Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry Review No. RR-2019-003

Concrete Reinforcing Bar

Order and reasons issued
Wednesday, October 14, 2020

Canada

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on January 9, 2015, in Inquiry No. NQ-2014-001, concerning:

CERTAIN CONCRETE REINFORCING BAR ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA, THE REPUBLIC OF KOREA AND THE REPUBLIC OF TURKEY

ORDER

The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, has conducted an expiry review of the finding made on January 9, 2015, in Inquiry No. NQ-2014-001, concerning the dumping of hot-rolled deformed steel concrete reinforcing bar in straight lengths or coils, commonly identified as rebar, in various diameters up to and including 56.4 millimeters, in various finishes, excluding plain round bar and fabricated rebar products, originating in or exported from the People's Republic of China, the Republic of Korea and the Republic of Turkey and the subsidizing of the aforementioned goods originating in or exported from the People's Republic of China. In accordance with the finding in Inquiry No. NQ-2014-001, the product definition excludes the following:

- 10-mm-diameter (10M) rebar produced to meet the requirements of CSA G30 18.09 (or equivalent standards) and coated to meet the requirements of epoxy standard ASTM A775/A 775M 04a (or equivalent standards) in lengths from 1 foot (30.48 cm) up to and including 8 feet (243.84 cm).

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its finding in respect of the aforementioned goods.

Peter Burn

Peter Burn
Presiding Member

Cheryl Beckett

Cheryl Beckett
Member

Georges Bujold

Georges Bujold
Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	August 11, 2020
Tribunal Panel:	Peter Burn, Presiding Member Cheryl Beckett, Member Georges Bujold, Member
Support Staff:	Peter Jarosz, Lead Counsel Heidi Lee, Counsel Mark Howell, Lead Analyst Thy Dao, Analyst Josée St-Amand, Analyst Andrew Wigmore, Analyst Julie Charlebois, Data Services Advisor

PARTICIPANTS:

Domestic Producers	**Counsel/Representatives**
AltaSteel Inc.	Benjamin P. Bedard Linden Dales Shannel J. Rajan Greg Landry Annie Arko
ArcelorMittal Long Products Canada, G.P.	Paul Conlin Anne-Marie Oatway Lydia Blois Manon Carpentier Nasrudin Mumin
Gerdau Ameristeel Corporation	Christopher J. Kent Gerry Stobo Christopher J. Cochlin Andrew M. Lanouette Marc McLaren-Caux Michael Milne Cynthia Wallace Andrew Paterson E. Melisa Celebican Jordan Lebold
Max Aicher (North America) Limited	Jonathan O'Hara Lisa Page Chris Scheitterlein Nicole Rozario Thomas van den Hoogen Ricki-Lee Williams Tayler Farrell

Importers/Exporters/Others	**Counsel/Representatives**
Turkish Steel Exporters' Association	Gordon LaFortune
United Steelworkers	Craig Logie Christopher Somerville Jacob Millar
Ministry of Jobs, Trade and Technology, Government of British Columbia	Jeffrey S. Thomas

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

[1] The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*,[1] has conducted an expiry review of the finding made on January 9, 2015, in Inquiry No. NQ-2014-001, concerning the dumping of certain concrete reinforcing bar originating in or exported from the People's Republic of China (China), the Republic of Korea (Korea) and the Republic of Turkey (Turkey) and the subsidizing of certain concrete reinforcing bar originating in or exported from China (the subject goods).

[2] Under *SIMA*, findings of injury or threat of injury and the associated protection in the form of anti-dumping or countervailing duties expire five years from the date of the finding, unless the Tribunal initiates an expiry review before that date. The finding in Inquiry No. NQ-2014-001 was therefore scheduled to expire on January 8, 2020.

[3] The Tribunal's mandate in this expiry review is to determine whether the expiry of the finding is likely to result in injury to the domestic industry and then, accordingly, make an order either continuing or rescinding the finding, with or without amendment for a further five years.

PROCEDURAL BACKGROUND

[4] The Tribunal initiated this expiry review on December 9, 2019. On December 10, 2019, the Canada Border Services Agency (CBSA) initiated an expiry review investigation to determine whether the expiry of the finding was likely to result in the continuation or resumption of dumping or subsidizing of the subject goods.

[5] On May 7, 2020, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the finding was likely to result in the continuation or resumption of dumping of the subject goods from China, Korea and Turkey and the subsidizing of the subject goods from China.[2]

[6] On May 8, 2020, following the CBSA's determination, the Tribunal began its expiry review to determine whether the expiry of the finding was likely to result in injury to the domestic industry.

[7] The period of review (POR) for the Tribunal's expiry review covered the three complete calendar years of 2017, 2018 and 2019, and the three months from January 1 to March 31, 2020.

[8] The Tribunal sent questionnaires to known domestic producers and importers of rebar meeting the product definition and to known foreign producers of the subject goods. Using the questionnaire responses and other information on the record, staff of the Canadian International Trade Tribunal Secretariat of the Administrative Tribunals Support Service of Canada prepared public and protected versions of the investigation report and placed them on the record on June 29, 2020.[3]

[9] Domestic producers AltaSteel Inc. (AltaSteel), ArcelorMittal Long Products Canada, G.P. (ArcelorMittal), Gerdau Ameristeel Corporation (Gerdau), and Max Aicher (North America) Limited

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

2 Exhibit RR-2019-003-03, Vol. 1 at 5.

3 Public and protected revisions of the investigation report were subsequently placed on the record.

(MANA), as well as the United Steelworkers (USW), filed submissions in support of a continuation of the finding. Submissions opposing the continuation of the finding were filed by the Turkish Steel Exporters' Association (TSEA). The Ministry of Jobs, Trade and Technology of the Government of British Columbia did not make any submissions.

[10] The Tribunal did not receive any requests for product exclusions.

[11] Due to the circumstances surrounding the COVID-19 pandemic, the Tribunal cancelled the public hearing scheduled to take place on August 4, 2020, and heard the matter by the following alternative hearing procedures.[4]

[12] After the filing of reply submissions of parties in support of a continuation of the finding, parties were permitted to suggest questions for the Tribunal to ask another party or parties, in writing. These questions were limited to requests for clarification or explanations regarding evidence submitted by another party and were required to be directly relevant to the issues in this expiry review. Parties were permitted to object to suggested questions and reply to any objections.

[13] The TSEA suggested questions to be put to all four domestic producers, and ArcelorMittal (jointly with AltaSteel) and Gerdau suggested questions for the TSEA. The TSEA objected to some of the questions suggested jointly by ArcelorMittal and AltaSteel, as well as from Gerdau. ArcelorMittal, jointly with AltaSteel, and Gerdau submitted replies to the TSEA's objection.

[14] Based on these submissions, the Tribunal directed written questions to AltaSteel, ArcelorMittal, Gerdau, MANA and the TSEA. The Tribunal received written responses from the parties on August 7, 2020.

[15] On August 11, 2020, the Tribunal heard final closing arguments by videoconference, from AltaSteel, ArcelorMittal, Gerdau, MANA, the USW and the TSEA.

PRODUCT

Product definition

[16] The subject goods are defined as follows:[5]

> Hot-rolled deformed steel concrete reinforcing bar in straight lengths or coils, commonly identified as rebar, in various diameters up to and including 56.4 millimeters, in various finishes, excluding plain round bar and fabricated rebar products, originating or exported from the People's Republic of China, the Republic of Korea and the Republic of Turkey.

[17] In accordance with the Tribunal's finding in Inquiry No. NQ-2014-001, the subject goods exclude the following:[6]

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4 On July 10, 2020, the Tribunal cancelled the public hearing, proposed alternative hearing procedures and invited the parties to provide comments. All parties did so by July 17, 2020. On July 22, 2020, the Tribunal circulated the final revised hearing procedures. The revised expiry review schedule was published in the Further Revised Notice of Expiry Review on August 5, 2020.

5 Exhibit RR-2019-003-03A, Vol. 1 at para. 19.

6 *Ibid.* at para. 20.

10-mm-diameter (10M) rebar produced to meet the requirements of CSA G30 18.09 (or equivalent standards) and coated to meet the requirement of epoxy standard ASTM A775/A 775M 04a (or equivalent standards) in lengths from 1 foot (30.48 cm) up to and including 8 feet (243.84 cm).

Product information

[18] The CBSA provided the following additional product information:[7]

> [21] For further clarity, the subject goods include all hot-rolled deformed bar, rolled from billet steel, rail steel, axle steel, low alloy-steel and other alloy steel that does not comply with the definition of stainless steel.
>
> [22] Uncoated rebar, sometimes referred to as black rebar, is generally used for projects in non-corrosive environments where anti-corrosion coatings are not required. On the other hand, anti-corrosion coated rebar used in concrete projects that are subjected to corrosive environments, such as road salt. Examples of anti-corrosion coated rebar are epoxy or hot-dip galvanized rebar.
>
> [23] The subject goods include uncoated rebar and rebar that has a coating or finish applied. Fabricated rebar products are generally engineered using Computer Automated Design programs, and are made to the customer's unique project requirements. The fabricated rebar products are normally finished with either a protective or corrosion-resistant coating. Rebar that is simply cut-to-length is not considered to be a fabricated rebar product excluded from the definition of subject goods.

Production process

[19] The standard lengths for rebar are 6 metres (20 feet), 12 metres (40 feet) and 18 metres (60 feet), although rebar can be cut and sold in other lengths as specified by customers, or sold in coils.[8]

[20] Deformed steel rebar can be produced in an integrated steel production facility or by using ferrous scrap metal as the principal raw metal. Scrap metal is melted in an electric arc furnace and is further processed in a ladle arc-refining unit. The molten steel is then continuously cast into rectangular billets of steel that are cut-to-length. An integrated facility would also produce billets from molten steel. The billets are then rolled into various sizes of rebar, which is cut to various lengths depending on the customers' requirements.[9]

[21] Deformed rebar is rolled with deformations on the bar, which provides gripping power so that concrete adheres to the bar and provides reinforcing value. The deformations must conform to requirements set out in the national standards.[10]

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7 *Ibid.* at paras. 21-23.
8 *Concrete Reinforcing Bar* (9 January 2015), NQ-2014-001 (CITT) [*Rebar*] at para. 25.
9 *Rebar* at para. 26.
10 *Rebar* at para. 27.

Production standards

[22] Rebar is produced in Canada in accordance with the National Standard of Canada CAN/CSA-G30.18-M92 for Billet-Steel Bars for Concrete Reinforcement (the National Standard)[11] prepared by the Standards Association and approved by the Standards Council of Canada.[12]

[23] The following are the most common bar designation numbers for the subject goods in Canada, with the corresponding diameter, in millimeters, in brackets: 10 (11.3), 15 (16.0), 20 (19.5), 25 (25.2), 30 (29.9) and 35 (35.7). Rebar sizes are commonly referred to as the bar designation number combined with the letter "M". Thus, 10M rebar has a designation number of 10 and a diameter of 11.3 millimeters.[13]

[24] The National Standard identifies two grades of rebar, namely, regular or "R" and weldable or "W". "R" grades are intended for general applications, while "W" grades are used where welding, bending or ductility is of special concern. Welded rebar was a premium product for the Canadian industry, reflecting the higher cost of alloy steel; however, since all imports have been weldable products, Canadian production has shifted to weldable as a standard product. Weldable rebar is substitutable for regular rebar in all applications, though the reverse does not hold.[14]

[25] The National Standard also identifies yield strength levels of 300, 400 and 500. This number refers to the minimum yield strength and is measured in megapascals (MPa). The grade and yield strength of rebar is identified by combining the yield strength number with the grade. Thus, 400R is regular rebar with a yield strength of 400 MPa, and 400W is weldable rebar with a yield strength of 400 MPa.[15]

LEGAL FRAMEWORK

[26] The Tribunal is required, pursuant to subsection 76.03(10) of *SIMA*, to determine whether the expiry of the finding in respect of the subject goods is likely to result in injury or retardation for the domestic industry.[16] Pursuant to subsection 76.03(12), if the Tribunal determines that the expiry of the finding is unlikely to result in injury, it is required to rescind it. However, if it determines that the expiry of the finding is likely to result in injury, the Tribunal is required to continue it, with or without amendment.

[27] Before proceeding with its analysis of the likelihood of injury, the Tribunal must first determine what constitutes "like goods". Once that determination has been made, the Tribunal must determine what constitutes the "domestic industry".

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11 The evidence on the record also includes references to CSA G30.18-09 for Carbon Steel Bars for Concrete Reinforcement. These appear to be equivalent standards.

12 *Rebar* at para. 21.

13 *Rebar* at para. 22.

14 *Rebar* at para. 23.

15 *Rebar* at para. 24.

16 Subsection 2(1) of *SIMA* defines "injury" as "material injury to a domestic industry" and "retardation" as "material retardation of the *establishment* of a domestic industry" [emphasis added]. Given that there is currently an established domestic industry, the issue of whether the expiry of the finding is likely to result in retardation does not arise in this expiry review.

[28] The Tribunal must also determine whether it will make an assessment of the cumulative effects of the dumping of the subject goods from China, Korea and Turkey and whether it will make an assessment of the cumulative effects of the dumping and subsidizing of the subject goods (i.e. whether it will "cross-cumulate" the effects). Both of these matters are addressed in detail in this statement of reasons, including the Tribunal's majority assessment and a separate opinion from Member Bujold.

LIKE GOODS AND CLASSES OF GOODS

[29] In order for the Tribunal to determine whether the resumed or continued dumping and subsidizing of the subject goods is likely to cause material 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.[17]

[30] Subsection 2(1) of *SIMA* defines "like goods", in relation to any other goods, as follows:

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

[31] 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.[18]

[32] In Inquiry No. NQ-2014-001, the Tribunal found that domestically produced rebar of the same description as the subject goods were like goods in relation to the subject goods.[19] The Tribunal determined that the subject goods and domestic goods are commodity products that compete with one another in the Canadian marketplace on the basis of price and are otherwise fully interchangeable. The Tribunal found that they are used for the same purposes, sold through the same channels of distribution and used by the same end users.[20] The Tribunal also found that there was a single class of goods.[21]

[33] There were no submissions or evidence in this expiry review to suggest that domestically produced rebar described in the same way as the subject goods is not "like" the subject goods, or that there is more than one class of goods. Accordingly, the Tribunal finds that domestically produced rebar of the same specifications as the subject goods constitutes like goods in relation to the subject goods and that there is a single class of goods.

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17 Should the Tribunal determine that there is more than one class of goods in this expiry review, 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 (FC).

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

19 *Rebar* at para. 47.

20 *Rebar* at para. 43. See also paras. 44-46.

21 *Rebar* at para. 79.

DOMESTIC INDUSTRY

[34] 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.

[35] The Tribunal must therefore determine whether there is a likelihood 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.[22]

[36] During the POR, there were five known producers: AltaSteel, ArcelorMittal, Gerdau, MANA and Ivaco Rolling Mills LP. The Tribunal received questionnaires from all five producers. Accordingly, the Tribunal finds that these five producers account for a major proportion, if not the entirety, of total domestic production of the like goods and constitute the domestic industry for the purposes of this expiry review.

CUMULATION AND CROSS-CUMULATION

Cumulation

[37] Subsection 76.03(11) of *SIMA* provides that the Tribunal shall make an assessment of the cumulative effect of the dumping or subsidizing of goods ". . . that are imported into Canada from more than one country if the Tribunal is satisfied that an assessment of the cumulative effect would be appropriate taking into account the conditions of competition . . ." between the goods imported into Canada from any of the countries and the goods from any other countries or between those goods and the like goods. Whether the Tribunal will or will not assess the cumulative effects of the dumped or subsidized goods is a threshold issue. If the Tribunal determines that cumulation of any goods is not appropriate, it must conduct a separate likelihood of injury analysis for those goods.

[38] In considering the conditions of competition between goods, the Tribunal typically takes into account the following factors, as applicable: the degree to which the goods from each subject country are interchangeable with the subject goods from the other subject countries or with the like goods; the presence or absence of sales of imports from different subject countries and of the like goods into the same geographical markets; the existence of common or similar channels of distribution; and differences in the timing of the arrival of imports from a subject country and of those from the other subject countries, and of the availability of like goods supplied by the domestic industry. However,

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22 The term "major proportion" means an important or significant proportion of total domestic production of the like goods and not necessarily a majority of these goods: *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (FCA); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (FCA); *China – Anti-dumping and Countervailing Duties on Certain Automobiles from the United States* (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 from China* (15 July 2011), WTO Docs. WT/DS397/AB/R, Report of the Appellate Body at paras. 411, 412, 419; *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil* (22 April 2003), WTO Docs. WT/DS241/R, Report of the Panel at para. 7.341.

the Tribunal has previously commented that "conditions of competition" is a broad term which is not limited to consideration of any set of traditional factors analyzed by the Tribunal.[23]

[39] The Tribunal's current practice, subject to other applicable statutory conditions being met, is that it will cumulate goods from countries subject to a dumping investigation, and will separately cumulate goods from countries subject to a subsidy investigation. As well, it will separately analyze the likelihood of injury from goods from countries subject to both types of investigations at the same time. This current practice was enunciated at length in the Tribunal's expiry review decision in *Carbon Steel Welded Pipe*.[24]

Positions of the parties

[40] Counsel for the domestic industry argued that *CSWP* was wrongly decided and, while not necessary to justify a continuation of the findings in this case, *SIMA* mandates the Tribunal to cumulate indiscriminately imports that are dumped, subsidized and both dumped and subsidized;[25] this was the Tribunal's past practice prior to the World Trade Organization (WTO) Appellate Body decision in *US – Carbon Steel (India)*. The domestic industry makes specific arguments that a) the past practice is unambiguously mandated by Canadian law, b) Parliament has failed to change Canadian law on this issue, in the face of pronouncements from the WTO Appellate Body, and c) Parliament continues to refuse to do so despite making amendments to *SIMA* on other issues.

