



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## FINDING AND REASONS

Inquiry No. NQ-2017-005

Dry Wheat Pasta

*Finding issued  
Thursday, July 26, 2018*

*Reasons issued  
Friday, August 10, 2018*

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

## DRY WHEAT PASTA

### FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping and subsidizing of all dry wheat-based pasta, not stuffed or otherwise prepared, and not containing more than two percent eggs, whether or not enriched, fortified, organic, whole wheat or containing milk or other ingredients, originating in or exported from the Republic of Turkey, excluding refrigerated, frozen or canned pasta, have caused injury or are threatening to cause injury to the domestic industry.

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of final determinations dated June 26, 2018, that the aforementioned goods have been dumped and subsidized, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping and subsidizing of the above-mentioned goods have caused injury to the domestic industry.

Jean Bédard  
Jean Bédard  
Presiding Member

Serge Fréchette  
Serge Fréchette  
Member

Ann Penner  
Ann Penner  
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	June 25 to 29, 2018
Tribunal Panel:	Jean Bédard, Presiding Member Serge Fréchette, Member Ann Penner, Member
Support Staff:	Courtney Fitzpatrick, Lead Counsel Dustin Kenall, Counsel Rebecca Campbell, Analyst Josée St-Amand, Analyst Grant MacDougall, Analyst Julie Charlebois, Support Analyst Kristina Emmerson, Trade Remedies Investigations Officer Jyotsna Venkatesh, Trade Remedies Investigations Officer

**PARTICIPANTS:****Domestic Producers**

Canadian Pasta Manufacturers Association

**Counsel/Representatives**

Greg Tereposky  
Vince DeRose  
Jennifer Radford  
Daniel Hohnstein  
Stephanie Desjardins  
Chirani Mudunkotuwa  
Martin Perron

**Importers/Exporters/Others**

AGT Foods and Ingredients  
Durum Gida Sanayi ve Ticaret A.S.  
Mediterranean Exporters Association

**Counsel/Representatives**

Victoria Bazan

Loblaws Inc.  
Shopper's Drug Mart Corporation

Jeffrey Thomas

**WITNESSES:**

Gary Fiorelli  
Finance Manager  
Italpasta Limited  
  
Frank P. DeMichino  
Chief Operating Officer  
Italpasta Limited

Orville Anderson  
Controller  
Italpasta Limited  
  
Mike Medeiros  
Director, Retail Sales Operations  
Italpasta Limited

Ralph Younes  
Vice President, Sales & Marketing  
Primo Foods Inc.

Fabian Venier  
V.P. Logistics  
Primo Foods Inc.

Eddy Petaccia  
Vice-President  
Grisspasta Products Ltd.

A. Kadir Kulahcioglu  
Managing Director, Durum Gida Sanayi ve Ticaret A.S.  
President, Association of Turkish Pasta Manufacturers

Gulcin Arslan Hazar  
Deputy General Manager  
Durum Gida Sanayi ve Ticaret A.S.

Joel Young  
Category Manager  
Wal-Mart Canada Corp.

Ryan Hood  
National Category Merchant  
Sobeys Inc.

John Porco  
Chief Operating Officer  
Primo Foods Inc.

Enzo D'adamo  
Sales Director  
Grisspasta Products Ltd.

Nathalie Madiba  
Controller  
Grisspasta Products Ltd.

Murad Al-Katib  
President and CEO  
AGT Food and Ingredients

Ian M. Cleghorn  
Vice President, Operations  
Loblaw Companies Limited

Doug Watt  
President & CEO  
Catelli Foods Corporation

Danielle Pelletier  
Director, National Procurement and Support  
Systems, Grocery  
Metro Richelieu Inc.

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](mailto:citt-tcce@tribunal.gc.ca)

## STATEMENT OF REASONS

### EXECUTIVE SUMMARY

1. The Tribunal finds that the dumping and subsidizing of the subject goods over the POI has materially injured the domestic industry by targeting the most price-sensitive segment of the dry wheat pasta market, i.e. the retail sector, in which the vast majority of Canadian production was sold at competitive and falling prices as either private-label pasta or established national brands.

2. Turkish pasta first entered the Canadian market in 2011 when a domestic producer lost a private-label account to a Turkish producer.<sup>1</sup> Dynamics in the market did not change, however, until 2015, when the subject goods established a significant foothold in Canada as Durum Gida won the private-label account of a major Canadian retailer, Loblaws, at the expense of a domestic producer. Durum Gida won the account primarily because it was able to provide a high-quality product at an aggressively low price, achieved due to dumping and subsidizing. Loblaws passed those price savings on to its customers, resulting in an increase in its dry wheat pasta sales, a major driver of store traffic.

3. Loblaws' competitors took notice, especially the discount retailers. They saw that a major Canadian retailer was able to obtain a reliable supply of a quality product at a competitive price from an offshore supplier. This caused a race to the bottom in terms of pricing as retailers sought to maintain or increase their sales of this staple product. Some of them received and/or solicited credible offers from Turkish producers to supply their own private-label businesses. Others pressured Canadian producers to lower prices of pasta supplied for private labels or pasta sold as established national brands.

4. This series of events has impacted Canada's entire dry wheat pasta market and all of its producers. In one way or another, all of Canada's domestic producers have had to respond to dumped and subsidized Turkish pasta. As a result, the domestic industry has suffered material injury in two major ways. First, retailers successfully obtained price concessions from their domestic private-label suppliers: price concessions which significantly reduced their already wafer-thin margins. Second, the Loblaws-Durum Gida contract sparked a price war and caused prices to spiral downward, intensifying the already aggressively competitive market. This price war forced domestic producers to choose between lowering their prices or risk losing sales and market share. This price war also accelerated competition between private-label and national brands, to the extent that domestic producers must now consider alternative business strategies, such as expanding into the lower-margin private-label segment or retreating further into niche product categories at the expense of market share. This will only further intensify price competition and injury to the domestic industry.

### INTRODUCTION

1. The mandate of the Canadian International Trade Tribunal (the Tribunal) in this inquiry<sup>2</sup> is to determine whether the dumping and subsidizing of dry wheat pasta originating in or exported from the Republic of Turkey (Turkey) (the subject goods) has caused injury or is threatening to cause injury to the domestic industry.

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1. *Transcript of In Camera Hearing* at 74.

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

2. For the reasons that follow, the Tribunal has determined that the dumped and subsidized subject goods have caused injury to the domestic industry.

## BACKGROUND

3. This inquiry stems from a complaint filed by the Canadian Pasta Manufacturers Association (CPMA) and the initiation of an investigation on December 28, 2017, by the President of the Canada Border Services Agency (CBSA), into the alleged injurious dumping and subsidizing of dry wheat pasta originating in or exported from Turkey.

4. The CBSA's decision triggered a preliminary injury inquiry by the Tribunal on December 29, 2017. On February 26, 2018, the Tribunal determined that there was evidence that disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused injury or were threatening to cause injury to the domestic industry.

5. On March 28, 2018, the CBSA made preliminary determinations of dumping and subsidizing, resulting in the imposition of provisional duties on the subject goods and the commencement of this inquiry. On March 29, 2018, the Tribunal issued a notice of commencement of inquiry. The Tribunal's period of inquiry (POI) covers three full years, from January 1, 2015, to December 31, 2017.

6. The CPMA consists of three members who are in favour of a finding of injury or threat of injury: Italpasta Limited (Italpasta); Primo Foods Inc. (Primo); and Grisspasta Products Ltd. (Grisspasta).

7. The opposing parties are AGT Foods and Ingredients (AGT); Durum Gida Sanayi Ve Ticaret A.S. (Durum Gida); and the Mediterranean Exporters Association.

8. Two other entities filed notices of participation. A witness for Loblaw's Inc. (Loblaw's) filed a witness statement and was examined at the hearing, but Loblaw's did not take a position either in support of, or opposition to, the complaint. Pulse Canada did not file any evidence or arguments, take a position, or otherwise participate.

9. On March 29, 2018, staff of the Secretariat to the Canadian International Trade Tribunal of the Administrative Tribunals Support Service of Canada (CITT Secretariat) issued questionnaires to the domestic producers, importers, purchasers, foreign producers, and exporters of dry wheat pasta. Using the questionnaire replies and import data from the CBSA, staff of the CITT Secretariat prepared public and protected versions of the investigation report, issued on May 17, 2018. The public investigation report was distributed, along with the remainder of the public record, to parties who had filed notices of participation in the inquiry. A protected investigation report, containing information designated as confidential, was distributed, along with the remainder of the protected record, to counsel who had signed the required declaration and undertaking.

10. The case schedule provided that requests for product exclusions must be filed by May 24, 2018. No requests for product exclusions were received. On May 25 and June 5, 2018, the parties filed case briefs, witness statements and other evidence in response. On June 12, 2018, the CPMA filed reply submissions and reply witness statements. Revised public and protected versions of the investigation report were issued on June 11, 2018.

11. On May 25, 2018, parties submitted to the Tribunal various requests for information (RFI) directed at other parties. As some parties objected to certain RFIs, the Tribunal issued directions to the parties on

May 31, 2018, indicating which RFIs required responses. The Tribunal also issued its own RFIs directed to parties and non-parties.

12. The Tribunal held a hearing in Ottawa, Ontario, from June 25 to 29, 2018. It included public and *in camera* sessions. All of the represented parties called witnesses. The Tribunal itself called four witnesses: Mr. Joel Young of Wal-Mart Canada Corp. (Walmart); Mr. Doug Watt of Catelli Foods Corporation (Catelli); Mr. Ryan Hood of Sobeys's Inc. (Sobeys); and Mme Danielle Pelletier of Metro Richelieu Inc. (Metro).

