Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDINGS AND REASONS

Inquiry NQ-2021-003

Certain Small Power Transformers

Finding issued
Friday, December 24, 2021

Reasons issued
Monday, January 10, 2022

Corrigendum issued
Thursday, March 24, 2022

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

CERTAIN SMALL POWER TRANSFORMERS

FINDINGS

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 liquid dielectric transformers having a top power handling capacity equal to or greater than 3,000 kilovolt amperes (kVA) (3 megavolt amperes [MVA]), and less than 60,000 kilovolt amperes (kVA) (60 megavolt amperes [MVA]), and having a nominal high voltage rating of greater than 34.5 kilovolts (kV), whether assembled or unassembled, complete or incomplete, originating in or exported from the Republic of Austria (Austria), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), and the Republic of Korea (South Korea), has caused injury or retardation or is threatening to cause injury, as these words are defined in SIMA.

On November 25, 2021, the President of the Canada Border Services Agency (CBSA), pursuant to paragraph 41(1)(a) of SIMA, terminated its dumping investigation with respect to the above-mentioned goods exported to Canada from South Korea by IEN Hanchang Co., Ltd (Hanchang). Pursuant to paragraph 41(1)(b) of SIMA, the CBSA made a final determination of dumping in respect of the above-mentioned goods originating in or exported from Austria, Chinese Taipei and South Korea (excluding goods exported from South Korea by Hanchang).

Further to its inquiry, the Tribunal hereby finds, pursuant to subsection 43(1) of SIMA, that:

(a) the dumping of the above-mentioned goods, originating in or exported from Chinese Taipei and South Korea (excluding those goods exported from South Korea by Hanchang), has caused material injury to the domestic industry; and

(b) the dumping of the above-mentioned goods, originating in or exported from Austria, has not caused injury and is not threatening to cause injury to the domestic industry.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Susan D. Beaubien

Susan D. Beaubien
Member

Serge Fréchette

Serge Fréchette
Member

The statement of reasons will be issued within 15 days.

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

CERTAIN SMALL POWER TRANSFORMERS

CORRIGENDUM

Paragraph 10 of the Statement of Reasons should read as follows:

On October 25, 2021, the Coalition filed a case brief, witness statements and other evidence in support of a finding of injury or threat of injury.

The last sentence of paragraph 114 of the Statement of Reasons should read as follows:

While the degree of undercutting is confidential, it exceeded 15 percent in each period and increased from 2018 to 2020.

Frédéric Seppey
Frédéric Seppey
Presiding Member

Susan D. Beaubien
Susan D. Beaubien
Member

Serge Fréchette
Serge Fréchette
Member

Place of Hearing:	Via videoconference
Dates of Hearing:	November 22, 23, 25 and 26, 2021
Tribunal Panel:	Frédéric Seppey, Presiding Member Susan D. Beaubien, Member Serge Fréchette, Member
Tribunal Secretariat Staff:	Heidi Lee, Lead Counsel Michael Carfagnini, Counsel Mark Howell, Lead Analyst Thy Dao, Analyst Andrew Wigmore, Analyst Kim Gagnon-Lalonde, Acting Senior Registrar Officer Rekha Sobhee, Registrar Officer

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United Steelworkers	Adam Casey Craig Logie Ardita Sinojmeri Christopher Somerville

Importers/Exporters/Others	**Counsel/Representatives**
EU Delegation to Canada	Maud Labat
Korean Embassy	Joung Ki Kim
Shihlin Electric & Engineering Corp.	WeyHeng Hsu Po-Ching Lee
Siemens Energy Austria GmbH	Peter Clark
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WITNESSES:

George Partyka Jr. Chief Executive Officer PTI Transformers L.P. and PTI Transformers Inc.	Colin Sturm Inside Sales Manager PTI Transformers L.P. and PTI Transformers Inc.
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STATEMENT OF REASONS

INTRODUCTION

[1] The mandate of the Canadian International Trade Tribunal in this inquiry[1] is to determine whether the dumping of certain small power transformers (SPTs), originating in or exported from the Republic of Austria (Austria), the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), and the Republic of Korea (South Korea) (the subject goods), has caused injury or is threatening to cause injury to the domestic industry.

[2] For the reasons that follow, the Tribunal has determined that the dumping of the above-mentioned goods from Chinese Taipei and South Korea has caused material injury to the domestic industry, and that the dumping of the above-mentioned goods from Austria has not caused injury and does not threaten to cause injury to the domestic industry.

BACKGROUND

[3] This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on February 23, 2021, by Northern Transformer Corporation, Transformateurs Delta Star Inc., PTI Transformers Inc. and PTI Transformers L.P. (together the Coalition), concerning the alleged dumping of certain SPTs originating in or exported from Austria, Chinese Taipei and South Korea, and the subsequent decision by the President of the CBSA, on April 15, 2021, to initiate an investigation into the alleged dumping of the subject goods.

[4] On April 16, 2021, as a result of the CBSA's decision to initiate the investigation, the Tribunal initiated a preliminary injury inquiry pursuant to subsection 34(2) of SIMA. On June 14, 2021, the Tribunal determined that there was evidence that disclosed a reasonable indication that the dumping of certain SPTs from Austria, Chinese Taipei and South Korea had caused injury or was threatening to cause injury to the domestic industry.[2]

[5] On August 27, 2021, the President of the CBSA made a preliminary determination of dumping concerning SPTs originating in or exported from Austria, Chinese Taipei and South Korea.[3] On August 30, 2021, the Tribunal accordingly issued a notice of commencement of inquiry into the alleged injurious effect of the dumping of certain SPTs from Austria, Chinese Taipei and South Korea.[4]

[6] The Tribunal's period of inquiry (POI) was from January 1, 2018, to December 31, 2020, and the interim period of January 1, 2021, to March 31, 2021 (interim 2021). For comparative purposes, information was also collected for January 1, 2020, to March 31, 2020 (interim 2020).

[7] As part of the inquiry, a number of known domestic producers, importers, purchasers and foreign producers of SPTs were asked to respond to questionnaires from the Tribunal. The Tribunal received replies to its questionnaires from 4 domestic producers of goods meeting the product

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

2 *Certain Small Power Transformers* (14 June 2021), PI-2021-001 (CITT) [*SPT PI*].

3 Exhibit NQ-2021-003-01.

4 Exhibit NQ-2021-003-03. The notice was published on the Tribunal's website and in Part I of the September 11, 2021, edition of the *Canada Gazette*.

definition, 7 importers of subject goods and/or goods meeting the product definition, as well as 17 purchasers and 5 foreign producers of such goods.

[8] Using the questionnaire responses and other information on the record, staff of the Secretariat to the Tribunal prepared public and protected investigation reports, which were issued on October 18, 2021.[5] Revised versions of the reports were issued on November 17, 2021.[6]

[9] The Tribunal received no requests for product exclusions and no requests for information.

[10] On October 25, 2021, the Coalition filed a case brief, witness statements and other evidence opposing a finding of injury or threat of injury.

[11] On October 28, 2021, the Embassy of the Republic of Korea (the Korean Embassy) filed submissions opposing a finding of injury or threat of injury. On November 1, 2021, Siemens Energy Canada Limited and Siemens Energy Austria GmbH (together Siemens) also filed a case brief, witness statements and other evidence opposing a finding of injury or threat of injury.

[12] The Coalition filed a reply brief, reply witness statement and additional evidence on November 9, 2021.

[13] On November 18, 2021, the United Steelworkers and UNIFOR (together the Unions) filed a late written submission in support of a finding of injury or threat of injury. On the same date, Shihlin Electric & Engineering Corp. (Shihlin) also filed a late written submission opposing a finding of injury or threat of injury.[7]

[14] A hearing with public and in camera sessions was held by videoconference, from November 22 to 26, 2021.[8] The Tribunal heard evidence from witnesses for the Coalition and Siemens, as well as four witnesses called by the Tribunal.[9] The Tribunal heard final arguments by the Coalition, Siemens, the Korean Embassy and Shihlin. The Coalition's submissions were supported by the Unions.

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5 Exhibit NQ-2021-003-06; Exhibit NQ-2021-003-07 (protected).

6 Exhibit NQ-2021-003-06A; Exhibit NQ-2021-003-07A (protected).

7 Shihlin and the Unions each requested time to present final arguments at the hearing. The Unions also requested time for cross-examination. However, as neither party had filed submissions by the deadlines set out by the Tribunal in the present inquiry, the Tribunal directed each party to seek leave to participate in the hearing. Both parties did so. Shihlin submitted that its position was limited to its written submission filed in the preliminary injury inquiry and the information provided in its questionnaire response. Similarly, the Unions submitted that their position was limited to their written submission filed in the preliminary injury inquiry. At the Tribunal's further direction, each party also filed the written summary of its position in the present inquiry. In the circumstances, the Tribunal considered that the other parties would not be prejudiced by the late participation of Shihlin and the Unions. The Tribunal granted both requests.

