Evidence indicates that Selenis had been on a path to financial ruin since it began its PET resin operations in 2011. Selenis's own witnesses aptly described its poor financial performance during the entire POI as "unsustainable". As U.S. sales volumes fell, Selenis's costs of production must have risen substantially. The Tribunal finds, therefore, that Selenis would have most certainly experienced better financial results on its domestic sales in 2016 had it retained its U.S. sales volumes. After 2015, U.S. sales volumes were no longer available to provide much-needed cash flow and to offset its fixed costs.

162. As such, the Tribunal cannot attribute any injury Selenis experienced in terms of poor financial performance on either group of the subject goods, in and of themselves.

Conclusion

163. To the extent that Selenis may have been injured during the POI, such injury cannot be attributed to either group of the subject goods, in and of themselves. Any injury was due to unrelated factors.

THREAT OF INJURY

164. Having found that neither of the two groups of subject goods caused injury to the domestic industry, the Tribunal must now consider whether one or both of them are threatening to cause material injury.

84. *Ibid.*

85. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 14-15, 72, 90-91; *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 162, 192-193.

86. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 14-15, 41, 90-91; Exhibit NQ-2017-003-A-05, Vol. 11 at para. 57.

165. 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.⁸⁷

166. In its analysis, the Tribunal will also be mindful of Article 3.7 of the WTO *Anti-dumping Agreement* and Article 15.7 of the *SCM Agreement*,⁸⁸ which set out the framework of obligations implemented in *SIMA*:

A determination of threat of injury shall be *based on facts and not merely on allegation, conjecture or remote possibility*. The change in circumstances which would create a situation in which the dumping would cause injury *must be clearly foreseen and imminent*.

[Emphasis added]

167. The fundamental requirement that threat of injury determinations must be based on facts and not on “allegation, conjecture or remote possibility” aims to mitigate the risk that such findings may be grounded in speculation about possible future events, rather than objective facts directing such a conclusion. Although the WTO Appellate Body recognized the inherent difficulty in a threat of injury finding of having to predict future events, it is nevertheless required by WTO law that “a ‘proper establishment’ of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be ‘clearly foreseen and imminent’”⁸⁹ Therefore, for the Tribunal to make a finding of threat of injury, there must be evidence on the record that bears out this substantive standard.

168. Further, subsection 37.1(3) of the *Regulations* directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the threat of injury on the basis of the factors listed in subsection 37.1(2), and whether any factors other than the dumping and subsidizing of the goods are threatening to cause injury.

169. In other words, a finding of threat of injury requires the same rigorous analysis of these factors, supported by cogent and convincing evidence, as does a finding of injury.

87. Subsection 37.1(2) of the *Regulations* reads as follows: “For the purposes of determining whether the dumping or subsidizing of any goods is threatening to cause injury, the following factors are prescribed: (a) the nature of the subsidy in question and the effects it is likely to have on trade; (b) whether there has been a significant rate of increase of dumped or subsidized goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped or subsidized goods; (c) whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter, that indicates a likelihood of a substantial increase of dumped or subsidized goods, taking into account the availability of other export markets to absorb any increase; (d) the potential for product shifting where production facilities that can be used to produce the goods are currently being used to produce other goods; (e) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of the goods; (f) inventories of the goods; (g) the actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced version of like goods; (g.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods; (g.2) evidence of the imposition of anti-dumping or countervailing measures by the authorities of a country other than Canada in respect of goods of the same description or in respect of similar goods; and (h) any other factors that are relevant in the circumstances.”

88. For the purposes of these reasons, all subsequent references to Article 3.7 of the *Anti-dumping Agreement* can be taken to refer also to Article 15.7 of the *SCM Agreement*, as their provisions are essentially the same.

89. *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Article 21.5 – US)* (22 October 2001), WT/DS132/AB/RW (Appellate Body) at para. 85.

170. Notably, a finding of threat also requires a change of circumstances, which in this case is a change compared to the circumstances that existed during the POI, when no injury was found.

171. These concepts are enacted into Canadian law in subsection 2(1.5) of *SIMA*, which indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping and subsidizing of the good, as the case may be, would cause injury are clearly foreseen and imminent. That is, there must be a *high probability* of change to a situation such that the subject goods will threaten to cause material injury in the very near future, in the absence of *SIMA* measures.