13. When it became clear that two of the Tribunal's witnesses (Mr. Hood of Sobeys and Mr. Young of Walmart) needed to make further inquiries to answer certain questions posed at the hearing, the Tribunal issued written RFIs to them, and counsel for the parties were provided an opportunity to comment on the responses after they were filed. Comments from both parties were received on July 12, 2018.

14. The Tribunal issued its finding on July 26, 2018.

## **RESULTS OF THE CBSA'S INVESTIGATION**

15. On June 26, 2018, the CBSA made final determinations of dumping and subsidizing. The CBSA's period of investigation for its dumping investigation was December 1, 2016, to November 30, 2017. The period of investigation for its subsidy investigation was January 1, 2016, to November 30, 2017.

16. The CBSA determined that 100 percent of the subject goods were dumped and subsidized. It also determined that the weighted average margin of dumping expressed as a percentage of export price was 7.0 percent for Durum Gida and 99.9 percent for all other Turkish exporters. It further determined that the amount of subsidy expressed as a percentage of export price was 1.4 percent for Durum Gida and 4.2 percent for all other Turkish exporters.

## **PRODUCT**

### **Product Definition**

17. The CBSA defined the subject goods as follows:

All dry wheat-based pasta, not stuffed or otherwise prepared, and not containing more than two percent eggs, whether or not enriched, fortified, organic, whole wheat or containing milk or other ingredients, originating in or exported from the Republic of Turkey, excluding refrigerated, frozen or canned pasta.

### **Additional Product Information**

18. The subject goods broadly include all white pasta, standard pasta, regular pasta, whole wheat pasta and organic pasta in the durum wheat semolina family of pasta. The subject goods can also be enriched or fortified, and may contain milk or other optional ingredients such as chopped vegetables, vegetable purees, vegetable powders, gluten, diastases, vitamins, colouring and flavourings.

19. The subject goods include long shapes (generally referred to as vermicelli and including spaghetti, spaghettini, capelli, linguini, vermicelli, angel hair, fettuccini and pasta nests), short lengths (generally referred to as macaroni and including elbow macaroni, penne, rigatoni, rotini, fusilli and ziti) and specialty shapes (including bows, shells, cannelloni, manicotti, lasagna and wagon wheels).

20. The subject goods are imported in various types and sizes of packaging. The packaging can include fiberboard, cardboard cartons, polyethylene bags or polypropylene bags in a wide range of sizes. The most common sizes are 200g, 375g, 400g, 454g, 500g, 750g, 800g, 900g, 1kg, 10lb, 20lb, 30lb, 40lb, 50lb, “Box Specialty” and “Bulk Tote”. In Canada, it is common for dry wheat pasta to be packaged by the producer.

## LEGAL FRAMEWORK

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

22. 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.

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

24. The Tribunal can then assess whether the subject goods have caused material injury to the domestic industry. Should the Tribunal arrive at a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.<sup>3</sup> As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.<sup>4</sup>

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

## LIKE GOODS AND CLASSES OF GOODS

26. In order for the Tribunal to determine whether the dumping and subsidizing of the subject goods have caused or are threatening to cause injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.<sup>5</sup>

27. 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

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3. 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.

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

5. 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.).

(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.

28. In deciding the issue of like goods when goods are not identical in all respects to the other goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).<sup>6</sup>

29. In addressing the issue of classes of goods, the Tribunal typically examines whether goods potentially included in separate classes of goods constitute “like goods” in relation to each other. If those goods are “like goods” in relation to each other, they will be regarded as comprising a single class of goods.<sup>7</sup>

30. There is no dispute between the parties that the dry wheat pasta produced in Canada that is of the same description as the subject goods is “like goods” in relation to the subject goods. Further, parties do not dispute that there is a single class of goods. As such, and on the basis of the evidence on the record in relation to the above factors, the Tribunal will conduct its analysis on this basis.

31. During the inquiry a question arose as to whether or not pasta kits, defined as dry wheat pasta packaged with a separate sachet of flavouring or sauce (e.g. macaroni and cheese kits), should be included in the product definition. The Tribunal elected to collect the pertinent data and report it in its investigation report without deciding whether they fit within the product definition of dry wheat pasta or are like goods.<sup>8</sup>

32. The CPMA took the position that pasta kits were part of the product definition and should not be excluded because (1) no exclusion request has been filed and (2) if excluded, pasta kits could serve as a vehicle for the circumvention of any finding. The opposing parties took no position. With respect to whether they were like goods, neither party filed any evidence of the physical or market characteristics of pasta kits, or made any submissions demonstrating whether or how their uses or characteristics closely resemble those of the subject goods.

33. Normally, consistent with subsection 43(1) of *SIMA*, the Tribunal’s injury finding will define the scope of goods covered, including any exclusions. Indeed, the Tribunal has held that, to the extent that the subject goods’ definition lacks clarity, the Tribunal has jurisdiction to interpret, without redefining, it.<sup>9</sup> However, where the question is academic, moot, or the Tribunal lacks sufficient evidence to make an informed determination, it will defer such questions to a subjectivity or scope assessment at a later date when the issue is riper.<sup>10</sup>

34. Here, the product definition lacks clarity in relation to pasta kits, in the sense that it is not clear whether or not pasta kits constitute “otherwise prepared” pasta, which is expressly excluded from the product definition. There is also no robust evidentiary record on whether pasta kits are like goods, because of the failure of the parties to adduce evidence and the lack of participation of Kraft-Heinz Canada ULC (Kraft) (the primary domestic producer of pasta kits aside from some minor production<sup>11</sup>) in these proceedings. Most importantly, none of the subject goods imported over the POI (or from any period as

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

7. *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 115; see, also, *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.

8. Exhibit NQ-2017-005-06A, Vol. 1.1A at 11.

9. *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) [*FISC*] at para. 36.

10. *FISC* at paras. 39-40.

11. Exhibit NQ-2017-005-11.08, Vol. 3B at 89-90.

known to the Tribunal based on the full record) includes pasta kits.<sup>12</sup> Pasta kits (either domestically produced or imported from non-subject countries) appear to be a niche portion of the total apparent market, based on sales volumes and pricing levels.<sup>13</sup> Accordingly, the Tribunal finds that the status of pasta kits is largely academic because it involves prospective competition from subject imports that has not occurred yet. The question is also moot as the inclusion (or not) of pasta kits and Kraft has no material impact on the Tribunal's injury analysis. As will be discussed below, the benchmark products do not include any pasta kits and provide the best evidence of direct competition with the subject goods. Therefore, the status of pasta kits does not need to (and should not) be resolved by the Tribunal as part of its injury inquiry.

35. Whether future imports of pasta kits from Turkey would fall under the product definition (chosen by the CPMA and adopted by the CBSA) or outside it as "otherwise prepared" dry wheat pasta is a question more properly posed and answered through the subjectivity or scope proceedings provided for in *SIMA*.<sup>14</sup>

36. Further, while in the past the Tribunal has considered the threat of circumvention as a factor in the context of considering exclusion requests,<sup>15</sup> it does not find that it should do so here for two reasons: (1) it is not clear whether pasta kits are subject goods that would require an exclusion and (2) Parliament has recently implemented a regime for certain types of anti-circumvention investigations under the purview of the CBSA, which could arguably be used to address this type of circumvention, to be initiated only after the Tribunal has made a finding of injury.<sup>16</sup>

## DOMESTIC INDUSTRY

37. Subsection 2(1) of *SIMA* defines "domestic industry" as follows:

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

38. The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.<sup>17</sup>

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12. Exhibit NQ-2017-005-07A (protected), Table 15, Schedules 2, 4, 5, Vol. 2.1A; Exhibit NQ-2017-005-15.09A, Vol. 6A at 145; Exhibit NQ-2017-005-15.09C, Vol. 6A. The Tribunal also notes that no party made submissions or filed evidence that the imports of the subject goods included pasta kits.

13. Exhibit NQ-2017-005-07A (protected), Tables 19, 42, 86, Vol. 2.1A; Exhibit NQ-2017-005-12.08B (protected), Vol. 4B at 34; Exhibit NQ-2017-005-15.15, Vol. 6C at 104; Exhibit NQ-2017-005-15.06, Vol. 6 at 131.

14. Sections 56-67 of *SIMA* and sections 57.11 to 57.21 of the *Regulations*.

15. E.g. *Leather Footwear* (27 December 2001), NQ-2001-003 (CITT) at 21.

16. Section 72 of *SIMA*.

17. The term "major proportion" means an important, serious or significant proportion of total domestic production of like goods and not necessarily a majority: *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A.); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); *China – Anti-dumping and countervailing duties on certain automobiles (US)*, (23 May 2014), WTO Docs. WT/DS440/R, Report of the Panel, at para. 7.207; *European Community – Definitive anti-dumping measures on certain iron or steel fasteners (China)*, (15 July 2011), WTO Docs. WT/DS397/AB/R, Report of the Appellate Body, at paras. 411, 419, 430; *Argentina – Definitive Anti-dumping duties on poultry (Brazil)*, (22 April 2003), WTO Docs. WT/DS241/R, Report of the Panel, at paras. 7.341-7.344.