8 The hearing was adjourned on November 24, 2021.

9 One of the witnesses called by the Tribunal was a representative of Valard Construction LP (Valard), which had not provided a questionnaire response in this inquiry. At the start of the hearing, the Coalition requested that the Tribunal order Valard to provide a response prior to the witness's testimony on the third day of the hearing (see Exhibit NQ-2021-003-39; *Transcript of Public Hearing* (evidence) at 9–12). The Tribunal requested that Valard complete a shortened form of the importer questionnaire, but ultimately Valard did not provide this information.

[15] Although the European Union Delegation to Canada filed a notice of participation, it did not file any evidence or arguments, take a position, or otherwise participate in the inquiry.

[16] The Tribunal issued its findings on December 24, 2021.

Procedural matters concerning the investigation report

[17] On October 19, 2021, the Coalition raised several concerns related to the investigation report.[10]

[18] The Coalition argued that the investigation report data relating to the domestic industry's market share were distorted, as the report did not include certain imports of subject goods from South Korea and because the import volumes of non-subject goods were underreported due to a lack of importer questionnaire responses. The Coalition also argued that data relating to the domestic industry's sales volumes, prices and financial performance were distorted due to inaccurate information reported by Transmag Énergie Inc. (Transmag), another domestic producer.[11]

[19] The Coalition therefore requested that the Tribunal seek information on the "missing" South Korean imports by directing questionnaires to a producer of South Korea and the two Canadian-based importers of those goods. In support, the Coalition submitted a response to a CBSA request for information from Hyundai Electric & Energy Systems Co., Ltd. (HEES), indicating imports and importers which were not reflected in the Tribunal's data.[12] The Coalition also asked that the Tribunal clarify Transmag's data. There were no objections to these requests.

[20] In addition, the Coalition further requested that the Tribunal estimate import volumes of non-subject goods based on CBSA data. In the alternative, the Coalition submitted that request additional information from the CBSA should be obtained with respect to the volume and value of such imports during the POI.

[21] Siemens objected to the request for additional information from the CBSA. It argued that the volume and value of such imports, as reported by the CBSA in its preliminary determination, were already on the record of this inquiry.[13] Siemens also stated that Rio Tinto Alcan Inc. (Rio Tinto), which had not previously participated in this inquiry, was in the process of completing a purchaser questionnaire.[14]

[22] The Tribunal granted the Coalition's request, in part.[15] The Tribunal issued a foreign producer questionnaire to HEES and importer questionnaires to Hyundai Electric America Corporation and Remington Sales Co.[16] Responses were received from all three companies, which accounted for the "missing" imports from South Korea. The Tribunal also sought and received clarifications from Transmag regarding its data, and accepted a late questionnaire response from Rio

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10 Exhibit NQ-2021-003-24; Exhibit NQ-2021-003-24A (protected).

11 Transmag, which did not participate as a party in this inquiry, represented a relatively small share of domestic production, as compared to the other domestic producers. See Exhibit NQ-2021-003-07A (protected), Table 15.

12 Exhibit NQ-2021-003-24 at 8–12.

13 Exhibit NQ-2021-003-26 at 2–3.

14 *Transcript of Public Hearing* (arguments) at 155; Exhibit NQ-2021-003-26A (protected) at 1.

15 Exhibit NQ-2021-003-27.

16 A questionnaire was also issued to Hyundai Heavy Industries (Canada), which is the same entity as Remington Sales Co.

Tinto. Further to the receipt of this information, the Tribunal issued a revised investigation report on November 17, 2021.

[23] The Tribunal declined to grant the Coalition's request to seek additional information concerning imports of subject goods from the CBSA. Having regard to the CBSA data already on the record of this inquiry, the Tribunal considered that this additional information was not necessary to address the Coalition's concerns about the market share information in the investigation report. The Tribunal also noted that it remained open to parties to make submissions based on the CBSA data on the record.

Issues relating to witnesses

[24] Proceedings brought pursuant to SIMA engage significant commercial interests at different trade levels within the industry, with respect to both domestic and foreign producers. The imposition of anti-dumping duties has significant effects on the market, and impacts the interests of producers, importers and purchasers. As such, the Tribunal recognizes the importance of ensuring that its decision is reached on the basis of an evidential record that is as comprehensive as reasonably possible.

[25] In the course of conducting proceedings under SIMA, the Tribunal seeks out, and relies upon, economic data and other evidence not only from those parties that have chosen to participate in the inquiry, but also from other stakeholders and third parties possessing information relevant to the issues that are before the Tribunal. The full and diligent cooperation of the parties, stakeholders and of third parties holding relevant information is accordingly a critical aspect of SIMA proceedings. Indeed, SIMA confers statutory authority on the Tribunal to compel the disclosure of relevant information, up to and including issuance of subpoenas to require the attendance of witnesses. The Tribunal has practices and procedures, underpinned by statute, which protect the confidentiality of commercially sensitive information.

[26] Although the Tribunal is satisfied that there is ample evidentiary foundation for the conclusions that it has reached in this matter, the acquisition of some of that evidence was more time-consuming and difficult than it needed to be. The Tribunal encountered incidents of stakeholders either refusing to comply with the Tribunal's requests for information or drip-feeding the Tribunal with information that was incomplete or ambiguous.

[27] More particularly, and having regard to the grounds of complaint raised by the domestic industry, the Tribunal considered that Valard, as an entity that purchased and issued tenders for SPTs over the POI, would be well placed to provide evidence concerning the procurement of SPTs, including the significance of product customization, SPT technical requirements, pricing, competitive factors and other relevant aspects of the marketplace.

[28] Valard refused or neglected to respond to the Tribunal's written requests for information, despite prompting. A subpoena was issued to compel the attendance of a corporate witness from Valard at the hearing of this matter. Regrettably, the Tribunal found Valard and its witness to be uncooperative throughout, with reluctance to provide information which bordered on truculence.

[29] As noted above, the Tribunal has been entrusted by Parliament to render decisions pursuant to SIMA which have wide-ranging economic impact. It must be understood that full cooperation by all parties and stakeholders is crucial when dealing with SIMA issues. Recalcitrance and lack of

cooperation are not viable or acceptable options. The Tribunal wishes to highlight that it has the statutory authority of a court of record to compel production of information. Neither parties nor stakeholders should presume that the Tribunal will exercise tolerance or forbearance with respect to attempts to evade or obstruct the Tribunal's efforts to requisition information that is relevant to proceedings, as the Tribunal is mandated by statute to do.

RESULTS OF THE CBSA'S INVESTIGATION

[30] On November 25, 2021, the CBSA, pursuant to paragraph 41(1)(a) of SIMA, terminated the dumping investigation in respect of subject goods exported from South Korea by IEN Hanchang Co., Ltd. (Hanchang), as goods of this exporter were found to not have been dumped.[17]

[31] On the same day, pursuant to paragraph 41(1)(b), the CBSA made a final determination of dumping concerning the subject goods originating in or exported from Austria, Chinese Taipei and South Korea (excluding those goods exported from South Korea by Hanchang).[18]

[32] The CBSA's period of investigation for its dumping investigation was from July 1, 2019, to December 31, 2020.

[33] The following margins of dumping (expressed as a percentage of the export price) were determined by the CBSA for its period of investigation:[19]

Exporter	Margin of Dumping (Percentage of export price)
Austria	
Siemens Energy Austria GmbH	73.1%
Chinese Taipei	
Shihlin Electric & Engineering Corp.	11.7%
South Korea	
Hyundai Electric & Energy Systems Co., Ltd.	73.1%
IEN Hanchang Co., Ltd.	0.0%
ILJIN Electric Co., Ltd.	16.6%
All other exporters	73.1%

PRODUCT

Product definition

[34] The subject goods are defined as follows:

> Liquid dielectric transformers having a top power handling capacity equal to or greater than 3,000 kilovolt amperes (kVA) (3 megavolt amperes [MVA]), and less than 60,000 kilovolt amperes (kVA) (60 megavolt amperes [MVA]), and having a nominal high voltage rating of greater than 34.5 kilovolts (kV), whether assembled or unassembled, complete or incomplete,

17 Exhibit NQ-2021-003-04 at 10.
18 *Ibid.* at 10.
19 *Ibid.* at 15.

originating in or exported from the Republic of Austria, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), and the Republic of Korea.

