Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2020-003

Wheat Gluten

Finding issued
Thursday, April 22, 2021

Reasons issued
Friday, May 7, 2021

Canada

TABLE OF CONTENTS

FINDING i

STATEMENT OF REASONS 1
- INTRODUCTION 1
- BACKGROUND 1
- RESULTS OF THE CBSA'S INVESTIGATION 2
- PRODUCT 2
  - Product definition 2
  - Product information 3
- PRELIMINARY MATTER 4
  - Arguments on confidential information in the Investigation Report 4
  - Arguments on the significance of production-related impact indicators in the injury analysis 6
- LEGAL FRAMEWORK 7
- LIKE GOODS AND CLASSES OF GOODS 8
- DOMESTIC INDUSTRY 9
- CUMULATION 10
  - Negligibility and insignificance 11
  - Conditions of competition 11
- INJURY ANALYSIS 12
  - Context for the injury analysis 13
  - Import volume of dumped goods 14
  - Price effect of dumped goods 15
  - Resulting impact on the domestic industry 19
  - Other factors 23
  - Materiality 23
- CONCLUSION 24

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

WHEAT GLUTEN

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act* (*SIMA*), has conducted an inquiry to determine whether the dumping of wheat gluten, whether or not blended with wheat flour, salt or any other substance, with a minimum wheat protein content of 40% by weight on a dry basis calculated using a Jones Factor of 5.7, originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania, but excluding (i) devitalized wheat gluten; (ii) hydrolyzed wheat gluten; (iii) wheat protein isolates; and (iv) organic wheat gluten that is certified organic in accordance with and otherwise meets the requirements of the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and regulations made thereunder, and the *Safe Food for Canadians Act*, S.C. 2012, c.24, and regulations made thereunder including the *Safe Food for Canadians Regulations*, S.O.R./2018-108, all of which as may be amended or replaced from time to time (the subject goods), has caused injury or retardation or is threatening to cause injury.

For greater certainty, the subject goods include but are not limited to vital wheat gluten as defined by the World Health Organization's Codex Standard 163-1987, Rev. 1-2001 ("Standard for Wheat Protein Products Including Wheat Gluten").

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated March 23, 2021, that the subject goods from Australia, Austria, Belgium, France, Germany and Lithuania have been dumped, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of *SIMA*, that the dumping of the subject goods originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania has caused injury to the domestic industry.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

Cheryl Beckett
Cheryl Beckett
Member

Serge Fréchette
Serge Fréchette
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Via videoconference
Dates of Hearing:	March 24 and 25, 2021
Tribunal Panel:	Randolph W. Heggart, Presiding Member Cheryl Beckett, Member Serge Fréchette, Member
Support Staff:	Kalyn Eadie, Lead Counsel Anja Grabundzija, Senior Counsel Martin Goyette, Counsel Isaac Turner, Student-at-Law Shawn Jeffrey, Lead Analyst Chelsea Lappin, Analyst Joseph Long, Analyst Patrick Stidwill, Data Analyst

PARTICIPANTS:

Domestic Producers	**Counsel/Representatives**
ADM Agri-Industries Co.	Gerry Stobo Christopher J. Kent Christopher J. Cochlin Andrew Lanouette Marc MacLaren-Caux Michael Milne Susana May Yon Lee Cynthia Wallace Andrew Paterson E. Melisa Celebican Alexander Hobbs Jordan Lebold
Permolex Ltd.	Paul Conlin Benjamin P. Bedard M. Drew Tyler Linden Dales Anne-Marie Oatway Shannon McSheffrey Lydia Blois Greg Landry Meagan Brae Vestby Manon Carpentier

Importers/Exporters/Others	**Counsel/Representatives**
Tereos Starch & Sweeteners Belgium and Tereos Starch & Sweeteners Europe (collectively The Tereos Group)	Neil Campbell Jonathan O’Hara Lisa Page Jeremiah Kopp

Embassy of the Republic of Lithuania to Canada	Darius Skusevičius Inga Miškinytė
Delegation of the European Union to Canada	Maud Labat

WITNESS:

Jason Hutchinson
Canada Bread / Bimbo Canada

Please address all communications to:

The Deputy Registrar
Telephone: 613-993-3595
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

INTRODUCTION

[1] The mandate of the Canadian International Trade Tribunal in this inquiry[1] is to determine whether the dumping of wheat gluten originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania (the subject goods) has caused injury or is threatening to cause injury to the domestic industry.

[2] The Tribunal has determined, for the reasons that follow, that the dumping of the above-mentioned goods has caused material injury to the domestic industry.

BACKGROUND

[3] This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on June 24, 2020, by ADM Agri-Industries Co. (ADM) and the subsequent decision by the President of the CBSA on August 14, 2020, to initiate an inquiry into the alleged injurious dumping.

[4] The CBSA's investigation triggered the initiation of a preliminary injury inquiry by the Tribunal on August 17, 2020. The Tribunal issued its preliminary determination on October 13, 2020, that the evidence disclosed a reasonable indication that the dumping of the subject goods had caused or was threatening to cause injury to the domestic industry.[2]

[5] On December 23, 2020, the CBSA made a preliminary determination of dumping, resulting in the imposition of provisional anti-dumping duties on the subject goods. On December 24, 2020, the Tribunal commenced this inquiry.[3]

[6] The Tribunal collected information from domestic producers, importers, purchasers and foreign producers of the subject goods. The Tribunal's period of inquiry (POI) was from January 1, 2017, to September 30, 2020, and included the two following interim periods: January 1, 2019, to September 30, 2019 (interim 2019), and January 1, 2020, to September 30, 2020 (interim 2020).

[7] The Tribunal received submissions from ADM and one other domestic producer of wheat gluten, Permolex Ltd. (Permolex), arguing that the subject goods have caused injury or are threatening to cause injury to the domestic industry.

[8] The Tribunal received a submission from Tereos Starch & Sweeteners Europe and Tereos Starch & Sweeteners Belgium (collectively The Tereos Group), foreign producers of the subject goods, opposing a finding of injury or threat of injury in respect of the subject goods. The Tribunal also received submissions from the Embassy of the Republic of Lithuania to Canada and the Delegation of the European Union to Canada (EU Delegation) opposing a finding of injury or threat of injury.

[9] The Tribunal held a videoconference hearing on March 24 and 25, 2021, and heard testimony from one purchaser of wheat gluten in the Canadian market.[4]

---

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

2 *Wheat Gluten* (13 October 2020), PI-2020-003 (CITT) [*Wheat Gluten PI*].

3 Exhibit NQ-2020-003-03.

4 The purchaser was summoned by subpoena to appear as a Tribunal witness at the hearing on March 24, 2021.

RESULTS OF THE CBSA'S INVESTIGATION

[10] The CBSA's period of investigation was from January 1, 2019, to April 30, 2020. On March 23, 2021, the CBSA made final determinations of dumping and specified the following margins of dumping (expressed as a percentage of the export price):[5]

Exporter and country of origin or export	Margin of Dumping
Australia	26.2%
All Exporters	26.2%
Austria	26.2%
All Exporters	26.2%
Belgium	26.2%
All Exporters	26.2%
France	13.6%
ADM	13.1%
Roquette Frères	10.4%
All Other Exporters	14.1%
Germany	26.2%
All Exporters	26.2%
Lithuania	10.3%
Roquette Amilina	10.0%
All Other Exporters	26.2%

PRODUCT

Product definition

[11] The subject goods are defined as follows:

5 Exhibit NQ-2020-003-04 at 13, 19.

Wheat gluten, whether or not blended with wheat flour, salt or any other substance, with a minimum wheat protein content of 40% by weight on a dry basis calculated using a Jones factor of 5.7, originating in or exported from Australia, Austria, Belgium, France, Germany and Lithuania, but excluding:

(i) devitalized wheat gluten;

(ii) hydrolyzed wheat gluten;

(iii) wheat protein isolates; and

(iv) organic wheat gluten that is certified organic in accordance with and otherwise meets the requirements of the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and regulations made thereunder, and the *Safe Food for Canadians Act*, S.C. 2012, c. 24, and regulations made thereunder including the *Safe Food for Canadians Regulations*, S.O.R./2018-108, all of which as may be amended or replaced from time to time.