[41] Counsel for the TSEA argued in support of the Tribunal's practice on the basis that the cumulation provisions of *SIMA* are ambiguous and, when properly interpreted, give the Tribunal a right to cumulate the effect of dumped Turkish and Korean rebar separately from the effect of dumped and subsidized Chinese rebar (or give the Tribunal the discretion to do so even in the event of lack of ambiguity in the provision).

Statutory interpretation principles

[42] The modern rule of statutory interpretation requires that "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[26] In addition, statutory interpretation principles provide that international sources can be referred to by the Tribunal in interpreting its domestic statute as these sources form the basis of the statute's enactment and context. There is a presumption that domestic law is to be interpreted in accordance with international obligations, but this presumption of conformity may be effectively rebutted by clear legislative intent to act inconsistently with international obligations (see a full discussion of these principles below).

[43] In *National Corn Growers Association v. Canada (Import Tribunal)*, the Supreme Court of Canada stated the following:

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23 See *Cold-rolled Steel* (21 December 2018), NQ-2018-002 (CITT) at para. 39.

24 (15 October 2018), RR-2017-005 (CITT) [*CSWP*].

25 In WTO parlance, the act of cumulating dumped goods with goods that are only subsidized or are both subsidized and dumped is referred to as the act of cross-cumulation (i.e. cumulating goods that are subject to either or both of the *Anti-Dumping Agreement* [*ADA*] and *Agreement on Subsidies and Countervailing Measures* [*ASCM*]).

26 Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), cited in *Rizzo* v. *Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 at 41.

> [h]aving found that the rules of statutory interpretation allow consideration of an underlying agreement at the preliminary stage of determining if the domestic legislation contains an ambiguity, I do not hesitate to conclude in this case that the Tribunal did not act unreasonably in consulting the GATT.[27]

[44] The minority of the Supreme Court, in agreeing with the majority on the result, also stated as follows:

> . . . it is for the Tribunal, staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing with a large volume of trade related cases, to decide what documents may or may not be of assistance in interpreting the Act. While my colleague's discussion of the documents that a court may refer to in interpreting legislation may well be sound, we are not faced with an appeal from an ordinary court's decision. Instead, we are dealing with a statutory tribunal's interpretation of its own constitutive legislation. *If the legislature wishes to place limits on the range of documents that the Tribunal may refer to, then it is for the legislature to do so. In the meantime, courts should not get into the business of assessing what documents a statutory tribunal may consult*.[28]
>
> [Emphasis added]

[45] More recently, in *B010*,[29] McLachlin C.J., writing for the Court, stated the following:

> This Court has previously explained that the values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53. This follows from the fact that *to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law. The contextual significance of international law is all the more clear where the provision to be construed "has been enacted with a view towards implementing international obligations".*
>
> . . .
>
> In keeping with the international context in which Canadian legislation is enacted, this Court has repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations. . . .
>
> These principles, derived from the case law, direct us to relevant international instruments at the context stage of statutory interpretation.[30]
>
> [Emphasis added]

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27 [1990] 2 S.C.R. 1324 at 1372-1373 (per Gonthier, La Forest, L'Heureux-Dubé and McLachlin JJ.) [*National Corn Growers*].

28 *Ibid.* at 1348 (per Dickson C.J., Lamer C.J. and Wilson J.).

29 *B010 v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 704 [*B010*].

30 *B010* at paras. 47-49. See also *Canada* v. *Seaboard Lumber Sales Co.*, [1995] 3 FC 113 where Linden J.A. stated the following: "It is now established that courts will look to relevant international documents to aid interpretation of implementing legislation from the outset of the investigation, and even absent ambiguity on the face of that legislation. . . . Ambiguity may arise out of the consideration of any manner or variety of contextual factors; it should not be taken as a necessary precondition to looking to those factors. This approach gives effect to the presumption that implementing legislation is meant to correspond with obligations assumed under the international convention or memorandum in question."

[46] These principles must be applied to the provisions at issue.

[47] In interpreting *SIMA*, the Tribunal can and should look to the international agreements that are the source of Canada's international obligations, and seek context and guidance from those agreements and from the decisions that interpret the provisions of these agreements. While WTO decisions are not binding on members that are not parties to the specific dispute, the decisions should be used by non-parties for guidance in the interpretation of relevant provisions. Further, in choosing between possible interpretations of a provision, the interpretation consistent with international law should be preferred.[31] Finally, it is trite law that unambiguous domestic legislation takes precedence over Canada's international obligations; no matter what the international context, the Tribunal cannot do something which it is not permitted to do under domestic law. However, that is not the situation the Tribunal faces with the cumulation provisions of *SIMA*.

[48] The Tribunal's past practice on cumulation arrived at an interpretation of *SIMA* that cannot be maintained in light of the above principles; it opted for an interpretation that permits the assessment of injury or likelihood of injury from dumped, subsidized, and dumped and subsidized imports indiscriminately. That interpretation is inconsistent with Canada's obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*ADA*) and the *Agreement on Subsidies and Countervailing Measures* (*ASCM*), as clarified by the WTO Appellate Body. This previous practice is the one to which the parties to this review are inviting the Tribunal to return as it is argued to be unambiguously mandated by *SIMA*. However, the majority of the panel finds that subsection 76.03(11) of *SIMA* can be interpreted in conformity with Canada's international obligations and that this presumption of conformity has not been rebutted, as the provision does not expressly or unambiguously mandate the past practice for the reasons set out below.

Text of the cumulation provisions

[49] Subsection 42(3) of *SIMA* states the following:

> **(3)** In making or resuming its inquiry under subsection (1), the Tribunal shall make an assessment of the cumulative effect of the *dumping or subsidizing of goods* to which the preliminary determination applies that are imported into Canada from more than one country if the Tribunal is satisfied that
>
> > **(a)** the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible; and
> >
> > **(b)** an assessment of the cumulative effect would be *appropriate taking into account the conditions of competition* between goods to which the preliminary determination applies that are imported into Canada from any of those countries and
> >
> > > **(i)** goods to which the preliminary determination applies that are imported into Canada from any other of those countries, or
> > >
> > > **(ii)** like goods of domestic producers.
>
> [Emphasis added]

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31 *R. v. Hape* [2007] 2 SCR 292 [*Hape*] at para. 53.

[50] Subsection 76.03(11) of *SIMA* provides the following:

> **(11)** For the purpose of subsection (10), the Tribunal shall make an assessment of the cumulative effect of the *dumping or subsidizing of goods* to which the determination of the President described in subsection (9) applies that are imported into Canada *from more than one country* if the Tribunal is satisfied that an assessment of the cumulative effect would be *appropriate taking into account the conditions of competition* between goods to which the order or finding applies that are imported into Canada from any of those countries and
>
> > **(a)** goods to which the order or finding applies that are imported into Canada from any other of those countries; or
> >
> > **(b)** like goods of domestic producers.
>
> [Emphasis added]

[51] At the outset, it is helpful to recall the purpose and effect of cumulation. It essentially means that under specified circumstances, it is not necessary to find injury (or likelihood of injury) caused by individual *country* sources of goods in order to justify the imposition (or continuation) of duties on those goods.

[52] Subsection 76.03(11) of *SIMA* expressly indicates that the Tribunal shall cumulatively assess goods from more than one country if certain conditions are met. The issue in this subsection arises first with the interpretation of which goods may be included in that cumulation analysis, and second with the interpretation of what conditions of competition should be reviewed by the Tribunal to justify cumulation. The first interpretation issue before the Tribunal is whether the phrase "dumping or subsidizing" in subsection 76.03(11) means that the Tribunal should conduct separate analyses of the effects of dumped goods and of subsidized goods from different countries, or that it can conduct one analysis of the cumulative, combined effects of the goods.

[53] In ordinary parlance, the word "or" is used to link alternatives.[32] In this regard, based on one reading of these elements, the provisions of *SIMA* could be said to be unambiguous in *not* permitting the cumulation of dumped goods with subsidized goods (in concord with the agreements).

[54] However, in statutory interpretation, "or" can be read conjunctively or disjunctively. Subsection 2(7) of *SIMA* supports a disjunctive interpretation:

> **(7)** Where, by its terms, any provision of this Act applies to both dumped and subsidized goods, the application of the provision
>
> > **(a)** to subsidized goods shall not be taken into account in an investigation, inquiry or other proceeding or matter under this Act relating to the dumping of goods; and
> >
> > **(b)** to dumped goods shall not be taken into account in an investigation, inquiry or other proceeding or matter under this Act relating to the subsidizing of goods.

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[32] *Hoch v. The Queen*, 2019 TCC 99 (CanLII) at para. 13.

[55] In the same vein, other words in this provision can be interpreted as follows: "appropriate" means "suitable in the circumstances",[33] while "taking into account" means to "regard", "consider" or "take notice of".[34] In other words, subsection 76.03(11) mandates the Tribunal to cumulate if it is satisfied that cumulation is suitable in the circumstances, while it takes notice of the conditions of competition.

[56] In this regard, the Tribunal's view is that the provision gives it discretion to consider the application of different trade practices to the goods as a condition of competition, i.e. as a reason not to consider cumulation appropriate.[35] As the Tribunal has previously stated, the exercise of this discretionary authority does not give any party a right to a particular outcome or to the application of a particular legal test.[36] The Tribunal must consider whether in the context of this provision, having considered the conditions of competition, it can also consider other factors in determining the appropriateness of cumulation.

[57] The textual language of subsection 76.03(11) is open to interpretation both in terms of the "dumping or subsidizing" expression and the text on conditions of competition; therefore, a contextual analysis must be undertaken to clarify its meaning.

Contextual analysis of the cumulation provisions

[58] The circumstances under which trade remedy actions can be taken and rules respecting the conduct of investigations are largely governed by the WTO agreements resulting from the Uruguay Round of Multilateral Trade Negotiations signed in 1994 (the Uruguay Round). Two of those are of particular importance in the *SIMA* context, the *ASCM* and the *ADA*. Key provisions of these agreements include methods for determining the existence of dumping and countervailable subsidies, requirements for the initiation of investigations, obligations respecting procedural fairness, duration of orders, and transparency in decision-making. In addition, these agreements set out the economic

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33 Collins Dictionary (online: <https://www.collinsdictionary.com/dictionary/english/appropriate>). See also *Doucet-Boudreau* v. *Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at para. 52.

34 *Canada (Attorney General)* v. *Suzuki Canada Inc.*, 2004 FCA 131 at para. 13.

35 The Tribunal has previously recognized this issue as a factor: *Stainless Steel Wire* (July 29, 2009), RR-2008-004 (CITT) [*Stainless Steel Wire*] at paras. 53-54. Goods subject to anti-dumping duties can be issued normal values which permit the exporter to increase its prices, i.e. to collect the increased purchase price, without payment of anti-dumping duties to the Canadian government. In contrast, goods subject to countervailing duties are assessed on absolute basis, without comparison to any floor price; importers do not have the opportunity to avoid their payment. For the same type of good, a sale during the pendency of an anti-dumping duty can be more attractive for the exporter than the application of a countervailing duty, given the same final price to the importer. Other considerations could involve situations where there is a great disparity between the quantum of anti-dumping duties and that of countervailing duties. If one is hugely greater than the other, price-based choices will be made to pay the lesser of the two duties where similar goods are available. These are differences in the conditions of competition, i.e. profitability, between goods subject to countervailing duties and similar goods which only face anti-dumping duties. This can in turn affect the goods' attractiveness, presence in the market and competitiveness during application of the anti-dumping and countervailing measures. Likewise, it is reasonable to consider that goods that are likely to be dumped are likely to have a competitive dynamic that is different from that of goods that are subsidized, and from that of goods that are likely to be both dumped and subsidized.

36 *Certain Corrosion-resistant Steel Sheet Products* (27 July 2004), RR-2003-003 (CITT) at para. 68. International obligations are relevant to the exercise of discretion, see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 52-54, 56, 67, 69-71; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 108, 110, 114, 117-121.

factors to be considered in determining whether injury exists and whether such injury is caused by dumped or subsidized imports.

[59] Following Canada's execution of these two WTO agreements, substantial changes were made to *SIMA* in 1994 to implement Canada's obligations under these international multilateral agreements. These changes included important issues such as the definition of subsidies, injury determination, and procedures for establishing dumping margins. Further amendments were made to the *SIMA* legislation after a full review and report on *SIMA* by a Parliamentary sub-committee in 1996. The ensuing 1999 amendments to *SIMA* resulted in the adoption of subsection 76.03(11) which clarified the Tribunal's obligation to cumulate goods in an expiry review in a similar fashion as set out in subsection 42(3), which section applies only to cumulation in an original inquiry investigation.

The contextual analysis – The WTO agreements and WTO decisions

[60] When read in context of the entire statutory scheme and the WTO agreements and decisions, the current practice is compliant with the intended scheme of *SIMA*. This was the thrust of the Tribunal's decision in *CSWP*, with which the majority of the Tribunal agrees and adopts. The majority's comments in these reasons are in addition to the unanimous decision set out in *CSWP*.

[61] The Tribunal is of the opinion that it must consider WTO Appellate Body decisions when undertaking statutory interpretation of its domestic legislation which embodies the WTO agreements. WTO Members can bring disputes before WTO panels and subsequently appeal such panel decisions to the WTO Appellate Body. This current dispute settlement system was created as part of the WTO agreements negotiated and executed during the Uruguay Round. It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding (DSU). Article 3 of the DSU sets out the general provisions of the WTO dispute settlement system. Article 3.2 provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. . . . it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[37]

[62] In *US – Stainless Steel (Mexico)*, the WTO Appellate Body specifically discussed the interpretative role of panel and Appellate Body decisions as follows:

> It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. In *Japan – Alcoholic Beverages II*, the Appellate Body found that:
>
> > [a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.

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[37] *Marrakesh Agreement Establishing the World Trade Organization*, (15 April 1994), 1867 U.N.T.S. 14, Annex 2, art. 3.2 (online: <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>).

> In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body clarified that this reasoning applies to adopted Appellate Body reports as well. In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body held that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."
>
> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.
>
> In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.[38]
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> [Italics in original, footnotes omitted]

[63] The Tribunal finds that consideration of WTO panel and Appellate Body decisions is required when reviewing the context and interpretation of the WTO agreements as they impact the statutory interpretation of *SIMA*.

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[38] *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, (30 April 2008), WTO Docs. WT/DS344/AB/R, Report of the Appellate Body [*US – Stainless Steel (Mexico)*] at paras. 158-161.

[64] The most important feature of the context provided by the *ASCM* and the *ADA* is a simple one: *these are wholly separate agreements*. Although both agreements deal with trade remedy actions, the primary cause of the trade remedy (whether by dumping or subsidizing) has historically been viewed and treated as a separate subject and remedied by separate investigations. These two agreements do not provide for any interchange of procedures and substantive provisions between them; as such, they separately require an injury analysis as mandated by each agreement. It is only where investigations are carried out in accordance with the disciplines of each agreement that the imposition of anti-dumping or countervailing duties, respectively, by a WTO Member can achieve compliance with their obligations.

[65] The issue of cumulation of goods from more than one country is addressed in both agreements. It is not correct to say that there is a legal silence or vacuum on the issue of cumulation in injury inquiries. On the contrary, these are subject to specific and limiting requirements in each agreement. However, the *ASCM* only addresses the effects of subsidized goods in a subsidy investigation and the *ADA* only addresses the effects of dumped goods in an anti-dumping investigation.

[66] The WTO Appellate Body in *US – Carbon Steel (India)* recognized these principles in stating the following:

> *We have found that Article 15 is not silent on the question of cumulation of the effects of subsidized imports with the effects of non-subsidized imports*. As we have explained above, Article 15.3 provides that investigating authorities may, if the conditions set out in the last clause of Article 15.3 are fulfilled, cumulatively assess the effects of imports that are simultaneously subject to countervailing duty investigations. It follows that a cumulative assessment pursuant to Article 15.3 must not encompass the effects of non-subsidized imports.[39]
>
> [Emphasis added]

[67] The WTO Appellate Body in *US – Carbon Steel (India)* had other comments which have particular significance to the interpretation of *SIMA*, as follows:

> Finally, we note the United States' argument that Article VI:6(a) of the GATT 1994 supports its reading that the cross-cumulation at issue in this dispute is consistent with the provisions of Article 15 of the SCM Agreement. Article VI:6(a) of the GATT 1994 stipulates:
>
> > No Member shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another Member unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.
>
> The United States relies in particular on the phrase "as the case may be" in Article VI:6(a). For the United States, this language recognizes that "there may be situations in which it 'may

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39 *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO Docs. WT/DS436/AB/R, Report of the Appellate Body [*US – Carbon Steel (India)*] at para. 4.589.

> be the case' that the unfair trade practices covered by an authority's injury determination may involve dumping, subsidization, or both unfair trade practices."
>
> We examine the phrase "as the case may be" in Article VI:6(a) within the structure of that provision, referring to "the effect of the dumping or subsidization, as the case may be". In particular, we observe that this clause refers to two elements, "dumping" and "subsidization", and connects these two elements with the word "or". *To us, the use of "or", as well as the use of the singular "the effect", indicates that the provision refers separately to "dumping" or to "subsidization". Read in this context, the phrase "as the case may be" clarifies that injury may be caused by either the effect of the subsidy (one "case") or the effect of dumping (the other "case").* We therefore agree with the Panel that the phrase "as the case may be" refers to one of two alternatives expressly listed in this provision, and that a third alternative posited by the United States – "dumped and subsidized imports" or "unfairly traded imports" – is not present in Article VI:6(a).[40]
>
> [Emphasis added, footnotes omitted]

[68] The Tribunal practice under *SIMA*, prior to the issuance of the Appellate Body decision in *US – Carbon Steel (India)*, departed from the legal framework enunciated by the WTO Appellate Body in this case. The Tribunal's past practice on cumulation was built on the premise that *SIMA* is silent on the issue of cumulating dumped goods with subsidized goods, and therefore *could* be interpreted in such a vacuum to allow such cross-cumulation. The WTO decision in *US – Carbon Steel (India)*, which confirmed that this type of cumulation is not permissible in injury inquiries from the perspective of the WTO agreements, was the catalyst for changing the Tribunal's practice in interpreting and applying *SIMA*, as it clarified the context in which cumulation was permitted under the WTO agreements. In this regard, it must be reiterated that the past practice of cross-cumulation of goods from countries subject to anti-dumping duty investigations and countries subject to countervailing duty investigations was not and is not consistent with anything *expressly* contemplated in *SIMA* or the WTO agreements.