Product information

[35] The CBSA provided the following additional product information:[20]

> [32] For greater clarity, the subject goods include but are not limited to transformers manufactured to meet CSA standard C88-16, "Power transformers and reactors," and superseding or equivalent standards, and similar proprietary specifications and standards that may be established by a customer for power transformers whether or not expressly based on or incorporating CSA C88-16.
>
> [33] Incomplete SPT are subassemblies consisting of the active part and any other parts attached to, imported with, or invoiced with the active parts of the SPT. The "active part" of the SPT consists of one or more of the following when attached to or otherwise assembled with one another: the steel core or shell, the windings, electrical insulation between the windings, and/or the mechanical frame for an SPT.
>
> [34] The product definition encompasses all SPT regardless of name designation, including but not limited to: Generation Station/Generator Step-Up Transformers, Step-Down Transformers, Auto-Transformers, Interconnection Transformers, Voltage Regulator Transformers, High-voltage Direct Current ("HVDC") Transformers, and Mobile Transformers.
>
> [35] The subject goods do not include reactors, as reactors are not like SPT. Reactors are used at the terminal end of a transmission line to neutralize the reactive power generated by the line capacitance. Rather than transform voltage from one level to another, as SPT do, reactors reduce voltage drop by consuming reactive power. Reactors, therefore, have very different end uses than SPT. Reactors are also produced differently than SPT. Reactors contain, in general, only one winding and are based on a completely different core concept than SPT. SPT, on the other hand, typically have more than one winding.
>
> [36] For greater clarity, the subject goods also do not include fully assembled mobile substations but do include SPT that are designed to be incorporated into mobile substations.

LEGAL FRAMEWORK

[36] 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".

[37] 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.

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20 Exhibit NQ-2021-003-04.A.

[38] Given that the subject goods are originating 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 or certain subject countries).

[39] The Tribunal can then assess whether the dumping of the subject goods has caused material injury to the domestic industry.[21] 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.[22] As a domestic industry is already established, the Tribunal will not need to consider the question of retardation.[23]

[40] 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

[41] 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.[24]

[42] 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.

[43] 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).[25]

[44] 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

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21 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.

22 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.

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

24 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.).

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

those goods are "like goods" in relation to each other, they will be regarded as comprising a single class of goods.[26]

[45] In the preliminary injury inquiry, the Tribunal found that domestically produced SPTs constitute like goods to the subject goods, and that there is a single class of goods.[27] In doing so, the Tribunal found that, despite the differences between SPTs that fall within the product definition, both subject goods and domestically produced SPTs have similar physical and market characteristics, have similar end uses and generally resemble one another.[28]

[46] The Coalition submitted that there is no reason for the Tribunal to depart from this finding. The opposing parties did not raise any arguments in respect of the like goods or classes of goods analysis.

[47] The evidence shows that SPTs in the Canadian market are capital goods that are made-to-order based on customer specifications and are largely sold through competitive procurements.[29] Both domestically produced SPTs and subject goods fulfill the same end uses and customer needs, i.e. to transform voltage from one level to another using electromagnetic induction coils.[30] Both domestically produced SPTs and subject goods also have the same or similar customizable features and key features, are produced using the same raw materials and production processes, and are manufactured to conform to the same regulatory standards for use in Canada.[31]

[48] As such, the evidence indicates that where a domestically produced SPT and a subject good both meet a purchaser's technical specifications, there is a high degree of substitutability between them.[32] In addition, almost all purchasers indicated that subject goods are "always" or "usually" interchangeable with domestic SPTs.[33]

[49] In light of the evidence outlined above, the Tribunal's finding in the preliminary injury inquiry, and the fact that no party has presented arguments or evidence suggesting that the Tribunal should conduct its analysis on a different basis in this inquiry, the Tribunal finds that domestically produced SPTs of the same description as the subject goods constitute "like goods" in relation to the subject goods, and that there is a single class of goods.

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

27 *SPT PI* at paras. 28, 33.

28 *SPT PI* at para. 32.

29 Exhibit NQ-2021-003-A-05 at paras. 7–11; Exhibit NQ-2021-003-A-06 (protected) at paras. 7–11; Exhibit NQ-2021-003-B-05 at paras. 8, 11, 13–14; Exhibit NQ-2021-003-C-05 at paras. 5, 11–14; Exhibit NQ-2021-003-F-04 at para. 7; Exhibit NQ-2021-003-09.01 at 8; Exhibit NQ-2021-003-18.07 at 8; Exhibit NQ-2021-003-07A (protected), Table 13.

30 Exhibit NQ-2021-003-C-05 at paras. 6–7; Exhibit NQ-2021-003-04.A at paras. 38, 53.

31 Exhibit NQ-2021-003-C-05 at paras. 9; Exhibit NQ-2021-003-09.03C at 9; Exhibit NQ-2021-003-04.A at 14; Exhibit PI-2021-001-03.01 (protected) at 15–18, 23–24, 168–170, 368.

32 Exhibit NQ-2021-003-A-05 at para. 15; Exhibit NQ-2021-003-12.01 at 9; Exhibit NQ-2021-003-12.02 at 7; Exhibit NQ-2021-003-12.04A at 7; Exhibit NQ-2021-003-09.03B at 9; Exhibit NQ-2021-003-09.01 at 9; Exhibit NQ-2020-003-09.02 at 9; Exhibit NQ-2021-003-09.04B at 8.

33 Exhibit NQ-2021-003-07A (protected), Table 8.

DOMESTIC INDUSTRY

[50] 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.

[51] 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.[34]

[52] The Tribunal's record includes data for four domestic producers, i.e. the three Coalition members and Transmag.

[53] There are two other known domestic producers of SPTs: Pioneer Transformers Ltd. (Pioneer) and Stein Industries Inc. (Stein).[35] Pioneer and Stein did not respond to the domestic producers' questionnaire or otherwise participate in the injury inquiry, but provided letters of support for the Coalition in the preliminary injury inquiry.[36] The Coalition also submitted evidence on Stein's production volumes and estimates of Pioneer's production volumes based on market intelligence.[37]

[54] The Coalition submitted that its production constitutes a major proportion of the total domestic production of the like goods. The Coalition initially argued that the Tribunal should place little weight on the information provided by Transmag, due to alleged anomalies in its questionnaire response, as discussed above in these reasons. The opposing parties did not raise any arguments in response.

[55] Further to the corrections by Transmag, the Tribunal is satisfied that its data can be properly relied on. In the Tribunal's view, there are no other reasons to exclude Transmag from the domestic industry for the purposes of this inquiry.

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34 The term "major proportion" means an important, serious or significant proportion of total domestic production of like goods and not necessarily a majority: *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); 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.

35 The Coalition also identified Atlas Transformer (Atlas) and Surplec HV (Surplec) as active companies in the Canadian SPT market, but submitted that Atlas sells non-subject goods and that Surplec sells refurbished SPTs that are not manufactured in Canada. Both companies were sent a domestic producer questionnaire and neither responded. As such, the Tribunal finds that the complainants' evidence remains uncontroverted.

36 *SPT PI* at para. 38; Exhibit NQ-2021-003-A-10 (protected) at 3514–3515.

37 Exhibit NQ-2021-003-A-10 (protected) at 3514; Exhibit PI-2021-001-02.01 at 451–452; Exhibit PI-2021-001-03.01 (protected) at 2546.

[56] The evidence shows that the Coalition and Transmag together account for the vast majority of domestic production of like goods.[38]

[57] As such, the Tribunal finds that the Coalition and Transmag account for a major proportion of domestic production. The Tribunal therefore finds that these four producers constitute the domestic industry for the purposes of this injury inquiry.

CUMULATION

[58] At the hearing of this matter, the parties made extensive submissions concerning the issue of cumulation. The Coalition presented arguments that the injurious effects from the importation of dumped SPTs should be cumulatively assessed. In essence, the Tribunal was urged to find that the injury arising from subject goods imported from each of South Korea, Chinese Taipei and Austria was indistinguishable and caused a collective effect on the domestic industry. For its part, Siemens submitted that SPTs from Austria differ from those imported from other subject countries because they compete in a narrow, specialized market niche, such that there is no justification for cumulation.

[59] Cumulation is governed by subsection 42(3) of SIMA. Where dumped goods have been imported into Canada from more than one country, the Tribunal is required to assess the cumulative effect of the dumping, provided that the Tribunal is satisfied that cumulation is justified in the circumstances.

[60] Both parties contend that the application of subsection 42(3) of SIMA supports their respective positions. As such, the Tribunal must consider, interpret, and apply the provisions of subsection 42(3) which are set forth below:

> **(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.

[61] The principles of statutory interpretation are well established, having been summarized as follows by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*:

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[38] Exhibit NQ-2021-001-07A (protected), Table 15; Exhibit NQ-2021-003-A-10 (protected) at 3514; Exhibit PI-2021-001-02.01 at 451-452; Exhibit PI-2021-001-03.01 (protected) at 2546.