For greater certainty, the subject goods include, but are not limited to vital wheat gluten as defined by the World Health Organization's Codex STAN 163-1987, Rev. 1-2001 ("Standard for Wheat Protein Products Including Wheat Gluten").

Product information

[12] The CBSA provided the following additional product information:

> [27] Wheat gluten is the natural protein found in wheat. "Gluten" consists of two main protein groups, gliadins and glutenins in approximately equal proportions. Wheat gluten is also sometimes referred to in the market as simply "gluten" or "wheat protein".
>
> [28] Wheat gluten is generally sold as a fine powder with a cream colour. For grades used in most food (including baking) applications, wheat gluten contains between 75 – 80% protein by weight on a dry basis using a Jones factor of 5.7, with the remainder of the weight being attributable to fiber, starch, fat and ash. Wheat gluten products with a wheat protein concentration in the range of 80% or more, which also contain sodium citrate, are often used to enhance whole-grain baked goods, noodles and pastas, pizza crusts and vegetarian products. Some wheat gluten grades that are used as a filler binder for processed meat products contain a lower percentage of protein by weight on a dry basis and are usually blended with a larger amount of wheat flour to obtain a lower percentage of protein. Wheat gluten is also sold to animal feed and pet food manufacturers as a source of protein.
>
> [29] There are different ways to measure the protein content of a substance, but the most commonly used method involves isolating the mass of nitrogen in a given sample of the substance, because nitrogen is an element contained in all proteins but not found in the other macro-nutrients, i.e. fat and carbohydrates. In this respect, the mass of nitrogen isolated from the sample of a substance represents a proxy for the weight of the protein. The weight of the nitrogen is then multiplied by a "Jones factor" that corresponds to the type of protein under consideration (because not all proteins contain the same ratio of nitrogen containing amino acids to weight ratio).[6]

---

6 Exhibit NQ-2020-003-04A at paras. 27-29.

PRELIMINARY MATTER

Arguments on confidential information in the Investigation Report

[13] In its case brief and oral arguments, the EU Delegation argued that “the essential facts of this investigation, as required in the WTO Anti-Dumping Agreement, were not disclosed.”[7] The EU Delegation argued more specifically that too much information in the Tribunal’s Investigation Report had been designated as confidential and redacted from the public version of the report, and that by failing to provide either non-confidential summaries of this information or statements as to why such summarizations were not possible, the Tribunal failed to comply with the requirements of Article 6.5.1 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.[8] The EU Delegation therefore requested that non-confidential information be disclosed in a manner which complies with Article 6.5.1 in order to allow interested parties a reasonable understanding of the substance of the confidential information and to allow them to exercise their right of defence.

[14] The EU Delegation stated the following:

> For instance, the Investigation report does not disclose import figures in tonnes. The Commission does not see how such information may threaten confidentiality in this case. Moreover, all the aggregated domestic industry injury factors in the Investigation report were considered to be confidential and they were not summarized. Even if CITT summarises some of the injury factors per individual complainant (others are not summarised at all), these summaries do not provide a view of the situation, as they do not reflect the domestic industry as a whole. There is also no meaningful information on price effects, such as undercutting or price depression and suppression. Overall, it is impossible for interested parties having no counsel representation to have a reasonable understanding of the injury picture and to exercise their rights of defence.[9]

[15] ADM submitted that the investigation was conducted consistently with Canadian law and international obligations. In its oral argument, it submitted that 19 of the 71 tables in the Investigation Report fully disclose information in public format and a further 10 contain indexed data regarding a variety of data points, including a public summary of the analysis of benchmark products

---

7 *Transcript of Public Hearing* at 145.

8 WTO Anti-dumping Agreement, online: <https://www.wto.org/english/docs_e/legal_e/19-adp.pdf>. Article 6.5 provides that information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Article 6.5.1, which the EU Delegation referenced, provides that:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of reasons why summarization is not possible must be provided.

The EU Delegation also referenced Article 6.9 of the WTO Anti-dumping Agreement, which provides that “The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.”

9 Exhibit NQ-2020-003-E-01 at 2.

at Table 15. ADM noted that, despite the confidentiality concerns inherent from having only two domestic producers in this case, Schedules 15 and 18 contain indexed company-specific data for each of the two domestic producers.[10]

[16] The WTO Appellate Body has held that Article 6.5.1 of the WTO Anti-dumping Agreement—which requires the provision of non-confidential summaries—serves to balance the goals of protecting confidentiality and ensuring the transparency of the investigation process.[11] As a result, any non-confidential summaries must protect the confidential information at issue, while at the same time contain sufficient detail to permit other parties a reasonable understanding of the substance of the information, so that they may respond and defend their interests.

[17] The data presented in the Investigation Report are largely based on information provided by respondents to the Tribunal's questionnaires that is properly designated as confidential by respondents and which the Tribunal has a statutory obligation to protect.[12] In this case, the domestic industry is comprised of two entities, and there is a limited number of importers. Consequently, it is not possible, in many cases, to reveal aggregated data or even indexed data, without compromising, directly or indirectly, the confidentiality of the information of one or more respondents.[13] Despite these limitations, the Tribunal believes that it has met its transparency obligations by placing as much information as possible in the public version of its Investigation Report. In this regard, while absolute figures are, for the most part, confidential, several tables in the report include percent change figures in order to allow parties to gain a reasonable understanding of the substance of the information. Furthermore, in response to the EU Delegation's concerns expressed during the investigation process, and in an effort to improve transparency even beyond its usual procedures, the Tribunal issued a public summary table of confidential information from the Investigation Report, using arrows to indicate the direction (increases, decreases) of certain indicators over the POI.[14]

[18] The Tribunal notes that these arguments or similar arguments have on several occasions been made by the EU Delegation in the context of previous Tribunal proceedings. The Tribunal has offered a response that is no different than the response offered in the present matter. It is suggested that, in as much as these arguments are concerned, the EU Delegation and the Tribunal will simply have to disagree. Having said that, the Tribunal will always aim to make public as much of the information as it considers feasible and appropriate in the context of its inquiries.

---

10 *Transcript of Public Hearing* at 157.

11 Appellate Body Report, *EC – Fasteners* (*China*), WT/DS397/AB/R at para. 542; see also Panel Report, *Mexico – Steel Pipes and Tubes* (*Guatemala*), WT/DS331/R at para. 7.380.

12 In accordance with sections 45 to 49 of the *Canadian International Trade Tribunal Act*, which set out obligations and objectives similar to those in Article 6.5 and 6.5.1 of the WTO Anti-Dumping Agreement. The Tribunal's *Confidentiality Guidelines* provide further guidance, including, *inter alia*, on the types of information that are typically considered confidential. Online: <www.citt-tcce.gc.ca/en/resource-types/confidentiality-guidelines.html>.

13 As indicated in the Investigation Report, rigorous procedures are followed in preparing the report to ensure that confidentiality of data is not compromised, having regard to such things as the number of respondents and whether there is dominance (a situation where a small number of firms accounts for a very large portion of any data field such that confidential information could be revealed by means of reverse engineering). When any revision to the Investigation Report is issued, the same rigorous procedures are followed. In addition, those revisions may lead to previously public information being treated as confidential so as not to expose the confidential revised data. See Exhibit NQ-2020-003-06 at 9.

14 Exhibit NQ-2020-003-06C at 2. The Tribunal consulted the domestic industry on this table prior to its release to ensure no information that they considered confidential was divulged.