[69] As to the WTO agreements themselves, even a cursory examination of the ones that are at issue shows the separateness of the cumulation provisions in these agreements. Regarding inquiries, the cumulation provisions are set out in article 3.3 of the *ADA*, and read as follows:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible. . . .

[70] The cumulation provisions of article 15.3 of the *ASCM* read as follows:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and

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40 *US – Carbon Steel (India)* at paras. 4.597-4.599.

> *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

[71] As the above provisions show, the past Tribunal practice is most clearly inconsistent with the WTO provisions when cumulating goods subject only to a dumping investigation with goods subject only to a subsidy investigation; goods subject only to a subsidy investigation can never have any margin of dumping, and goods subject only to a dumping investigation cannot have an amount of subsidization, despite the constraints on cumulation set out in the above WTO agreements.

[72] It was also argued that the *US – Carbon Steel (India)* decision of the Appellate Body only applied to original injury inquiries and did not prohibit the Tribunal's past practice in expiry reviews and that the WTO panel decision in *US – Pipe and Tube (Turkey)* endorsed the Tribunal's past practice in the context of expiry reviews.

[73] The Tribunal has set out its view on this point in *CSWP*. Ultimately, whether or not the WTO agreements expressly permit or prohibit cumulation of any kind in expiry reviews, as discussed above, they contain clear limitations on the type of cumulative assessment that may support an injury finding (and resultant duties) in injury inquiries. The provisions of subsection 42(3) of *SIMA* (cumulation in inquiries) and subsection 76.03(11) of *SIMA* (cumulation in expiry reviews) are almost identical. In the Tribunal's view, by using essentially identical wording, Parliament intended subsection 76.03(11) and the relevant parts of subsection 42(3) to have the same meaning. Accordingly, the same interpretation should apply in the context of an expiry review governed by section 76.03.

[74] Moreover, the WTO Appellate Body has not made any pronouncements on this issue with regard to the specific context of expiry reviews, other than stating that its previous decisions on cumulation in expiry reviews did not deal with the issue of cumulating goods from dumping countries and subsidizing countries but dealt with how to cumulate goods which were only dumped.

[75] This was acknowledged by the WTO panel in *US – Pipe and Tube (Turkey)* which referred to the panel decision in *US – Carbon Steel (India)* to support its views on cumulation in expiry reviews. It should be emphasized that it was only after the WTO panel in *US – Pipe and Tube (Turkey)* wholly adopted the Appellate Body's analysis in *US – Carbon Steel (India)* regarding cumulation in injury inquiries,[41] that the panel stated the following:

> In light of our approach, we also do not consider that the Appellate Body's findings in *US – Carbon Steel (India)* regarding cumulation of subsidized and dumped, non-subsidized imports in injury determinations in original investigations are relevant to our assessment [regarding expiry reviews].[42]

[76] While cumulation of dumped goods with other dumped goods is expressly permitted by the *ADA* in original inquiries (and vice versa under the *ASCM*), cumulation is nowhere allowed or disallowed in the international agreements in an expiry review. In other words, in the WTO sphere, there is a perceived silence on this issue in expiry reviews. However, silence is neutral at best in

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41 *United States – Countervailing Measures on Certain Pipe and Tube Products (Turkey)*, WTO Docs. WT/DS523/R, Report of the Panel [*US – Pipe and Tube (Turkey)*] at paras. 7.288-7.295.

42 *US – Pipe and Tube (Turkey)* at para. 7.329.

these circumstances. The statements in *US – Pipe and Tube (Turkey)* concerning the absence of provisions regarding cumulation in expiry reviews do not mean that the Tribunal *must* cumulate dumped and subsidized goods. The decision in *US – Pipe and Tube (Turkey)* does not negate the Tribunal's ability to adopt a methodology which it views as consistent with both the agreements and *SIMA*.

[77] Crucially, while the WTO agreements do not expressly permit or prohibit cumulation of any kind in expiry reviews, *SIMA* treats cumulation in inquiries as well as expiry reviews on the same terms. Again, it would be highly inconsistent to apply a different practice to cumulation in injury inquiries than in expiry reviews given the almost identical text of the relevant *SIMA* provisions. The Tribunal has been presented with no convincing substantive rationale for this proposition. Given that the separate agreements provide for the conduct of expiry reviews generally but still separately, the more consistent view—and one that the Tribunal adopts—is that expiry reviews under *SIMA* regarding dumped goods from a country must (at least conceptually) be separated from reviews regarding subsidized goods from a different country.

The contextual analysis – The scheme of the Act

[78] The issue regarding cumulation has arisen mainly because *SIMA* is drafted in a "shortcut" manner to account for trade remedy proceedings of both kinds (dumping as well as subsidizing investigations).

[79] *SIMA* refers to "dumping or subsidizing" where relevant. This is not only the case for the cumulation provision, as set out above, but also elsewhere in the Act. For example, the relevant portions of sections 31, 42 and 76.03 of *SIMA* all contain this expression. It is also apparent that the Act addresses discrete particularities of these different types of investigations, including in the context of an injury analysis.[43]

[80] It follows that *SIMA* does not, in the operative words of its provisions, conflate dumping with subsidizing.[44] In the Tribunal's view, there is a gap between this particular language and statutory scheme adopted by Parliament, and the domestic industry's argument that *SIMA* clearly and intentionally compels a practice contrary to the separate obligations set out in the *ADA* and the *ASCM* that it is meant to implement.

[81] The point is reinforced by looking at the CBSA's practice under the relevant *SIMA* provisions. The CBSA conducts its anti-dumping duty and countervailing duty investigations concerning goods from different countries wholly separately, both in procedure and substance. For example, the CBSA made two separate determinations in the current expiry review as follows:

> . . . the expiry of the finding made by the Canadian International Trade Tribunal on January 9, 2015, in Inquiry No. NQ-2014-001, concerning certain concrete reinforcing bar originating or exported from the People's Republic of China, the Republic of Korea, and the Republic of Turkey,

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43 For example, refer to different criteria for "insignificant" dumping versus "insignificant" subsidizing in subsection 2(1) of *SIMA*, and also different requirements in paragraphs 42(1)(b) and (c) regarding massive importation findings as to dumped versus subsidized goods.

44 See also subsection 2(7) of *SIMA*.

> 1. is likely to result in the continuation or resumption of *dumping* of such goods originating in or exported from the People's Republic of China, the Republic of Korea, and the Republic of Turkey; and
>
> 2. is likely to result in the continuation or resumption of *subsidizing* of such goods originating in or exported from the People's Republic of China.[45]
>
> These *determinations* take effect on May 7, 2020.
>
> [Emphasis added]

[82] As well, and consistent with the text of the above determinations, the CBSA's Statement of Reasons in this expiry review divides its analysis into separate considerations of likelihood of continued or resumed dumping and likelihood of continued or resumed subsidizing, prior to reaching the two determinations above.[46]

The contextual analysis – The intent of Parliament

[83] In this case, the Tribunal has determined that subsection 76.03(11) is to be interpreted consistent with Canada's international obligations, as it is possible to interpret this subsection following the presumption of conformity. This presumption can always be rebutted by a clear intent of Parliament for the Tribunal to act inconsistently with international obligations. Parliament's intent is best derived from the textual and contextual elements, and the scheme of *SIMA*, already discussed above. The Tribunal has been presented with no persuasive evidence in this review supporting the view that Parliament *intended* to enact a rule on cumulation which was inconsistent with the above-noted international obligations.

[84] The domestic industry's arguments regarding Parliament's "choice" not to amend the cumulation provisions of *SIMA* after the *US – Carbon Steel (India)* decision, are not persuasive. The more convincing view here is that Parliament has not done so simply because, properly interpreted (as the Tribunal has strived to do following *US – Carbon Steel [India]*), the cumulation provision has been and remains consistent with the WTO agreements—no amendment needs to be enacted. The Tribunal reiterates its views that, if possible, *SIMA* must be read as consistent with Canada's international obligations.[47] As subsection 76.03(11) is worded, the Tribunal is able to do exactly that, with no amendments required.

[85] The domestic industry also argued that the text of the WTO cumulation provision states that the investigation authority "may" cumulate (as in *SIMA* in 1994), but this text was amended in subsections 42(3) and 76.03(11) in 1999 to replace "may" with "shall". Aside from the fact that any decision to cumulate hinges on the Tribunal's assessment of its appropriateness, having regard to the conditions of competition, this change is not relevant to the extent that the Tribunal finds that the cumulation referred to in *SIMA* can only pertain to one injury analysis, either with respect to dumping, or to subsidizing. Parliament did not clearly give direction, for the purpose of examining injury and ultimately justifying the imposition of anti-dumping or countervailing duties, with regard to the cumulative assessment of goods from different countries that are subject to different, or both,

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45 Exhibit RR-2019-003-03, Vol. 1 at 5.

46 *Concrete Reinforcing Bar*, CBSA Statement of Reasons (online: <https://www.cbsa-asfc.gc.ca/sima-lmsi/er-rre/rb12019/rb12019-de-eng.html>).

47 *CSWP* at para. 29.

types of investigations. In other words, the amendment involving replacing the word "may" with the word "shall" does not affect the interpretation that goods from countries subject to a dumping investigation cannot be cumulated with goods from countries subject to a subsidy investigation, or vice versa.

Conclusion on cumulation

[86] In summary, the question for the Tribunal is whether the *SIMA* provisions unambiguously show a parliamentary intent to cumulate goods from countries subject to dumping investigations with those subject to subsidy investigations, a past practice which is contrary to Canada's international obligations. The Tribunal concludes that the provisions of *SIMA* on this issue do not show such an unambiguous intent and therefore, can and should be interpreted consistent with the requirements of the WTO agreements. The parties to this review who support a return to the past practice of cumulation have therefore not convinced the majority of the Tribunal to do so.

[87] Accordingly, consistent with its established practice and in accordance with the evidence regarding conditions of competition, the Tribunal will conduct its likelihood of injury analysis separately for the goods subject to a dumping investigation (Korea and Turkey), and separately for goods subject to both dumping *and subsidizing* investigations (China).

[88] An alternative solution to this approach would be for the Tribunal to conduct completely separate anti-dumping and countervailing injury inquiries and reviews. In the present expiry review, such an analysis would look at the cumulated likely volume and price effects of all dumped goods (from Korea, Turkey and China, provided that the conditions of competition permit such a cumulative assessment), and then separately assess the likely volume and price effects of the subsidized goods (from China, as distinguishable from any other factors, including the dumped goods from Korea and Turkey). However, conducting separate analyses in this way, while not impossible,[48] would cause other difficulties in certain circumstances. For instance, it would require assessing likelihood of injury from the same set of goods twice (otherwise potentially resulting in a double-counting of the goods being analyzed) and would raise enhanced difficulties in terms of the treatment of all factors other than the goods in issue, as well as determining of the appropriate sequencing for the likelihood of injury analysis. On balance, the Tribunal concludes that this is not a preferred approach.

Analysis of the effects of the dumping and subsidizing of the goods from China

[89] As noted above, the subject goods from China are likely to be both dumped and subsidized. As the majority's analysis shows, the subject goods from China cannot be cumulated with goods from the other countries as these are subject solely to an anti-dumping investigation or solely to a subsidy investigation.

[90] However, there are no legislative provisions that directly address the issue of "cross-cumulating", i.e. analyzing the effects of both dumping and subsidizing of the same goods from a single country. As noted in previous cases, the effects of dumping and subsidizing of the *same* goods

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[48] This type of de-cumulated analysis does *not* involve the disentangling of the effects of dumping and subsidizing of the same goods from the same country, which is addressed under the subtitle "Analysis of the effects of the dumping and subsidizing of the goods from China". As explained under that subtitle, the Tribunal remains of the view that the latter exercise is practically impossible.

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.[49] In reality, when the dumped and subsidized goods originate from a single country, the effects are so closely intertwined as to render it impossible to allocate discrete portions of injury to the dumping and the subsidizing of the same goods.[50]

[91] Given that this expiry review concerns dumped and subsidized goods from China, the likely effects of the resumption of dumping and subsidizing of the Chinese subject goods will likewise be manifested in a single set of prices. Therefore, the Tribunal will make a cross-cumulative assessment of the likely impact of the continued or resumed dumping and subsidizing of the subject goods from China on the domestic industry.

SEPARATE OPINION OF MEMBER BUJOLD ON CUMULATION

[92] With respect, I am unable to agree with my colleagues' analysis on the issue of cumulation. For the reasons that I recently provided in *Carbon Steel Screws*,[51] I am of the view that, correctly interpreted and applied, subsection 76.03(11) of *SIMA requires* an assessment of the cumulative effect of the likely resumed dumping of the goods from the three subject countries in the circumstances of this case as well.

[93] In my opinion, this conclusion is mandated by the unambiguous language of this provision, regardless of the fact that the goods from China are also likely to be subsidized. I therefore disagree with my colleagues' conclusion that subsection 76.03(11) may be interpreted otherwise in light of Canada's international obligations and, for that matter, with their view on the meaning and relevance of such obligations, which reflects the Tribunal's conclusion on this issue in *CSWP*.

[94] In this regard, I note that my colleagues expressly endorsed the Tribunal's approach from *CSWP* in their analysis. In my opinion, this approach is misguided and, while they remain apposite, I will not repeat here the reasons in support of my conclusion in *CSS*, which is that *CSWP* was wrongly decided on that issue and should not be followed.

[95] Rather, I will address the additional reasons provided by my colleagues in support of what they characterized as the Tribunal's current practice regarding cumulation. With respect, I find that my colleagues' description of the relevant principles of statutory interpretation and their "contextual analysis" of the cumulation provisions of *SIMA* are deficient. In my opinion, under the guise of this "contextual analysis", my colleagues improperly made an interpretation of inapplicable provisions of international agreements prevail over the clear text of subsection 76.03(11) of *SIMA*.

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49 This is consistent with both *SIMA* and the WTO agreements. The injury analysis under both *SIMA* and the WTO agreements aims to assess the injurious effects of *goods*, rather than of the dumping or subsidizing: *AGT Food and Ingredients v. Canadian Pasta Manufacturers Association*, 2019 FCA 229, at paras. 4-8; *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu* (21 December 2016), WTO Docs. WT/DS482/R, Report of the Panel.

50 See, for example, *Steel Piling Pipe* (4 July 2018), RR-2017-003 (CITT) at para. 42; *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) at paras. 72-73; *Silicon Metal* (2 November 2017), NQ-2017-001 (CITT) at para. 59; *Pup Joints* (7 April 2017), RR-2016-001 (CITT) at paras. 30-31; *Welded Large Diameter Carbon and Alloy Steel Line Pipe* (20 October 2016), NQ-2016-001 (CITT) at para. 84; *Carbon and Alloy Steel Line Pipe* (29 March 2016), NQ-2015-002 (CITT) at paras. 84-85; *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) [*Aluminum Extrusions*] at paras. 56-57.

51 (2 September 2020), RR-2019-002 (CITT) [*CSS*] at paras. 59-130.

[96] Accordingly, their conclusion that it would not be appropriate, in light of Canada's international obligations, to conduct a cumulative assessment of the effects of goods from a country that have been dumped and subsidized with the effects of goods from other countries that are only dumped is, in my view, inconsistent with subsection 76.03(11) of *SIMA*. More generally, I find that the cumulation provisions of *SIMA* do not provide the Tribunal with the discretion asserted by my colleagues.

[97] These issues and my specific areas of disagreement with their analysis are discussed below.

Principles of statutory interpretation and potential relevance of international law

[98] My colleagues rely on the modern rule of statutory interpretation and cited certain authorities in support of their conclusion that, in interpreting *SIMA*, the Tribunal can and should look to the international agreements that are the source of Canada's international obligations, and seek context and guidance from those agreements and from the decisions that interpret the provisions of these agreements. In my opinion, their discussion of the relevant interpretative principles and of Canada's international obligations is incomplete and inaccurate in important respects.

[99] First, while it is true that Canada's international treaty obligations and the principles underlying international law can play a role in the interpretation of Canadian laws, this does not mean that international law is necessarily and appropriately considered as part of the modern rule of statutory interpretation.[52] It is only, "where possible", that is, where the text of a provision is unclear or lends itself to it, that domestic legislation can and should be interpreted in light of both Canada's international obligations and the underlying principles of international law.[53] "Where possible" is a key qualifier,[54] which means that, contrary to my colleagues' view, international agreements are not necessarily relevant at the context stage of statutory interpretations. Crucially, international law cannot be used to support an interpretation that is inconsistent with the unambiguous terms of domestic law, including *SIMA*.[55]

[100] On that basis, I disagree with my colleagues that the Tribunal's past practice on cumulation arrived at an interpretation of *SIMA* that cannot be maintained in light of the principles of statutory interpretation. To the contrary, applying these very principles leads me to conclude that subsection 76.03(11) of *SIMA* is clear and unambiguous and that it is the Tribunal's recent practice, which my colleagues chose to follow in this case, that is inconsistent with the terms of this provision.

[101] In *CSS*, I provided the legal basis for my conclusion that, provided its conditions are met, subsection 76.03(11) cannot be interpreted to allow the Tribunal to conduct a separate assessment of the effect of the dumping of subject goods from countries to which the CBSA determination applies

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52 *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 [*Entertainment Software*] at 76-92.