> It has been long established as a matter of statutory interpretation that "the 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": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to the provisions of an Act as a harmonious whole.[39]

[62] Accordingly, the words of a statutory provision, if clear, will dominate the interpretation. If the words are unclear, they will yield to an interpretation that will best serve the overriding purpose of the statute.[40] SIMA implements Canada's treaty obligations in relation to international trade. Canada's international obligations are part of the context that assists in the comprehension of the object and purpose of SIMA when considering the issue of cumulation.[41]

[63] On a plain reading, subsection 42(3) of SIMA prescribes two requirements that must underpin a finding of cumulation. These requirements are defined by paragraphs 42(3)(a) and 42(3)(b) which are bridged by the word "and", signalling Parliament's intention that these paragraphs should be read conjunctively. Accordingly, the factors in both paragraphs 42(3)(a) and 42(3)(b) must be met before the Tribunal can find that the effects of dumping and subsidizing should be cumulatively assessed.

[64] With respect to paragraph 42(3)(a) of SIMA, the Tribunal must be satisfied that the margin of dumping in relation to the goods from each of the subject countries is not insignificant, and that the volume of dumped goods from each subject country is not negligible. Section 2 defines "insignificant" with respect to the margin of dumping and "negligible" with respect to volume of dumped goods. As such, the provisions of paragraph 42(3)(a) afford the Tribunal with relatively little discretion.

[65] In contrast, the criteria under paragraph 42(3)(b) of SIMA are framed quite broadly. Here, the Tribunal is afforded considerable discretion, having to decide whether cumulation is "appropriate". In coming to this conclusion, the Tribunal must "take into account" the "conditions of competition". Although the statutory language mandates that one specific factor ("conditions of competition") must be considered, the direction to "take into account" is open-ended wording. It implies that other relevant factors in addition to "conditions of competition", at the discretion of the Tribunal, may also be considered, if needed, in order to arrive at a decision as to whether cumulation is "appropriate". In other words, the Tribunal *must* consider "conditions of competition" in its analysis, but the statute leaves room for other factors, if present and relevant, to be considered. If "conditions of competition"

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39 2005 SCC 54 at para. 10. See also *Angang Steel Company Limited v. Canada (Border Services Agency)*, 2020 FCA 67 at para. 16.

40 *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 21.

41 With respect to cumulation, Article 3.3 of the Agreement on Implementation of Article VI of the GATT, i.e. the World Trade Organization (WTO) Anti-Dumping Agreement, is relevant.

was intended to be the sole factor, the language used in the statutory provision would be more prescriptive and inflexible.

[66] In conducting this analysis, the Tribunal must consider whether cumulation is appropriate having regard to the conditions of competition between the goods of each country *or* as between the subject goods and the like goods. The interpretation of paragraph 42(3)(b) of SIMA is discussed in more details below.

[67] The Tribunal begins its cumulation analysis with the factors described by paragraph 42(3)(a) of SIMA.

Insignificant and negligibility

[68] The issue for determination pursuant to paragraph 42(3)(a) of SIMA was, for practical purposes, uncontested by the parties.

[69] Subsection 2(1) of SIMA defines "insignificant", in relation to a margin of dumping, as a margin that is less than 2 percent of the export price of the goods, and "negligible" means a volume that represents less than 3 percent of the total volume of goods meeting the product definition that are released into Canada from all countries.

[70] As seen above, the margins of dumping for each of the subject countries, as reported by the CBSA in its final determination, were greater than 2 percent and therefore not "insignificant".[42]

[71] In assessing whether the volume of dumped goods from a country is negligible, the Tribunal typically considers import volumes during the CBSA's period of investigation. In this case, the relevant time frame spanned the 18-month period between July 1, 2019, to December 31, 2020.[43] During this period, the volumes of dumped goods from each subject country were greater than 3 percent of the total volume of imports, meeting the production definition, and were therefore not "negligible".[44]

Is an assessment of cumulative effect appropriate?

[72] Having determined that the margins of dumping were not insignificant and that the volumes of dumped goods were not negligible, the Tribunal will determine whether an assessment of the cumulative effect of the dumping of goods from the three subject countries is appropriate. The

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42 Exhibit NQ-2021-003-04 at 15.

43 See, for example, *Heavy Plate* (5 February 2021), NQ-2020-001 (CITT) at para. 66; *Corrosion-resistant Steel Sheet* (16 November 2020), NQ-2019-002 (CITT) at para. 58. 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 of dumped goods during the period of data collection for the dumping investigation, i.e. the CBSA's period of investigation. See *Notification Concerning the Time-Period for Determination of Negligible Import Volumes Under Article 5.8 of the Agreement*, G/ADP/N/100/CAN.

44 Exhibit NQ-2021-003-07A (protected), Table 14; Exhibit NQ-2021-003-04 at 21. To assess negligibility, the Tribunal typically considers volumes of dumped imports as reported by the CBSA in its final determination and volumes of imports of non-subject goods from the Tribunal's investigation report. Given the issues raised by parties regarding volumes of imports of non-subject goods, the Tribunal also assessed negligibility by considering import volumes of non-subject goods reported by the CBSA in its final determination, which similarly showed that volumes from each country were not "negligible".

conditions of competition that are relevant to the goods at issue is an important factor to be considered.

[73] The Coalition submitted that a cumulative assessment of the effect of dumping from all three subject countries is warranted in this case, as SPTs are interchangeable once technical specifications are met and are sold through the same channels of distribution to the same customers.

[74] For its part, Siemens argued that cumulation of imports from Austria is not warranted as Austrian subject goods are concentrated in a geographic market and actual competition with subject goods and like goods is limited.

[75] In reply, the Coalition argued that the domestic industry competes against Austrian subject goods for sales in Quebec and Ontario, which are markets that include key purchasers in Canada. The Coalition argued that the participation of Austrian subject goods in Canada is therefore not as limited as suggested by Siemens, despite their presence in only two provinces, and warrants a cumulated assessment of the Austrian subject goods.

[76] In essence, Siemens's position is premised on the argument that the criteria of subparagraph 42(3)(b)(i) of SIMA are not met. According to Siemens, the relevant conditions of competition operate to distinguish or exclude SPTs from Austria as opposed to those manufactured in South Korea and Chinese Taipei, for practical purposes.

[77] On the other hand, the Coalition's arguments are predicated on the factors of subparagraph 42(3)(b)(ii) of SIMA. The Coalition stresses that the conditions of competition are such that SPTs from all of the subject countries can, and do, take sales from the domestic industry.

[78] In assessing conditions of competition, the Tribunal will typically consider a range of factors such as 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 subject goods of a particular country should be cumulated, and no single factor is determinative.[45] The assessment of whether it is appropriate to cumulate the subject goods of a country involves the weighing of evidence and circumstances in each case.[46]

[79] An analysis of conditions of competition pursuant to paragraph 42(3)(b) of SIMA may lead to the conclusion that cumulation is appropriate where the conditions enable competition as between subject goods from each subject country individually (as per subparagraph 42(3)(b)(i)) or where the subject goods compete with like goods produced by the domestic industry (as per subparagraph 42(3)(b)(ii)), or where both situations exist. This arises from the use of the "or" bridging subparagraphs 42(3)(b)(i) and (ii), and will, in any given case, be dependent upon the evidence and particular circumstances.[47]

[80] The circumstances in this case are unusual. Contrary to a uniform, homogeneous market where the conditions of participation in the market are similar or are the same for all participants, the SPT market in Canada is characterized by market conditions driven by the specific needs of

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45 *Corrosion-resistant Steel Sheet* (21 February 2019), NQ-2018-004 (CITT) at para. 45.

46 *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 16.

47 Depending on the statutory context, the word "or" may be read conjunctively. See *Russell v. The Queen*, 2001 CanLII 423 at paras. 9–13. The Tribunal sees no reason to read the "or" in paragraph 42(3)(b) in such a way.

individual purchasers. In this context, the Tribunal considers that conditions of competition are best examined by analyzing the conditions that are set in procurement practices of purchasers. Furthermore, the Tribunal is also of the view that the degree of actual competition among the various participants in the market provides a good indication of the existence of differences in the conditions of competition as they exist among those participants.

[81] SPTs in Canada are sold through procurement processes. Each request for proposal (RFP) establishes its own set of conditions and requirements, including product specifications and financial requirements. The degree of sophistication or the complexity of specifications required by some purchasers may be so significant for certain individual suppliers that it could effectively alter the conditions of competition.

[82] In certain cases, a potential supplier of SPTs will only be authorized to participate in an RFP process if it has been prequalified following a detailed and onerous process of assessment of its capacity to satisfy a range of needs and requirements of a specific purchaser – whether in terms of specifications or application of technological skills and know-how. While a majority of purchasers indicated that they require certification of pre-qualification of bidders, the operation of these processes greatly differs from one procuring entity to another. In the specific case of Hydro-Québec, pre-qualification of suppliers is a multi-year process which has not been opened since before the POI, effectively limiting access to Hydro-Québec's RFPs to a very small number of suppliers during the POI.