39. The CPMA submitted that the Tribunal should make a determination based on injury to those domestic producers whose production represents a major proportion of the total production of like goods. The Federal Court of Appeal has interpreted “major proportion” to mean “significant” rather than a majority of total production of like goods in Canada.<sup>18</sup> As it is not contested that the CPMA members account for a significant share of total production (even when assessed in a total market that includes Kraft’s volumes of pasta kits), they argue that they need not prove injury or threat of injury to Catelli or Kraft.

40. The opposing parties submitted that the Tribunal should only make a finding of injury based on the domestic producers as a whole. As such, they opposed the argument that the Tribunal should limit its analysis to Primo, Italpasta and Grisspasta.

41. Both parties agreed that, consistent with the Federal Court of Appeal’s decision in *Essar Steel Algoma Inc. v. Jindal Steel and Power Limited*,<sup>19</sup> the decision of whether to assess injury to the domestic industry as a whole or a major proportion thereof is a matter of Tribunal discretion. The question turns on the facts that arise during the course of the Tribunal’s investigation, including structural and behavioural differences among producers and the availability of evidence. The purpose of the option in subsection 2(1) of *SIMA* is to enable the Tribunal to assess injury based on the facts of each case while remaining compliant with Canada’s international obligation to conduct an objective assessment based on positive evidence across the entire domestic industry.<sup>20</sup> The purpose of the definition is not to provide a lower evidentiary bar for complainants where the facts of their case are unfavourable regarding certain domestic producers.<sup>21</sup> In any given case, it is incumbent on the domestic producers to identify a principled reason for the Tribunal to use the major-proportion rather than the as-a-whole standard, as using the former carries the risk of basing an injury finding on a “misleading impression of the data relating to the industry as a whole”.<sup>22</sup>

42. Here, Catelli (the only major domestic dry wheat pasta producer not part of the CPMA) competes directly with the CPMA members for sales of dry wheat pasta; it also completed the Tribunal’s questionnaires, answered Tribunal RFIs and attended the hearing as a Tribunal witness. Accordingly, there is no reason not to consider it as part of the domestic industry for the purposes of the Tribunal’s injury analysis.

43. Kraft produces dry wheat pasta in Canada but it is only consumed internally for the production of pasta kits.<sup>23</sup> Kraft does not sell or supply dry wheat pasta by itself in competition with any other buyer, seller or producer in the market. For the reasons discussed above, the focus of this inquiry is dry wheat pasta, not pasta kits. Nonetheless, subsection 2(1) of *SIMA* defines the domestic industry in terms of production of like goods. As such the Tribunal finds that there is no statutory basis to exclude Kraft from the domestic industry for the purposes of this inquiry on the basis that the dry wheat pasta it produces is for

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18. E.g. *McCulloch of Canada Ltd. v. Canada (Anti-Dumping Tribunal)* (1977), [1978] 1 F.C. 222 (F.C.A.) at 225.

19. *Essar Steel Algoma Inc. v. Jindal Steel and Power Limited*, 2017 FCA 166 (CanLII) [*Essar Steel*].

20. See *Essar Steel* at paras. 26-27. See also articles 3.1 of the *Anti-dumping Agreement* and 15.1 of the *Agreement on Subsidies and Countervailing Measures*.

21. See *Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Steel Plate* (6 January 2016), NQ-2015-001 (CIIT) at paras. 50, 54 and 70.

22. *United States – Anti-dumping measures on certain hot-rolled steel products from Japan*, (24 July 2001), WTO Doc. WT/DS184/AB/R, Report of the Appellate Body, at para. 204.

23. Exhibit NQ-2017-005-11.08, Vol. 3B at 89-90; Exhibit NQ-2017-005-12.08 (protected), Vol. 4B at 21; Exhibit NQ-2017-005-12.08B (protected), Vol. 4B at 34.

further internal processing.<sup>24</sup> However, as is discussed in greater detail below, the Tribunal will focus its injury analysis primarily on the impact of the subject goods on the merchant market.

44. On the basis of the foregoing, the Tribunal finds that the appropriate analytical framework is for it to assess injury to the domestic industry as a whole, which, for the purposes of this inquiry, comprises Primo, Italpasta, Grisspasta, Catelli and, where appropriate, Kraft.

45. The Tribunal further notes that the total domestic production of Italpasta, Primo, Grisspasta, and Catelli accounted for the vast majority of domestic production over the POI.<sup>25</sup> Therefore, even including Kraft and its production of pasta for pasta kits, these four producers constitute a major proportion of the total domestic production of like goods.

## CROSS-CUMULATION

46. There are no legislative provisions that directly address the issue of cross-cumulating the effects of both dumping and subsidizing. However, as noted in previous cases,<sup>26</sup> 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 to the dumping and the subsidizing respectively.

47. Given the above, the Tribunal's usual practice is to make a cumulative assessment of the injurious effects of goods that are both dumped and subsidized. In this proceeding, no party submitted that the dumping and subsidizing of the subject goods should be considered separately. Therefore, the Tribunal will make a cumulative assessment of the effects of the dumping and subsidizing of the subject goods.

## INJURY ANALYSIS

48. Subsection 37.1(1) of the *Special Import Measures Regulations*<sup>27</sup> prescribes that, in determining whether the dumping and subsidizing have caused material injury to the domestic industry, the Tribunal is to consider the volume of the dumped and subsidized goods, their effect on the price of like goods in the domestic market, and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the injury on the basis of the factors listed in subsection 37.1(1), and whether any factors other than the dumping and subsidizing of the goods have caused injury.

### Preliminary Matter

49. Prior to and at the hearing, parties opposed took issue with the fact that the volume of imports from non-subject countries in the Tribunal's investigation report is significantly lower than the volume of non-subject imports estimated by the CBSA in its final determinations of dumping and subsidizing. They argued

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24. *Mattress Innerspring Units* (24 November 2009), NQ-2009-002 (CITT) at paras. 57-58.

25. Exhibit NQ-2017-005-07A (protected), Table 86, Vol. 2.1A; Exhibit NQ-2017-005-12.08B (protected), Vol. 4B at 34.

26. 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.

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

that this discrepancy has an important impact on the Tribunal's analysis, including the Tribunal's assessment of market share and trends.

50. The Tribunal acknowledges the discrepancies between the CBSA's and the Tribunal's import data relating to non-subject countries.<sup>28</sup> Indeed, discrepancies of this nature are not uncommon in cases where the CBSA's import data is based on Harmonized Commodity Description and Coding System (HS) codes that include a broader set of goods than the subject goods as set out in the product definition for the inquiry. For its part, the Tribunal applied its well-established methodology to estimate imports and sales from non-subject countries using import data provided in the responses to the Tribunal's questionnaires and estimations using CBSA import data for non-surveyed and non-responding importers.<sup>29</sup> One of the goals of the questionnaires and the estimations is to zero in on the imports and sales of goods meeting the product definition only, which thus results in a smaller volume of goods than what is found in the CBSA's HS code data.

51. While the data in the investigation report may understate the actual volume of non-subject imports, the Tribunal considers this data to be the best evidence on the record concerning the relative volume and market share of non-subject imports. More importantly, the Tribunal is satisfied that the data in the investigation report provides a reasonable and proportionate picture of the Canadian market in terms of the relative market share of subject goods, imports from non-subject countries, and like goods, and the manner in which competition between subject and like goods evolved over the period of investigation.

### **Overview of the Dry Wheat Pasta Market in Canada**

52. The Canadian dry wheat pasta market is divided into three major segments: retail, food services and industrial. The retail segment is by far the largest, accounting for the vast majority of the production and sales of the domestic industry.<sup>30</sup>

53. The retail segment of the market is mature, and competition is intense, driven by four essential dynamics.

54. First, dry wheat pasta is a low-margin product.<sup>31</sup> It contains two main ingredients: semolina flour milled from durum wheat and water. Its production (though automated and capital intensive) is based on decades-old methods whereby the flour and water are mixed, the dough is extruded through a die, cut, dried, and then packaged. All producers use essentially the same technology to produce dry wheat pasta.<sup>32</sup> Its price corresponds directly to the price of semolina flour, which in turn is dependent upon the price of durum wheat. Although consumer demand for whole wheat, gluten free, high-fiber, artisanal, fresh and other more expensive types of pasta is increasing,<sup>33</sup> most retail sales still comprise dry wheat pasta made of white semolina flour in a traditional cut (e.g. spaghetti).<sup>34</sup> Because dry wheat pasta is a consumer staple (indeed, retailers recognize that it drives store traffic),<sup>35</sup> competition is highly price intensive, especially for the plain,

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28. Exhibit NQ-2017-005-07A (protected), Table 15, Vol. 2.1A; Exhibit NQ-2017-005-05 (protected), Vol. 2 at 66-67.

29. Exhibit NQ-2017-005-06A, Vol. 1.1A at 17.

30. Exhibit NQ-2017-005-07A (protected), at Tables 22, 28 and 34, Vol. 2.1A.

31. *Transcript of In Camera Hearing* at 3; *Transcript of Public Hearing* at 68; Exhibit NQ-2017-005-A-03 at para. 27, Vol. 11.

32. Exhibit NQ-2017-005-A-17, Vol. 11A at paras. 2-5; Exhibit NQ-2017-005-A-15, Vol. 11A at paras. 2-4.

33. *Transcript of Public Hearing* at 182, 184 and 242.

34. *Transcript of In Camera Hearing* at 274.