[19] Finally, the Tribunal notes that, pursuant to subsection 45(3) of the *Canadian International Trade Tribunal Act*[15] and subrule 16(1) of the *Canadian International Trade Tribunal Rules*, information that has been designated as confidential may be disclosed to counsel who have provided the required declaration and undertaking. Thus, it was open to the EU Delegation to obtain access to confidential information by retaining counsel to act on its behalf in these proceedings. As the Tribunal has previously stated, "[p]roviding access to confidential information in this way allows the Tribunal to obtain maximum voluntary participation from interested parties, ensure transparency and, at the same time, protect confidential information."[16]

Arguments on the significance of production-related impact indicators in the injury analysis

[20] In its submissions and oral arguments, The Tereos Group suggested that, in determining if the domestic industry was materially injured, the Tribunal should focus on production effects such as production volume and capacity utilization. It argued that production is "among the most important factors in any injury analysis" having regard to the objectives of the *Special Import Measures Regulations*[17] and *SIMA* and indeed, "the most fundamental factor in a Tribunal injury assessment."[18]

[21] A context to this inquiry is the fact that wheat gluten and starch are produced in a single production process from wheat flour: as such, the production of wheat gluten is not exclusively driven by demand for wheat gluten, but also by demand for starch and/or downstream products.[19] Moreover, the co-production process, and the fact that the domestic producers do not ordinarily track production costs for wheat gluten and its co-products separately, has necessitated cost allocations and estimation by the domestic producers to provide the data reported in the Investigation Report.[20]

[22] The domestic producers argued that the Tribunal's practice is to undertake an overall assessment of all injury factors, taking into account industry realities. In the context of the wheat gluten industry, ADM asked the Tribunal to weigh the factors in light of the fact that the industry produces two products, sold into two separate markets, in the same production process.[21] In its oral argument, Permolex submitted that while production figures prominently in *SIMA*, the context of the particular industry matters and here, certain indicators have more weight.[22]

[23] While production volume and capacity utilization are important indicators to consider when assessing injury, the Tribunal is directed through subsection 37.1(1) of the *SIMR* to consider much more, including the volume of dumped goods, their price effect, as well as, consistent with subsection 37.1(1)(c) and its paragraphs (i) through (iii), the resulting impact of the dumped goods having regard to all relevant economic factors and indices that have a bearing on the state of the domestic industry. This also includes economic factors and indices such as sales, market share, profits and inventories. In other words, the Tribunal considers and weighs all of the indicators,

---

15 R.S.C. 1985, c. 47 (4th Supp.).

16 *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) at para. 25.

17 SOR/84-927 [*SIMR*].

18 Exhibit NQ-2020-003-C-01 at para. 13; *Transcript of Public Hearing* at 113. The Tereos Group also submitted that injury to domestic production of like goods is "an essential requirement under subsection 42(1) of *SIMA*." Exhibit NQ-2020-003-C-01 at para. 13. However, in oral argument, it submitted that injury to production and capacity utilization is not a sole or determinative factor. *Transcript of Public Hearing* at 113.

19 See, for example, Exhibit NQ-2020-003-A-03 at para. 6; Exhibit NQ-2020-003-B-03 at para. 12.

20 See, for example, Exhibit NQ-2020-003-A-07 at paras. 13-14; Exhibit NQ-2020-003-B-08 (protected) at para. 6.

21 Exhibit NQ-2020-003-A-11 at para. 21.

22 *Transcript of Public Hearing* at 163-164.

having regard to the specific evidence before it; it ultimately determines, overall, whether the subject goods have caused material injury to a domestic industry.[23] This is a fact-specific exercise, in which no factor is necessarily decisive.[24]

LEGAL FRAMEWORK

[24] The Tribunal is required, pursuant to subsection 42(1) of *SIMA*, to inquire as to whether the dumping of the subject goods has caused injury or retardation or is threatening to cause injury, with "injury" being defined, in subsection 2(1), as ". . . material injury to a domestic industry". In this regard, "domestic industry" is defined in subsection 2(1) by reference to the domestic production of "like goods".

[25] Accordingly, the Tribunal must first determine what constitutes "like goods". Once that determination has been made, the Tribunal must determine what constitutes the "domestic industry" for purposes of its injury analysis.

[26] Given that the subject goods are originating in or exported from more than one country, the Tribunal must also determine if the prerequisite conditions are met in order to make a cumulative assessment of the effect of the dumping of the subject goods from all the subject countries on the domestic industry (i.e. whether it will conduct a single injury analysis or a separate analysis for each subject country).

[27] The Tribunal can then assess whether the dumping of the subject goods has caused material injury to the domestic industry.[25] Should the Tribunal arrive at a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.[26] As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.[27]

---

23 The term "domestic industry" is defined in subsection 2(1) of *SIMA* as "the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods . . ." The inquiry under *SIMA* assesses the existence of material injury to a domestic industry, i.e. to all or a subset of domestic producers that account for a major proportion of domestic production of like goods. It does so having regard to the factors set out in the *SIMR*. While production of like goods is a basis for identifying domestic producers and defining the domestic industry for the purposes of a *SIMA* injury analysis, the Tribunal is not convinced by the argument that this definition indicates that the impact to the volume of production (i.e. output), *per se*, is necessarily paramount to the concept of material injury to a domestic industry. See *Transcript of Public Hearing* at 114.

24 The Tribunal's approach is further informed by Article 3.4 of the WTO Anti-dumping Agreement, which provides that "[t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." See also *EC – Bed Linen* (*India*) (Article 21.5), WT/DS141/RW at paras. 6.160-6.163.

25 The Tribunal will proceed to determine the effect of the dumping of the subject goods on the domestic industry, for individual countries or for the cumulated countries, as appropriate.

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

27 Subsection 2(1) of *SIMA* defines "retardation" as ". . . material retardation of the establishment of a domestic industry."

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

LIKE GOODS AND CLASSES OF GOODS

[29] In order for the Tribunal to determine whether the dumping of the subject goods has caused or is threatening to cause injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.[28]

[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).[29]

[32] In addressing the issue of classes of goods, the Tribunal typically examines whether goods potentially included in separate classes of goods constitute "like goods" in relation to each other. If they do, they will be regarded as comprising a single class of goods.[30]

[33] In its preliminary injury inquiry, the Tribunal found that wheat gluten produced in Canada that is of the same description as the subject goods constitutes "like goods" in relation to the subject goods and that there was a single class of goods.[31] The evidence on the record of this inquiry confirms that the subject goods and domestically produced like goods are substitutable, comparable in quality, compete in the Canadian market, and are distributed through the same distribution channels.[32] As none of the parties have challenged the preliminary findings on the issues of like goods and classes of goods, and in the absence of any contradictory evidence, the Tribunal sees no reason to depart from them.

---

28 Should the Tribunal determine that there is more than one class of goods in this inquiry, it must conduct a separate injury analysis and make a decision for each class that it identifies. See *Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd. and Anti-dumping Tribunal*, [1982] 2 F.C. 283 (F.C.).

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

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

31 *Wheat Gluten PI* at paras. 18-25.

32 Exhibit NQ-2020-003-06, Tables 6-12.

[34] The Tribunal therefore finds that domestically produced wheat gluten of the same description as the subject goods constitutes "like goods" in relation to the subject goods and that there is a single class of goods.

DOMESTIC INDUSTRY

[35] 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.

[36] The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.[33] However, the Tribunal may decide to exclude a domestic producer from the domestic industry if that producer would contribute to, or benefit from, the dumping, either directly as an importer or indirectly through related companies.[34]

[37] The evidence before the Tribunal indicates that there are two domestic producers of like goods, namely, ADM and Permolex. ADM produces wheat gluten in its facility in Candiac, Quebec, and Permolex produces wheat gluten in its facility in Red Deer, Alberta.

[38] The Embassy of the Republic of Lithuania to Canada submitted that ADM should be excluded as a domestic producer because it is an importer of wheat gluten and is also related to exporters based in the United States and France. The Embassy of Lithuania to Canada submitted in oral argument that the fact that the complainant imported the subject goods might prove that local production does not meet the supply needs of the Canadian market.

[39] ADM submitted that in determining whether to exclude a domestic producer from the definition of the domestic industry, the Tribunal considers both "structural factors" and "behavioural factors" to determine whether "the domestic producer is essentially a producer of like goods in Canada, or instead, essentially an importer of dumped or subsidized goods". ADM argued that the evidence clearly demonstrates that ADM is in essence a domestic producer, as well as that, as the sole complainant in this matter, ADM clearly views itself as producer of domestic like goods.