[83] This determination of ability to compete prior to the issuance of a specific RFP is, in the Tribunal's view, a clear example of conditions of competition that differ as between market participants and serve to differentiate them. The imposition of these very strict pre-qualification requirements by Hydro-Québec is a good example of conditions of competition having been different among market participants, as they did not allow certain participants to respond to RFPs that led to the purchase of SPTs by Hydro-Québec during the POI. For practical purposes, this operates to create discrete, albeit *ad hoc*, niches within the marketplace where the conditions of competition are different, uneven, and potentially exclusionary with respect to all of the actual or potential players. This is further examined below.

[84] The evidence shows that SPTs from Austria are generally only offered in Canada when specific customers require a high-performance SPT or one with a unique technical design, such as the types of goods procured for Hydro-Québec's non-standardized needs.[48] Austrian subject goods imported into Canada during the POI were produced only at the Siemens facility in Linz, Austria (the Linz facility) and imported into Canada by Siemens. Witnesses for Siemens explained that the Linz facility is a "premium" factory that is specifically equipped to produce high-end SPTs with complex technical requirements, such as those relating to load loss ratios, noise levels and safety features.[49]

[85] Indeed, the Linz facility is the only supplier of subject goods pre-qualified to participate in procuring opportunities established by Hydro-Québec, which is a purchaser with highly complex

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48 Exhibit NQ-2021-003-F-04 at paras. 5–11; *Transcript of Public Hearing* (evidence) at 104–105; *Transcript of In Camera Hearing* at 203–204, 206–209.

49 Exhibit NQ-2021-003-F-04 at paras. 6–7; Exhibit NQ-2021-003-G-04 at paras. 3–7; Exhibit NQ-2021-003-G-03 (protected) at paras. 3–7, 14; *Transcript of Public Hearing* (evidence) at 101–103; *Transcript of In Camera Hearing* at 163–166.

requirements.[50] The Linz facility's capacity to meet these requirements is largely, if not exclusively, dependent upon the use of intellectual property, including proprietary technologies and know-how which are unique and restricted, even within Siemens itself, to the Linz facility.[51] Nor would such technology of Siemens be accessible to any other prospective bidder. Other bidders could, of course, develop their own innovation and proprietary technology that could be used to design SPTs that would address the specialized technical requirements of sophisticated purchasers, such as Hydro-Québec. However, such an exercise would be time- and resource-intensive, entailing considerable investment in personnel, time and research, and would still be subject to vetting through pre-qualification procedures, with no certainty of a successful outcome.

[86] On the other hand, when it comes to producing smaller or less complex SPTs, the evidence indicates that the Linz facility is not as competitive as other SPT manufacturers, including Siemens plants located in other countries or other manufacturers that can offer multiple versions of the same design.[52]

[87] Even though SPTs (both subject and like goods) constitute a single class of goods, the Tribunal finds that the highly specialized and sophisticated technical requirements mandated by certain purchasers, notably Hydro-Québec and Rio Tinto, define a distinct niche in the marketplace and unique conditions of competition. As such, it is clear that the conditions of competition are not the same among imports from the subject countries, and that is clearly supported by the evidence in terms of the degree of existing competition between those imports.

[88] The evidence shows that subject goods from South Korea and Chinese Taipei do not compete for these opportunities, as no supplier of these goods are prequalified to bid by either Hydro-Québec or Rio Tinto. There was an absence of head-to-head competition during the POI between, on the one hand, subject goods from South Korea and Chinese Taipei, and subject goods from Austria, on the other. There is no evidence on the record that this will change in the foreseeable future. In this context, the impact of imports of subject goods from Austria on like goods can be clearly distinguished from the impact of imports of subject goods from South Korea and Chinese Taipei on like goods.

[89] In contrast, the evidence shows that subject goods from South Korea and Chinese Taipei competed against each other and against like goods on bids across Canada, except in Quebec, where these subject goods were not present. This competition involved procurements from a variety of purchasers. The evidence also shows that for most of the sales won by like goods or subject goods from South Korea and Chinese Taipei, purchasers awarded contracts to the compliant bid with the lowest price or offering the lowest total cost of ownership.[53] These transactions also represented most of the sales in the bid data examined by the Tribunal.

[90] In these circumstances, the Tribunal is not satisfied that an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between subject goods from Austria and the other subject goods.

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50 *Transcript of Public Hearing* (evidence) at 163; *Transcript of In Camera Hearing* at 276–277.
51 *Transcript of Public Hearing* (evidence) at 103; *Transcript of In Camera Hearing* at 163–164.
52 Exhibit NQ-2021-003-G-04 at para. 4.
53 Exhibit NQ-2021-003-21.02 (protected); Exhibit NQ-2021-003-18; Exhibit NQ-2021-003-19 (protected).

[91] Although the above analysis is, in itself, dispositive of the issue of cumulation, the Tribunal will nevertheless address the argument made by the Coalition that the injury analysis should be conducted on a fully cumulated basis, considering the conditions of competitions between Austrian SPTs and like goods.

[92] The Coalition argues that subject goods from Austria compete fully with like goods and that this accordingly justifies, in and of itself, a cumulative assessment of injury under subparagraph 42(3)(b)(ii) of SIMA. According to the Coalition, this position finds support in the disjunctive nature of the conditions of competition test in paragraph 42(3)(b). With this argument, the Coalition essentially invites the Tribunal to ignore the conditions of competition as between imports of subject goods from subject countries. In the Coalition's view, it is not necessary to consider conditions under subparagraph 42(3)(b)(i) if conditions are found to be appropriate under subparagraph 42(3)(b)(ii).

[93] In the present case, the conditions of competition between subject goods from subject countries – that is, the conditions of competition referred to under subparagraph 42(3)(b)(i) – have been considered by the Tribunal more relevant and determinative in considering whether to proceed with a fully cumulative analysis. In the Tribunal's view, and as noted above, the language of paragraph 42(3)(b) of SIMA provides the Tribunal with broad latitude when examining the conditions of competition. The use of the conjunction "or" is meant to provide discretion in considering whether cumulation is appropriate in light of conditions of competition under either subparagraph 42(3)(b)(i), subparagraph 42(3)(b)(ii), or both.

[94] Proceeding with an injury analysis on a cumulative basis cannot be assumed in each case when in the presence of imports of subject goods from several countries. Although the plain reading of the provision suggests that it may be "appropriate", and even if the Tribunal has often found under subsection 42(3) of SIMA in proceedings involving multiple subject countries that a cumulative assessment is appropriate in view of the conditions of competition, the provision requires the Tribunal, in each case, to examine whether it is "appropriate" to do so considering the conditions of competition. By necessary implication, this admits that there may be circumstances where it is not. The provision recognizes that a domestic industry confronted with dumped imports from several countries may be injured by the cumulated effects and that those cumulated effects may not be adequately taken into account in a series of country-specific analyses. At the same time, it recognizes that, in certain circumstances, a cumulated analysis would not properly take into account differences in the manner in which imports of subject goods from different countries may be affecting the domestic industry.

[95] In circumstances where the conditions of competition between imports of subject goods are characterized by differences in terms of market dynamic that may result in distinct effects of those imports of subject goods on the domestic industry, it would not seem appropriate to conduct a cumulated analysis. This, in the opinion of the Tribunal, is particularly the case when the effects of those imports of subject goods can be distinguished.

[96] Furthermore, proceeding with a separate injury analysis would not deprive the domestic industry from benefiting from the provisions of SIMA to have the effects from *all* imports of subject goods considered in the context of the inquiry.

[97] As demonstrated above, imports of subject goods from Austria and from South Korea and Chinese Taipei are not present on the same market segments at the same time, nor are they offered in response to the same RFPs.[54] There is no commingling of the impact of the dumping of subject goods from Austria and from South Korea and Chinese Taipei. In that sense, there is no cumulative effect to be assessed as between the three subject countries. The potential impacts of Austrian subject goods are easily identifiable and distinguishable from those of the other subject goods.

[98] Whether Austrian subject goods actually compete with like goods and to what degree they compete with like goods changes nothing to this fundamental consideration. On the other hand, the existence of actual competition between subject goods from Austria and domestic like goods, in the absence of competition from other imports of subject goods, justifies and reinforces the conclusion that the effects of subject goods from Austria on like goods are distinguishable and should be assessed separately.

Conclusion on cumulation

[99] Having regard to the foregoing analysis, the Tribunal finds that it would not be appropriate to cumulate the subject goods from Austria with those from South Korea and Chinese Taipei in its assessment of injury. The Tribunal is also satisfied that a cumulative assessment of the effect of the dumping of the subject goods from South Korea and Chinese Taipei is appropriate. Accordingly, the Tribunal will conduct two separate injury and threat of injury analyses, one with regard to the subject goods from Austria and one with regard to the subject goods from South Korea and Chinese Taipei.