35. *Transcript of Public Hearing* at 245.

mass-produced and mass-consumed traditional shapes and cuts of white dry wheat pasta.<sup>36</sup> Retailers monitor each other's prices on staple dry wheat pasta products (such as 900-gram cellophane packaged white spaghetti) as frequently as on a weekly basis.<sup>37</sup>

55. Second, Canadian producers sell most of their production to retailers that are national or regional supermarket grocery chains.<sup>38</sup> Dry wheat pasta is then marketed to consumers in two ways: under a recognized, national brand label (e.g. Catelli, Italpasta, Primo, etc.), or the retailers' own private-label (No Name for Loblaws, Selection for Metro, Great Value for Wal-Mart, etc.). Private labels have become an increasingly important subset of the retail market.<sup>39</sup>

56. Third, national retailers have significant buying power in relation to dry wheat pasta producers. They are the principal forum through which producers can reach the mass-consumer market.<sup>40</sup> They control the volume of sales through allocation of shelving space, product placement, retail pricing and promotions to drive store traffic.<sup>41</sup> At the same time, they compete with their suppliers directly in the form of their own private-label offerings, which are ubiquitous among major national retailers in the dry wheat pasta market.

57. Fourth, national-brand and private-label dry wheat pasta compete directly with one another, but they represent different producer and retailer strategies for maximizing sales and profits. In general, national-brand dry wheat pasta is sold to retailers and consumers at a higher price point than private-label dry wheat pasta, based primarily on brand equity. This premium has historically been in the range of 10 to 25 percent.<sup>42</sup> The price premium that a national brand-name pasta product can maintain depends on consumer preferences and perceptions, which are affected by taste, product quality, country of origin (mostly limited to Italy, which is highly regarded by some consumers due to its historical association with pasta as an Italian food)<sup>43</sup> and investments in marketing.<sup>44</sup> This brand equity has eroded over the last decade due to changes in consumer tastes, in particular greater recognition of the competitiveness of private-label dry wheat pasta from both a quality and price perspective.<sup>45</sup> The major retailers' low-price banners (e.g. No Frills, Food Basics and FreshCo), which compete against each other and Walmart, create additional price pressure. Over the POI, the price gap between national-branded pasta and private-label pasta at some retailers has grown beyond the historically accepted price premium. The contracts to supply the private-label businesses of major retailers are vital for producers because, in addition to their increasing market share, private labels provide an additional source of revenue which, although at lower margins than national-branded sales, allows them to cover fixed costs and increase capacity utilization.<sup>46</sup>

58. The food services and industrial market segments are important to some individual producers, but they are not the drivers of competition in the Canadian market. The food services segment comprises

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36. *Transcript of Public Hearing* at 202; Exhibit NQ-2017-005-06A, Table 13, Vol. 1.1A.

37. *Transcript of Public Hearing* at 172, 187 and 236; *Transcript of In Camera Hearing* at 252.

38. Exhibit NQ-2017-005-07A (protected), Tables 22, 28 and 34, Vol. 2.1A.

39. Exhibit NQ-2017-005-07A (protected), Table 88, Vol. 2.1A; *Transcript of In Camera Hearing* at 135.

40. E.g. Exhibit NQ-2017-005-RI-09A (protected) at 03, Vol. 10.

41. *Transcript of Public Hearing* at 36, 74, 245; *Transcript of In Camera Hearing* at 60 and 63.

42. *Transcript of Public Hearing* at 74; Exhibit NQ-2017-005-12.04 (protected), Vol. 4A at 110; Exhibit NQ-2017-005-12.02 (protected), Vol. 4 at 81; Exhibit NQ-2017-005-12.03 (protected), Vol. 4A at 9; Exhibit NQ-2017-005-12.06 (protected), Vol. 4A at 200.

43. *Transcript of Public Hearing* at 242.

44. *Transcript of In Camera Hearing* at 319-320.

45. *Transcript of Public Hearing* at 73-74, 99 and 101.

46. Exhibit NQ-2017-005-A-03 at para. 43, Vol. 11; *Transcript of In Camera Hearing* at 150 and 325-326.

institutions, restaurants and restaurant chains. This segment makes up a much lower percentage<sup>47</sup> of the apparent market than retail. The industrial segment comprises manufacturers of processed food products incorporating dry wheat pasta (e.g. frozen dinners). This segment makes up by far the smallest percentage<sup>48</sup> of the apparent market, but, importantly, is linked to retail as these products are typically sold in retail stores. Co-packing, whereby one producer makes and packages pasta under another producer's label, is confined to one domestic producer and is mostly limited to providing specialty shapes and cuts.

59. Different pricing practices apply to the food services and industrial market segments. For this reason, these market segments may not be as immediately impacted by the presence of low prices as the retail segment. However, a substantial price decline in the retail segment of the market will spill over into these other segments. In fact, the Tribunal heard testimony that this has started to happen.<sup>49</sup>

60. While a significant volume of the dumped and subsidized subject goods imported over the POI were from one exporter (Durum Gida) to one purchaser (Loblaws) for its private-label business, the overall presence of the subject goods had significant, material and injurious consequences for the domestic industry as a whole given the aforementioned competitive market dynamics.<sup>50</sup>

### Import Volume of Dumped and Subsidized Goods

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

62. The absolute volume of imports of the subject goods increased over the POI, by 112 percent in 2016 and a further 16 percent in 2017.<sup>51</sup> Relative to both domestic production and domestic sales from domestic production, the volume of imports of the subject goods increased by five percentage points in 2016 and two percentage points in 2017.<sup>52</sup>

63. This increase in the volume of imports of the subject goods accounted for most of the increase in total imports over the POI.<sup>53</sup> As a result, the subject goods established—starting from a minor, scattered presence in the market confined to private-label sales at a discount store and name-brand sales to ethnic retailers—a significant nation-wide foothold as a private-label supplier of Loblaws, one of Canada's largest supermarket chains.<sup>54</sup>

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47. Exhibit NQ-2017-005-07A (protected), Tables 22, 28 and 34, Vol. 2.1A.

48. *Ibid.*

49. Exhibit NQ-2017-005-A-05 (protected) at para. 57, Vol. 12; *Transcript of Public Hearing* at 73; *Transcript of In Camera Hearing* at 155-156.

50. Exhibit NQ-2017-005-07A (protected), Tables 19, 94, Schedule 47, Vol. 2.1A; Exhibit NQ-2017-005-15.09B (protected), Vol. 6A at 162; *Transcript of Public Hearing* at 123-124.

51. Exhibit NQ-2017-005-06A, Table 16, Vol. 1.1A.

52. *Ibid.*, Table 18.

53. *Ibid.*, Table 16; Exhibit NQ-2017-005-07A (protected), Table 15, Vol. 2.1A. The Tribunal has addressed the concerns raised by the opposing parties regarding the volume of imports from non-subject countries earlier in these reasons. As noted in that section, even if the actual volume of imports from non-subject countries was slightly understated in the investigation report, the Tribunal is satisfied that the data in that report provides a reasonable and proportionate picture of the Canadian market in terms of relative volumes and market share.

54. *Transcript of In Camera Hearing* at 153; *Ibid.* at 126; Exhibit NQ-2017-005-06A, Table 6, Vol. 1.1A.

64. The Tribunal finds that there was a significant increase in the absolute and relative volume of imports of the subject goods over the POI.

### **Price Effects of Dumped and Subsidized Goods**

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

66. To that end, staff of the CITT Secretariat collected data from domestic producers, importers, purchasers and foreign producers regarding sales by market segment and trade level, sales to common accounts and sales of six benchmark products on a quarterly basis.

67. The benchmark products cover various sizes (900 grams, 450-454 grams), packaging (cardboard, cellophane/plastic) and branding (national brand and private label) of like and subject goods. Taken together they represent a significant share of sales from domestic production and imports, particularly subject imports, though meaningful comparisons cannot be made between the like goods and the subject goods for all of the benchmark products.<sup>55</sup>

68. Benchmark product No. 2 (900 g, private label, cellophane) is the most significant in terms of volume, representing more than half the volume of imports of the subject goods in 2016 and 2017.<sup>56</sup> Further, the pricing of benchmark products No. 2 and No. 1 (900 g, national-branded, cellophane) are linked, as benchmark product No. 2 is the private-label equivalent of benchmark product No. 1.<sup>57</sup> Together these two benchmark products represent a significant percentage of sales from domestic production.<sup>58</sup> These two benchmark products also represent the most price-sensitive type of pasta: plain, white, dry wheat pasta.<sup>59</sup> During the hearing, witnesses for Walmart, Sobeys and Metro confirmed that the 900-gram bag of pasta was particularly aggressively priced.<sup>60</sup>

69. For purposes of understanding the Tribunal's analysis of price effects, it is important to note that almost all of the subject goods were sold in the private-label sub-segment of the retail segment, with only a very small number of sales of branded Turkish pasta in the retail segment and in the food services segment, and none in the industrial segment.<sup>61</sup>

70. It is also important to note that the Tribunal has segregated Kraft's data from the unit values referred to in the following pricing analysis because, as noted above, the Tribunal has focused its injury analysis on dry wheat pasta, not pasta kits, and the impact of the subject goods on the retail and, to a lesser extent, the

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55. Exhibit NQ-2017-005-07A (protected), Table 62, Vol. 2.1A.

56. *Ibid.*, Tables 15, 62 and Schedule 2.

57. *Transcript of Public Hearing* at 252.

58. Exhibit NQ-2017-005-07A (protected), Table 62, Vol. 2.1A.

59. Benchmark products No. 2-5 contain very little higher-priced pasta such as whole-wheat-based or vegetable-based pasta or specialty shapes. Exhibit NQ-2017-005-RI-09A (protected) at 2, Vol. 10; Exhibit NQ-2017-005-RI-10A (protected) at 2, Vol. 10; Exhibit NQ-2017-005-RI-11C (protected) at 3, Vol. 10.