53 *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52 at 57-58. It is noteworthy that, in arriving at this conclusion, the Federal Court of Appeal considered *National Corn Growers* and *B010*, two of the authorities cited by my colleagues in support of their, in my respectful view, erroneous conclusion that international agreements and decisions interpreting these agreements necessarily provide useful guidance and context for the interpretation of *SIMA*.

54 *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 [*Brown*] at para. 55.

55 "An unambiguous provision must be given effect even if it is contrary to Canada's international obligations or international law . . .", see *Brown* at para. 56 (referring to *Németh v. Canada [Justice]*, 2010 SCC 56, [2010] 3 S.C.R. 281 at para. 35; *National Corn Growers* at 1371; *Schreiber v. Canada [Attorney General]*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 50; *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 16; *Hape* at para. 54).

(in this case, goods from Turkey, Korea and China). This constitutes, in my respectful view, the erroneous result of my colleagues' interpretation in this case as well.[56] In my comments on my colleagues' analysis below, I will provide additional reasons supporting my view that they misused purported international obligations as the determinative factor in order to arrive at this conclusion.[57]

[102] Second, I disagree with my colleagues' statement that decisions interpreting the provisions of the *ADA* or the *ASCM* provide useful "context" for the interpretation of the cumulation provisions of *SIMA*. Such decisions, including the report of the WTO Appellate Body in *US – Carbon Steel (India)* cannot shed light on the authentic meaning of subsections 42(3) and 76.03(11) of *SIMA*, as they did not form part of the context within which these provisions were enacted.

[103] In *Entertainment Software*, the Federal Court of Appeal made it clear that if a legislative provision is ambiguous, and international law "may have influenced its purpose or context", the relevant "international instrument" could enter the interpretive task.[58] The Court also emphasized that it is international law that is part of the "context surrounding the enactment of legislation" that may be relevant and taken into account.[59]

[104] Respectfully, my colleagues' statement that the Tribunal "must" consider WTO Appellate Body decisions when undertaking statutory interpretation of its domestic legislation which embodies the WTO agreements is blatantly inconsistent with this Federal Court of Appeal precedent. In that case, the Court confirmed that international law instruments may be resorted to in the interpretation of domestic law only to the extent that certain conditions are met.[60]

[105] Indeed, the primary role of statutory interpretation is to ascertain the intention of Parliament.[61] The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.[62] These overarching principles must guide the Tribunal in determining which documents or materials may form part of the relevant international context in which *SIMA* and, in particular, its provisions governing cumulation were enacted.

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56 In *CSS*, I reached the same conclusion for both subsections 42(3) and 76.03(11).

57 Suffice it to say at this point that, as I stated in *CSS*, subsection 76.03(11) mandates the cumulation of *all* goods from countries to which to CBSA's likelihood of resumed dumping determination applies when the statutory conditions are met. My colleagues' interpretation, which results in the de-cumulation of a subset of those goods on the basis that they are also subject to a CBSA's likelihood of resumed subsidizing determination, is not permissible under *SIMA*. The Tribunal cannot conduct an expiry review in a manner that is inconsistent with the terms of subsection 76.03(11) solely to achieve consistency with ostensible international obligations.

58 *Entertainment Software* at para. 83.

59 *Ibid.* at para. 91.

60 See my discussion of the circumstances in which international law may be referenced in *CSS* at paras. 66-73. The Federal Court of Appeal reaffirmed that it cannot be assumed that international materials enter the process of legislative interpretation automatically, "... as if they are some sort of super-Charter that can be used to supplement, amend or displace the provisions of domestic law", in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at para 22. In this decision, issued on October 6, 2020, the Court again cautioned that international law enters into the interpretation of domestic law "only in certain limited ways" and that international obligations cannot be used to amend domestic legislation (at para. 24). As in that case, none of these "limited ways" are available here.

61 *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915 at para. 54.

62 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at 121.

[106] On my review of the authorities, it follows that only "international instruments" that can be presumed to be known to the legislator at the time of the enactment of the relevant domestic law provisions may be legitimately examined at the context stage of statutory interpretation. Indeed, given that the goal of statutory interpretation recognized by the Supreme Court of Canada is the ascertainment of the intention of Parliament, documents, such as a report of the WTO Appellate Body issued some 15 years after the enactment of the relevant provisions of *SIMA* and that were, therefore, clearly not known to the legislator at the time of enactment cannot be said to reveal in any way its intention.[63]

[107] In other words, while there might be no legislative limit to the range of documents that the Tribunal may refer to in its interpretative exercise,[64] that is not to say that all international materials are relevant or form part of the pertinent international context. Unlike my colleagues, I consider that an important distinction must be made between international agreements *per se*, as they existed at the time of the enactment of domestic law, and decisions that subsequently interpret the provisions of these agreements. The authorities cited by my colleagues simply do not support the assertion that reports of the WTO Appellate Body provide guidance and "context" for the interpretation of *SIMA* in application of the modern rule of statutory interpretation.

[108] In fact, international jurisprudence is not even part of the relevant context for the interpretation of treaties. Article 31 of the *Vienna Convention on the Law of Treaties*[65] provides as follows:

> [t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> *(b)* any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> [Emphasis added]

[109] While paragraph 31(3)(b) of the *Vienna Convention* also provides that "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account in interpreting the terms of a treaty, reports of WTO panels

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63 Subsections 42(3) and 76.03(11) of *SIMA*, in their current form, were enacted in March 1999 (see R.S. 1999, c. 12, ss. 26, 36). The Report of the Appellate Body in *US – Carbon Steel (India)* was issued on December 8, 2014.

64 As was stated by the minority of the Supreme Court in *National Corn Growers* and noted by my colleagues. However, it warrants emphasizing that, in that case, the question before the Court was "whether it was patently unreasonable for the Tribunal to give consideration to the terms of the GATT in interpreting s. 42 of *SIMA*". The Court then found that the Tribunal had not acted unreasonably in referring to the text of an international agreement such as the GATT in its interpretation of section 42 of *SIMA*. In its own analysis, the Court also reviewed the express terms of Article 6 of the GATT before concluding that it supported the Tribunal's interpretation of *SIMA* in that case. Whereas the GATT is itself an instrument of conventional international law, reports of WTO panels or the Appellate Body interpreting it are not. As such, *National Corn Growers* does not support the view that WTO jurisprudence forms part of the context surrounding the enactment of *SIMA*.

65 (1969) 1155 U.N.T.S. 331, in force 27 January 1980 [*Vienna Convention*].

or of the Appellate Body do not constitute such subsequent practice.[66] Given that they are not comprised in the context for the purpose of interpreting a treaty, it follows that these reports do not form part of the potentially relevant international context for the interpretation of a domestic statute like *SIMA*.

[110] This distinction between international agreements and decisions interpreting them for the purpose of identifying the relevant context in which domestic law is enacted is also borne out by the authorities cited by my colleagues. For example, in one of the cases on which they rely upon, *B010*, the Supreme Court of Canada stated that the ". . . *values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted* . . ." [emphasis added] and expressly referred to "international instruments" as the potentially relevant international contextual elements. Decisions interpreting international agreements are not international instruments. Indeed, international instruments mean treaties, conventions, protocols or similar documents that may be signed or ratified by States.[67] Thus, international jurisprudence must not be conflated with international instruments. It is the latter that may, "where possible", be considered at the context stage of statutory interpretation.

[111] In addition to not constituting international instruments forming part of the context in which *SIMA* was enacted, WTO case law, such as the report of the Appellate Body in *US – Carbon Steel (India)*, clearly does not set out values and principles of customary or conventional international law, of the type which McLachlin C.J., based on *Hape*, recognized as relevant contextual elements in *B010*. As a matter of law, such reports cannot even be said to create international obligations for Canada.

[112] Decisions of the Appellate Body do not generate values or principles of customary or conventional international law, nor are they the source of international obligations for Canada in disputes to which it is neither the complainant nor the respondent. In their analysis, my colleagues assume that the report of the Appellate Body in *US – Carbon Steel (India)* provides a definitive interpretation of the provisions of the WTO agreements concerning cumulation that shall be followed by Canada and, by extension, espoused by this Tribunal. This is incorrect.

[113] A WTO dispute relates to a specific matter and takes place between two or more specific WTO Members. The report of a panel or the Appellate Body also relates to that specific matter in the dispute between these members. Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties or different members on the same matter, even though the same questions of WTO law might arise. As in other areas of international law, there is no rule of *stare decisis*—no rule of precedent—in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases.[68]

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66 *Japan – Taxes on Alcoholic Beverages* (4 October 1996), WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body [*Japan – Taxes on Alcoholic Beverages*] at 12-14.

67 See the list of Treaties and other international instruments considered by the Supreme Court in *B010*. In that case, the Court determined that it was appropriate to consider the following international instruments in interpreting paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27: the Palermo Convention and its protocols, and the Refugee Convention (at para 50). On the nature of international instruments to which Canada is a party, see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 69-70 and *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para. 76.

68 *Japan – Taxes on Alcoholic Beverages* at 14. To quote the Appellate Body: "However, [adopted reports] are not binding, except with respect to resolving the particular dispute between the parties to that dispute."

[114] This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of the exact provisions which are again at issue before it. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases. While, in practice, the Appellate Body expects its decisions to be followed in subsequent cases, there may be *cogent reasons* to depart from past interpretations.[69]

[115] In this regard, I note that my colleagues quoted the report of the Appellate Body in *US – Stainless Steel (Mexico)* in support of their view that consideration of WTO panel and Appellate Body decisions is required when reviewing the context and interpretation of the WTO agreements as they impact the statutory interpretation of *SIMA*. In my respectful view, this report does not support this assertion.

[116] First, it confirms that WTO jurisprudence is not binding on Canada unless it is a party to the dispute. Second, it merely indicates that, while there is no formal system of precedent, there is an expectation that past rulings will be taken into account where the same obligations must be clarified in a subsequent dispute to help ensure certainty and foreseeability in the interpretation of the provisions of the WTO agreements. This does not mean that reports of the Appellate Body become relevant to or "impact" the statutory interpretation of *SIMA*. Unless, as suggested by the Appellate Body in *US – Stainless Steel (Mexico)*, they are taken into account by WTO Members, including Canada, when enacting or modifying laws and national regulations pertaining to international trade matters (which is not the case here), my view is that they are far removed from Parliament's intent.

[117] As for my colleagues' reliance on article 3.2 of the DSU, I would note that this provision does not give to reports of the Appellate Body the value of precedent for posterior interpretations. As a matter of WTO law, it does not prevent WTO panels from departing from past interpretations developed by the Appellate Body when there are "cogent reasons" to do so. A WTO panel recently did just that in a dispute involving Canada.[70]

[118] The corollary is that WTO Members other than the disputing parties are under no obligation to accept the findings and implement the recommendations of the Appellate Body. Put simply, the report of the Appellate Body in *US – Carbon Steel (India)* does not create prohibitive WTO requirements for Canada, nor does it represent a persuasive contextual element in the statutory interpretation of domestic law. As such, it is of little relevance to the interpretation of subsections 42(3) and 76.03(11) of *SIMA*.

[119] Moreover, while Appellate Body reports adopted by the WTO Dispute Settlement Body shall be accepted unconditionally by the parties to the dispute, it is the exclusive authority of the Ministerial Conference and the General Council to adopt, pursuant to Article IX:2 of the *Agreement establishing the World Trade Organization* (*WTO Agreement*), interpretations that are binding upon the WTO membership. In the absence of such an interpretation for the provisions of the *ASCM* and the *ADA* governing cumulation, there is no valid basis to conclude, as the Tribunal did in *CSWP*, that Canada's international obligations in this regard have been interpreted "by the WTO".[71] Appellate Body reports such as *US – Carbon Steel (India)*, do not constitute binding interpretations of WTO

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69 *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (30 April 2008), WTO Docs. WT/DS344/AB/R, Report of the Appellate Body at paras. 157-160.

70 *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada* (9 April 2019), WTO Docs. WT/DS534/R, Report of the Panel at para. 7.107.

71 *CSWP* at para. 29.

provisions, nor do they include recommendations that the entire WTO membership bring its measures into conformity with their findings.

[120] Thus, given their lack of binding effect on countries other than the United States and India, the findings of the Appellate Body in *US – Carbon Steel (India)* cannot be regarded as establishing international obligations for Canada or as setting out principles of international law of the kind which may be taken into account in the interpretation of domestic legislation. Again, it is noteworthy that in *National Corn Growers*, the Supreme Court referred to the examination of "international agreements", as part of the contextual interpretation of *SIMA*, not to subsequent interpretations of the provisions of such agreements by international adjudicative bodies.

[121] Similarly in *Hape*, the case relied upon by the Tribunal in *CSWP* and referred to by my colleagues in support of the statement that Canadian legislation must be presumed, and thus be construed, to conform to Canada's international obligations, clearly limits the scope of this presumption to *binding* obligations under international law. In that case, the actual ruling of the Supreme Court is that, since it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law, in interpreting the scope of application of the Charter, a court should seek to ensure compliance with Canada's *binding* obligations under international law where the express words are capable of supporting such a construction.[72] *Hape* does not stand for the proposition that Canadian legislation must be construed to comply with non-binding decisions in disputes involving other countries.

[122] In my view, Appellate Body reports interpreting provisions of the *ASCM* or the *ADA* in disputes between other WTO Members should therefore not be conflated with Canada's international trade obligations *per se* or read as conclusively delineating the boundaries of such obligations. There is an important distinction to be made between treaty text, binding interpretations pursuant to article IX:2 of the *WTO Agreement* and WTO case law. Neither *National Corn Growers* nor *B010*, and much less *Hape*, suggests that *SIMA* must be presumed to conform to non-binding WTO case law.

[123] As it does not set out international obligations for Canada, the report of the Appellate Body in *US – Carbon Steel (India)* should not have become, as my colleagues put it, the "catalyst for changing the Tribunal's practice in interpreting and applying *SIMA*" as it relates to cumulation. This report reflects the views of the Appellate Body at the time of its issuance in order to resolve a dispute between the United States and India. It cannot be assumed that the Appellate Body will not revisit its reasoning and ruling on this issue in subsequent disputes between other WTO Members in which the facts and arguments before it may be different. For this reason, I find that my colleagues incorrectly concluded, on the basis of the pronouncements of the Appellate Body in that report, that the Tribunal's past practice on cumulation is inconsistent with Canada's obligations under the *ASCM* and the *ADA*.

[124] To be clear, the point is that, unless *SIMA* is successfully challenged "as such" or "as applied" in a Tribunal inquiry or expiry review by other WTO Members in WTO dispute settlement proceedings, there is no international obligation for Canada to adopt the Appellate Body's

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[72] *Hape* at paras. 53-56 and 68. The Court's discussion makes it clear that by virtue of the presumption of conformity, Parliament is not presumed to legislate in breach of a *treaty* or in any manner inconsistent with the comity of nations and the *established rules of international law*.

interpretation of WTO provisions in this regard and, by implication, no requirement for the Tribunal to interpret *SIMA* so that it aligns with the pronouncements of the Appellate Body.

[125] Accordingly, my colleagues' reliance on WTO case law that did not exist at the time the cumulation provisions of *SIMA* were enacted, either as "context" for the interpretation of these provisions or as a basis for the application of the presumption of compliance of domestic legislation with international law to the interpretation of these provisions, is, in my respectful view, misplaced. As stated by the Federal Court of Appeal in *Entertainment Software*, international law is not always relevant, persuasive and binding, and is sometimes misused by decision makers when developing a legal argument.[73]

The requirements of subsections 42(3) and 76.03(11) of *SIMA*

[126] To assess whether it is possible to interpret the cumulation provisions of *SIMA* in light of my colleagues' view on the meaning of Canada's international obligations,[74] the first issue to examine is whether there is ambiguity in the text of these provisions making them susceptible to multiple interpretations. In this regard, I disagree with my colleagues' conclusion that subsections 42(3) and 76.03(11) of *SIMA* are open to interpretation and do not unambiguously mandate the Tribunal's past practice.

[127] It is useful to review the Tribunal's previous interpretations of the terms of the cumulation provisions of *SIMA*. Interestingly, none of these precedents suggests that a contextual analysis must be undertaken to clarify their meaning. As stated by the Supreme Court in *Canada Trustco Mortgage Co.*, when "the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process".[75]

[128] For example, in *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate*,[76] a case that was decided after the issuance of the report of the Appellate Body in *US – Carbon Steel (India)*, the subject goods in that inquiry were dumped plate from Russia and dumped and subsidized plate from India. The Tribunal proceeded to assess whether it was appropriate to consider the cumulative effect of the *dumped goods* from India and Russia accounting for relevant factors relating to the conditions of competition, such as interchangeability, quality, pricing, distribution channels, modes of transportation, timing of arrivals and geographic dispersion. The Tribunal expressly noted that this assessment was mandatory under subsection 42(3) of *SIMA* as follows:

> Moreover, having met the provisions of subsection 42(3) of *SIMA*, namely, the margins of dumping and amount of subsidy must not be insignificant, the volumes must not be negligible and the conditions of competition must warrant a cumulated analysis, the language

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73 *Entertainment Software* at para. 76.

74 Again, I disagree with my colleagues' conclusion that the Tribunal's past practice is inconsistent with Canada's obligations under the *ADA* and the *ASCM*. In this section, I will elaborate on the reasons that I provided in *CSS* in support of my view that, even if it was inconsistent, both subsections 42(3) and 76.03(11) of *SIMA cannot* be interpreted and applied to allow the Tribunal to conduct the separate injury analyses that my colleagues deem permissible.

75 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10.

76 (6 January 2016), NQ-2015-001 (CITT).