INJURY ANALYSIS WITH REGARD TO SOUTH KOREA AND CHINESE TAIPEI

[100] Subsection 37.1(1) of the *Special Import Measures Regulations*[55] 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.

[101] In conducting the injury analysis, the Tribunal has taken into consideration the fact that the market for small power transformers is characterized by time lags between sale (e.g., contract award or placement of order) and the delivery of the goods. In this case, the evidence indicates that SPTs are generally delivered between six and twelve months after they are ordered, and in some instances take even longer.[56]

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54 As noted above, the Tribunal is of the view that the imposition of very strict pre-qualification requirements by Hydro-Québec establishes conditions of competition that differentiate between market participants, preventing subject goods from South Korea and Chinese Taipei from competing with subject goods from Austria during the POI.

55 SOR/84-927 [Regulations].

56 Exhibit NQ-2021-003-07A (protected), Table 8.

[102] In addition, small power transformers are capital goods that have a lifespan of up to 45 years, and as such, there can be significant variation in the demand for small power transformers from one year to another, or even from quarter to quarter.[57] For this reason, the Coalition submitted, and the Tribunal accepts, that a quarter is not necessarily indicative of trends over the course of the whole year. The Tribunal therefore considered data relating to the interim periods with utmost caution.

Import volume of dumped goods

[103] 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.

[104] The volume of imports of subject goods from Chinese Taipei and South Korea, expressed in MVAs, fluctuated over the POI, increasing by 33 percent in 2019 and declining by 34 percent in 2020 to below 2018 levels. From interim 2020 to interim 2021, imports from Chinese Taipei and South Korea increased by 20 percent.[58]

[105] Relative to domestic production of like goods, the import volumes of goods from Chinese Taipei and South Korea followed trends similar to those observed in absolute volumes. The ratio of imports of these subject goods to domestic production of like goods increased by 4 percentage points in 2019, and contracted in 2020 by 7 percentage points. In the interim period, the ratio decreased by 12 percentage points.[59]

[106] Similarly, the ratio of imports of subject goods from Chinese Taipei and South Korea to domestic sales of domestic production increased by 4 percentage points in 2019, which was followed by a contraction of 21 percentage points in 2020. In the interim period, the ratio decreased by 14 percentage points.[60]

[107] In light of the foregoing, the Tribunal concludes that, though import volumes from Chinese Taipei and South Korea declined in 2020, there was a significant increase in both absolute volumes and relative volumes of subject goods in 2019.

Price effect of dumped goods

[108] Paragraph 37.1(1)(b) of the Regulations direct 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.

[109] In this case, the average unit values of SPTs were expressed in dollars per MVA. The parties submitted that this metric is of limited use, given the customized nature of each SPT and variations in unit configurations each year. The Coalition and Siemens both submitted that the Tribunal should instead focus its pricing analysis on detailed evidence of head-to-head competition within bids.

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57 Exhibit NQ-2021-003-A-08 at para. 17; Exhibit NQ-2021-003-B-04 (protected) at para. 31.
58 Exhibit NQ-2021-003-07A (protected), Table 16.
59 *Ibid.*, Tables 15, 16.
60 *Ibid.*, Tables 15, 20.

Relying on WTO jurisprudence, the Korean Embassy submitted that the Tribunal's analysis should avoid over-reliance on transaction-specific allegations and should also examine the evidence of price effects in the aggregate data.

[110] While the Tribunal finds that a transaction-specific analysis is appropriate, in the Tribunal's view, the aggregate data are also probative, and an assessment of these data would result in a more comprehensive analysis. The Tribunal will therefore conduct an analysis of the aggregate data, supplemented by an examination of the transaction-specific evidence.[61] Proceeding this way will allow the Tribunal to take both transaction-specific and aggregate data into account.

[111] Particularly useful transaction-specific evidence was provided by purchasers in their responses to the Tribunal's purchaser questionnaire. Specifically, purchasers provided information on RFP processes that were conducted over the POI, in which at least one bid was received from a domestic producer or supplier of like goods.[62] The information included the values of bids received by purchasers. The Tribunal considers these bid data to provide accurate and detailed information that helps illustrates the competitive dynamics within the SPT market at the bid level.

[112] The Tribunal also examined three trade levels in this inquiry – sales to distributors, sales to Engineering, Procurement and Construction firms (EPCs), and sales to end users. There were no sales of subject goods to distributors.[63] Accordingly, the Tribunal examined the two trade levels with competition between subject goods and like goods, i.e. sales to EPCs and sales to end users.

[113] Finally, the Tribunal notes the evidence regarding the importance of price in purchasing decisions. The evidence shows that, once technical requirements are met, price (or the total cost of ownership) is a key factor in purchasing decisions.[64]

Price undercutting

[114] At the aggregate level, the average price of the cumulated subject goods undercut the average price of the like goods in all periods of the POI, with the exception of interim 2021. While the degree of undercutting is confidential, it exceeded 15 percent in each period and increased from 2018 to 2021.[65]

[115] Undercutting was also observed at the trade levels. With regard to sales to EPCs, in each period of the POI where subject goods competed with like goods, those subject goods were sold at prices that undercut prices of like goods.[66] With regard to sales to end users, the cumulated subject goods significantly undercut the like goods in each full year of the POI, but not in the interim periods.[67]

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61 The Tribunal notes that this approach is consistent with the approach taken in *Liquid Dielectric Transformers* (20 November 2021), NQ-2012-001 (CITT) at paras. 65–67.

62 Exhibit NQ-2021-003-19 (protected).

63 Exhibit NQ-2021-003-06A, Table 23.

64 Exhibit NQ-2021-003-B-05 at para. 24; Exhibit NQ-2021-003-C-03 at paras. 16–18; Exhibit NQ-2021-003-18; Exhibit NQ-2021-003-07A (protected), Tables 10, 11, 12.

65 Exhibit NQ-2021-003-07A (protected), Tables 20, 35. The average unit values are weighted averages and are calculated using volume information in Table 20.

66 Exhibit NQ-2021-003-07A (protected), Tables 26, 39.

67 *Ibid.*, Tables 29, 41.

[116] The undercutting observed in the aggregate data is consistent with transaction-specific evidence on RFP processes that occurred during the POI. In the majority of the bids examined by the Tribunal, the sale was awarded to a supplier of subject goods, with those subject goods undercutting the bid value of the lowest-priced like goods. In each bid, the winning subject goods also undercut the average price of bids by suppliers of like goods in each period of the POI. The degree of undercutting by the cumulated subject goods observed in the bid data also remained relatively steady over the POI.[68]

[117] Furthermore, with respect to the sales won by the domestic industry, witnesses for the Coalition testified that the domestic producers priced their bids "aggressively", i.e. by reducing profit margins on bids to compete with subject goods in the hope of winning the sale.[69] This testimony is consistent with evidence on the domestic industry's performance in 2019, which saw an increase in sales volumes but with worsening gross margins at both the aggregate and per unit level.

[118] On the basis of the above, the Tribunal finds that there was significant price undercutting by subject goods from Chinese Taipei and South Korea over the POI.

Price depression and suppression

[119] The Coalition argued that the low-priced subject goods caused price depression and suppression by forcing domestic producers to offer lower prices than they otherwise would have, when they knew they were bidding against subject goods, in order to win sales. The Coalition argued that the domestic producers' bid prices did not cover rising costs, which resulted in lower profit margins.

[120] In this regard, witnesses for the Coalition provided detailed testimony regarding this pricing response to the subject goods.[70] Evidence from purchasers also shows that domestic producers reduced their bid prices over the POI in order to win sales.[71]

[121] With that said, the aggregate data do not show price depression over the POI, except in the interim period. Prices of like goods increased by 1 percent in 2019, and by 10 percent in 2020. These increases also occurred as the average prices of subject goods from Chinese Taipei and South Korea decreased in 2019 and 2020. With respect to the interim periods, prices of like goods declined from interim 2020 to interim 2021, while prices of the cumulated subject goods increased during that same period.[72]

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68 Exhibit NQ-2021-003-19 (protected).

69 *Transcript of Public Hearing* (evidence) at 50–51, 70–71; *Transcript of In Camera Hearing* at 9; Exhibit NQ-2021-003-B-03 at para. 11; Exhibit NQ-2021-003-C-04 (protected) at para. 22; Exhibit NQ-2021-003-C-06 (protected) at para. 88.