60. *Transcript of Public Hearing* at 187, 236 and 250-251.

61. Exhibit NQ-2017-005-07A (protected), Table 22, 29 and 34, Vol. 2.1A; Exhibit NQ-2017-005-18.01 (protected), Vol. 6.1 at 6; Exhibit NQ-2017-005-18.02 (protected), Vol. 6.1 at 37.

food services and industrial market segments.<sup>62</sup> However, in some instances the Tribunal has referenced Kraft's data, either for completeness or where necessary in order to enable a more public discussion of the data.

### Price Undercutting

71. On an annual basis, the average unit values of the subject goods significantly undercut those of the domestic like goods and non-subject imports in every year of the POI.<sup>63</sup> Price undercutting was evident in the retail and food services segments of the market.<sup>64</sup> The degree of undercutting was significant and would have been even more significant had the Tribunal included Kraft's unit values in its analysis.

72. With respect to sales to common accounts, the unit values of the subject goods significantly undercut the prices of the like goods and imports from non-subject countries in each quarter of 2016 and 2017 when in direct competition.<sup>65</sup>

73. In regard to benchmark sales, price comparisons show significant price undercutting by the subject goods in every instance of price comparison and across all quarters for which benchmark data was collected.<sup>66</sup> In contrast, the prices of imports from non-subject countries undercut the prices of like goods to a lesser degree and in fewer instances.<sup>67</sup>

74. There was significant price undercutting by the subject goods for benchmark product No. 2 (900 g, private-label, cellophane), benchmark product No. 4 (450-545 g, private-label, cardboard), and benchmark No. 5 (450-545 g, national-branded, cellophane) in every instance of competition in 2016 and 2017.<sup>68</sup>

75. As noted above, the national-branded products have historically enjoyed a price premium in the range of 10 to 25 percent.<sup>69</sup> It is notable that the degree of price undercutting between benchmark product No. 1 (national-branded pasta) and the subject goods for benchmark product No. 2 (private-label pasta) exceeds this historical price premium. In fact, the gap between the prices of like goods and the prices of subject goods for benchmark product No. 2 (which related only to private-label products) was greater than the historical price premium for national brands compared to private-label brands.<sup>70</sup>

76. On the basis of the above, the Tribunal finds that there was significant price undercutting by the subject goods over the entire POI.

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62. The Tribunal notes that these unit values do include a very small volume of pasta kits produced by another domestic producer, but the impact of this volume on unit pricing is negligible.

63. Exhibit NQ-2017-005-07A (protected), Tables 19, 42, Vol. 2.1A.

64. *Ibid.*, Tables 22, 28, 44, 48. As noted above, there were no sales of subject goods in the industrial market segment.

65. Exhibit NQ-2017-005-07A (protected), Tables 73-79, Vol. 2.1A.

66. *Ibid.*, Tables 64, 66.

67. *Ibid.*

68. *Ibid.*, Tables 64 and 69.

69. *Transcript of Public Hearing* at 74; Exhibit NQ-2017-005-12.04 (protected), Vol. 4A at 110; Exhibit NQ-2017-005-12.02 (protected), Vol. 4 at 81; Exhibit NQ-2017-005-12.03 (protected), Vol. 4A at 9; Exhibit NQ-2017-005-12.06 (protected), Vol. 4A at 200.

70. Exhibit NQ-2017-005-07A (protected), Tables 56, 57, and 64, Vol. 2.1A; Exhibit NQ-2017-005-12.04 (protected), Vol. 4A at 110; Exhibit NQ-2017-005-12.02 (protected), Vol. 4 at 81; Exhibit NQ-2017-005-12.03 (protected), Vol. 4A at 9; Exhibit NQ-2017-005-12.06 (protected), Vol. 4A at 200.

### Price Depression

77. The average unit values of the like goods increased slightly in 2016 and then decreased in 2017 for an overall decrease of four percent over the POI. Excluding Kraft's sales of pasta kits, prices fell each year at almost twice the rate. This decline coincided with a 17 percent decline in the prices of the subject goods. The prices of imports from non-subject countries increased over the same period.<sup>71</sup>

78. In the retail segment the average unit values of the domestic producers' sales of like goods followed essentially the same pattern. Prices of like goods increased in 2016 and decreased in 2017 for an overall decrease of four percent over the POI. Excluding Kraft's sales of pasta kits, prices fell each year at more than twice the rate. The unit values of the subject goods in the retail market segment declined by 17 percent over the POI.<sup>72</sup>

79. Prices of like goods in the food services segment followed a slightly different trend: the average unit values of the like goods (with or without Kraft) dipped in 2016 before returning to 2015 levels in 2017. The unit values of the subject goods in the food services market segment declined by eight percent over the POI.<sup>73</sup>

80. The pricing data for benchmark products show mixed results regarding the movements in the selling prices of the subject and like goods.<sup>74</sup> For benchmark product No. 1, the quarterly prices of like goods fluctuated, either staying flat or showing slight increases up to Q1 2017, then dropping significantly in Q2 2017, before increasing again in Q3 and Q4 2017 for an overall increase of one percent. There were no sales of subject goods for benchmark product No. 1.<sup>75</sup> For benchmark product No. 2, which represents the greatest source of competition between the like and subject goods, the quarterly prices of like goods steadily decreased from Q1 2016 to Q4 2017. The like goods saw minor increases occurring in Q1 2017 and Q3 2017, and the greatest drop occurred in Q4 2016 for an overall decrease of 18 percent. The quarterly prices of the subject goods decreased or remained steady in each quarter, with the exception of a slight increase in Q3 2017, for an overall decrease of 19 percent.<sup>76</sup>

81. For benchmark product No. 5, the price of like goods decreased in four quarters, for an overall decrease of nine percent. The price of the subject goods increased by five percent from Q1 2016 to Q4 2017, but remained well below the price of the like goods.<sup>77</sup>

82. The relationship between benchmark products No. 1 and No. 2 is critical to understanding the impact of the subject goods in the Canadian market. As noted above, national-branded products command a price premium over private-label products; as such, the prices of benchmark product No. 1 should have remained 10 to 25 percent higher than the prices of benchmark product No. 2.<sup>78</sup> However, the significant price undercutting by the subject goods had a depressive effect on prices for benchmark product No. 2.

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71. Exhibit NQ-2017-005-06A, Table 43, Vol. 1.1A; Exhibit NQ-2017-005-07A (protected), Tables 19, 42, Vol. 2.1A.

72. Exhibit NQ-2017-005-06A, Tables 22, 44, 45, Vol. 1.1A.

73. Exhibit NQ-2017-005-07A (protected), Tables 28, 48, Vol. 2.1A.

74. *Ibid.*, Tables 56-61.

75. *Ibid.*, Table 56.

76. *Ibid.*, Table 57.

77. *Ibid.*, Table 60.

78. *Transcript of Public Hearing* at 74; Exhibit NQ-2017-005-12.04 (protected), Vol. 4A at 110; Exhibit NQ-2017-005-12.02 (protected), Vol. 4 at 81; Exhibit NQ-2017-005-12.03 (protected), Vol. 4A at 9; Exhibit NQ-2017-005-12.06 (protected), Vol. 4A at 200.

Moreover, the price gap between benchmark product No. 1 and the subject goods for benchmark product No. 2 increased well beyond the historical range. This forced domestic producers, and especially those of national brands, to make a choice: lower the prices of their national-branded products, such as benchmark product No. 1, or risk losing sales as customers abandoned brand loyalty in favour of lower-priced alternatives, including the subject goods.<sup>79</sup>

83. The Tribunal accords considerable weight to the evidence of price depression for benchmark product No. 2 and its relationship with benchmark product No. 1. As noted above, these benchmark products account for a significant volume of sales and represent the source of a great deal of price aggression in the market. Also, as will be discussed below, competition from low-priced subject goods in the 900 g bag segment of private-label pasta represented the first in a series of price effects that eventually culminated in material injury to the domestic industry.

84. The testimony of the witnesses at the hearing corroborates the evidence regarding price depression.<sup>80</sup> As stated by Mr. Porco of Primo, the pricing pressure in the market over the POI has "... been relentless. As we speak today, the pressure is still there today, downward pressure on pricing."<sup>81</sup> Witnesses also provided evidence of price depression at specific accounts, alleging that multiple retailers pointed to competition from low-priced subject goods in the market in order to negotiate lower prices from suppliers.<sup>82</sup> While evidence uncovered over the course of the hearing revealed that not all of the retailers were referring to subject goods in their negotiations,<sup>83</sup> the Tribunal accepts that the domestic producers faced significant pressure from retailers to lower the prices of private-label products and that this pressure was directly linked to the presence of low-priced subject goods in the market.<sup>84</sup>

85. Notably the Tribunal heard that by mid-2016, the price of Loblaw's private-label 900-gram package of white dry wheat pasta fell by half to \$1.<sup>85</sup> This significant drop corresponded with significant increases in the volume of subject goods.<sup>86</sup> Other retailers then followed suit, decreasing the price of their own private-label pasta offering.<sup>87</sup> This, in turn, caused the domestic producers who compete directly against the subject goods in the private-label market segment to experience significant price depression.<sup>88</sup> The prices of national-branded products fell as well, as retailers pressured domestic producers to lower their prices to maintain the price premium between private-label and national brand-name offerings.<sup>89</sup>

86. Account-specific examples of price depression were also provided for the food services market segment.<sup>90</sup> The margins in the food services and industrial segments are already low because there is no

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79. *Transcript of In Camera Hearing* at 330.