[40] Under subsection 2(1) of *SIMA*, the Tribunal has discretion, as indicated by the word "may" in that provision, to exclude a producer from the definition of the domestic industry where the domestic producer is an importer of subject goods or is related to an exporter or importer of subject

---

33 The term "major proportion" means an important, serious or significant proportion of total domestic production of like goods and not necessarily a majority. *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (FCA); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (FCA); Panel Report, *China – Automobiles* (*US*), WT/DS440/R, at para. 7.207; Appellate Body Report, *EC – Fasteners* (*China*), WT/DS397/AB/R, at paras. 411, 412, 419; Panel Report, *Argentina – Poultry* (*Brazil*), WT/DS241/R, at para. 7.341.

34 *Carbon Steel Screws* (2 September 2020), RR-2019-002 (CITT) [*Carbon Steel Screws*] at para. 31.

goods.[35] The Tribunal typically treats a domestic producer of like goods as if it were not part of the domestic industry, and limits its injury analysis to the other domestic producers, if the producer is first and foremost a conduit for the importation of the subject goods (whether directly or through associated parties).[36] As noted by ADM, the Tribunal typically examines structural and behavioural factors to determine whether it would be appropriate to exercise its discretion to exclude a particular producer from the domestic industry definition.[37] Structural factors are concerned with the characteristics of the market and the producer's place in that market (expressed using ratios of the producer's imports of subject goods, domestic production and sales of both), while behavioural factors focus on the behaviour of the producer, including whether the producer imports the subject goods as a defensive or aggressive measure and whether it imports the subject goods to fill a specific market niche or to compete broadly with the like goods produced by other domestic producers.

[41] The evidence on the record supports ADM's position. Over the POI, ADM's role as a domestic producer was significantly more important than its role as an importer of subject goods. In this regard, ADM's volume of domestic production and sales from domestic production significantly exceeded its volume of subject imports and sales thereof, which were very small. Furthermore, the uncontradicted evidence of ADM's witnesses on the reasons explaining its importing behaviour over the POI are consistent with the view that it is first and foremost positioned as a domestic producer.[38] As such, the Tribunal is satisfied that ADM should not be excluded as a domestic producer of wheat gluten.

[42] Consequently, the Tribunal finds that ADM and Permolex constitute the domestic industry for the purposes of the injury analysis.

CUMULATION

[43] Subsection 42(3) of *SIMA* directs the Tribunal to make an assessment of the cumulative effect of the dumping of the subject goods if it is satisfied that the margin of dumping in relation to the goods from each of those countries is not insignificant, the volumes of dumped goods from each subject country is not negligible,[39] and cumulation is appropriate taking into account conditions of competition between the goods of each country or between them and the like goods.

---

35 *Cross-Linked Polyethylene Tubing* (13 October 2006), NQ-2006-001 (CITT) [*Cross-Linked Polyethylene Tubing*] at para. 53. This is consistent with Article 4.1(i) of the WTO Anti-Dumping Agreement; see also, on this issue, Panel Report, *EC – Fasteners* (*China*) WT/DS397/R, at para. 7.244.

36 *Carbon Steel Screws* at para. 36; *Cross-Linked Polyethylene Tubing* at para. 56.

37 See, for example, *Photovoltaic Modules and Laminates* (20 July 2015), NQ-2014-003 (CITT) at para. 59; *Copper Pipe Fittings* (6 March 2007), NQ-2006-002 (CITT) at paras. 64-65.

38 Exhibit NQ-2020-003-07 (protected), Tables 18, 22, 58; Exhibit NQ-2020-003-A-06 (protected) at paras. 38, 40, 41, 66, 67.

39 Subsection 2(1) of *SIMA* defines "negligible" as meaning, " . . . in respect of the volume of dumped goods of a country, less than 3% of the total volume of goods that are released into Canada from all countries and that are of the same description as the goods. However, if the total volume of goods of three or more countries — each of whose exports of goods into Canada is less than 3% of the total volume of goods that are released into Canada from all countries and that are of the same description — is more than 7% of the total volume of goods that are released into Canada from all countries and that are of the same description, the volume of goods of any of those countries is not negligible."

Negligibility and insignificance

[44] The Embassy of Lithuania to Canada argued that, based on Statistics Canada data, imports of subject goods from Lithuania were 1.4 percent of total imports in the period from May 1, 2019, to April 30, 2020, which it referred to as the "regular 12-month POI".[40] Accordingly, it argued that imports from Lithuania should therefore be found negligible and the investigation regarding wheat gluten from Lithuania should be terminated.

[45] The Tribunal typically assesses negligibility based on import volumes during the CBSA's period of investigation,[41] which in this case spanned the 16-month period from January 1, 2019, to April 30, 2020. This approach is consistent with Canada's notification to the WTO Committee on Anti-Dumping Practices, which provides that it will normally make this assessment with reference to the volume of imports during the period of data collection for the dumping investigation, i.e. the CBSA's period of investigation.[42] The Tribunal sees no reason to depart from this approach in this case. Using this methodology, there are no negligible import volumes.[43] In addition, none of the margins of dumping reported by the CBSA in its final determination are insignificant.[44]

Conditions of competition

[46] The Tribunal will now assess whether cumulation of the effect of the dumping of goods from the subject countries is appropriate taking into account the conditions of competition between the goods of each of those countries and/or between them and the like goods.

[47] Factors the Tribunal typically considers in assessing conditions of competition between subject goods and like goods include interchangeability, quality, pricing, distribution channels, modes of transportation, timing of arrivals and geographic dispersion. The Tribunal may also consider other factors in deciding whether the exports of a particular country should be cumulated, and no single factor is determinative.[45]

[48] During the preliminary inquiry, it was argued that Australian imports are imported under different conditions of competition than those from the European countries. At the conclusion of the preliminary inquiry, the Tribunal indicated that it did not view the evidence regarding Australian imports as sufficiently persuasive in terms of establishing differing conditions of competition for these imports, but that it would pursue this issue further in the context of the final injury inquiry.[46]

---

40 Exhibit NQ-2020-003-D-01 at 4, 9.

41 *Corrosion-resistant Steel Sheet* (16 November 2020), NQ-2019-002 (CITT) at para. 58 [*Steel Sheet*]; *Concrete Reinforcing Bar* (9 January 2015), NQ-2014-001 (CITT) at para. 92; *Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (6 January 2016), NQ-2015-001 (CITT) at para. 84; *Circular Copper Tube* (18 December 2013), NQ-2013-004 (CITT) at footnote 41; *Hot-rolled Carbon Steel Plate* (20 May 2014), NQ-2013-005 (CITT) at para. 64; *Copper Pipe Fittings* at para. 71.

42 See Committee on Anti-Dumping Practices, *Notification Concerning the Time-Period for Determination of Negligible Import Volumes Under Article 5.8 of the Agreement*, G/ADP/N/100/CAN. See also Committee on Anti-Dumping Practices, *Recommendation Concerning the Time-Period to Be Considered in Making a Determination of Negligible Import Volumes for Purposes of Article 5.8 of the Agreement*, G/ADP/10.

43 Exhibit NQ-2020-003-06D, Table 17.

44 Exhibit NQ-2020-003-04 at 19.

45 *Steel Sheet* at para. 45.

46 *Wheat Gluten PI* at para. 30.

[49] In this inquiry, ADM submitted that the evidence supports the cumulation of the effect of the dumping of all subject goods, including the subject goods from Australia. ADM submitted that wheat gluten from the subject countries has the same general physical characteristics and quality as like goods, with the result that subject and like goods are completely interchangeable. ADM further submitted that subject goods and like goods are sold through the same channels of distribution for the same limited range of end uses, and that the data in the Investigation Report demonstrate that there has been head-to-head competition both among subject goods and between like goods and subject goods. With respect to Australian wheat gluten, ADM submitted that the same conditions apply and that the only evidence of difference is with respect to price.