172. The change must indicate that injurious circumstances will exist. There is no requirement that a relevant change in circumstances be a single or specific event; rather, it may result from a series of events or developments in the situation of an industry and/or the dumped or subsidized imports, leading to the conclusion that that injury which has not yet materialized can be predicted to occur imminently.⁹⁰

173. It follows that where the situation in the future will be the same or similar to the period for which no injury was found, there cannot be a “change of circumstances” and thus there cannot be a threat of injury.

174. In the context of this case, price undercutting in the POI did not reach injurious levels for Selenis and there was no price depression caused by imports of subject goods. Accordingly, there was no causal relationship between the injury experienced by Selenis and the subject goods. Therefore, in order for the Tribunal to determine that there is a *threat* of injury, it would need to conclude that market conditions in the future would be substantially different than during the POI.⁹¹ As will be discussed below, the Tribunal finds that there is no looming “change of circumstances” that will affect the causal relationship between the subject goods and Selenis’s performance.

Time Frame for the Threat Analysis

175. In assessing threat of injury, the Tribunal typically looks within the next 12 or 18 months, and sometimes up to 24 months, beyond the date of its finding, depending on the circumstances of each case.

176. Selenis submitted that the Tribunal should analyze threat within a period of 24 months because temporary supply restrictions resulting from a prominent producer with facilities in Mexico and the U.S. entering receivership will be resolved in 2018 and prices will fall accordingly. Since the renegotiation of the bulk of Selenis’s 2019 order volumes will occur in the fall of 2018, Selenis submitted that resumed injury after a negative determination would be most acutely felt in 2019.⁹²

177. Opposing parties responded that a 24-month threat analysis would not be based on foreseeable and imminent events, but on alleged uncertainties in the U.S. market and conjectures about the future;⁹³ they also submitted that supply tightness due to an idle factory in Mexico and likelihood of increased imports of PET resin from Mexico related to imports from non-subject countries were, therefore, unrelated to a threat of injury from subject imports.⁹⁴

90. *U.S. – Softwood Lumber from Canada VI* (22 March 2004), WT/DS277 (Panel Report) at para. 7.57.

91. *Photovoltaic Modules and Laminates* (20 July 2015), NQ-2014-003 (CITT) at paras. 215-218.

92. Exhibit NQ-2017-003-A-01, Vol. 11 at paras. 153-155.

93. Exhibit NQ-2017-003-D-01, Vol. 13 at para. 64.

94. Exhibit NQ-2017-003-E-01, Vol. 13B at para. 46.

178. The Tribunal cannot accept that, in the circumstances of this case, a threat of injury 24 months in the future is “imminent”, particularly in view of the fact that PET resin is delivered to Canada within 41 to 75 days, on average, depending on the source.⁹⁵ In addition, supply restrictions in the U.S. market in 2017 resulting from the bankruptcy of M&G are easing and M&G’s West Virginia plant is expected to produce PET again in the near future after being purchased by another company.⁹⁶

179. Finally, the Tribunal observes that Selenis negotiated several of its one-year contracts for 2018 at a time when preliminary duties were already in place.⁹⁷ The time period for determining whether there is a “change” in circumstances must be the POI and the circumstances prevailing during that time, not the period when preliminary duties are in place. It is a foregone conclusion that circumstances are different between a time period where provisional duties are in place and a period where this is not the case.

180. As such, the Tribunal will look at the next 12 to 18 months in its analysis of threat of injury.

Positions of the Parties

181. Selenis submitted that:

- Imports from subject countries (combined) have remained consistently high during the POI;
- Production capacity increases are planned in each of the subject countries;
- There is unused capacity by individual exporters: excess capacity of Reliance in 2016 and 2017 (annualized) is greater than the entire Canadian market; OCTAL’s excess capacity in 2016 and 2017 (annualized) is twice the entire Canadian market; Novatex’s excess capacity in 2017 (annualized) is greater than the entire Canadian market;
- Producers and exporters from all four subject countries are export-oriented;
- Demand is forecast to slow in China in 2018 and 2019;
- Well-established distribution networks exist and there is a continued interest in the Canadian market in spite of the inquiry;
- Seven WTO members have currently initiated or concluded investigations into the dumping or subsidization of PET resin from the subject countries, and additionally that the United States International Trade Commission made a preliminary determination of injury by PET resin from Pakistan, potentially leading to a high volume of diversion into Canada.