70 *Transcript of Public Hearing* (evidence) at 50–51, 61, 70–71; *Transcript of In Camera Hearing* at 5, 6, 9, 19–20, 55–56, 127; Exhibit NQ-2021-003-C-04 (protected) at paras. 3, 22; Exhibit NQ-2021-003-C-06 (protected) at paras. 3, 18, 59–61; Exhibit NQ-2021-003-B-03 at para. 11; Exhibit NQ-2021-003-B-04 (protected) at para. 11; Exhibit NQ-2021-003-B-06 (protected) at paras. 41–50, 56; Exhibit NQ-2021-003-A-05 at paras. 14, 29, 32; Exhibit NQ-2021-003-A-06 (protected) at paras. 31–37, 40–41, 43–45, 49–52, 55–57; Exhibit NQ-2021-003-A-07 at paras. 14–16; Exhibit NQ-2021-003-A-08 (protected) at paras. 14–16.

71 Exhibit NQ-2021-003-18.03 at 9; Exhibit NQ-2021-003-18; Exhibit NQ-2021-003-19 (protected).

72 Exhibit NQ-2021-003-06A, Table 36; Exhibit NQ-2021-003-07A (protected), Tables 20, 35, 36

[122] When assessing price suppression, the Tribunal typically compares the domestic industry's average unit cost of goods sold (COGS) or cost of goods manufactured against its net sales values to determine whether the domestic industry has been able to increase prices in line with increase in costs.

[123] The aggregate data show that the domestic industry experienced a substantial increase in total and per unit COGS in 2019, and that selling prices and net sales value did not experience a similar increase.[73] As a result, the domestic industry saw lower gross margins in 2019 as compared to 2018. The Tribunal considers that the domestic industry's inability to increase prices in 2019 in step with higher COGS, in the face of sustained competition from the subject goods from Chinese Taipei and South Korea, demonstrates that prices were suppressed by the subject goods that year.

[124] The evidence of Coalition witnesses that subject goods forced domestic producers to bid lower prices supports the evidence of price suppression that can be observed in the aggregate data. The evidence therefore suggests that, but for price undercutting by the subject goods, the domestic industry would have been able offer bids at prices that would have covered rising costs and not led to deteriorating gross margins. In this regard, witnesses for the Coalition also testified that there is sufficient price transparency in the market for domestic producers to adjust their bid prices downward.[74]

[125] In 2020, the domestic industry's unit COGS and net sales value per unit did not show price suppression, as the increase in selling prices and net sales values outpaced the increase in COGS.[75] However, the domestic industry still saw gross margins that were inferior to those seen in 2018. There was also no price suppression observed in the interim period.

[126] Based on the foregoing, the Tribunal finds that the subject goods from Chinese Taipei and South Korea did not significantly depress prices over the POI, but did significantly suppress prices of like goods in 2019.

Resulting impact on the domestic industry

[127] 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.[76] These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.[77]

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73 Exhibit NQ-2021-003-06A, Table 36; Exhibit NQ-2021-003-07A (protected), Tables 35, 36, 43.

74 Exhibit NQ-2021-003-A-06 (protected) at paras. 14, 16, 33, 37, 41; Exhibit NQ-2021-003-B-06 (protected) at paras. 21, 28, 33, 34, 45, 49; Exhibit NQ-2021-003-C-06 (protected) at paras. 24–25, 42, 44–45, 48, 57.

75 Exhibit NQ-2021-003-07A (protected), Tables 35, 36, 43.

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

77 Paragraph 37.1(3)(b) of the Regulations directs the Tribunal to consider whether any factors other than dumping or subsidizing of the subject goods have caused injury. The factors which are prescribed in this regard are (i) the volumes and prices of imports of like goods that are not dumped or subsidized, (ii) a contraction in demand for

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, production and market share

[128] Domestic sales of like goods, expressed in MVAs, increased by 26 percent in 2019, declined by 9 percent in 2020, and increased by 70 percent between the interim periods.[78]

[129] With respect to production, as SPTs are custom-built to the purchaser's specifications and manufacturers keep no inventory, production volumes reflect sales volumes, although production is accounted for at the time of delivery. Domestic production of like goods therefore also increased in 2019, and decreased in 2020.[79] In the interim periods, production also increased.

[130] The domestic industry's market share declined by 4 percentage points in 2019 and increased by 13 percentage points in 2020.[80] Market share held by subject goods from Chinese Taipei and South Korea declined by 1 percentage point in 2019 and by a further 3 percentage points in 2020. In the interim periods, the domestic industry lost 2 percentage points of market share to imports of non-subject goods. Subject goods from South Korea and Chinese Taipei lost 10 percent of their market share in the interim periods.

[131] The loss in the domestic industry's market share in 2019 corresponds to a gain in market share by Austrian subject goods and non-subject goods.[81] While this coincided with the worst of the injury suffered by the domestic industry, the transaction-specific evidence shows that the market share held by Austrian subject goods represents a small number of sales to one purchaser. Moreover, both subject goods from Austria and non-subject goods were priced higher than like goods in all periods of the POI.[82] As such, the evidence suggests that like goods did not face price competition from these two sources of imports.

[132] The Coalition argued that it lost numerous sales to subject goods, and that securing these sales would have made a significant difference to the domestic producers' profitability and production capacity. In particular, witnesses for the Coalition testified that the lost sales volumes would have helped ensure that domestic producers had a healthy backlog of orders, which is critical to sustainable SPT operations.[83]

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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.

78 Exhibit NQ-2021-003-06A, Table 21.

79 *Ibid.*, Table 15. This general upward trend is also reflected in the volume of goods delivered over the POI; see Exhibit NQ-2021-003-07A (protected), Table 20.

80 Exhibit NQ-2021-003-07A (protected), Table 22.

81 *Ibid.*

82 *Ibid.*, Table 35.

83 *Transcript of Public Hearing* (evidence) at 30, 35–36, 76; *Transcript of In Camera Hearing* at 5, 126; Exhibit NQ-2021-003-A-03 at para. 11; Exhibit NQ-2021-003-A-04 (protected) at para. 11; Exhibit NQ-2021-003-B-05 at para. 40; Exhibit NQ-2021-003-C-06 (protected) at paras. 20–21.

[133] The Tribunal recalls that, as discussed above, subject goods from Chinese Taipei and South Korea undercut prices of like goods in each period of the POI, except interim 2021. The bid data examined by the Tribunal and other evidence from purchasers also showed that these subject goods won most of these contracts with bids that were lower-priced than bids offering like goods.[84]

[134] Based on the above, the Tribunal finds that the dumping of the subject goods prevented the domestic industry from capturing more sales and market share, which would have ensured healthy plant backlogs. The declines in backlogs suffered by the domestic industry as a result of the sales won by the low-priced subject goods are also likely to impact future production volumes.[85]

Financial performance

[135] The domestic industry saw a relatively healthy financial performance in 2018, which deteriorated in 2019.[86] In 2019, its financial performance worsened considerably and resulted in reduced profitability. Over the POI, the domestic industry saw its lowest gross margins in 2019, which coincided with the increase in imports of subject goods from Chinese Taipei and South Korea. Performance improved somewhat in 2020, although the domestic industry continued to see reduced profitability from 2018 levels, and improved further in interim 2021.

[136] Ultimately, the Tribunal is persuaded by the evidence submitted by the Coalition that declining profitability, starting in 2019, can be attributed to the combination of the dynamics outlined above, that is (1) price competition from subject goods from Chinese Taipei and South Korea, which required the domestic industry to reduce prices in order to maintain or continue winning sales, notwithstanding rising COGS and (2) actual sales lost to those subject goods during the POI, as well as the negative compounding effect of reduced backlogs on profitability.

[137] Altogether, the evidence shows that the domestic industry saw improvements in financial performance starting in 2020. However, in the Tribunal's view, these improvements are tenuous, as the domestic industry continued to see lagging profitability in 2020, and the apparent rebound in quarterly net income during the interim period is not necessarily reflective of broader trends.

[138] The Tribunal notes that Siemens argued that domestic producers injured themselves by accepting lower prices in order to maintain market share, but the Tribunal is satisfied, based on the evidence, that any such response reflects the price effects of the cumulated subject goods and the competition from those goods that the domestic producers faced.

[139] Evidence from the Coalition also indicates that returns on investment declined over the POI.[87] Several witnesses also stated that poor return on investment can be compounded through negative effects on cash flow[88] and the ability to raise capital.[89]

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84 Exhibit NQ-2021-003-21.02 (protected).

85 Exhibit NQ-2021-003-21.01; Exhibit NQ-2021-003-21.02 (protected); Exhibit NQ-2021-003-19 (protected); *Transcript of In Camera Hearing* at 5, 59–60,126–127; Exhibit NQ-2021-003-A-04 (protected) at para. 11; Exhibit NQ-2021-003-B-04 (protected) at paras. 30–31.

86 Exhibit NQ-2021-003-07A (protected), Table 43.

87 *Ibid.*, Table 43, 46; *Transcript of In Camera Hearing* at 6–7, 63–64, 127–128.