> within *SIMA* implies, and in particular the use of the term "shall", suggests that, under such circumstances, cumulation is not only appropriate but indeed mandatory.[77]

[129] Having found it appropriate (and, indeed, mandatory in the circumstances of that case) to cumulate the effects of the dumped goods from India with the dumped goods from Russia, the Tribunal proceeded with its injury analysis by considering the effects of the dumped and subsidized goods from India together with the dumped goods from Russia. This is how subsection 42(3) and the very similarly worded subsection 76.03(11) must be interpreted and applied. These provisions do not give the Tribunal the discretion to exclude dumped goods to which the CBSA determination applies from the cumulative analysis of the effect based on factors that are unrelated to the relevant conditions of competition.

[130] The Tribunal also addressed the plain meaning and purpose of subsection 42(3) in no uncertain terms in *Circular Copper Tube*.[78] In that case, the subject goods were dumped goods from Brazil, Greece, Korea and Mexico, and dumped and subsidized goods from China. After having satisfied itself that the margins of dumping and, where applicable, the amount of subsidy in relation to the subject goods from each country were not insignificant, that the volume of subject goods from each named country was not negligible, and that the ". . . same conditions of competition exist[ed] between the subject goods among each other, and between the subject goods and the like goods",[79] the Tribunal concluded as follows:

> Indeed, in the circumstances of this case, the Tribunal does not consider the relatively limited volumes and presence of the Greek and Brazilian imports in the Canadian market as a distinguishing condition of competition favouring "decumulation"; the Tribunal notes that the very purpose of subsection 42(3) of *SIMA* is to allow (<u>in fact, it directs</u>) a cumulative assessment of the effects of <u>any dumping and subsidizing</u> of the subject goods, as long as the volumes from the subject countries are not *de minimis* and it is appropriate, considering conditions of competition.[80]
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> [Italics in original, underlining added for emphasis]

[131] I agree with the above interpretation of the provision, which is consistent with my own in *CSS*. At a minimum, cumulation of *all* dumped goods to which the CBSA determination applies is mandatory when the statutory conditions are met. Per the terms of both subsections 42(3) and 76.03(11) of *SIMA*, it is the relevant CBSA determination that dictates which goods shall be included in an assessment of the cumulative effect.

[132] In this expiry review, the CBSA found in its determination under subsection 76.03(9) of *SIMA* that the subject goods from all three subject countries were likely to be dumped. If the relevant conditions of competition warrant cumulation, *SIMA* does not allow for a de-cumulated analysis of the effect of the dumped goods from any subject country, even if these goods may include imports

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77 *Ibid.* at para. 87.

78 (18 December 2013), NQ-2013-004 (CITT).

79 *Ibid.* at para. 67.

80 *Ibid.* at para. 73. In support of this conclusion, the Tribunal referred to subsections 37.1(1) and (2) of the *Special Import Measures Regulations* SOR/84-927 [*Regulations*] which prescribe the factors for the Tribunal to consider in making its findings and noted that they have, as their focus, the effects that dumped or subsidized goods have had or may have on a number of economic indices. On that basis, the Tribunal reasoned that it was not possible to isolate the effects caused by the dumping from the effects caused by the subsidizing.

that are also subsidized, no matter what the *ADA* and the *ASCM* stipulate, or the Appellate Body decides in disputes not involving Canada. Otherwise, a finding that the cumulated dumped imports from *all* subject countries are likely to result in injury to the domestic industry is precluded, which is, in my view, inconsistent with the statutory scheme.

[133] It stands to reason that a cumulative assessment is premised on the acknowledgement that the domestic industry faces the impact of the dumped or subsidized imports *as a whole* and that it may be injured, as in this case, by the total impact of at least all dumped imports, and that this impact might not be adequately taken into account in a country-specific or separate analysis of the effect of a subset of the dumped imports. In other words, the purpose of cumulation is to capture situations where imports from one particular country may not cause material injury, but the cumulation of the effects of subject goods from all the subject countries does or, in the context of an expiry review, is likely to. In my opinion, this rationale explains why, in 1999, Parliament amended *SIMA* to make cumulation mandatory.[81]

[134] In an article commenting on the amendments, it was observed that the result and purpose of the amendment were as follows:

> The new Act *requires* the CITT to cumulate the injurious effects of *dumping and subsidizing of imports from more than one country in injury inquiries and expiry reviews* under the SIMA. This is in recognition of the fact that dumping/subsidizing, whether from one or multiple sources, has a single price effect in the domestic market which, in most cases, cannot be disentangled. The ability to cumulate is, however, subject to certain pre-conditions under SIMA, as required by the WTO Anti-Dumping and Subsidies Agreements.[82]
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> [Emphasis added, footnotes omitted]

[135] The applicable pre-conditions are discussed above and in my separate opinion in *CSS*. In this case, they are limited to determining whether an assessment of the cumulative effect of the dumped goods from the three subject countries is appropriate in light of the relevant conditions of competition.

[136] The Tribunal cannot ignore the clear language of subsection 42(3) or, in this case, of subsection 76.03(11) of *SIMA mandating* cumulation of the effect of all dumped imports and the intent of these provisions for the purpose of achieving consistency with an interpretation of the meaning of WTO disciplines. In particular, developments in WTO case law pertaining to disputes involving other countries and concerning their own trade remedy regime do not make *SIMA* ambiguous or alter the authentic meaning of its provisions governing cumulation.

[137] On this issue, it warrants emphasizing the statements of the Supreme Court in *Kazemi Estate v. Islamic Republic of Iran*.[83] In that case, among the questions before the Court was whether the silence in the *State Immunity Act* on this issue created an ambiguity as to whether the exceptions to state immunity under the Act applied to lower-level officials. The Court examined whether it was possible to resolve this alleged ambiguity by referencing customary international law and the

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81 See my discussion of the relevant amendments in *CSS* at paras. 112-117.

82 P.M. Saroli and G. Tereposky, "Changes to Canada's Anti-dumping and Countervailing Duty Law for the New Millenium", (2000) 79 Can. Bar. Rev. 352 at 367.

83 2014 SCC 62, [2014] 3 SCR 176.

significant developments on the principle of reparation under public international law since the enactment of the *State Immunity Act*.

[138] The Supreme Court ruled that reliance need not, and indeed cannot, be placed on customary international law to carve out additional exceptions to the immunity granted to foreign states pursuant to the *State Immunity Act*. Writing for the Court's majority, Lebel J. stated the following:

> A number of interveners argue that s. 3(1) of the [*State Immunity Act*] is ambiguous and should therefore be interpreted in accordance with the common law, the Charter and international law. The intervener the Canadian Civil Liberties Association submits that the [*State Immunity Act*] is ambiguous because it does not clearly extend to cases involving alleged breaches of *jus cogens* norms. . . .
>
> The current state of international law regarding redress for victims of torture does not alter the [*State Immunity Act*], or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, "*Texture ouverte, droit international et interprétation de la Charte canadienne*", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* [5th ed. 2013], at pp. 231-35). Indeed, the presumption that legislation will conform to international law remains just that—merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute under consideration (*Hape*, at paras. 53-54). In the present case, the [*State Immunity Act*] lists the exceptions to state immunity exhaustively. Canada's domestic legal order, as Parliament has framed it, prevails.[84]
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> [Italics in original, underlining added for emphasis]

[139] Similarly, in this case, even assuming *arguendo* that international law has evolved to impose constraints on the Tribunal's ability to cumulate in injury inquiries and expiry reviews that were not previously established, the current state of international law does not render *SIMA* ambiguous or make cumulation discretionary.[85] It is the provisions of domestic law, as framed by Parliament and correctly interpreted by the Tribunal before *CSWP* and the issuance of the report of the Appellate Body in *US – Carbon Steel (India)*,[86] which must prevail.

[140] Turning to my colleagues' specific reasons in support of their conclusion that their interpretation of subsection 76.03(11) of *SIMA* is permitted by the words of the provision, I note that it is threefold. My colleagues referred to the use of the word "or" in the phrase "dumping or subsidizing", the ordinary meaning of the word "appropriate" and the meaning of the phrase "conditions of competition". I will address these points in turn.

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84 *Ibid.* at 59-60.

85 To avoid any confusion in this regard, it must be reiterated that I disagree that the report of the Appellate Body in *US – Carbon Steel (India)* creates international obligations for Canada and with my colleagues' conclusion that the past Tribunal practice is most clearly inconsistent with the WTO provisions, especially in expiry reviews.

86 In certain instances, the Tribunal also arrived at the correct interpretation after *US – Carbon Steel (India)*. As noted above, *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* was decided after *US – Carbon Steel (India)*. In the context of an expiry review, *US – Carbon Steel (India)* was likewise not followed in *Certain Fasteners* (5 January 2015), RR-2014-001 (CITT).

"Dumping or subsidizing"

[141] I disagree with my colleagues that the first interpretation issue before the Tribunal is whether the phrase "dumping or subsidizing" in subsection 76.03(11) means that the Tribunal should conduct separate analyses of the effects of dumped and of subsidized goods from different countries, or that it can conduct one analysis of the cumulative, combined effects of the goods. It is the relevant CBSA determination which indicates the assessment of the cumulative effect of which goods, from which countries and of which type (dumping or subsidizing) is mandated.

[142] In this case, the issue for the Tribunal's consideration is whether it shall make an assessment of the cumulative effect of the dumping of the subject goods from Turkey, Korea and China pursuant to subsection 76.03(11) of *SIMA*. The issue of whether it shall make a cumulative assessment of the effect of the subsidizing of certain subject goods under this provision does not arise because the CBSA's determination in this regard does not apply to subsidized goods imported into Canada from more than one country.

[143] As was correctly noted by the Tribunal in Inquiry No. NQ-2014-001 (the proceeding that resulted in the finding that is under review in this case): "[a]s the CBSA determined that only the subject goods from China were subsidized, the issue of the assessment of the cumulative effect under subsection 42(3) of *SIMA* only arises in respect of the dumping of the subject goods from China, Korea and Turkey."[87] The same issue arises in this expiry review, albeit under subsection 76.03(11).

[144] Therefore, the meaning of "or" is not determinative of how the provision should be applied. It is not necessary to decide whether it is disjunctive or conjunctive in order to determine whether the cumulation of the effect of all *dumped* imports is appropriate in this case. To the extent that this issue is relevant, I would note that, at any rate, I am not convinced that, in the context of subsections 42(3) and 76.03(11), "or" can be read disjunctively.

[145] First, this interpretation is inconsistent with the authorities cited above which suggest that, consistent with the intent of Parliament when it last amended these provisions, *SIMA* directs a cumulative assessment of the effects of any dumping *and* subsidizing of the goods to which the CBSA determinations apply, provided that the statutory conditions are met. Second, with respect to my colleagues' assertion that subsection 2(7) of *SIMA* supports a disjunctive interpretation, it should first be noted that, in that event, the phrase "dumping or subsidizing" should similarly be read disjunctively for the assessment of the effect of the Chinese subject goods in this case. However, despite subsection 2(7), my colleagues deem it appropriate to assess together the effect of the dumping *and* subsidizing of the Chinese subject goods in this case.

[146] The Tribunal has previously stated, with regard to the meaning of subsection 2(7), the following:

> It is the Tribunal's view that subsection 2(7) of SIMA appears to have been enacted as a declaratory provision *ex abundanti cautela* (out of abundant caution). Generally, provisions of SIMA dealing with both dumping and subsidizing are interpreted as applying only with respect to either subsidized goods or dumped goods, as the particular case dictates. To contend that subsection 2(7) prohibits the Tribunal from considering together the effects of dumping and subsidizing when the same goods are being both dumped and subsidized, or are

87 *Rebar* at para. 89 and footnote 39.

> likely to be both dumped and subsidized, is unreasonable, given the impossibility of separating the effects of dumping from the effects of subsidizing those same goods. Had Parliament intended not to allow the Tribunal to cross-cumulate in such situations, it would have said so much more clearly and directly, in plain language.[88]

[147] In my view, had Parliament intended to prohibit the cross-cumulation of the effect of goods that are both dumped and subsidized with goods that are only dumped or only subsidized, it would similarly have done it directly in plain language. Also, it should be reiterated that, in this case, the issue is the cumulation of dumped goods from multiple countries under subsection 76.03(11) and that goods from the three subject countries are likely to be dumped. Therefore, this is a matter where dumped goods are taken into account in the Tribunal's assessment, that is, the provision is applied to dumped goods. At the most, while the Tribunal has previously found otherwise, subsection 2(7) could perhaps be invoked to argue that goods that are only subsidized should not be cumulated with goods from other countries that are only dumped. This is not the situation in this expiry review.

[148] Moreover, one of the domestic producers noted that there is a presumption in Canadian law that "or" is inclusive when used in a statute which cannot be rebutted in this instance, considering the immediate context of subsection 76.03(11) of *SIMA*. It was notably argued that when Parliament expresses "or" in the exclusive or disjunctive sense elsewhere in *SIMA*, it uses the "either . . . or" construction.[89] Another domestic producer noted that the phrase "dumping or subsidizing" in subsection 76.03(11), and elsewhere in *SIMA*, is conjunctive in that it can be read to include imports that are dumped only, subsidized only, or a mix of the two across different countries.[90] Considering these contextual elements, I disagree with my colleagues that subsections 42(3) and 76.03(11) of *SIMA* could be said to be unambiguous in not permitting the cumulation of dumped goods with subsidized goods based on the fact that, in ordinary parlance, "or" is used to "link alternatives".

> <u>". . . appropriate taking into account the conditions of competition . . ."</u>

[149] My colleagues also suggest that subsection 76.03(11) of *SIMA* mandates the Tribunal to cumulate "if it is satisfied that cumulation is suitable in the circumstances, while it takes notice of the conditions of competition". In my view, this interpretation introduces a new test to determine whether cumulation is appropriate which is inconsistent with the terms of the provision and Tribunal precedents.

[150] Specifically, I disagree that the Tribunal is only required to take notice of the conditions of competition in its assessment. The requirements of subsection 76.03(11) go beyond merely having regard to the condition of competition in order to determine if cumulation is appropriate. If the relevant conditions of competition warrant cumulation, *SIMA* does not allow for a de-cumulated analysis of the dumped goods to which the CBSA determination applies. As was argued by one of the domestic producers as follows:

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88 *Black Granite Memorials and Black Granite Slabs* (19 July 1999), RR-98-006 (CITT) at 12.

89 Exhibit RR-2019-003-C-09 at paras. 36-40.

90 Exhibit RR-2019-003-A-01 at para. 69.

> [T]he statute is clear. Cumulation is mandatory if it is appropriate based on the conditions of competition. The only basis for a decumulated assessment has to do with the conditions of competition, not WTO compliance considerations.[91]

[151] Tribunal jurisprudence confirms that its discretion under subsection 76.03(11) of *SIMA* is not as broad as portrayed by my colleagues. This discretion must be applied by the Tribunal within the conditions set out in subsection 76.03(11), namely those set out in paragraph (a) or (b) as follows:

> The legislation provides that the Tribunal *may decide that it is not appropriate to cumulate if* (a) the conditions of competition between the goods in question are not similar, or (b) the conditions of competition between the goods in question and the like goods are not similar. . . . The wording of subsection 76.03(11) should be read to mean that the *goods in question from the countries are to be cumulated when their conditions of competition are similar*, not when they are different.[92]
>
> [Emphasis added]

[152] Similarly, in Expiry Review No. RR-2008-004, the Tribunal indicated that its determination on the appropriateness of cumulation must be *based on* its assessment of the relevant conditions of competition. It stated as follows:

> If the Tribunal is not satisfied that an assessment of the cumulative effect of the dumping or subsidizing of goods from more than one country would be appropriate, based on its assessment of the relevant conditions of competition, then it shall not assess the effects of dumping or subsidizing cumulatively.[93]

[153] Therefore, subsection 76.03(11) does not provide the Tribunal with the discretion to de-cumulate dumped goods from a country to which the CBSA determination applies on the basis of factors that have nothing to do with the relevant conditions of competition. With respect, I find that my colleagues' interpretation improperly suggests that the Tribunal could de-cumulate certain goods on the mere grounds that cumulation would not be suitable in the circumstances, irrespective of the relevant conditions of competition. In my view, this interpretation is not possible in light of the words of the provision, when they are read together. In my view, their interpretation also unnecessarily opens the door to arguments, in future cases, that the Tribunal should de-cumulate certain goods despite the fact that the relevant conditions of competition warrant cumulation.

Whether different trade practices are "conditions of competition"

[154] My colleagues also stated that subsection 76.03(11) of *SIMA* gives the Tribunal discretion to consider the application of different trade practices to the goods as a condition of competition, i.e. as a reason not to consider cumulation appropriate. In this regard, my opinion is that, in deciding whether or not dumped imports from multiple countries should be cumulated, the fact that certain of these goods are also subsidized is not a relevant factor in the assessment. This fact does not make the

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91 *Transcript of Public Hearing* (11 August 2020) at 10.

92 *Certain Corrosion-resistant Steel Sheet Products* (27 July 2004), RR-2003-003 (CITT) at para. 69.

93 *Stainless Steel Wire* at para. 46.

dumped and subsidized goods distinguishable from other dumped subject goods in the marketplace or result in them competing under different or unique conditions.[94]

[155] The Tribunal previously expressed a similar view in Inquiry No. NQ-2013-001. In that case, it was argued that subject goods from China, which were both dumped and subsidized, were not competing on an equal footing with other subject goods that were only dumped. The Tribunal found that "[h]aving a cost advantage, whether due to an innovative manufacturing technique or production subsidies, however, does not alter the fact that the subject goods from Spain and China compete with each other and with the subject goods of Israel, or with the like goods, in the Canadian market".[95]

[156] However, it must be stressed that, if the application of different trade practices to the goods are considered as a condition of competition as suggested by my colleagues, then cross-cumulation is, by necessary implication, contemplated by and conceptually permissible under subsection 76.03(11) of *SIMA*. Otherwise, I wonder what would be the point to even consider this factor in the analysis.