182. The opposing parties submitted that the conditions of threat of material injury do not exist because Selenis’s outlook for the future is positive. In particular, they highlighted that:

- Selenis is now managed professionally by a company with global experience, there are plans for product diversification, plans to modernizing its facilities will result in improved efficiency and unit costs;
- Selenis’s sales improved substantially in 2017 and volume commitments for 2018 are strong;
- Prices improved in 2017 and are continuing to strengthen in 2018;

95. Exhibit NQ-2017-003-06A, Vol. 1.1, Table 6.

96. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 11-12.

97. *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 217-218, 273-274.

- Any injury that Selenis may be faced with in the near term is a perpetuation of self-inflicted harm in the past, unrelated to subject imports;
- A threat finding by the Tribunal regarding Pakistan cannot be based on a preliminary determination of injury in the U.S. with respect to PET resin imported into the U.S.

Tribunal's Analysis

Global Market Conditions

183. Although supply and demand factors associated with both groups of subject countries are examined below, global market conditions are a reasonable indicator of whether volumes produced in excess of a given country's demand are likely to enter Canada in the next year and, further, the prices at which those goods are likely to enter.

184. From 2015 to 2017, capacity, production (supply) and global consumption (demand) increased, with the gap between the supply and demand narrowing as consumption increased at a higher rate than production.⁹⁸

185. For 2018, both capacity and consumption are forecast to increase, with capacity increasing by 16.5% and consumption increasing by 5%. Capacity utilization is forecast to reach a low point in 2018. However, in 2019, capacity is forecast to increase by only 1.8% while demand is forecast to increase by 5.3%. As a result, capacity utilization is forecast to begin to increase again.⁹⁹ In 2018 and 2019, supply is forecast to very closely track demand, leaving very little spare production capacity.¹⁰⁰

186. Thus, global demand and supply trends indicate that there is a general positive outlook for the PET resin market in the near to medium term as capacity utilization will rebound and excess capacity will diminish.

Canadian Market Conditions

187. In 2018 and 2019, Canadian demand for PET resin is forecast to increase by 2.2% and 1.1%, respectively.¹⁰¹

188. Witnesses for Selenis testified that they are cautiously optimistic about the future; as Selenis saw improvements in 2017 over 2016, they forecast that 2018 volumes and prices look better still. Selenis is also working to develop alternative products to rebuild its presence in the U.S. market.¹⁰²

189. The Tribunal heard that the acquisition by DAK brought about a number of other positive changes at Selenis, including improved cash flow and better customer service and sales support, ultimately renewing

98. Exhibit NQ-2017-003-A-01, Vol. 11, Table 7 at 41. This data is from a third-party publication, *PCI Wood Mackenzie PET Supply Demand Database, Q3, 2017*; note that the definition of PET resin in that publication may differ from the definition used in this proceeding.

99. Exhibit NQ-2017-003-A-01, Vol. 11, Table 7.

100. *Ibid.*

101. *Ibid.*, Table 6.

102. *Transcript of Public Hearing*, Vol. 1, 12 February 2018, at 58-59.

increased customer confidence.¹⁰³ The Tribunal also heard that purchasers that had concerns or supply issues with Selenis in 2016, including Polar Pak, have continued to purchase from Selenis to date.

190. In addition, witnesses for several of Selenis's customers stated that their businesses are growing and that they are planning to continue purchasing from Selenis.¹⁰⁴ Witnesses for Selenis's two biggest purchasers stated that they are currently very satisfied with their business relationship with Selenis and will continue to purchase from Selenis while maintaining other sources of supply, including subject countries, as alternative sources.¹⁰⁵

191. There are also indicators that competition experienced by the domestic industry from goods from the U.S. may be easing, which has been and may continue to be of some benefit to Selenis. As a consequence of the takeover of Selenis by DAK, volumes from the U.S. were more than halved in interim 2017 compared to interim 2016¹⁰⁶ and U.S. unit values have markedly increased during that same period.¹⁰⁷ Across the four benchmark products, U.S. prices were above those of Selenis during the third quarter of 2017.¹⁰⁸

192. Nonetheless, given that the immediate past is the best prediction of the near future in this case, the Tribunal is of the view that the situation for Selenis in the Canadian market remains challenging. Over the next 12 to 18 months, Selenis will likely continue to grapple with the increased cost of production for sales in the domestic market as a consequence of the loss of its sales volumes to the U.S. market. These increased costs, however, cannot be tied to either group of the subject goods.