80. *Transcript of Public Hearing* at 47, 70-71, 187, 206, 236-237, 250-251.

81. *Ibid.* at 70.

82. *Transcript of In Camera Hearing* at 6-11, 51, 62, 98, 130, 141-142.

83. See, e.g., *Transcript of In Camera Hearing* at 8; Exhibit NQ-2017-005-36 (protected), Vol. 2 at 79.

84. *Transcript of In Camera Hearing* at 279-80, 295-297, 355-357, 380.

85. *Transcript of Public Hearing* at 47.

86. Exhibit NQ-2017-005-07A (protected), Table 15, Vol. 2.1A; Exhibit NQ-2017-005-A-04 (protected) at paras. 36-37.

87. *Transcript of In Camera Hearing* at 279-280. As discussed above, these price decreases are evident in the relevant benchmark product data.

88. Exhibit NQ-2017-005-07A (protected), Tables 44, 57, Vol. 2.1A.

89. *Transcript of In Camera Hearing* at 11-12, 44, 60, 90, 141; Exhibit NQ-2017-005-07A (protected), Tables 56, 57, Vol. 2.1A.

90. Exhibit NQ-2017-005-A-02 at paras. 84-86, Vol. 11.

allocated budget to account for trade spending, e.g. promotional and marketing activities. Thus, price pressure in this market segment was particularly impactful as it occurred from already low levels.<sup>91</sup>

87. There is also evidence that a number of other Turkish producers were soliciting business from Canadian purchasers.<sup>92</sup> Primo received solicitations from Turkish producers.<sup>93</sup> Major Canadian retailers received or solicited quotations as well.<sup>94</sup> Food services and industrial clients were also solicited by Turkish producers.<sup>95</sup> Regardless of whether the subject goods won the contract, even the mere possibility allowed retailers to demand lower prices from their Canadian suppliers.

88. The opposing parties submitted that any price depression cannot be attributed to the subject goods. Rather, price declines were caused by the decline in the price of durum wheat and, by extension, durum semolina, over the POI. The CPMA responded that the decline in durum wheat prices does not account for the degree of price depression experienced by the domestic producers during the POI.

89. Several witnesses testified that the downward pressure from low-priced subject goods forced them to decrease their prices at a faster rate than durum wheat prices fell, and one referenced third party survey data demonstrating that from the second quarter of 2016 to the end of 2017, private-label retailer pricing fell over twice as much as the price of durum wheat over the same period.<sup>96</sup>

90. It is not disputed that, in general, the prices of durum wheat and durum semolina declined during the POI and that this decline would have contributed to the downward trend in pricing of the subject and like goods.<sup>97</sup> However, these declines do not explain the degree of price depression experienced by the domestic producers in 2016 and 2017, particularly with respect to the price of the 900-gram bag of private-label dry wheat pasta. For example, the quarterly data for benchmark product No. 1 Hard Amber Durum (FOB Minneapolis) shows that the price in Canadian dollars of this wheat actually increased significantly from Q3 2016 to Q3 2017 whereas the prices of like goods for benchmark product No. 1 decreased by one percent and, for benchmark product No. 2, decreased by nine percent over the same period.<sup>98</sup> Further, the depression persisted longer than prior cycles in the fluctuation of durum wheat. Some retailers went so far as to voice serious concerns to suppliers about their ability to maintain sales of higher-margin national-branded products.<sup>99</sup>

91. Based on the above, the Tribunal finds that, although some firms were affected more adversely than others, the domestic industry as a whole experienced significant price depression over the POI.

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91. *Transcript of In Camera Hearing* at 156.

92. Exhibit NQ-2017-005-11.02, Vol. 3A at 3.

93. Exhibit NQ-2017-005-A-18 (protected), Appendix 1, at 10-48, Vol. 12A; *Transcript of Public Hearing* at 65.

94. Exhibit NQ-2017-005-37 (protected), Vol. 2 at 82.

95. Exhibit NQ-2017-005-A-10 (protected) at paras. 13-14, Vol. 12.

96. *Transcript of In Camera Hearing* at 91, 340.

97. Exhibit NQ-2017-005-07A (protected), Tables 85, 96, Vol. 2.1A; *Transcript of Public Hearing* at 29.

98. Exhibit NQ-2017-005-07A (protected), Tables 56, 57, Vol. 2.1A; Exhibit NQ-2017-005-A-06 (protected) at 36, Vol. 12. The Tribunal also heard that price increases can take up to 12-16 weeks to come into effect (*Transcript of In Camera Hearing* at 86). If the prices of like goods are brought forward by one quarter to account for this, the above analysis still holds true: there is a one percent increase in the prices for benchmark product No. 1 and a four percent decrease in the prices of benchmark product No. 2.

99. *Transcript of In Camera Hearing* at 329-330.

### Price Suppression

92. In order to assess whether the price of the subject goods has suppressed the price of like goods, the Tribunal typically compares the domestic industry's average unit cost of goods sold or manufactured with its average unit selling values in the domestic market to determine whether the domestic industry has been able to increase selling prices in step with increases in the cost of production. However, the Tribunal may examine more generally whether the subject goods have significantly "suppressed the price of like goods by preventing the price increases for those like goods that would otherwise likely have occurred".<sup>100</sup>

93. There is no strong evidence that the domestic producers were consistently unable to pass along cost increases over the POI or a material portion thereof. The domestic industry's annual cost of goods manufactured and cost of goods sold (on a dollar-per-kilogram basis) decreased in each year of the POI,<sup>101</sup> as did their cost of semolina.<sup>102</sup> Further, none of the domestic producers testified at the hearing that their negotiated terms with retailers changed over the POI. On paper, they retained the ability to adjust their selling price in response to significant changes in the price of durum wheat.<sup>103</sup>

94. In practice, however, some domestic producers alleged that they were unable to raise their prices in response to fluctuations in the prices of durum wheat and semolina in early 2017 because of the presence of the low-priced subject goods in the market. Italtasta identified one incident where, after an increase in the cost of semolina in early 2017, a customer denied its request for a cost increase because of another competitive bid in the market.<sup>104</sup> Primo also indicated that "during a period when durum wheat costs increased, the presence of Turkish pasta prevented us from increasing our prices to offset the increased costs".<sup>105</sup>

95. On the basis of the foregoing, the Tribunal accepts that some domestic producers may have experienced incidents of price suppression in early 2017 but finds that, as a whole, the domestic industry did not experience significant price suppression over the POI.

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100. Subparagraph 37.1(1)(b)(iii) of the *Regulations*. See for instance *Certain Hot-rolled Carbon Steel Plate and High-strength Low-alloy Plate* (17 May 1994), NQ-93-004 (CITT) at pp. 20-21; *Polyiso Insulation Board* (6 May 2010), NQ-2009-005 (CITT) at para. 71. A finding that dumped goods prevented price increases for the like goods that would otherwise likely have occurred must be based, *inter alia*, on an objective examination of positive evidence of what the prices of the like goods would have been in the absence of dumping. *Russia – Anti-dumping Duties on Light Commercial Vehicles from Germany and Italy* (27 January 2017), WTO Doc. WT-DS479/R, Report of the Panel at paras. 7.57-7.61; *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* (18 October 2012), WTO Doc. WT/DS414/AB/R, Report of the Appellate Body at paras. 130, 141, 152.

101. Exhibit NQ-2017-005-07A (protected), Table 82, Vol. 2.1A.

102. *Ibid.*, Table 85.

103. *Transcript of Public Hearing* at 27-28, 60-61; *Transcript of In Camera Hearing* at 36-37, 86-87, 317; see also Exhibit NQ-2017-005-A-04 (protected) at para. 59, Vol. 12.

104. *Ibid.* at 19.

105. Exhibit NQ-2017-005-A-17 at para. 6, Vol. 11A.

## Resultant Impact on the Domestic Industry

96. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped and subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry.<sup>106</sup> These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.<sup>107</sup> 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. As discussed earlier, the Tribunal will focus on the performance indicators of the domestic producers that produce for the retail segment of the market given its overwhelming share of domestic production.

### Production, Sales from Domestic Production and Market Share

97. Domestic production and total sales from domestic production modestly declined in each year of the POI,<sup>108</sup> even as the total apparent market grew by two percent over the POI.<sup>109</sup> This downward trend in production and sales volumes coincided with increasing volumes of imports of low-priced subject goods.

98. In regard to market share, subject goods gained five percentage points over the POI. In contrast, the market share of the domestic producers and imports from non-subject countries fell by a similar amount over the same period.<sup>110</sup>

99. Domestic producers responded to the increasing presence of low-priced subject goods in different ways over the POI. Some chose to compete with or match the lower prices of the subject goods in order to maintain volume, whereas others tried to maintain prices at the expense of sales and market share.<sup>111</sup> However, even those producers that chose the price-matching strategy still lost sales and market share in the end given the increasingly competitive and aggressive nature of the market since the arrival of Durum Gida's goods in the market.

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106. Such factors and indices include (i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and (iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support programme.

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

108. Exhibit NQ-2017-005-06A, Tables 87 and 20, Vol. 1.1A; Exhibit NQ-2017-005-07A (protected), Tables 86 and 19, Vol. 2.1A.

109. Exhibit NQ-2017-005-06A, Table 20, Vol. 1.1A; Exhibit NQ-2017-005-07A (protected), Table 19, Vol. 2.1A.

110. *Ibid.*, Table 21, Schedules 47, 48.