[50] ADM also noted that the Embassy of Lithuania to Canada argued that imports from Lithuania should not be considered injurious. ADM submitted that the Embassy of Lithuania to Canada did not argue that imports from Lithuania should be decumulated or address the cumulation factors in its submission.

[51] The majority of questionnaire respondents indicated that subject goods are always or usually interchangeable with like goods and that they are sold through the same channels of distribution.[47] The benchmark product and common accounts data demonstrate that subject and like goods are present in the market at the same time and compete for the same customers.[48]

[52] With respect to Australia, the purchaser of Australian wheat gluten reported that imports from Australia and domestically produced like goods are comparable in terms of physical characteristics, quality, and range of product line; in fact, of all factors examined, subject goods from Australia only had the advantage in terms of lowest net price and delivery cost.[49] In addition, there is evidence that imports from Australia and domestically produced like goods are sold through the same channels of distribution and compete directly for the same customers; there is also evidence that Australian goods compete in the marketplace at the same time as other subject goods.[50]

[53] In light of the foregoing, the Tribunal is satisfied that a cumulative assessment of the effect of the dumping of the subject goods from all of the subject countries is appropriate.

INJURY ANALYSIS

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

---

47 Exhibit NQ-2020-003-06, Table 7.

48 Exhibit NQ-2020-003-07 (protected), Tables 52, 54; Exhibit NQ-2020-003-07A (protected), Tables 43-44, 53.

49 Exhibit NQ-2020-003-06, Table 7; Exhibit NQ-2020-003-12.07 at 8; Exhibit NQ-2020-003-18.10 at 13.

50 Exhibit NQ-2020-003-18.10 at 6, 9; Exhibit NQ-2020-003-06, Table 51; Exhibit NQ-2020-003-07A (protected), Table 43.

Context for the injury analysis

[55] Imports of wheat products into Canada are subject to an annual tariff rate quota (TRQ) of 123,557 tonnes. Duties apply to goods imported over access commitment. However, some imports benefit from preferential tariff treatment pursuant to free trade agreements. The Comprehensive Economic and Trade Agreement (CETA), which entered into force provisionally in September 2017, resulted in European wheat product imports no longer being subject to the TRQs. As for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force in December 2018, it provided for a reduced rate of duties for, *inter alia*, Australian wheat product imports over access commitment, a rate that is set to be progressively liberalized over 10 years.[51] U.S. imports are also exempt from TRQs.

[56] Parties opposed submitted that the increase in subject imports over the POI is an expected result of the liberalization of the Canadian market through CETA and the CPTPP.[52] The Tereos Group argued that volume increases in European imports must be attributed to the Canadian Government's trade policy decision and that there is no evidence of any injury in excess of the expected market-opening effects of CETA. Specifically, The Tereos Group argued that 2017 is an unreliable benchmark for assessing injury from European imports, given that that year would not have reflected the market-opening effects of CETA, and as such, would create an "appearance" of injury in latter years of the POI.[53] The parties opposed made similar arguments in respect of the Tribunal's examination of subject goods' pricing trends over the POI, and the impact of subject goods on domestic industry sales and market share.

[57] The domestic industry, in turn, argued that 2017 is an appropriate benchmark for the Tribunal's analysis, as it demonstrates the impact of increasing import volumes year over year, and submitted that nothing warrants varying the Tribunal's practice of analyzing import and injury trends over the full period of a POI. Furthermore, ADM submitted that, while the removal of above-quota tariffs permitted additional volumes of wheat gluten to enter the Canadian market tariff free, CETA did not require or condone the dumping of subject goods at injurious prices and volumes.[54] Finally, ADM submitted that Statistics Canada data indicate that, in 2017, subject goods were imported almost exclusively duty free,[55] and thus were imported in comparable market conditions as in the remainder of the POI.

[58] The changes over the POI in the application of Canada's TRQs on wheat products as a result of CETA and the CPTPP, form part of the context of this inquiry and may shed light on trends seen over the POI. In particular, these trade agreements have created conditions where subject imports from Europe are no longer subject to TRQs. In this regard, when asked whether he saw any difference in the market with the coming into effect of CETA and/or the CPTPP, Mr. Jason Hutchinson testified that there was "more interest" in supplying Canada and that the change from the quota system to a more open market environment was a factor. Mr. Hutchinson further testified that, while there was "more interest," the end result was a "very small change in the way we allocated business."[56]

---

51 Exhibit NQ-2020-003-C-03 at 12-17; Exhibit NQ-2020-003-A-09 at 847.
52 Exhibit NQ-2020-003-D-01 at 4-5; Exhibit NQ-2020-003-C-01 at paras. 50-55.
53 Exhibit NQ-2020-003-C-01 at paras. 21, 50-55; *Transcript of Public Hearing* at 111.
54 Exhibit NQ-2020-003-A-11 at paras. 14-17, 40.
55 Exhibit NQ-2020-003-A-15 at 3.
56 *Transcript of Public Hearing* at 19-20.

[59] That said, CETA and the CPTPP both expressly provide for the retention of the rights of the contracting parties under Article VI of GATT 1994 and the Anti-Dumping Agreement.[57] They thus reaffirm the right of contracting parties to apply anti-dumping laws to goods imported from a free-trade partner; furthermore, they do not change the analytical methodology or standards for the injury determination. The Tribunal has held on prior occasions that dumping, if found to exist, is dumping, regardless of any enabling or explanatory causes of that dumping.[58] Dumping is defined under *SIMA* and the underlying international agreements. These also provide the methodology for assessing whether such dumping is causing material injury (namely involving the examination of the volume and prices of the dumped goods, and the impact of those volumes and prices on the state of the domestic industry). In particular, the Tribunal agrees with ADM's submission that:

> Injurious dumping may be facilitated by factors such as the removal of regulatory barriers, or exchange rate trends, just as it may be facilitated by the removal of above-quota tariffs. Such factors may impact the competitive conditions in the Canadian market and in part explain, as a matter of fact, *why* such injurious dumping is now occurring; however, these points of factual context do not in any way supersede the causal link between the dumping and the injury or disentitle domestic industries which have been materially injured by dumping to protection under *SIMA*.[59]
>
> [Footnotes omitted]

[60] As such, the Tribunal will consider the entirety of the evidence, over the entire POI, and give it the weight that it deserves in the circumstances.

Import volume of dumped goods

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

[62] Over the POI, the absolute volume of subject imports increased year over year, as well as from one interim period to the next. Subject imports increased 48 percent in 2018, as compared to 2017, and 102 percent in 2019 as compared to 2018. Volumes of subject imports also increased 34 percent in interim 2020 in comparison to interim 2019.[60]

[63] The ratio of subject imports relative to domestic production increased in each period of the POI, the data showing a 7-percentage-point increase from 2017 to 2018, a 20-percentage-point increase from 2018 to 2019, and a 12-percentage-point increase in interim 2020 in comparison to interim 2019. Likewise, the ratio of subject imports to domestic sales from domestic production increased consistently, rising by 52 percentage points from 2017 to 2019, and 23 percentage points in

---

57 See CETA at Article 3.1 and the CPTPP at Article 6.8.

58 See, for example, *Gypsum Board* (19 January 2017), NQ-2016-002 (CITT) at para. 131; see similarly, *Photovoltaic Modules and Laminates* (20 July 2015), NQ-2014-003 (CITT) at paras. 119-120.

59 Exhibit NQ-2020-003-A-11 at para. 41.

60 Exhibit NQ-2020-003-06D, Table 19.

interim 2020 in comparison to interim 2019.[61] Subject imports also grew significantly over the POI as a share of *all* imports, particularly in 2019 and interim 2020.[62]

[64] As noted above, the Tribunal has not been convinced by the arguments of parties opposed that 2017 data should not be taken into account in analyzing trends over the POI. However, in any event, subject import volumes reached their highest levels in the latter portion of the POI, with significant period-over-period increases observed in both 2019 compared to 2018, and interim 2020 compared to interim 2019.[63]

[65] The Tribunal finds that there has been a significant increase in the absolute and relative volume of imports of the subject goods.