Threat of Injury from China and India

193. Regarding likely volumes in the near future, while volumes of imports from China and India steadily decreased from 2014 to 2016, they essentially doubled in interim 2017 driven largely by imports from India.¹⁰⁹ However, despite this increase, imports in interim 2017, if annualized, would stay below the 2014 level.¹¹⁰ For the next 12 to 18 months this does not point to increased levels of imports of subject goods from China and India above POI levels, which prior levels the Tribunal has already found not be injurious.

194. Evidence indicates that growth in PET resin consumption in India will by far outstrip the growth in production capacity in 2018 and 2019, respectively.¹¹¹ As for China, although it will increase its capacity in 2018 (but not add any capacity in 2019), consumption is forecast to grow by substantial amounts in 2018 and 2019,¹¹² somewhat narrowing that gap.

103. *Ibid.* at 14; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 274.

104. *Transcript of Public Hearing*, Vol. 2, 13 February 2018, at 176; *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 206, 271-272.

105. *Transcript of Public Hearing*, Vol. 3, 14 February 2018, at 206, 271-272.

106. Exhibit NQ-2017-003-09 (protected), Vol. 2.1, Table 14.

107. Exhibit NQ-2017-003-09A (protected), Vol. 2.1, Table 25.

108. Exhibit NQ-2017-003-09B (protected), Vol. 2.1, Tables 31, 33-34.

109. Exhibit NQ-2017-003-08, Vol. 1.1, Table 10.

110. *Ibid.*

111. Exhibit NQ-2017-003-E-02A (protected), Vol. 14 at 87, 91.

112. *Ibid.* at 92-93.

195. Selenis suggested that the Tribunal should consider an increase of Chinese imports to the EU after termination of the EU anti-dumping investigation against PET resin from China in 2017 as indicative of future Chinese imports to Canada in case of a negative finding in this inquiry. The Tribunal disagrees. In the Canadian market, the record shows that Chinese imports consistently decreased in every year of the POI and dropped sharply during interim 2017 compared to interim 2016, while not being subject to duties during that entire period.¹¹³ This situation is not comparable to an increase of imports to the EU after a prolonged period of being subject to duties and is not an appropriate indicator for future Chinese imports to Canada.

196. On this basis, the Tribunal finds that it is unlikely that the import volumes from China and India will substantially increase in the next 12 to 18 months.

197. Regarding likely prices in the near future, the Tribunal has previously concluded that the volume of subject goods from China and India sold at undercutting prices was less than 10% of total sales of all four benchmark products in all four quarters examined. The Tribunal found significant undercutting only for benchmark product 2, which was not found to have injurious effects on Selenis. The Tribunal determined that the subject goods from China and India did not significantly depress the prices of the like goods during the POI.

198. Moreover, during interim 2017 when import volumes increased substantially, and especially after filing of the complaint in June 2017, while prices of subject goods from China and India undercut domestic prices for the four benchmark products to some extent, the undercutting was not systemic and consistent.¹¹⁴ Although some undercutting may still occur in the future, it is not likely to be more significant than during the POI as the same market forces will apply.

199. On the basis of these findings, the Tribunal has no reason to believe that prices of subject goods from China and India entering the Canadian market in the next 12 to 18 months are likely to significantly undercut prices or to depress the prices of like goods, and the Tribunal finds accordingly.

200. Given that the volumes and price effects are unlikely to change in the next 12 to 18 months, and as they did not cause material injury during the POI, the Tribunal finds that the dumped and subsidized goods from China and India are not threatening to cause material injury to the domestic industry in the next 12 to 18 months.