[157] Put differently, assuming that there could be situations where goods that are dumped and subsidized would have a different price effect in the domestic market compared to goods that are only dumped, this would mean that cross-cumulation is *allowed* under the cumulation provisions, when such a different effect is *not* demonstrated by the evidence.[96] For example, in *Stainless Steel Wire*, the case cited by my colleagues on this issue, after alluding to the above hypothetical scenario as a potentially relevant factor militating *against* cross-cumulating the effect of dumped and subsidized goods from different countries, the Tribunal went on to find that this situation was not present in the circumstances of that case. It concluded that it was therefore appropriate to make an assessment of the cumulative effect of the dumping of the subject goods from Korea, Switzerland and the United States, *and* of the subsidizing of the subject goods from India.[97]

[158] In this case, while my colleagues also discussed in a footnote certain hypothetical scenarios under which the dumping, the subsidizing, or the dumping and subsidizing of the subject goods could result in differences in the conditions of competition between them, they did not refer to any evidence demonstrating that such differences are likely to exist. In fact, on my review of the record evidence, there is none. In other words, similar to the situation in *Stainless Steel Wire*, there is no evidence to support a finding that the Chinese subject goods, which are likely to be dumped and subsidized, are likely to have a competitive dynamic in the marketplace that is different from that of the other subject goods that are likely to be only dumped. As such, to the extent that it is relevant, this factor does not support de-cumulating the Chinese subject goods in this expiry review.

My colleagues' "contextual analysis"

[159] My colleagues stated that the most important feature of the context provided by the *ASCM* and the *ADA* is that these are wholly separate agreements and that they do not provide for any interchange of procedures and substantive provisions between them. As such, according to my colleagues, they separately require an injury analysis as mandated by each agreement. I disagree. In itself, the fact that there are two separate agreements does not create international obligations or

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94 *CSS* at para. 120.
95 *Galvanized Steel Wire* (20 August 2013), NQ-2013-001 (CITT) at para. 47.
96 Assuming that the evidence on relevant other factors traditionally examined by the Tribunal supports cumulation.
97 *Stainless Steel Wire* at paras. 53-54.

inform the Tribunal on the nature and extent of Canada's international obligations that could, if it was possible, provide guidance for the interpretation of subsection 76.03(11) of *SIMA*.

[160] What matters are the actual provisions of each agreement. In this regard, I find that the most important feature of the context provided by the *ASCM* and the *ADA* is that they do not include provisions governing cumulation in expiry reviews or that are relevant to the interpretation of subsection 76.03(11) of *SIMA*. In any event, under *SIMA*, cumulation is mandatory for assessing the effect of dumped goods from multiple countries. There is no legal basis to exclude dumped goods from a particular source from this assessment on grounds other than different conditions of competition for such goods. The fact that there are two separate international agreements does not change this unambiguous requirement.

[161] I also note that according to my colleagues' analysis, it is appropriate to cross-cumulate the effect of the dumped and subsidized Chinese subject goods. In my view, this conclusion is inconsistent with their statements on the requirement for a separate injury analysis based on the type of trade practice. If the Tribunal is required under the *ASCM* and the *ADA* to conduct a separate injury analysis as mandated by each agreement, then a separate analysis of the effect of the dumping and of the subsidizing of the Chinese subject goods would also be warranted.

[162] Be that as it may, my colleagues "contextual analysis" is focussed on the wrong issue, that is, what must be done, in their view, to achieve consistency with provisions of the *ASCM* and the *ADA*. Again, the Tribunal's task is to discern the authentic meaning of subsection 76.03(11) of *SIMA*, not to interpret provisions of international agreements, which are not self-executing in Canadian law, or to enforce their terms. The key issue is how these provisions are incorporated into Canadian law.

[163] My colleagues' analysis fails to account for the fact that *SIMA* does not explicitly adopt or incorporate the *ASCM* or the *ADA* wholesale, nor does it broadly instruct the Tribunal to construe and apply its provisions in a manner that complies with Canada's international obligations. In fact, where *SIMA* directs the Tribunal to be guided by Canada's obligations, it does so expressly.[98]

[164] It can therefore not be assumed that Parliament has adopted these agreements indiscriminately. As discussed above and in my separate opinion in *CSS*, in my view, the terms of subsections 42(3) and 76.03(11) of *SIMA* clearly do not incorporate the constraints on cumulation set out in the provisions of the *ASCM*, as interpreted by the Appellate Body in *US – Carbon Steel (India)*. The context in which cumulation is permitted under the WTO agreements is therefore not determinative of the circumstances under which it is permitted under the cumulation provisions of *SIMA* or of Parliament's intent.[99]

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98 See, for example, subsection 42(4), which provides that "[t]he Tribunal shall, in making a cumulative assessment under subsection (3), take into account the provisions of paragraph 12 of Article 27 of the Subsidies Agreement". Article 27 is not relevant in this case.

99 As for the fact that CBSA conducts two investigations and makes two determinations, it is relevant to the extent that the latter defines the scope of goods that are to be considered by the Tribunal for its determination under either subsection 42(3) or 76.03(11) of *SIMA*. In this case, the CBSA's determination that the subsidizing of subject goods from China is likely to continue or resume does not alter its conclusion that the dumping of these goods is also likely to continue or resume, which is the legal conclusion which triggers the application of subsection 76.03(11) to these goods. Other than for this purpose, the CBSA's process and its mandate under *SIMA* has no bearing on the Tribunal's duties under subsection 76.03(11).

[165] In their analysis, my colleagues also insist that the Tribunal's past practice with respect to cumulation is inconsistent with the provisions of international agreements. However, they are unable to identify which specific provisions are breached by this practice in the context of an expiry review. Most of their discussion on the requirements of the WTO agreements pertains to article 15.3 of the *ASCM* and article 3.3 of the *ADA*, two provisions that do not apply in expiry reviews and, therefore, do not impose obligations on investigating authorities in expiry reviews. In my respectful view, this undermines their analysis.

[166] To the extent that international obligations and WTO jurisprudence interpreting them are relevant contextual elements to ascertain the meaning of subsection 76.03(11),[100] they must be taken at face value. The Tribunal's role is not to read in WTO agreements obligations that have not been established. In other words, silence in the international agreements and the fact that the Appellate Body has not made any pronouncements on the issue of cumulation in the specific context of expiry reviews are significant elements and not neutral ones. It means that there is no international law impediment to making, in an expiry review, an assessment of the cumulative effect of goods which are likely to be both dumped and subsidized and of goods which are likely to be dumped only.

[167] Also, assuming for the sake of argument that my colleagues are correct and international obligations, as interpreted by WTO panels and the Appellate Body, should be given significant weight and provide guidance in the contextual interpretation of subsection 76.03(11) of *SIMA*, then the full international context should be taken into account. In this scenario, a review of WTO jurisprudence indicates not only that the report of the Appellate Body in *US – Carbon Steel (India)* and the panel report in *US – Pipe and Tube (Turkey)* do not prohibit cross-cumulation in sunset (i.e. expiry) reviews, but also that other reports confirm that investigating authorities are not required to apply in sunset reviews the WTO disciplines that apply to original investigations.

[168] Under the *ASCM*, for the *review* of a determination of injury that has already been established in accordance with article 15, article 21.3 does not require that injury again be determined in accordance with article 15, and consequently investigating authorities are not mandated to follow the provisions of article 15 when making a determination of likelihood of injury under article 21.3.[101]

[169] The parallel provisions under the *ADA* are articles 3 (e.g. 3.1-3.5) and 11.3. Under the *ADA*, the nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation and the disciplines applicable to original investigations cannot be automatically imported into review processes.[102] Moreover, the *ADA* distinguishes between "determination[s] of injury", addressed in article 3, and determinations of likelihood of "continuation or recurrence of injury", addressed in article 11.3. Therefore,

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100 This is my colleagues' position. As discussed above, given the unambiguous terms of subsections 42(3) and 76.03(11), my conclusion is that they must be similarly given effect regardless of WTO compliance considerations.

101 *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (14 July 2014), WTO Docs. WT/DS436/R, Report of the Panel at paras. 7.389-7.390.

102 *United States – Anti Dumping Measures on Oil Country Tubular Goods from Mexico* (2 November 2005), WTO Docs. WT/DS282/AB/R, Report of the Appellate Body at paras. 118-123; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (15 December 2003), WTO Docs WT/DS244/AB/R, Report of the Appellate Body at paras. 106-107.

investigating authorities are not mandated to follow the provisions of article 3 and of article VI of the GATT when making a determination of likelihood of injury.[103]

[170] Given the acknowledged differences in scope in the WTO legal provisions for original investigations and expiry reviews, even if I were to accept that subsection 76.03(11) does not unambiguously mandate the cumulation of all dumped goods imported from the three subject countries and that international obligations would, therefore, become relevant to its interpretation, I would have to conclude that the Tribunal's ability to cumulate in expiry reviews is not constrained by the WTO provisions that apply to original inquiries. WTO jurisprudence indicating that an expiry review is a distinct process with a different purpose than an original inquiry also suggests that, in this context, subsection 76.03(11) could be interpreted and applied in a different manner than subsection 42(3).

The object of the Act and the intention of Parliament

[171] My colleagues stated that the Tribunal has been presented with no persuasive evidence in this review supporting the view that Parliament intended to enact a rule on cumulation which was inconsistent with international obligations. However, at the time of the enactment of the cumulation provisions of *SIMA*, the government of Canada's official position was that Canada's international obligations included the right to cross-cumulate.

[172] In this regard, in the context of a review of its trade policies under the auspices of the WTO in 1998, Canada's response to a question from Japan concerning cross-cumulation under *SIMA* was as follows:

> The object and purpose of the AD and SCM Agreements is to provide a remedy against unfair trade practices causing injury to a domestic industry. To deny a remedy where the cumulative effect of dumping and subsidy practices is injury to a domestic industry would frustrate the purpose of the Agreements. Accordingly, it is Canada's view that silence on the issue of cumulation between agreements can be interpreted as permissive of cross-cumulation.
>
> Quite apart from the general principle of that which is not expressly prohibited is permitted, this view is supported by a number of practical considerations, e.g.: whether caused by dumping, subsidizing or both, there is a single price effect in the domestic market that is the cause of injury to the domestic industry. In most cases, it would be virtually impossible to allocate the total quantum of injury between dumping and subsidising with any degree of precision; and the prohibition of cross-cumulation would lend itself to circumvention involving the combined use of dumping and subsidies.[104]

[173] In view of this position expressed by Canada's executive branch at the time, it seems clear that Parliament did not intend to prohibit cross-cumulation when it amended *SIMA* to make cumulation mandatory in injury inquiries and expiry reviews in 1999. The more reasonable interpretation, taking into account Canada's understanding of its international obligations when these

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103 *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (29 November 2004), WTO Docs. WT/DS268/AB/R, Report of the Appellate Body at 278-280.

104 *Trade Policy Review Body Report* (15 and 17 December 1998), WTO Docs. WT/TPR/M/53, Minutes of Meeting at 67.

provisions were enacted, is that that the intent behind subsections 42(3) and 76.03(11) of *SIMA* was to make cumulation obligatory, including the practice of cross-cumulation.

[174] In short, Parliament could not have implemented into domestic law an international obligation that was not perceived to exist. For this reason, the external context surrounding the enactment of the cumulation provisions of *SIMA* does not support the view that Parliament's intention was to preclude cross-cumulation or that it meant to implement such a prohibitive international obligation into Canadian law. Unlike my colleagues, I consider that the totality of the textual, contextual elements and relevant legislative history, discussed above and in my separate opinion in *CSS*, suggest otherwise.

[175] Finally, under the modern rule of statutory interpretation, the object and purpose of the scheme of *SIMA* must be considered. The object and purpose of *SIMA* is to provide protection to Canadian industries adversely impacted by unfairly traded imports.[105] In my view, my colleagues' interpretation of subsection 76.03(11) of *SIMA* is not congruent with the object and purpose of the Act because it reduces the likelihood of an order continuing a finding in respect of the goods from certain subject countries by requiring separate or de-cumulated analyses. In effect, this renders the demonstration of multiple injury cases necessary.

[176] I consider that when certain goods are de-cumulated on the basis of differences in conditions of competition, this is the result that Parliament intended. However, when the Tribunal de-cumulates on the basis of other factors that are not expressly provided for in *SIMA*, it undermines its object and purpose.

[177] My colleagues' interpretation could also have the unintended consequence of encouraging domestic producers not to pursue claims of injurious subsidizing when they are adversely affected by the impact of dumped and subsidized goods from multiple countries. Indeed, in this case, had the subject goods imported from China not been subsidized, they would likely have been included in the cumulative assessment of the effect of the dumped goods with the goods from Turkey and Korea and the Tribunal would have conducted a single injury analysis. A complainant or domestic industry might therefore choose to exclude allegations of injurious subsidization to avoid having to separately demonstrate that injury was caused by the dumped and subsidized goods from a particular country. I do not believe that Parliament intended such a result when it enacted subsections 42(3) and 76.03(11) of *SIMA*.

[178] In the final analysis, my conclusion is that Parliament's intent was to direct the Tribunal to make a cumulative assessment, for the purpose of examining injury and ultimately justifying the imposition or maintenance of anti-dumping or countervailing duties, of the effect of goods from different countries that are dumped and subsidized and of the effect of goods that are only dumped or only subsidized, provided that this assessment is appropriate on the basis of the relevant conditions of competition.

Application to the facts of this case

[179] Overall, there is ample evidence to support a finding that the subject goods from China, Korea and Turkey compete against each other and with the like goods and that the conditions of

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105 *Gypsum Board* (19 January 2017), GC-2016-001 (CITT) at para. 37.

competition between these goods are similar.[106] Accordingly, it is appropriate to make a cumulative assessment of the effect of the dumped goods from the three subject countries.

[180] As there is no evidence on the record that would allow the Tribunal to differentiate between the effects that are likely to be caused by the dumping of the goods from Turkey, Korea and China from the effects that are likely to be caused by the subsidization of the goods from China, a single injury analysis is required in this expiry review. In other words, *SIMA* mandates a cumulative assessment of the effect of subject imports from China, that are both dumped and subsidized, with that of subject imports from Turkey and Korea, which are only dumped, in the circumstances of this case.

[181] Since I agree with my colleagues for the reasons provided in the injury analysis below that, even if the effect of goods from China is analyzed separately, the expiry of the order is likely to result in material injury to the domestic industry, I will exercise judicial economy and refrain from providing an alternative analysis of likelihood of injury in which the effect of the subject goods from all subject countries would be assessed cumulatively even if, in my view, such an analysis is warranted.

LIKELIHOOD OF INJURY ANALYSIS

[182] An expiry review is forward-looking.[107] It follows that evidence from the period during which an order or a finding was being enforced is relevant insofar as it bears upon the prospective analysis of whether the expiry of the order or finding is likely to result in injury.[108]

[183] There is no presumption of injury in an expiry review; findings must be based on positive evidence, in compliance with domestic law and consistent with the requirements of the WTO.[109] In the context of an expiry review, positive evidence can include evidence based on past facts that tend to support forward-looking conclusions.[110]

[184] In making its assessment of likelihood of injury, the Tribunal has consistently taken the view that the focus should be on circumstances that can reasonably be expected to exist in the near to medium term. In this case, the Tribunal finds it appropriate to focus its analysis on the next 12 to 18 months following the POR as it has done in previous cases concerning steel products.[111]

[185] Subsection 37.2(2) of the *Regulations* lists factors that the Tribunal may consider in addressing the likelihood of injury in cases where the CBSA has determined that there is a likelihood of continued or resumed dumping or subsidizing. The factors that the Tribunal considers relevant in this expiry review are discussed in detail below. The discussion of these factors will, where possible,

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106 Exhibit RR-2019-003-A-02 at paras. 41-52; Exhibit RR-2019-003-C-02 at paras. 20-30 and evidence therein referred to.

107 *Certain Dishwashers and Dryers* (procedural order dated 25 April 2005), RR-2004-005 (CITT) at para. 16.

108 *Copper Pipe Fittings* (17 February 2012), RR-2011-001 (CITT) at para. 56. In *Thermoelectric Containers* (9 December 2013), RR-2012-004 (CITT) [*Thermoelectric Containers*] at para. 14, the Tribunal stated that the analytical context pursuant to which an expiry review must be adjudged often includes the assessment of retrospective evidence supportive of prospective conclusions. See also *Aluminum Extrusions* at para. 21.

109 *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (16 August 2006), RR-2005-002 (CITT) at para. 59.

110 *Thermoelectric Containers* at para. 14; *Aluminum Extrusions* at para. 21.

111 *Structural Tubing* (16 October 2019), RR-2018-006 (CITT) [*Structural Tubing*] at paras. 37-38; *Circular Copper Tube* (25 September 2019), RR-2018-005 (CITT) at para. 35.

apply to subject goods from the three subject countries. However, as the Tribunal must ultimately make a separate assessment of the effect of the likely continued or resumed dumping of the subject goods from Turkey and Korea, and the effect of the likely continued or resumed dumping and subsidizing of the subject goods from China, it will, where appropriate, make relevant distinctions between the subject goods from Turkey and Korea, considered together, and those from China, and ensure not to attribute the effect of the subject goods from Turkey and Korea to the Chinese subject goods and vice versa.

Changes in market conditions

[186] In order to assess the likely volumes and prices of the subject goods and their impact on the domestic industry if the finding were rescinded, the Tribunal will first consider changes in international and domestic market conditions since its original inquiry.[112]

[187] Most importantly, early 2020 saw the global outbreak of the COVID-19 pandemic, which had and continues to have serious economic effects. The global community ground to a halt and has since been slowly attempting to return to pre-pandemic levels of activity. It is widely understood that the development and deployment of a safe and effective vaccine is key to economic recovery. If a vaccine is not developed and deployed in 2021 along the timelines projected by respected health authorities, the economic outlook may deteriorate further.