Price effect of dumped goods

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

[67] The domestic industry submitted that price is the predominant factor in purchasing decisions for wheat gluten and there is a significant degree of price transparency in the market.[64] None of the other parties contested this view.

[68] According to the evidence on record, wheat gluten purchases are price sensitive. Purchasers have indicated that the lowest priced goods "always" or "usually" win the contract or sale; and likewise, most purchasers have indicated that the lowest net prices are "very important", with some others indicating it is "somewhat important" in purchasing decisions.[65]

[69] Purchases of wheat gluten are almost exclusively made through contracts[66] and the majority of purchasers contact more than one supplier.[67] In testimony, Mr. Hutchinson, responsible for global wheat gluten purchasing for Bimbo Canada (Grupo Canada), indicated that negotiations for contracts go through multiple rounds, where price plays a critical role. Mr. Hutchinson indicated that price offers from other suppliers are leveraged to negotiate prices in these negotiations.[68]

---

61 *Ibid.*, Table 21.
62 Exhibit NQ-2020-003-07 (protected), Table 20.
63 *Ibid.*; Exhibit NQ-2020-003-06D, Table 19.
64 Exhibit NQ-2020-003-A-01 at para. 21.
65 Exhibit NQ-2020-003-06, Tables 13, 15.
66 *Ibid.*, Table 16.
67 *Ibid.*, Table 15.
68 *Transcript of Public Hearing* at 13-14.

Price undercutting

[70] Over the POI, prices of subject goods undercut the domestic industry in 2019 to interim 2020, when volumes of subject imports were at their highest. In addition, the magnitude of this undercutting increased over the POI.[69]

[71] There were small volumes and little price competition at the "sales to distributors" trade level. On the other hand, at the "sales to end-users" trade level, pricing closely tracks the aggregate market data.[70]

[72] The undercutting at the aggregate market level is consistent with benchmark and common account price undercutting.

[73] In this case, the benchmark products added together make up the entirety of the product definition, and benchmark data cover a high proportion of both domestic sales and sales/purchases from imports for the last eight quarters of the POI. Moreover, there were a number of instances of competition between domestic producers of like goods and importers of subject goods that were collected in questionnaire replies. Most of the competition between the domestic industry and importers occurred in sales of benchmark product 1 and benchmark product 2.[71]

[74] Benchmark data indicate that prices of subject goods increasingly undercut the prices of the like goods in instances of competition over the last eight quarters. Prices of subject goods undercut the prices of like goods in 27 of 54 instances of competition. Specifically, sales of subject imports from France and Germany undercut like goods in 67 percent and 90 percent, respectively, of instances where the subject and like goods competed in the same quarters; sales of Belgian imports undercut like goods in 50 percent of instances of competition. Of the two instances of competition with Austrian imports, the like goods were undercut in both periods. Subject imports from Australia and Lithuania did not undercut the prices of like goods in any of the instances of competition collected.[72] The volume of subject goods associated with these instances of undercutting was significant in proportion to the volume of subject goods captured by the benchmark data.

[75] The common account data reported in the Investigation Report indicate that prices of the subject goods frequently undercut the prices of the like goods.[73]

[76] Based on the totality of this evidence, the Tribunal finds that the prices of the subject goods significantly undercut the prices of the like goods during the POI, particularly in 2019 and interim 2020.

---

69 Exhibit NQ-2020-003-07C (protected), Tables 36, 22.

70 *Ibid.*, Tables 36, 40; Exhibit NQ-2020-003-07 (protected), Table 38.

71 Benchmark Product 1: Vital wheat gluten with a protein content of greater than 70% and less than 79% by weight on a dry basis calculated using a Jones Factor of 5.7 for human consumption; Benchmark Product 2: Vital wheat gluten with a protein content of greater than 70% and less than 79% by weight on a dry basis calculated using a Jones Factor of 5.7 for animal consumption.

72 Exhibit NQ-2020-003-06A, Table 51.

73 Exhibit NQ-2020-003-07 (protected), Tables 52, 54; Exhibit NQ-2020-003-07A (protected), Table 53.

<u>Price depression and suppression</u>

[77] The domestic industry has alleged that the consistent undercutting by the subject goods has caused serious price depression and suppression. ADM submitted that the average pricing of subject goods decreased over the POI, as did that of the domestic industry, while costs increased.

[78] Prices of domestic producers' sales from production decreased overall over the POI.[74] Specifically, domestic prices declined slightly in 2018, held steady in 2019 and declined more significantly in interim 2020 compared to interim 2019.[75]

[79] Aggregate market unit values show that the prices of subject goods decreased year over year during the POI. From 2017 to 2018, prices of subject goods decreased by 15 percent, followed by a 7 percent decline in 2019 compared to 2018, and a further drop of 17 percent in interim 2020 from interim 2019.[76] Concurrently, the volume of sales and market share of the subject goods increased throughout the POI.[77]

[80] When the downward trend in domestic prices is examined in light of the increasing volumes of subject goods at declining prices, the evidence suggests that the subject goods have depressed the prices of the like goods.

[81] Furthermore, the domestic industry's specific injury allegations support the view that the subject goods have played a price-depressive role over the POI. Mr. Leon Bell, of ADM, provided evidence showing that, as a result of competition from the subject goods, ADM faced strong pressure to lower prices during contract negotiations over the POI. Likewise, Mr. Randy Cook, of Permolex, submitted evidence that it has experienced consistent pressure on pricing as a result of import competition.[78]

[82] Overall, the Tribunal finds that price depression is demonstrated by the evidence on the record.[79]

[83] In order to assess whether the subject goods have suppressed the price of like goods, the Tribunal typically compares the domestic industry's average unit cost of goods sold (COGS) or cost of goods manufactured (COGM) with its average unit selling values in the domestic market to determine whether the domestic industry has been able to increase selling prices in line with increases in costs.

[84] While there were fluctuations from period to period, the domestic industry's COGS and COGM increased overall during the POI. Average unit selling values evolved in the opposite direction.[80] There is evidence of price suppression specifically in 2018 and interim 2020 when the

---

74 Exhibit NQ-2020-003-06C at 2.
75 Exhibit NQ-2020-003-07C (protected), Table 37.
76 Exhibit NQ-2020-003-06D, Table 37.
77 The volume of sales of subject goods grew 124 percent in 2018, 89 percent in 2019 and 19 percent in interim 2020. Exhibit NQ-2020-003-06D, Tables 23, 25; Exhibit NQ-2020-003-07C (protected), Table 24.
78 Exhibit NQ-2020-003-A-06 (protected) at paras. 22-23, 25-87; Exhibit NQ-2020-003-A-04 (protected) at para. 9; Exhibit NQ-2020-03-B-04 (protected) at paras. 16-20.
79 The Tribunal also considered the trends in sales to common accounts. Exhibit NQ-2020-003-07 (protected), Tables 52, 54; Exhibit NQ-2020-003-07A (protected), Table 53.
80 Exhibit NQ-2020-003-07 (protected), Table 55; Exhibit NQ-2020-003-06C at 2.

COGS increased while the average unit net sales value decreased in the same period; likewise, the COGM in relation to the average unit net sales value mirrored this trend. The domestic industry was thus not able to increase its prices in step with the increasing COGS or COGM.[81]

[85] Opposing parties argued that cost allocations made by the domestic producers to their production of wheat gluten are unreliable or arbitrary in this case, given that wheat gluten is produced along with other co-products. However, other than pointing to the fact that wheat gluten is a co-product, the opposing parties did not specifically explain in what respect cost allocations applied in this case were unreasonable. As further discussed in the next section, having regard to the evidence and arguments before it, the Tribunal is satisfied that the cost allocations reported by the domestic producers in this proceeding are reasonable and provide an adequate basis to examine claims of price suppression. The value-based allocation methodology used by the complainant was supported with adequate evidence.[82]

[86] The Tribunal further examined whether the price depressive and price suppressive trends in domestic prices over the POI are attributable to factors other than the dumped goods, in particular those raised by parties opposed.