111. *Transcript of In Camera Hearing* at 6-10, 336; *Transcript of Public Hearing* at 209.

100. A portion of the domestic industry's decline in production, sales and market share in late 2015 and in 2016 is directly attributable to the loss of Loblaw's No Name private-label pasta account to Durum Gida.<sup>112</sup>

101. The opposing parties submitted that this lost account only adversely affected one producer and that any injury cannot, therefore, be considered material to the domestic industry as a whole. The Tribunal disagrees. This one account, and the subsequent increase in volume of dumped and subsidized Turkish pasta, set off a cascading series of events that touched all domestic producers, albeit in different ways. In short, losses of production, sales and market share permeated the entire domestic industry.

102. The low-priced subject goods accelerated the growth of the private-label market segment, a trend that had been gradually developing in the Canadian market over decades, resulting in loss of market share by national-brand domestic producers.<sup>113</sup> These effects were also felt through lost shelf space for national-branded products and increased competition between domestic producers for other private-label business.<sup>114</sup>

103. The opposing parties also alleged that Loblaw's did not switch from a domestic producer to a Turkish producer on the basis of price alone: inferior product quality, in terms of colour, was also to blame.<sup>115</sup> The CPMA responded that Loblaw's never raised this concern before terminating the account. Furthermore, it noted that all three members of the CPMA have confirmed that, if given the opportunity, they could meet any quality requirements of Loblaw's.<sup>116</sup> In particular, Primo tested its own pasta against Durum Gida's (the results of which are confidential) and indicated that there was no question that it can meet or exceed the quality of Turkish pasta.<sup>117</sup>

104. The Tribunal does not accept that there is a quality issue with Canadian dry wheat pasta. The Tribunal finds that Durum Gida's lower price was a major driver behind the decision to switch suppliers.<sup>118</sup> The evidence of the alleged discolouration was also inconsistent, with Loblaw's claiming that the offending pasta was one colour and Durum Gida claiming it was another.<sup>119</sup> Loblaw's provided no documentary evidence that it ever raised concerns about quality or colour with Italtasta before terminating their long-standing relationship.<sup>120</sup> It is also not clear whether Loblaw's contacted any other Canadian producers at the time to ask them whether they could meet its specifications.<sup>121</sup> The evidence suggests that quality is closely linked to the semolina blend and that pasta made with flour from 100 percent Grade 1 durum wheat will meet standard quality requirements.<sup>122</sup> All domestic producers use modern pasta making equipment and have access to Grade 1 durum wheat through the world market to make their semolina flour.

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112. Exhibit NQ-2017-005-E-01 at para. 7, Vol. 13A.

113. Exhibit NQ-2017-005-C-04 (protected) at 214, 219, Vol. 14A; Exhibit NQ-2017-005-07A (protected), Table 21, Vol. 2.1A; *Transcript of In Camera Hearing* at 312; *Transcript of Public Hearing* at 215.

114. *Ibid.* at 74; *Transcript of In Camera Hearing* at 128-129, 141; Exhibit NQ-2017-005-07A (protected), Table 21, Vol. 2.1A.

115. Exhibit NQ-2017-005-C-06 (protected) at para. 8, Vol. 14A.

116. Exhibit NQ-2017-005-A-15 at para. 6, Vol. 11A; Exhibit NQ-2017-005-A-19 at para. 3, Vol. 11A.

117. Exhibit NQ-2017-005-A-18 (protected) at paras. 10-15, Vol. 12A; Exhibit NQ-2017-005-A-17 at paras. 10-15, Vol. 11A; *Transcript of Public Hearing* at 66.

118. *Transcript of In Camera Hearing* at 241.

119. *Ibid.* at 232-233 and 259.

120. Exhibit NQ-2017-005-A-16 (protected) at 7, Vol. 12A.

121. *Transcript of Public Hearing* at 170.

122. *Transcript of In Camera Hearing* at 24; Exhibit NQ-2017-005-A-15 at para. 7, Vol. 11A.

105. Further, aside from Loblaws, no other retailers expressed concern about the quality of domestically produced dry wheat pasta.<sup>123</sup>

106. Given the lack of contemporaneous evidence substantiating a claim of inferior quality and the lack of due diligence investigating the state of the Canadian industry before switching suppliers, the Tribunal finds that this factor is not well founded.

107. On the basis of the above, the Tribunal finds that the subject goods had a significant, negative effect on the production, sales and market share of the domestic industry over the POI.

#### Profitability

108. The domestic industry's financial performance suffered over the POI.<sup>124</sup> In particular, net sales value and gross margin deteriorated, particularly from 2016 and 2017, in the face of significant price undercutting and the price-depressing effects of the subject goods.<sup>125</sup>

109. The opposing parties submitted that the domestic producers' declining performance was due to the increased cost of durum wheat in 2017, but the evidence suggests that price depression was the main cause. While the Tribunal appreciates that costs do fluctuate throughout the year, the domestic industry's collective cost of goods sold and cost of goods manufactured declined in each year of the POI. Notably, from 2016 to 2017, the drop in gross margin exceeded the drop in the cost of goods manufactured.<sup>126</sup>

110. Furthermore, the Tribunal finds that to the extent that fluctuations in durum wheat costs affected dry wheat pasta prices, profitability by itself should not have necessarily been affected to the degree that it was. A number of domestic producers and retailers enjoyed "open-book costing" during the POI; that is, they retained the ability to negotiate prices when input costs fluctuated significantly to keep profit margins stable and preserve the benefits of the commercial arrangement for both parties.

111. On the basis of the above, the Tribunal finds that the subject goods had a significant, negative effect on the profitability of the domestic industry, particularly in 2017.

#### Capacity Utilization

112. Over the POI, the overall capacity utilization rate of the domestic industry fell significantly.<sup>127</sup> This decline was across all types of sales. The most significant decrease was a drop of six percentage points in domestic sales of national brands, followed by a drop of two percentage points in domestic sales of private-label brands and export sales.<sup>128</sup>

113. The opposing parties submitted that the capacity utilization of only one domestic producer could have been affected by the subject goods. However, the Tribunal finds that such an argument ignores the fact that sales of the subject goods grew each year, capturing significant market share from both private-label and national-branded pasta products.

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123. *Transcript of Public Hearing* at 66, 241; *Transcript of In Camera Hearing* at 357.

124. Exhibit NQ-2017-005-07A (protected), Table 82, Vol. 2.1A.

125. *Ibid.*

126. *Ibid.*

127. *Ibid.*, Table 86.

128. *Ibid.*

114. Therefore, while some of the decline in capacity utilization is attributable to other factors, such as export demand, the Tribunal finds that a considerable portion was directly attributable to the growth of the subject goods and that this decline has had a negative effect on the domestic industry in the form of increased throughput costs and reduced profitability on a per kilogram basis.<sup>129</sup>

#### Investment

115. Investments were significant and stable in 2015 and 2016, before dropping precipitously in 2017. While they are projected to increase significantly in 2018 and 2019, these projections depend on the outcome of this case.<sup>130</sup>

116. The Tribunal heard credible evidence at the hearing that domestic producers have cut important investments in the face of competition from low-priced subject goods.<sup>131</sup> As discussed above, the widening price gap between national-brand and private-label pasta<sup>132</sup> has left some domestic producers with the difficult choice of either following private-label pricing or maintaining pricing but losing sales—in either case, their profitability will continue to erode and investments will be negatively affected.

#### Inventories

117. The total volume and value of inventories decreased over the POI, but they remained at significant levels.<sup>133</sup> As will be discussed below, to limit inventories to these levels (i.e. to avoid a build-up of inventories in the face of reduced sales) domestic producers had to take unprecedented measures, such as terminating employees and other steps.<sup>134</sup> These measures exacerbated the lost revenue of the affected producers by increasing throughput costs and negatively affecting employees.

#### Employment, Wages and Productivity

118. Over the POI, the total number of direct employees in the domestic industry increased by one percent each year while the total number of indirect employees decreased by one percent in 2016 and an additional seven percent in 2017.<sup>135</sup> Total wages increased by nine percent in 2016 and decreased by five percent in 2017 for an increase of four percent over the POI.<sup>136</sup>

119. While the overall decrease in total hours worked was of only one percent, the number of hours worked by direct employees increased by one percent in 2016 and then dropped by six percent in 2017. Productivity on a kilogram-per-direct-employee basis dropped by three percent each year but on a kilogram-per-direct-hour-worked basis it dropped by two percent in 2016 before increasing by five percent in 2017.<sup>137</sup>

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129. Exhibit NQ-2017-005-A-04 (protected) at para. 84, Vol. 12.

130. Exhibit NQ-2017-005-07A (protected), Tables 86, 87, Vol. 2.1A.

131. *Transcript of In Camera Hearing* at 319-320.

132. *Transcript of Public Hearing* at 74.

133. Exhibit NQ-2017-005-06A, Tables 86, 87, Vol. 1.1A.

134. Exhibit NQ-2017-005-A-02 (protected) at paras. 90-91, Vol. 12; *Transcript of In Camera Hearing* at 103.

135. Exhibit NQ-2017-005-06A, Tables 86, 87, Vol. 1.1A; Exhibit NQ-2017-005-07A (protected), Table 87, Vol. 2.1A.

136. Exhibit NQ-2017-005-06A, Tables 86, 87, Vol. 1.1A.

137. *Ibid.*

120. The CPMA submitted that, despite this relatively stable consolidated picture of the domestic industry, individual producers had to make unprecedented reductions in employment.<sup>138</sup> The opposing parties submitted that any adverse effects were confined to one producer and are therefore not material.