[188] The TSEA argued that the COVID-19 pandemic has caused a level of uncertainty and volatility such that the questionnaire replies and other data gathered and summarized in the Tribunal's Investigation Report, economic forecasts and other documents, including witness statements filed by the parties including the TSEA, cannot constitute positive evidence. The TSEA submitted that the Tribunal therefore cannot make a finding of likely injury *based on positive evidence*, as required by domestic laws and WTO agreements.

[189] The Tribunal does not accept the TSEA's arguments. In an expiry review, the Tribunal's role is to make reasonable and logical inferences of future activity based on positive evidence. The concept of positive evidence relates to the quality of the evidence that the investigating authority may rely upon in making a determination. Positive evidence must be of an affirmative, objective and verifiable character, and must be credible.[113] Despite the nature of the COVID-19 pandemic and the heightened level of uncertainty, the Tribunal does not find itself in a position where it cannot discharge its statutory mandate with respect to this review. The Tribunal is satisfied that the evidence on the record is positive, reliable and, in any case, the best available evidence, which enables the Tribunal to make informed conclusions on likelihood of injury.

International market conditions

[190] As referred to above, the global COVID-19 pandemic commenced in early 2020, causing severe economic effects worldwide. Global economic recovery is widely predicted to occur towards the end of 2021.

[191] In June 2020, the Organization for Economic Cooperation and Development (OECD) provided what it considered two equally likely scenarios in its Economic Outlook. It forecasted that,

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112 See paragraph 37.2(2)(j) of the *Regulations*.

113 *US – Hot-Rolled Steel (Japan)*, WTO Docs. WT/DS184/AB/R at para. 192; *Structural Tubing* at para. 148.

if COVID-19 cases peak and recovery is smooth (the "single-hit" scenario), global economic growth would contract by 6 percent in 2020 and nearly recover to 2019 levels by the end of 2021. In the event of a resurgence or second wave of COVID-19 (the "double-hit" scenario), the OECD forecasted that global economic growth would contract 7.6 percent in 2020 and remain well below 2019 levels by the end of 2021.[114] The OECD's outlook for each of the subject countries is as follows:[115]

> **China:** Under the single hit scenario, GDP [gross domestic product] is forecast to contract 2.6 percent in 2020 and grow 6.8 percent in 2021. Under the double hit scenario, GDP is forecast to contract 3.7 percent in 2020 and grow 4.5 percent in 2021.
>
> **South Korea:** Under the single hit scenario, GDP is forecast to contract 1.2 percent in 2020 and grow 3.1 percent in 2021. Under the double hit scenario, GDP is forecast to contract 2.5 percent in 2020 and grow 1.4 percent in 2021.
>
> **Turkey:** Under the single hit scenario, GDP is forecast to contract 4.8 percent in 2020 and grow 4.3 percent in 2021. Under the double hit scenario, GDP is forecast to contract 8.1 percent in 2020 and grow 2 percent in 2021.
>
> [Bolding in original]

[192] Similarly, in its April 2020 *World Economic Outlook*, the International Monetary Fund (IMF) projected that the global economy would contract by 3 percent in 2020, which the IMF noted would be worse than the economic aftermaths of the 2008 and 2009 financial crises.[116] If COVID-19 is contained in the second half of 2020, the IMF predicts growth of 5.8 percent in 2021. The IMF noted that there is "extreme uncertainty" surrounding this forecast and that the level of GDP at the end of 2021 in both advanced and emerging markets and developing economies is expected to remain below the pre-virus baseline published in January 2020.[117]

[193] The world also continues to face a global steel overcapacity crisis.[118] For the first time since 2014, global steel capacity increased in 2019 by 1.5 percent, to approximately 2.4 billion metric tonnes, most of which occurred in Asia. Though excess capacity decreased from 2018 to 2019 by 6 million metric tonnes, the OECD reported that there are projects underway to add 58.2 million metric tonnes of additional capacity by 2022.[119]

[194] According to the World Steel Association's June 2020 update, global steel demand is forecasted to contract by 6.4 percent in 2020 and recover by 3.8 percent in 2021. Specific to subject

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114 Exhibit RR-2019-003-A-03 at 65, Vol. 11.

115 Exhibit RR-2019-003-A-03 at 69-74, Vol. 11.

116 Exhibit RR-2019-003-A-01 at 159, Vol. 11.

117 Exhibit RR-2019-003-A-01 at 159, 164, Vol. 11.

118 The Tribunal has previously recognized global steel overcapacity and the potential threat it poses to domestic steel producers. The most recent occasions were the *Safeguard Inquiry into the Importation of Certain Steel Goods* (3 April 2019), GC-2018-001 (CITT) [*Steel Safeguard Inquiry*], *Hot-rolled Carbon Steel Plate* (January 9 2004) NQ-2003-002 (CITT) [*Plate V*], and *Hot-rolled Carbon Steel Plate* (February 2 2010) NQ-2009-003 (CITT) [*Plate VI*]. See *Plate VI* at para. 57; *Steel Safeguard Inquiry* at 12-13, 36-37; *Plate V* at para. 46. See also *Hot-rolled Carbon Steel Plate* (October 27 1997) NQ-97-001 (CITT) [*Plate III*] at para. 48. *Corrosion-resistant Steel Sheet Products supra* footnote 14 at paras. 111-112.

119 Exhibit RR-2019-003-A-01 at 185, Vol. 11.

countries, Korean steel demand is expected to be sluggish, and Chinese steel demand is projected to increase by 1 percent in 2020 with continued demand spurred in 2021 due to infrastructure projects.[120]

[195] Global capacity for rebar did not increase between 2017 and 2019, and is expected to remain steady in 2020, 2021 and 2022.[121] CRU reported that global excess capacity for rebar declined year over year from 2017 to 2019, and is anticipated to increase in 2020 before declining in 2021, to below 2019 levels, and declining further in 2022.[122] Global production and demand for rebar both grew from 2017 to 2019, and are, unsurprisingly, both forecasted to decrease in 2020. However, CRU forecasted that global production and demand for rebar will recover to past 2019 levels in 2021 and increase further in 2022.[123]

[196] Since the finding under review, there have also been numerous trade restrictions imposed on rebar imports from the subject countries by other jurisdictions.

[197] In March 2018, pursuant to section 232 of the U.S. *Trade Expansion Act of 1962*, the United States imposed a 25 percent duty on imports of certain steel products, including rebar, from most countries including the subject countries (referred to here as U.S. section 232 measures). Korea has since negotiated a quarterly quota of tariff-free imports, but the 25 percent duties continue to apply to goods from China and Turkey.

[198] The European Union imposed provisional safeguards on steel products including rebar, on July 18, 2018, and definitive measures on January 31, 2019, in the form of a tariff-rate quota aimed at preserving historical levels of imports, while placing a 25 percent tariff above those levels.

[199] In addition to the above, the investigation report shows 14 other anti-dumping or countervailing measures against the subject countries for various types of steel rebar, bars and rods.[124] Altogether, these measures, most of which did not exist at the time of the finding, limit the access of steel exporters to key markets and increase the likelihood that steel producers, including those of the subject goods, will seek any markets without such restrictions.

Domestic market conditions

[200] The apparent Canadian market for rebar grew over the POR. Total sales of rebar increased by 22 percent in 2018, 6 percent 2019, and 17 percent in the first quarter of 2020, as compared to the first quarter of 2019.[125]

[201] In 2017, at the start of the POR, the average price of domestic rebar was comparable to average prices during the period of inquiry (POI). In 2018, average net delivered selling value (NDSV) of domestic rebar increased 23 percent and a further 4 percent in 2019, but declined 15 percent in the first quarter of 2020 as compared to the same quarter in 2019. The average NDSV

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120 Exhibit RR-2019-003-A-01 at 176-178, 299-300, Vol 11.

121 Exhibit RR-2019-003-A-02 (protected) at 209, Vol. 12.

122 Exhibit RR-2019-003-A-01 at para. 115, Vol. 11. See also Exhibit RR-2019-003-A-02 (protected) at 209, 213, Vol. 12.

123 Exhibit RR-2019-003-A-01 at para. 116, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at 212-213 (see summary of data at para. 124), Vol. 12.

124 Exhibit RR-2019-003-05, Table 56, Vol. 1.1.

125 Exhibit RR-2019-003-05, Table 26, Vol. 1.1.

of both imports and the total market followed a similar trend, increasing in 2018 and 2019, while declining in the first quarter of 2020 compared to 2019.[126]

[202] Since the inquiry, there has been a major shift in the sources of imports. In 2017 and 2018, the majority of importers' non-subject imports were sourced from the United States, but as U.S. imports dropped following Canadian retaliatory tariffs, other non-subject countries became the major sources in 2019 and the 2020 interim period.[127]

[203] Looking forward, the Canadian market is expected to recover and see modest growth. Like many other countries, Canada put into place strict containment measures against COVID-19 in March 2020. Though economic activity has slowly increased as measures have eased, the road to pre-pandemic levels remains uncertain. Under the "single-hit" scenario, the OECD expects Canada's GDP to contract 8 percent in 2020, and grow 3.9 percent in 2021.[128] Under the "double-hit" scenario, the OECD forecasts a 9.4 percent contraction of the GDP in 2020, and 1.5 percent growth in 2021.[129]

[204] Following the COVID-19 containment measures, demand for rebar is expected to begin recovering in the third quarter of 2020, but on an annual basis is forecasted to decrease in 2020. Demand is expected to remain soft in 2021 and 2022.[130]

[205] Overall, respondents to the Tribunal questionnaires indicated that the domestic market would continue to be challenging for the foreseeable future due to the effects of the COVID-19 pandemic.[131]

Likely import volume of the subject goods if the finding is rescinded

[206] Paragraph 37.2(2)(a) of the *Regulations* directs the Tribunal to consider the likely volume of the dumped or subsidized goods if the order or finding is allowed to expire and, in particular, whether there is likely to be a significant increase in the volume of imports of the dumped or subsidized goods, either in absolute terms or relative to the production or consumption of like goods.

[207] The Tribunal's assessment of the likely volumes of dumped or subsidized imports encompasses the likely performance of the foreign industry, the potential for the foreign producers to produce goods in facilities that are currently used to produce other goods, evidence of the imposition of anti-dumping and/or countervailing measures in other jurisdictions, and whether measures adopted by other jurisdictions are likely to cause a diversion of the subject goods to Canada.[132]

Likely volume of dumped subject goods from Turkey and Korea

[208] As recently as early in the POR (i.e. in 2017 and 2018), Turkish rebar held substantial market share in the Canadian market, but its share dropped by 25 percentage points in 2019, when the CBSA began using U.S. Dollars to establish normal values, rather than the Turkish Lira. As a result, the presence of Turkish rebar in the Canadian market was minimal in 2019 and in the first quarter of 2020.[133] Korean rebar was largely absent from the Canadian market during the POR.

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126 Exhibit RR-2019-003-05, Tables 40, 41, Vol. 1.1.
127 Exhibit RR-2019-003-05, Tables 21-23, Vol. 1.1.
128 Exhibit RR-2019-003-A-03 at 68, Vol. 11.
129 Exhibit RR-2019-003-A-03 at 67, Vol. 11.
130 Exhibit RR-2019-003-A-01 at para. 324, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at 212, Vol. 12.
131 See Collective Public Exhibit RR-2019-003-013 and Collective Public Exhibit RR-2019-003-016.
132 Paragraphs 37.2(2)(a), (d), (f), (h) and (i) of the *Regulations*.
133 Exhibit RR-2019-003-05, Table 28, Vol. 1.1; Exhibit RR-2019-003-06 (protected), Table 27, Vol. 2.1.

[209] In its original inquiry, the Tribunal found that Turkey and Korea produced massive volumes of rebar, and that each country's production level far exceeded the Canadian apparent market.[134] The evidence in this review indicates that this remained the case during the POR.[135]

[210] The individual excess production capacities for rebar of Turkey and Korea each far exceed the entire Canadian market when compared to any period of the POR.[136] Turkey's excess capacity increased from 2.97 million metric tonnes in 2017 to 7.68 million metric tonnes in 2019.[137] Excess capacity is forecasted to decline starting in 2020 to reach 3.59 million metric tonnes in 2022, which still exceeds the Canadian market several times over when compared to any period of the POR. Similarly, Korea's excess capacity for rebar is expected to increase to 4.3 million metric tonnes in 2020, and decline in 2021 and further in 2022 to 3.3 million metric tonnes.[138]

[211] Turkey's production capacity remained flat over the POR.[139] According to CRU forecasts, production capacity is not expected to increase, but Turkish producers have reported that work is underway to increase capacity.[140] Turkish rebar production significantly exceeded domestic demand over the POR and will continue to do so until 2022.[141]

[212] Korean demand for steel declined from 2017 to 2019, in part due to a weak construction sector and deteriorating export markets.[142] Demand for rebar has followed this trend and is expected to decline further in 2020.[143] CRU projects rebar demand to improve in 2021 and in 2022, though it is not expected to recover to 2017 levels.[144]

[213] The evidence also demonstrates that producers in Turkey are highly export-oriented.[145] Subject goods from Turkey accounted for a significant share of total imports in the Canadian market in 2017 and 2018 but, as noted above, dropped steeply in 2019 after the CBSA's currency adjustment. The TSEA argued that Turkish producers have pivoted away from the North American market after the imposition of U.S. section 232 measures and are not likely to return in injurious volumes. However, the evidence on the record does not support this claim. In March 2020, the United States effectively removed anti-dumping duties on imports from certain Turkish producers. The result was an increase in Turkish imports into the United States, indicating that Turkish producers are able and willing to rapidly increase exports to North America.[146]

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134 *Rebar* at para. 223.

135 Exhibit RR-2019-003-A-02 (protected) at 209, 213, Vol. 12. See also paras. 173-174 and 208-210.

136 Exhibit RR-2019-003-A-07 at para. 16, Vol. 11; Exhibit RR-2019-003-06 (protected), Table 25, Vol. 2.1; Exhibit RR-2019-003-A-02 (protected) at 209, 213, Vol. 12. See also paras. 173-174 and 208-210.

137 Exhibit RR-2019-003-A-02 (protected) at paras. 208-210, 213, Vol. 12; Exhibit RR-2019-003-A-01 at paras. 208-210, Vol. 11.

138 Exhibit RR-2019-003-A-02 (protected) at paras. 173-174, 209, 213, Vol. 12; Exhibit RR-2019-003-A-01 at paras. 173-174, Vol. 11.

139 Exhibit RR-2019-003-03A, Vol. 1, at para. 117; Exhibit RR-2019-003-A-02 (protected) at 209, Vol. 12.

140 Exhibit RR-2019-003-A-03 at 153, Vol. 11; Exhibit RR-2019-003-A-04 (protected) at 162, Vol. 12; Exhibit RR-2019-003-A-02 (protected) at 209, Vol. 12.

141 Exhibit RR-2019-003-A-02 (protected) at 212-213, Vol. 12.

142 Exhibit RR-2019-003-C-07 at 83, Vol. 11; Exhibit RR-2019-003-A-01 at 248, Vol. 11.

143 Exhibit RR-2019-003-A-02 (protected) at 212, Vol. 12.

144 *Ibid.*

145 Exhibit RR-2019-003-A-01 at 563-576, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at 214, 687-689, Vol. 12; Exhibit RR-2019-003-23.01, Vol. 7.1 at 17; Exhibit RR-2019-003-25.02, Vol. 7.1 at 13.

146 See Exhibit RR-2019-003-A-03, Vol. 11, at 128-130, 154-156; Exhibit RR-2019-003-A-04 (protected), Vol. 12, at 166-167; Exhibit RR-2019-003-A-02 (protected) at 222, Vol. 12.

[214] Similarly, Korea's rebar exports increased steadily from 2017 to 2019, rising by 28 percent in that time period.[147] In addition, Korea's long steel products, a category of goods that generally includes rebar, remained active in the Canadian market during the POR, increasing in volume from 2017 to 2019.[148]

[215] While circumstances vary between Turkey and Korea, the evidence shows that there will be strong incentives for producers in both subject countries to export more volumes if the finding is rescinded. They each have very significant excess capacity and are likely to face challenging conditions in their home and export markets over the next 12 to 18 months.

[216] Turkey and Korea are also subject to trade measures against rebar in other markets. This is likely to impede the export of subject goods into those markets and enhance the likelihood that producers of the subject goods seek available opportunities elsewhere, such as Canada.

[217] The North American market, including Canada, generally has higher prices relative to other markets. [149] There is no evidence to suggest that this will change in the near term. Combined with the U.S. section 232 measures in place, which constrain subject countries' access to the U.S. market, Canada is likely to be an attractive market for producers of the subject goods to access North American pricing.

[218] As well, the continued, albeit in some cases small, presence of subject imports from Korea and Turkey throughout the POR, despite the imposition of anti-dumping duties, is indicative of continued interest from foreign producers from these countries, in the Canadian market and reflects that distribution channels of subject goods remain in Canada. The small volumes also indicate that despite these distribution channels being in place, the subject goods could not compete in the Canadian market at normal values, or in the case of Turkey, once normal values were established in U.S. Dollars to offset the impact of the devaluation of the Turkish Lira.

[219] Based on the foregoing, the Tribunal finds that a significant increase in the volume of subject goods from Korea and Turkey is likely, should the finding be rescinded.

147 Exhibit RR-2019-003-A-04 (protected) at 157, Vol. 12.
148 Exhibit RR-2019-003-A-01 at 426, Vol. 11.
149 Exhibit RR-2019-003-A-02 (protected) at 215, Vol. 12.