[87] Non-subject imports undercut the domestic prices over the POI at the aggregate market level and were present in significant volumes.[83] However, the evidence before the Tribunal, notably benchmark data, does not support the view that non-subject imports, including those from the United States, have significant explanatory force for the pricing pressures experienced by the domestic industry during the POI.[84] Aggregate market share data trends support the same view. While non-subject imports gained market share in 2018, the domestic industry notably experienced pricing pressure in periods where non-subject imports were static or declining, i.e. 2019 and interim 2020, whereas subject imports were reaching their highest volume and market share levels.[85]

[88] Finally, with two domestic producers, there is some intra-industry competition. However, the evidence before the Tribunal does not indicate that the price pressures faced by the domestic industry over the POI were to a significant degree the result of intra-industry competition.[86]

[89] Considering the above, the Tribunal finds that the prices of like goods were significantly depressed and suppressed by the subject goods.

---

81 Exhibit NQ-2020-003-07C (protected), Table 36; Exhibit NQ-2020-003-007 (protected), Table 55; Exhibit NQ-2020-003-06C at 2.

82 Exhibit NQ-2020-003-A-08 (protected) at paras. 13-22. Permolex explained its cost allocation methodology at Exhibit NQ-2020-003-B-08 (protected) at para. 6 and Exhibit NQ-2020-003-10.02A at 20.

83 Exhibit NQ-2020-003-07C (protected), Table 36.

84 Exhibit NQ-2020-003-07A (protected), Tables 42, 43, 44, 46. See also Mr. Hutchinson's testimony regarding his perspective, pertaining to the bakery sector, on U.S. and Canadian wheat gluten price dynamics, as well as U.S. imports into Canada: *Transcript of Public Hearing*, at 45-47. See also Exhibit NQ-2020-003-A-13 at para. 3.

85 Exhibit NQ-2020-003-07C (protected), Table 25.

86 The Tribunal has carefully examined the evidence on the confidential record relevant to this issue, including Exhibit NQ-2020-003-07C (protected), Table 36; Exhibit NQ-2020-003-07A (protected), Tables 43-44; Exhibit NQ-2020-07 (protected), Tables 45-46 and Schedules 1-4; Exhibit NQ-2020-003-A-06 (protected) at para. 51; Exhibit NQ-2020-003-B-04 (protected) at paras. 8, 18, 24; Exhibit NQ-2020-03-10.01 (protected) at 13; Exhibit NQ-2020-03-10.02 (protected) at 12; Exhibit NQ-2020-003-A-05 at para. 24; Exhibit NQ-2020-003-RI-02A (protected) at 1.

Resulting impact on the domestic industry

[90] Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry.[87] These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.[88] Paragraph 37.1(3)(a) of the *Regulations* requires the Tribunal to consider whether a causal relationship exists between the dumping of the goods and the injury, retardation or threat of injury, on the basis of the volume, the price effect, and the impact on the domestic industry of the dumped goods.

Sales and market share

[91] The size of the Canadian market for wheat gluten increased by 33 percent from 2017 to 2019 and an additional 2 percent in interim 2020 as compared to interim 2019. In this context, the domestic industry's sales declined over the POI, with partial recovery in 2019. The domestic industry also lost 26 percentage points of market share over the POI, indicating that it failed to take advantage of the market growth.[89] At the same time, over the POI, as discussed in the next section, the domestic industry accumulated increasing, significant inventories.[90] In an expanding market, the Tribunal would expect that the industry should have been in a position to sell some of this inventory, and thus, mitigate its declining sales volumes and market share.

[92] Conversely, subject imports increased their market share by 31 percentage points in the same period, with the balance of the increase assumed by a decrease in market share of non-subject imports.[91]

[93] The Tribunal's record also includes evidence provided by the domestic producers regarding specific sales volumes lost to the subject goods.[92] This evidence was uncontradicted.

[94] The parties opposed argued that the domestic industry's lost sales volumes and market share are not attributable to subject imports, but rather to other factors such as trade liberalization and the presence of non-subject imports.

---

87 Such factors and indices include (i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, (ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, and (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods.

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

89 Exhibit NQ-2020-003-06D, Tables 23, 25.

90 Exhibit NQ-2020-003-07B (protected), Table 59.

91 Exhibit NQ-2020-003-06D, Table 25.

92 See e.g. Exhibit NQ-2020-003-A-06 (protected) at paras. 30, 44-46, 51, 54, 60, and attachments thereto; Exhibit NQ-2020-003-B-04 (protected) at paras. 16-17, 19.

[95] The impact of the liberalization of the wheat gluten market due to the implementation of CETA and the CPTPP has been discussed above.

[96] The EU Delegation submitted that in 2018, both subject and non-subject import volumes increased, and in 2019, when the subject imports' market share increased, there was no parallel decline in the domestic industry's market share.

[97] Both subject and non-subject goods gained market share in 2018, which suggests that the domestic industry's loss of market share in that particular period may have been attributable to both. However, in 2019, as the market share of non-subject imports receded, this market share was not regained by the domestic industry (which saw its share decline a further 2 percentage points) but was captured by the subject goods.[93]

[98] Finally, as discussed previously, other evidence before the Tribunal does not support the view that non-subject imports had significant explanatory force for the competitive pressures experienced by the domestic industry, most clearly in the second half of the POI (for which more granular data are available).[94] Overall, the Tribunal finds that the subject goods prevented the domestic industry from capturing more sales and market share.

[99] Accordingly, the subject goods, in and of themselves, have negatively impacted the level of domestic industry sales and market share over the POI.

Production, capacity utilization and inventories

[100] As previously described in these reasons, wheat gluten is co-produced with starch. ADM submitted that its current production volumes and capacity utilization rates reflect the demand for both co-products, and that in particular capacity utilization should be weighted in accordance with the reality of a co-production process.

[101] ADM further submitted that, in the context of the co-production process, sales lost due to imports of subject goods have caused its inventories of wheat gluten to increase substantially over the POI. In addition, given the costs of maintaining inventories and the limited shelf life of wheat gluten, ADM alleged it will face increasing pressure to sell the inventories at prices it would normally not accept.

[102] The opposing parties submitted that the domestic industry's production and capacity utilization figures do not demonstrate injury. Further, The Tereos Group submitted that the domestic industry is not able to serve growing demand in the Canadian wheat gluten market, and the Embassy of Lithuania to Canada noted that the domestic industry was importing wheat gluten from its sister companies, thereby causing self-inflicted injury.

[103] With respect to inventories, The Tereos Group argued that accumulating inventories do not justify a finding of material injury as they are effectively deferred sales rather than lost sales; they are assets, not costs. It submitted that for inventories to cause material injury, they must be sold below cost or become unsellable and discarded. The Tereos Group submitted that wheat gluten is relatively

---

93 Exhibit NQ-2020-003-06D, Table 24.

94 Exhibit NQ-2020-003-07A (protected), Tables 42, 43, 44, 46. See also Mr. Hutchinson's testimony regarding his perspective, pertaining to the bakery sector, on U.S. and Canadian wheat gluten price dynamics, as well as U.S. imports into Canada: *Transcript of Public Hearing* at 45-47. See also Exhibit NQ-2020-003-A-13 at para. 3.

shelf-stable, and the domestic industry did not put forward any positive evidence to show actual or expected disposals. In addition, the inventory volumes do not represent a significant proportion of annual production, and some are expected to decrease. It added that ADM has not provided evidence that the Tribunal can assess whether the inventory increases will result in non-transitory injury. Finally, The Tereos Group submitted that the increase in inventories is due to a shift in market focus and factors other than the dumped subject goods.[95]

[104] ADM replied that The Tereos Group's arguments regarding production and capacity utilization do not take into account the impact of inventories accumulated by the domestic industry over the POI, and that the volume of its imports was small.

[105] ADM further maintained that any reduction to the price of inventories or other sales due to accumulated inventories is injurious and is not due to factors other than the dumping of subject goods. Moreover, ADM argued, if it had been able to sell the additional wheat gluten in inventory at the end of each year of the POI, this would have allowed it to capture additional market share.