121. For the same reasons that apply to capacity utilization, the Tribunal recognizes that these layoffs and other measures were caused in large part by the subject goods. Although the measures were often temporary and of limited scope, the Tribunal finds that had the domestic industry not taken them, the reduced profitability experienced by the domestic industry over the POI would have been even worse.

122. The Tribunal therefore finds that the rise in low-priced imports of the subject goods negatively impacted employment levels and productivity.

#### Cash Flow, Return on Investments, Growth and Ability to Raise Capital

123. There is evidence indicating that, through their impact on the domestic industry's profitability in 2017, the subject goods also negatively affected the domestic industry's growth, ability to invest and its return on capital investments recently made.<sup>139</sup>

#### Magnitude of the Margin of Dumping and Subsidizing

124. As noted above, subparagraph 37.1(1)(c)(ii.1) of the *Regulations* prescribes the magnitude of the margin of dumping or amount of subsidy as factors to consider for the purposes of determining whether the subject goods have caused injury.

125. The parties opposed argued that if the effects of the margins of dumping and amount of subsidy were eliminated (i.e. if the Tribunal were to add an amount equivalent to the dumping margin and amount of subsidy to Durum Gida's prices), Durum Gida would still have won Loblaw's private-label account and the resulting price depression would have occurred anyway. In other words, the parties opposed argued that Durum Gida's low margin of dumping and amount of subsidy severs any causal link between the dumping and subsidizing and the injury to the domestic industry.

126. The domestic industry replied, with reference to certain WTO reports, that there is no requirement to evaluate the magnitude of the margin of dumping or the amount of subsidy in any particular manner or that any particular weight be given to this factor. All that is required is that the magnitude of these figures be assessed as a substantive matter, along with an assessment of all the other injury indicators. The domestic industry also argued that an insignificant dumping margin or amount of subsidy can still be injurious and, by extension, so can a relatively low margin of dumping or amount of subsidy. It stressed that the key question for the Tribunal is whether the dumped and subsidized goods are causing injury.

127. As noted above, the CBSA set the final margins of dumping and amount of subsidy for Durum Gida at 7.0 and 1.4 percent respectively.<sup>140</sup> The margin of dumping and amount of subsidy for "all other" Turkish producers (i.e. those without specific normal values) were 99.9 and 4.2 percent respectively.<sup>141</sup>

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138. Exhibit NQ-2017-005-A-02 (protected) at paras. 90-91, Vol. 12.

139. Exhibit NQ-2017-005-07A (protected), Table 93, Vol. 2.1A; Exhibit NQ-2017-005-12.04 (protected), Vol. 4A at 112; *Transcript of In Camera Hearing* at 186. None of the domestic producers indicated that their ability to raise capital had been negatively affected.

140. Exhibit NQ-2017-005-04, Vol. 1 at 167-168.

141. *Ibid.*

128. The Tribunal must, therefore, conclude that the magnitude of the margin of dumping and the amount of subsidy of the subject goods are significant, and that they likely contributed to their success in the market.

129. WTO reports make it clear that the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)* and the *Agreement on Subsidies and Countervailing Measures* do not envisage or require an examination of the effects of the dumped or subsidized imports and a separate examination of the effects of the dumping or subsidy as distinguished from the effects of the subsidized imports.<sup>142</sup> As such, the focus of the Tribunal's injury analysis is on the effect of the dumped or subsidized imports, rather than on the effects of the dumping or subsidization *per se*. That is what the Tribunal has done in its above examination of the volume, price effects, and resulting impact of the subject goods.

130. In addition, the significance of these margins cannot be considered in isolation from the facts and context of the specific market at issue. It may be that in some cases very low margins will weigh against a finding of injury, such as if the subject goods were a premium product priced well above the rest of the market. However, the evidence shows that over the POI the majority of the imports of the subject goods were in the form of 900-gram cellophane packaged private-label pasta, which undercut the price of both private-label and national-brand like goods and, as discussed above, resulting in injury experienced by the domestic industry.<sup>143</sup>

### Summary

131. Having considered the impacts of the dumped and subsidized goods on the state of the domestic industry, and distinguishing these impacts from the impact of other known factors also having a bearing on the domestic industry in the above analysis, the Tribunal finds that the subject goods, through their significant and increasing volumes and significant price undercutting, have, in and of themselves, caused injury to the domestic industry in the form of price depression; lost sales and market share; declining production volumes, profitability, and employment; and reduced capacity utilization and investments.

### **Materiality**

132. The Tribunal will now determine whether the effects of the subject goods were "material", as contemplated in the definition of "injury" under section 2 of *SIMA*. *SIMA* does not define the term "material". However, both the extent of injury during the relevant time frame and the timing and duration of the injury are relevant considerations in determining whether any injury caused by the subject goods is "material".<sup>144</sup>

133. The Tribunal recalls its conclusion in the preliminary injury inquiry that the evidence did not disclose a reasonable indication that the dumping and subsidizing of the subject goods caused material

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142. *Canada – Anti-dumping Measures on Imports of Certain Carbon Steel Welded Pipe (Taiwan)*, (21 December 2016), WTO Docs. WT/DS482/R, Report of the Panel, at 7.100; *Japan – Countervailing Duties on Dynamic Random Access Memories (Korea)*, (28 November 2007), WTO Docs. WT/DS336/AB/R, Appellate Body Report, at paras. 264-270.

143. Exhibit NQ-2017-005-07A (protected), Tables 15, 62 and Schedule 2, Vol. 2.1A.

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

injury to the domestic industry but disclosed a reasonable indication that the dumping and subsidizing of the subject goods were threatening to cause material injury.<sup>145</sup> The Tribunal also recalls its statements that the final injury inquiry would not be restricted to determining whether there is a threat of injury.<sup>146</sup>

134. The preliminary and final injury inquiries are two separate processes. During a preliminary inquiry the “reasonable indication” standard applies, which is lower than the evidentiary threshold that applies in a final injury inquiry under section 42 of *SIMA*.<sup>147</sup> Generally, the evidence at the preliminary phase of proceedings will be significantly less detailed and comprehensive than the evidence in a final injury inquiry as not all the evidence is available at the preliminary phase, and typically there is no oral hearing to fully probe what is available.

135. At the preliminary injury inquiry phase there were gaps in the complaint, which led the Tribunal to conclude that there was no reasonable indication of injury. These gaps have now been filled through the Tribunal’s inquiry process, and the evidence was tested at the Tribunal’s hearing. Now that the Tribunal has more complete and up-to-date information, the picture has changed.<sup>148</sup>

136. In this case, the injury to the domestic industry manifested itself primarily in late 2016 and in 2017, a period in which there was a significant and increasing volume of low-priced subject goods entering the Canadian market. While this time frame represents only a portion of the POI, the Tribunal finds, as it has in previous decisions,<sup>149</sup> that this does not detract from the materiality of the injury suffered by the domestic industry, which took the form of price depression; loss of sales and market share; declining production volumes, profitability and employment; and reduced capacity utilization and investments. Indeed, the Tribunal heard from domestic producers that the current state of the market is unsustainable and that it is forcing domestic producers to re-evaluate their business plans and strategies.<sup>150</sup>

137. The timing of the injury is also significant given the overlap with the CBSA’s dumping and subsidizing periods of investigation: the injury is most prevalent during the period when imports of subject goods were found to be dumped and subsidized in large volumes. What’s more, all of the evidence reviewed in the record supports the conclusion that the catalyst for the price war in the retail segment (which ultimately led to material injury to the domestic industry) was the subject goods—there is no evidence of any other disruption in the retail segment, such as another entrant that could have been the impetus for the price war.

138. The extent of the injury was not uniform and must be appreciated in the context of a domestic industry made up of four producers with different business models. This means that while some domestic producers experienced a significant reduction in revenue and net income caused by price depression, others suffered lost sales volumes and reduced market share or made significant cuts elsewhere in order to maintain financial results.<sup>151</sup> When the totality of the injury factors are considered within this context, and in

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145. Dry Wheat Pasta (26 February 2018), PI-2017-004 (CITT) [*Dry Wheat Pasta PI*] at paras. 59-60.

146. *Dry Wheat Pasta PI* at 81-83.

147. *Grain Corn* (10 October 2000), PI-2000-001 (CITT) at 7.

148. For example, the Tribunal recalls that data on full year 2017 and data about Catelli’s sales to retailers and its financial performance were not available and did not form part of the record of the preliminary injury inquiry.

149. See, e.g., *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT) at para. 185 and footnote 182.

150. *Transcript of In Camera Hearing* at 69, 140, 324-325; Exhibit NQ-2017-005-A-03 at para. 83, Vol. 11; Exhibit NQ-2017-005-A-04 (protected) at paras. 23, 82, Vol. 12; Exhibit NQ-2017-005-A-06 (protected) at para. 59, Vol. 12.

151. Exhibit NQ-2017-005-07A (protected), Schedule 22, Vol. 2.1A; *Ibid.*, Schedule 28; *Transcript of In Camera Hearing* at 8.

light of the significant position of the retail segment within the dry wheat pasta market, the Tribunal can only conclude that the domestic industry as a whole has been materially injured by the subject goods.

## CONCLUSION

139. Pursuant to subsection 43(1) of *SIMA*, the Tribunal finds that the dumping and subsidizing of dry wheat pasta originating in or exported from Turkey has caused injury to the domestic industry.

Jean Bédard

Jean Bédard

Presiding Member

Serge Fréchette

Serge Fréchette

Member

Ann Penner

Ann Penner

Member