Likely volumes of dumped and subsidized subject goods from China

[220] China is the world's largest steel producer. In recent years, Chinese economic growth has slowed, in part due to the impact of escalating trade restrictions.[150] Growth is expected to slow even further as increasing trade restrictions impact Chinese manufacturing output and investment.[151] Following COVID-19 lockdown measures in early 2020, China's economy contracted sharply by 6.8 percent in the first quarter of 2020.[152] Chinese steel demand is expected to grow by 1 percent in 2020, and remain flat in 2021, following growth of 8.5 percent in 2019.[153]

[221] CRU reported that rebar production rebounded as COVID-19 shutdowns eased.[154] Production is expected to further increase, albeit modestly, in 2021 and 2022, while demand is forecasted to remain steady.[155]

[222] Even with increasing production, China's expected excess rebar capacity for 2020, 2021 and 2022, dwarfs the entire apparent Canadian market for rebar.[156]

[223] Although export volumes of rebar decreased from 2017 to 2019, China still exported over 4.6 million metric tonnes of rebar in 2019, and over 1.8 million metric tonnes in the period of January to May 2020.[157] Looking forward, CRU forecasts net exports of Chinese rebar to increase in 2021 and 2022.[158]

[224] During the POR, Chinese rebar was present in the Canadian market, albeit in minimal amounts. The presence of the subject goods points to ongoing interest in the Canadian market from Chinese producers and indicates there are established distribution channels in Canada. As with the Korean and Turkish subject imports, the Tribunal finds that the small volumes of imports from China over the POR indicate that Chinese products cannot compete at fairly traded prices, and these volumes are unlikely to be representative of the volume of subject goods from China if the finding is rescinded.

[225] Altogether, the evidence shows that Chinese producers of the subject goods will be motivated to export more volumes. As a relatively higher-priced market, Canada is an attractive destination for exports, particularly so as the U.S. section 232 measures restrict access of Chinese subject goods to the U.S. market.[159] China is also subject to various trade measures in other markets, which will restrict access to those markets and push producers of the subject goods to seek any available opportunities elsewhere.

[226] For these reasons, the Tribunal finds that there is likely to be a significant increase in the volume of subject goods from China, should the finding be rescinded.

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150 Exhibit RR-2019-003-03A at para. 96, Vol. 1.
151 *Ibid.*
152 Exhibit RR-2019-003-A-01 at 177, Vol. 11.
153 Exhibit RR-2019-003-A-01 at 177, 245, Vol. 11.
154 Exhibit RR-2019-003-A-02 (protected) at 344, 349, 350, Vol. 12.
155 Exhibit RR-2019-003-A-02 (protected) at 212-213, Vol. 12.
156 Exhibit RR-2019-003-03A, Vol. 1 at para. 95; Exhibit RR-2019-003-A-02 (protected) at 209, 212, 213, Vol. 12; Exhibit RR-2019-06 (protected), Vol. 2.1, Table 25.
157 Exhibit RR-2019-003-A-03 at paras. 46, 50, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at 209, 212, 213, Vol. 12; Exhibit RR-2019-003-A-04 (protected) at 138, Vol. 12.
158 Exhibit RR-2019-003-A-02 (protected) at 214, Vol. 12.
159 Exhibit RR-2019-003-A-02 (protected) at 215, Vol. 12.

Likely price effects of the subject goods if the finding is rescinded

[227] The Tribunal must consider whether, if the finding is rescinded, the dumping or subsidizing of goods is likely to significantly undercut the prices of like goods, depress those prices, or suppress them by preventing increases in those prices that would likely have otherwise occurred.[160] In this regard, the Tribunal distinguishes the price effects of the dumped or subsidized goods from any price effects that would likely result from other factors affecting prices.

Likely price effects of dumped subject goods from Turkey and Korea

[228] As noted by the Tribunal in the original inquiry, the subject goods and domestically produced rebar are fully interchangeable commodity products that compete in the Canadian market on the basis of price.[161] In other words, any future shipments of rebar, including any from the subject countries, would have to compete with the low-price leaders to secure sales in the Canadian market.

[229] Subject goods from Turkey and Korea were present in varying volumes in the Canadian market during the POR. However, the Tribunal does not consider the selling prices of these subject goods, constrained by the duties or normal values in place, to be a good indicator of what prices would likely be in the absence of the finding. In assessing the likely prices of the subject goods if the finding is rescinded, it is more useful to consider the selling prices of imports from non-subject countries.

[230] Although both domestic production and non-subject imports saw upward price trends from 2017 to 2019, domestic industry prices were undercut by import prices in all periods of the POR. In 2017 and 2018, the price leaders were the subject countries in *Rebar II*,[162] i.e. Belarus, Chinese Taipei, Hong Kong, Japan, Portugal and Spain (the *Rebar II* countries), despite being subject to preliminary duties starting in January 2017. In 2019, the lowest price was the average of Turkish and Korean selling prices, except in the interim 2019 period, during which the *Rebar II* countries were again the low-price leaders. Finally, in the first quarter of 2020, the low-price leaders were other non-subject countries, including, but not limited to, Algeria, Italy, Malaysia and Vietnam.

[231] This data is supported by account-specific evidence submitted by ArcelorMittal and AltaSteel showing 15 instances of undercutting by non-subject imports in 2019 and 2020.[163]

[232] Looking forward to the likely prices of subject goods, ArcelorMittal and AltaSteel submitted evidence to demonstrate the potential for undercutting on a landed price basis (ArcelorMittal and AltaSteel's "landed price analysis").[164] Relying on Turkish rebar export pricing from Metal Bulletin and the declared value of Korean rebar exports to the United States, this analysis compared the likely landed price of subject imports in June 2020 against the landed price of ArcelorMittal's product, differentiating between Eastern and Western Canada. According to the data, the prices of imports from both subject countries would undercut ArcelorMittal's prices in both regions.

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160 Paragraph 37.2(2)(b) of the *Regulations*.

161 *Rebar* at para. 47.

162 *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT) [*Rebar II*].

163 Exhibit RR-2019-003-A-01 at para. 303, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at para. 303, Vol. 12.

164 Exhibit RR-2019-003-A-03 at paras. 82-83, Vol. 11; Exhibit RR-2019-003-A-04 (protected) at paras. 82-83, Vol. 12.

[233] Furthermore, the Tribunal finds that the undercutting of domestic prices by non-subject countries, including the *Rebar II* countries, is likely to continue. Given that rebar is a commodity product that competes on a lowest-price basis, any future imports of Turkish or Korean subject goods would need to compete at prices at least comparable with these other sources, if not lower, to gain market share in the Canadian market. Mr. Philippe Boulanger, Vice President and Chief Marketing Officer at ArcelorMittal, stated that he believes that Canadian rebar market pricing would drop by at least $60/MT if the finding were rescinded. According to Mr. Boulanger, this is a conservative estimate based on the amount of undercutting by the new offshore sources which ArcelorMittal is currently encountering and the price of Turkish rebar landed in Canada.[165]

[234] The Tribunal also observed that importers were nimble in finding new sources of imports when U.S. imports became subject to Canadian retaliatory duties and Turkish imports were no longer available at low unit values expressed in Turkish Lira. The Tribunal concludes that importers are likely to take advantage of newly available goods from the current subject countries, unconstrained by duties or normal values, if the finding is rescinded, and that imports from those countries would compete on price to obtain sales.

[235] This is further supported by the evidence indicating that the domestic market is likely to be in a state of heightened price sensitivity. Gerdau submitted witness statements which stated that the company expects end users to look to reduce their costs in their efforts to recover from the effects of the COVID-19 pandemic, in part by increasingly seeking low-priced rebar.[166]

[236] The above evidence also suggests that if the finding is rescinded, subject imports are likely to cause price depression. As subject goods compete for sales and market share, prices are bound to be dragged down. The domestic industry argued, and the Tribunal agrees, that it will be forced to lower its prices or risk losing sales. Similarly, Harris Rebar, an importer, also expressed that undercutting by imports will lower the market price.[167]

[237] For these reasons, the Tribunal finds that prices of subject goods from Turkey and Korea will likely undercut and depress the prices of domestic like goods if the finding is rescinded.

Likely price effects of dumped and subsidized subject goods from China

[238] Subject goods from China were present in minimal volumes during the POR, but the selling prices for these goods, with anti-dumping and countervailing measures in place, are not a good indicator of their likely prices should the finding be rescinded. Instead, the Tribunal considered the selling prices of imports from non-subject countries. Given the commodity nature of rebar, as described above, subject goods from China would need to compete with the low-price leaders to secure sales and gain market share.

[239] Based on the data relied on above, non-subject imports from the *Rebar II* countries undercut domestic prices in every period of the POR, except interim 2020, where the price leaders were other

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165 Exhibit RR-2019-003-A-07 at para. 77, Vol. 11; Exhibit RR-2019-003-A-08 (protected) at 85, Vol. 12. See also Exhibit RR-2019-003-A-01 at para 354, Vol. 11; Exhibit RR-2019-003-A-02 (protected) at para. 354, Vol. 12.

166 Exhibit RR-2019-003-13.05 at 13, 313, Vol. 3.

167 Exhibit RR-2019-003-16.18 at 6, 8, Vol. 5.

non-subject countries. Evidence submitted by ArcelorMittal, comparing its net sales unit values with export prices in China, also showed that price undercutting increased between 2017 and 2019.[168]

[240] The landed price analysis submitted by ArcelorMittal and AltaSteel also demonstrated the potential for undercutting by Chinese subject goods. Using June 2020 pricing, the analysis showed that the prices of imports from China would undercut ArcelorMittal's prices in both Eastern and Western Canada.

[241] For the reasons stated above, undercutting by non-subject countries will continue and will occur while end users look to reduce costs in their efforts to recover from the effects of the COVID-19 pandemic. Domestic producers therefore expect to lower prices or lose sales, and importers have demonstrated that they will take advantage of lower priced imports.

[242] Based on the foregoing, the Tribunal finds that prices of subject goods from China are likely to undercut and depress the prices of domestic like goods if the finding is rescinded.

Likely impact on the domestic industry if the finding is rescinded

[243] The Tribunal will assess the likely impact of the above volumes and prices on the domestic industry if the finding is rescinded,[169] taking into consideration the recent performance of the domestic industry. In this analysis, the Tribunal distinguishes the likely impact of the dumped or subsidized goods from the likely impact of any other factors affecting or likely to affect the domestic industry.[170]

[244] The issue that the Tribunal must address is whether the domestic industry is likely to be able to continue to perform within an acceptable range or maintain relatively satisfactory financial results if the finding is rescinded. For the reasons discussed below, the Tribunal finds that, if the finding is rescinded, the domestic industry would be materially injured by the resumed or continued dumping of the subject goods from Turkey and Korea or by the resumed or continued dumping and subsidizing of the subject goods from China.

[245] The parties supporting the continuation of the finding submitted that the domestic industry is struggling to compete with low-priced imports from non-subject countries. These parties also submitted that they are particularly vulnerable in the current and near term economic climate, as customers seek to reduce costs to aid their recovery from the effect of COVID-19 measures. The USW emphasized that injury to domestic producers will negatively affect jobs, pensions and the union's bargaining position.

[246] The TSEA, which is opposed to the continuation of the finding, submitted that the domestic industry will not be injured by resumed imports of the subject goods. The TSEA submitted that imports of subject goods from Turkey would not resume in injurious volumes, as Canada is not an important market for Turkish producers, and that they would not be sold at injurious prices, as Turkey does not have a steel production imperative.

[247] As background, during the POR, from 2017 to 2019, the domestic industry experienced improved performance. Sales from domestic production increased by 27 percent in 2018, and by a

168 Exhibit RR-2019-003-A-04 (protected) at para. 80, Vol. 12.
169 Paragraphs 37.2(2)(e) and (g) of the *Regulations*.
170 See paragraph 37.2(2)(k) of the *Regulations.*

further 24 percent in 2019, while the total market grew by 22 percent and by 6 percent respectively.[171] The average NDSV of domestic rebar increased from $721/tonne in 2017 to $917/tonne in 2019, as did the average NDSV of total imports, which increased from $769/tonne in 2017 to $915/tonne in 2019.[172] Similarly, the domestic industry's market share increased in 2018 and 2019, while market share for total imports declined.[173] In addition, the domestic industry's financial performance, net income in particular, recovered significantly in 2018 and continued improving in 2019.[174]

[248] In contrast, the first quarter of 2020, when compared to the same quarter in 2019, saw mixed results. Sales of domestic rebar declined by 5 percent while the total market grew by 17 percent due to an increase in non-subject imports.[175] Average NDSV of domestic rebar decreased by 15 percent to $816/tonne, which was in line with the downward price trend for the entire market during this period.[176] The domestic industry also lost considerable market share to imports and saw weaker financial performance compared to the first quarter of 2019.[177]

[249] Even with the finding in place and the increase in the average NDSV of domestic rebar from 2017 to 2019, the domestic industry is facing price pressures from subject and non-subject countries. Indeed, when comparing the average NDSV of domestic rebar and of total imports, the Tribunal found price undercutting in both 2018 and 2019.[178] Among the subject countries, price undercutting was primarily attributable to Turkey, given that the other subject countries had minimal activity in the Canadian market during the POR. The domestic industry also faced price pressure from non-subject countries during the POR, particularly from the *Rebar II* countries, which undercut domestic NDSV in greater amounts and more frequently than other non-subject countries.[179]

[250] Despite the pricing pressure from non-subject imports throughout the POR, the domestic industry has performed relatively well. While demand is expected to remain soft for some time during and following the COVID-19 pandemic, the record evidence indicates that the dumping or subsidizing of the subject goods are likely to injure, in and of themselves, the domestic industry's performance in the next 12 to 18 months.

[251] In fact, the evidence shows that if the finding is rescinded, subject imports from Korea and Turkey will likely be imported in significantly increased volumes, at prices which are likely to undercut and depress domestic prices, as separately analyzed above regarding the volumes and prices of Turkish and Korean goods. The Tribunal finds in addition that the domestic industry is likely to suffer lost sales, lower sales volumes and lower revenues as a result. All of these negative impacts would be independent of the effects of the Chinese goods. These adverse effects are likely to be of a magnitude sufficient to amount to material injury.

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171 Exhibit RR-2019-003-05, Vol. 1.1, Tables 26, 28.
172 Exhibit RR-2019-003-05, Vol. 1.1, Table 40.
173 Exhibit RR-2019-003-05, Vol. 1.1, Table 28.
174 Exhibit RR-2019-003-05, Vol. 1.1, Table 46.
175 Exhibit RR-2019-003-05, Vol. 1.1, Tables 25, 26, 28; Exhibit RR-2019-003-06 (protected), Vol. 2.1, Tables 25, 27.
176 Exhibit RR-2019-003-05, Vol. 1.1, Tables 40-41.
177 Exhibit RR-2019-003-05, Vol. 1.1, Tables 28, 46.
178 Exhibit RR-2019-003-05, Vol. 1.1, Table 40.
179 Exhibit RR-2019-003-05, Vol. 1.1, Tables 40-41; Exhibit RR-2019-003-06 (protected), Vol. 2.1, Table 40.

[252] The evidence also shows that the goods from China would also likely be imported in significantly increased volumes and would undercut and depress domestic prices (as separately analyzed above regarding China), which would cause similar significant negative effects, independently of the effects of the Korean and Turkish goods.

[253] The domestic industry's financial performance will likely deteriorate as a result of the effects of either group of subject goods and this will have an adverse impact on capital investment, employment and wage levels. In this regard, the Tribunal recognizes the impact of the COVID-19 pandemic, specifically that the Canadian market is likely to experience heightened price sensitivity in the near term as customers recover from the economic effects of COVID-19 measures. However, the likely adverse impact of either the Korean and Turkish goods or of the Chinese goods on the financial performance of the domestic industry cannot be attributed to the COVID-19 pandemic and its repercussions.

[254] According to ArcelorMittal, a $60/MT price decrease resulted in net losses in 2019 and the first quarter of 2020 for the domestic industry.[180] The Tribunal has conducted its own impact analysis of a $60/MT price decrease, which confirmed the negative impact of the above scenario for the entire domestic industry. The Tribunal also notes the statements by witnesses for the USW, who submitted that the viability of domestic producers has a direct effect on the livelihood of current and retired steel workers. In addition to potential job losses, witnesses stated that unfair competition from dumped and subsidized goods severely weakened the union's negotiating position in the past, particularly with respect to pension benefits, and will do so again if the finding is rescinded.

[255] With respect to low-priced non-subject imports, the Tribunal notes that the subject countries are likely to have strong incentives to seek additional sales and, in order to regain a greater foothold in the Canadian market, will have to compete for sales and market share not only with the domestic industry but with the low-price leaders (i.e. non-subject countries) on the basis of price. In doing so, the subject goods from Korea and Turkey, and those from China, each in and of themselves, are likely to cause significant price undercutting, depression and/or lost sales. These effects are properly attributable to the subject goods and are likely to lead to injury over and above any effects from the pricing pressures that may otherwise be felt by the domestic industry from non-subject sources with the finding in place.

[256] Accordingly, for the above reasons, the Tribunal finds that the resumption of dumping of the subject goods from Korea and Turkey will likely result, in and of itself, in material injury to the domestic industry, should the finding be rescinded.

[257] Similarly, the Tribunal finds that the resumption of dumping and subsidizing of the subject goods from China will likely result, in and of itself, in material injury to the domestic industry, should the finding be rescinded.

CONCLUSION

[258] On the basis of the foregoing analysis, and pursuant to paragraph 76.03(12)(b) of *SIMA*, the Tribunal hereby continues its finding in respect of the dumping of hot-rolled deformed steel concrete reinforcing bar in straight lengths or coils, commonly identified as rebar, in various diameters up to and including 56.4 millimeters, in various finishes, excluding plain round bar and fabricated rebar

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180 Exhibit RR-2019-003-A-01 at paras. 354-355, Vol. 11.

products, originating in or exported from Korea and Turkey and in respect of the dumping and subsidizing of the aforementioned goods from China.

Peter Burn

Peter Burn
Presiding Member

Cheryl Beckett

Cheryl Beckett
Member

Georges Bujold

Georges Bujold
Member