[106] According to the data on the Tribunal's record, the domestic industry's overall production and capacity utilization do not indicate injury. However, production for domestic sales decreased in interim 2020 as compared to interim 2019.[96]

[107] The domestic industry's inventory volumes increased significantly over the POI. At the same time, the valuation of these inventories per tonne decreased period over period.[97] The Tribunal is satisfied that these effects were largely attributable to the dumped subject goods and not to other factors.

[108] As indicated in the previous section, the Tribunal agrees with ADM that the growth of inventories also indicates that the domestic industry was unable to make sales that it should have been in a position to make over the POI, in an expanding market, and improve its market share to an extent.

Profitability

[109] ADM alleged that the combined impact of lost sales, price depression and price suppression translated to a significant loss of revenue and decline in profitability for the domestic industry over the POI.

[110] ADM calculated the losses attributable to subject imports by multiplying its 2017 pricing by the volumes offered in each year. It then multiplied the price obtained for a given year by the volumes sold and subtracted the results in the face of dumping from the "but for" results to obtain a total lost revenue number. In this way, the lost revenue number represents revenue lost due to subject import pressure that caused ADM to reduce its prices to maintain the sale, as well as revenue lost when it lost the sale completely.[98] Based on this analysis, ADM concluded that this lost revenue

---

95 *Transcript of Public Hearing* at 121, 156.
96 Exhibit NQ-2020-003-07B (protected), Table 59.
97 Exhibit NQ-2020-003-07B (protected), Tables 59-60.
98 Exhibit NQ-2020-003-A-03 at para. 17.

represented significant injury that was both material and directly attributable to imports of subject goods during the POI.[99]

[111] The parties opposed argued that the Tribunal cannot reliably assess injury in the co-production context, as the cost allocation between the co-products is discretionary. In addition, the parties opposed stated that lost revenues and declining profitability are predominantly attributable to factors other than subject goods.

[112] ADM argued that the Tribunal often accepts cost-allocated income statements as few businesses keep income statements for specific product definitions. It submitted that, by any measure, the lost *revenue* is itself material, it being "undeniable" that the domestic industry suffered declines in top-line revenue and increases to its costs of direct materials.

[113] The consolidated financial results of the domestic industry for domestic sales show that financial performance declined significantly over the POI. Performance at the gross margin and net income levels declined significantly from 2017 to 2018, improved slightly in 2018 as compared to 2019, but declined again in interim 2020 as compared to interim 2019.[100] The evidence indicates that this was the combined effect of declining prices and increasing costs, as well as declining sales volumes, as described above.

[114] The Tribunal recognizes that a misallocation of expenses between starch and gluten production could account for the decline in the domestic industry's financial performance. However, the Tribunal has reviewed the domestic industry's cost allocation methodology and has determined that it is both reasonable and appropriate. ADM has indicated that its value-based cost allocation methodology is widely used and is accepted for the accounting of agricultural co-products in the industry. It noted that volume-based cost allocation would be unreasonable for its business as the ratio of volumes produced between starch and wheat gluten is significantly different than the ratio of revenues earned between the two co-products. Thus, ADM used a value-based cost allocation methodology based on revenues earned, much like a number of other exporters of subject goods used during the CBSA investigation.[101]

Other performance indicators

[115] Employment indicators, including wages paid, hours worked and productivity, remained stable over the POI. Consistent with its rationale with respect to production and capacity utilization, the domestic industry argued that these employment indicators cannot be considered without weighing the production of starch, as its employees working on the production of starch and those working on the production of wheat gluten are not segregated. Further, ADM submitted that it competes with its sister operations for investments within the ADM group of companies based on relative performance, and accordingly, any decline in performance could put discretionary investments at risk. The parties opposed argued that these indicators show no injury.

---

99 Exhibit NQ-2020-003-A-04 (protected) at para. 18 and attachments thereto.
100 Exhibit NQ-2020-003-07 (protected), Table 55; Exhibit NQ-2020-003-06C at 2.
101 Exhibit NQ-2020-003-A-07 at paras. 13-22. Permolex explained its cost allocation methodology at Exhibit NQ-2020-003-B-08 (protected) at para. 6 and Exhibit NQ-2020-003-10.02A at 20.

[116] There is little to no evidence that the increased presence of the subject goods in the Canadian market had negative effects on the domestic industry's cash flow, employment, wages, growth, ability to raise capital, investments or return on investments during the POI.

Magnitude of the margins of dumping

[117] As noted above, the margins of dumping determined by the CBSA ranged from 10.0 percent to 26.2 percent and were therefore not insignificant. This said, the Tribunal does not consider the margins of dumping, expressed as a percentage of the export price, to necessarily represent the level of the injurious effects caused by the prices in Canada of the subject goods during the POI. The magnitude of the margins of dumping therefore did not add much to the evidence and analysis of the previous sections.

Other factors

[118] Paragraph 37.1(3)(b) of the *Regulations* directs the Tribunal to consider whether any factors other than the subject goods have caused injury. In the analysis above, the Tribunal considered other factors such as the role of trade liberalization, the impact of imports of non-subject goods, the domestic industry's ability to serve the domestic market, and intra-industry competition.

[119] In addition, the Tribunal recognizes that the COVID-19 pandemic began to affect domestic and international markets at the end of the Tribunal's POI, in particular in interim 2020. Although some questionnaire respondents reported tightened supply and increased prices due to the pandemic, overall, the evidence is that the pandemic had a limited aggregate impact on the industry as a whole,[102] as the various impacts to both Canadian and global supply and demand generally offset each other. For example, there is some evidence that decreases in demand in the restaurant sector were balanced by increased demand in the retail food and other sectors.[103]

[120] Furthermore, the Tribunal observes that some of the injury caused by the subject goods occurred prior to the onset of the pandemic. As such, if there were any injurious effects of the COVID-19 pandemic that started manifesting themselves in interim 2020, those effects were over and above the effect of the subject goods during the POI and only added to the already-injured state of the domestic industry.

[121] The Tribunal finds that, while factors other than the dumping of the subject goods have affected the domestic industry's performance over the POI, the subject goods, in and of themselves, have caused injury to the domestic industry.

Materiality

[122] The Tribunal will now determine whether the effects of imports of the subject goods noted above are "material", as contemplated in the definition of "injury" under section 2 of *SIMA*. *SIMA* does not define the term "material". However, both the extent of injury during the relevant time

---

[102] Exhibit NQ-2020-003-9.01B at 11; Exhibit NQ-2020-003-9.02A at 7; Exhibit NQ-2020-003-15.03 at 8; Exhibit NQ-2020-003-16.01 (protected) at 4; Exhibit NQ-2020-003-12.07 at 8; Exhibit NQ-2020-003-18.03 at 7; Exhibit NQ-2020-003-18.06 at 7; Exhibit NQ-2020-003-18.11A at 7.

[103] Exhibit NQ-2020-003-9.01B at 11; Exhibit NQ-2020-003-9.02A at 7; Exhibit NQ-2020-003-18.08A at 7; *Transcript of Public Hearing* at 21-22, 35-36.

frame and the timing and duration of the injury are relevant considerations in determining whether any injury caused by the subject goods is "material".[104]

[123] The opposing parties argued that, if the domestic industry suffered any injury as the result of imports of subject goods, it did not rise to the level of materiality.

[124] The Tribunal finds that, on the whole, the negative effects of the subject goods on the state of the domestic industry, seen through the significant lost sales, price depression and price suppression and impact on profitability, have been material in terms of extent and duration. Overall, the Tribunal finds that the domestic producers were impacted in a material way by the presence of the subject goods in the market during the POI.

[125] The Tribunal therefore finds that the adverse impact of the subject goods has been to such an extent that it can be considered material injury.

CONCLUSION

[126] The Tribunal hereby finds, pursuant to subsection 43(1) of *SIMA*, that the dumping of the subject goods has caused injury to the domestic industry.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

Cheryl Beckett
Cheryl Beckett
Member

Serge Fréchette
Serge Fréchette
Member

---

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