Threat of Injury from Oman and Pakistan

201. Regarding likely volumes in the near future, the volumes of dumped goods from Oman and Pakistan increased from 2015 to 2016, but dropped sharply in interim 2017 compared to interim 2016.¹¹⁵ There is no evidence that volumes are likely to rise above 2017 levels in the coming 12 to 18 months.

202. On the basis of testimony of a witness from Novatex, Selenis submitted that imports from Pakistan may increase to 2016 levels, plus an additional percentage of growth, if no duties are imposed in this investigation.¹¹⁶ However, the Tribunal, as stated above, does not consider imports from Oman and Pakistan to have been injurious to the domestic industry, including the 2016 levels. In addition, the Tribunal does not

113. Exhibit NQ-2017-003-08, Vol. 1.1, Table 11.

114. Exhibit NQ-2017-003-09B (protected), Vol. 2.1, Table 37.

115. Exhibit NQ-2017-003-08, Vol. 1.1, Table 10.

116. *Transcript of In Camera Hearing*, Vol. 3, 14 February 2018, at 218.

consider the additional percentage of growth in Pakistani imports beyond 2016 levels indicated by Novatex's witness to be so large as to likely threaten injury to the domestic industry.

203. It is notable that the volume increase during the POI was largely driven by dumped goods from Pakistan. However, there is no evidence of anti-dumping or countervailing measures on PET resin from Pakistan in other jurisdictions in that period. Selenis urged the Tribunal to consider how market dynamics might change depending on the results of the current U.S. anti-dumping investigation including Pakistan. However, for the Tribunal to find that goods from Pakistan are likely to be diverted from the United States to Canada in the next 12 to 18 months, it would have to presuppose that a positive injury finding will indeed be made. The Tribunal is not willing to make any assumptions, as to do so falls squarely in the realm of speculation.

204. There is some evidence indicating that there is a planned increase in Omani production of PET resin between 2016 and 2021.¹¹⁷ However, given that this increase is only planned and that, over a period ending three years in the future, the Tribunal considers it speculative to conclude that imports of subject goods from Oman will increase during the next 12 to 18 months. As for Pakistan, although it added 133,000 tons to its capacity in 2017, capacity is forecast to grow by 6% in 2018 and remain unchanged, i.e. 0%, in 2019, while demand is forecast to grow by 5% in 2018 but by 6% in 2019, narrowing the gap between supply and demand.¹¹⁸

205. Finally, Canada has not been among the highest-ranking export markets for either Pakistani or Omani exporters in the POI.¹¹⁹

206. On the basis of the above, the evidence does not disclose any reason to believe that the volume of imports from Oman and Pakistan will increase to a level that would materially injure Selenis in the next 12 to 18 months and the Tribunal finds accordingly.

207. Regarding likely prices in the near future, the Tribunal found that the subject goods from Oman and Pakistan generally did not significantly undercut the prices of like goods, with the exception of benchmark product 2, where the Tribunal found that there was no injurious effect on Selenis. Similarly, the Tribunal determined that the subject goods from Oman and Pakistan did not depress the prices of the like goods during the POI.

208. On the basis of these findings, the evidence does not disclose any reason to believe that prices of subject goods entering the Canadian market in the next 12 to 18 months are likely to significantly undercut or to depress prices of like goods, and the Tribunal finds accordingly.

209. Given that the volumes and price effects are unlikely to change in the next 12 to 18 months, and as they have not caused material injury to date, the Tribunal finds that the dumped goods from Oman and Pakistan are not threatening to cause material injury to the domestic industry in the next 12 to 18 months.

117. Exhibit NQ-2017-005-A-09, Vol. 11A at 390.

118. Exhibit NQ-2017-003-E-02A (protected), Vol. 14 at 88, 91.

119. Exhibit NQ-2017-003-18.02, Vol. 6.1 at 27; Exhibit NQ-2017-003-18.01, Vol. 6.1 at 6.

CONCLUSION

210. The Tribunal finds that the dumping and subsidizing of the above-mentioned goods originating in or exported from China and India, and the dumping of the above-mentioned goods originating in or exported from Oman and Pakistan, have not caused injury and are not threatening to cause injury to the domestic industry.

Jean Bédard

Jean Bédard
Presiding Member

Ann Penner

Ann Penner
Member

Rose Ritcey

Rose Ritcey
Member