88 *Transcript of In Camera Hearing* at 129; Exhibit NQ-2021-003-C-04 (protected) at para. 9.

89 *Transcript of In Camera Hearing* at 147–148; Exhibit NQ-2021-003-A-08 (protected) at paras. 18–19; Exhibit NQ-2021-003-C-04 (protected) at paras. 8–9.

[140] In this regard, Siemens also argued that the financial issues facing domestic producers are related to factors other than dumping, such as investments in production facilities. Very rarely can the overall financial situation of a company be attributed to a single cause. However, as outlined above, the Tribunal finds persuasive the evidence submitted by the Coalition that the domestic industry's profitability was significantly impacted by price competition from, and sales lost to, the cumulated subject goods, in and of themselves.

[141] The Tribunal therefore also finds that although the domestic industry has made some investments in recent years, the evidence indicates that it has been prevented from seeing a return on those investments.

Other performance indicators

[142] Productivity, expressed in MVAs produced per direct employee, increased in 2019 and declined in 2020, following the trends observed in production levels and sales volumes.[90] With that said, the Tribunal notes that, because SPT production depends so heavily on market dynamics such as the size and timing of procurements, it may be difficult to draw meaningful conclusions from this productivity metric.

[143] The domestic industry's capacity utilization rate for domestic sales increased by two percentage points in 2019, and declined by one percentage point in 2020.[91]

[144] There was also no evidence of negative trends with regard to employment or wages over the POI, both of which increased in each period of the POI.[92]

Margins of dumping

[145] The margins of dumping of subject goods from South Korea and Chinese Taipei ranged from 11.7 percent to 73.1 percent[93] over the POI, and were therefore not insignificant.

[146] That said, the Tribunal does not consider that the margins of dumping, expressed as a percentage of the export price, 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 injury.

Other factors

[147] Before concluding its analysis regarding the impact of the cumulated subject goods on the domestic industry, the Tribunal will consider Siemens' arguments regarding other factors, as well as any other known factors, as apparent on the record, that were not already addressed in the foregoing analysis. If any such factors unrelated to the dumped cumulated goods are found to have injured the domestic industry, their injurious effects must not be attributed to the cumulated subject goods.

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90 Exhibit NQ-2021-003-07A (protected), Table 46.

91 *Ibid.*

92 Exhibit NQ-2021-003-06A, Table 46.

93 This excludes the zero margin of dumping found by the CBSA for goods exported from South Korea by Hanchang, with respect to which the CBSA terminated its investigation; Exhibit NQ-2021-003-04.A at 24, 26.

COVID-19 pandemic

[148] While there was some evidence of pandemic temporarily delaying procurements, as well as increasing input costs and lead times, there was little indication that the COVID-19 pandemic or related measures had a sustained impact on procurements or purchasing behaviour.[94] As such, any impact of the pandemic on the SPT market appeared to be marginal.

Intra-industry competition

[149] Siemens argued that the above-noted impacts on the domestic industry are attributable to competition among domestic producers, or between domestic producers and importers of non-subject goods.

[150] The evidence on the record indicates that imports of non-subject goods represented a small fraction of the market share held by the cumulated subject goods.[95] Further, the Tribunal has neither been pointed to, nor seen, evidence regarding competition among domestic producers, or with imports of non-subject goods, that explains the performance indicators of the domestic industry outlined above.

[151] In contrast, the record provides positive evidence of price effects, lost sales and negative impacts on the domestic industry due to direct competition from the cumulated subject goods over the POI. Evidence submitted by the Coalition that the initiation of this inquiry affected the behaviour of purchasers in favour of domestic producers reinforces the Tribunal's conclusions in this regard.[96]

Conclusion

[152] Based on the foregoing, the Tribunal finds that the domestic industry faced pricing pressures and lost sales to low-priced subject goods from South Korea and Chinese Taipei. This forced domestic producers to bid aggressively to maintain sales volumes and caused injury in the form of lost profitability and reduced plant backlogs, with downstream impacts on profitability, investments, and overall growth.

Materiality

[153] 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 frame and the timing and duration of the injury are relevant considerations in determining whether any injury caused by the subject goods is "material".[97]

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94 *Transcript of Public Hearing* (evidence) at 20–22; Exhibit NQ-2021-003-18.07 at 14.

95 Exhibit NQ-2021-003-07A (protected), Table 22. Austrian subject goods alone also outnumbered imports of non-subject goods throughout most of the POI.

96 *Transcript of Public Hearing* (evidence) at 22; *Transcript of In Camera Hearing* at 11–12; Exhibit NQ-2021-003-18.04A at 4; Exhibit NQ-2021-003-A-06 (protected) at paras. 30, 32–34, 64–68; Exhibit NQ-2021-003-A-08 (protected) at paras. 26–27; Exhibit NQ-2021-003-19.13A (protected) at 34.

97 The Tribunal suggested, in *Certain Hot-rolled Carbon Steel Plate* (27 October 1997), NQ-97-001 (CITT) at 13, that the concept of materiality could entail both temporal and quantitative dimensions: "However, the Tribunal is

[154] In this case, the domestic industry experienced injury in the form of price undercutting and price suppression, which resulted in lost sales and impacted financial performance, returns on investment, cash flow and ability to raise capital. As set out above, the domestic industry adopted a strategy of bidding lower prices to compete with the low-priced subject goods, in order to protect plant backlogs, as well as sales volumes and market shares.

[155] The domestic industry's performance deteriorated most significantly in 2019, then improved somewhat in 2020, but the domestic industry continued to see reduced profitability. Moreover, the injury was most prevalent in 2019, which falls within the CBSA's period of investigation, when large volumes of dumped imports were entering the domestic market. Although further improvements were noted in interim 2021, the Tribunal is not persuaded that this period of improved performance alone precludes a finding of material injury, in view of the concerns regarding the quarterly nature of the interim period, as well as the evidence of sustained injury over 2019 and 2020.

[156] In view of the foregoing, the Tribunal therefore finds that the dumping of the subject goods from South Korea and Chinese Taipei caused material injury to the domestic industry. Accordingly, the Tribunal need not address the question of whether these subject goods are threatening to cause injury.

INJURY ANALYSIS WITH REGARD TO AUSTRIA

Import volume of dumped goods

[157] As noted above, 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.

[158] The volume of imports of subject goods from Austria, expressed in MVAs, increased by 75 percent in 2019, which represented a limited number of transactions and overall modest absolute volumes, in comparison to volumes of the cumulated subject goods and the like goods. Austrian subject goods were not imported from 2020 to the end of the POI.

[159] Imports of Austrian subject goods relative to domestic production increased by 2 percentage points in 2019 and dropped to 0 percent in 2020 and in interim 2021.[98] Similarly, imports of subject goods from Austria relative to sales of domestic production increased by 4 percentage points in 2019 and declined to 0 percent in 2020 and interim 2021.[99]

[160] In light of the foregoing, the Tribunal concludes that, there has been a significant increase in both absolute volume and relative volume of subject goods in 2019.

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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].

98 Exhibit NQ-2021-003-07A (protected), Tables 15, 16.

99 *Ibid.*, Tables 16, 20.

Price effect of dumped goods

Price undercutting

[161] The aggregate data show that subject goods from Austria did not undercut the prices of like goods during the POI. Rather, Austrian goods were priced substantially higher than the like goods.[100]

[162] The transaction-specific evidence shows the same pattern as the aggregate data.[101] In the procurements where Austrian subject goods and like goods of the domestic industry were present, Austrian subject goods were offered at a higher price than the like goods. The price differential was substantial in favour of the like goods. The domestic industry was also successful in winning the bid in all these instances.[102]

[163] There is no evidence, therefore, that prices of the subject goods from Austria undercut prices of the like goods during the POI.

Price depression

[164] There is little evidence on the record to support a finding of price depression caused by Austrian subject goods. As noted above in the cumulated analysis, the aggregate pricing trends for the like goods do not show a significant declining trend.

[165] Further, transaction-specific allegations by the Coalition of pricing pressure caused by Austrian subject goods do not seem to be supported by positive evidence on the record. These allegations appear to be based on inaccurate market intelligence according to which Austrian imports were "price leaders" in RFP processes where no Austrian goods were actually offered. These allegations were subsequently corrected in the context of the inquiry.[103]

Price suppression

[166] As discussed above, the evidence shows that the domestic industry experienced price suppression in 2019. However, in the Tribunal's view there is no evidence to establish that Austrian subject goods contributed to that price suppression. Prices of subject goods from Austria were substantially higher than prices of like goods during the POI and would not have prevented the domestic industry from increasing its prices to keep up with increasing costs in 2019.[104]

Resulting impact on the domestic industry

[167] As set out above, the Tribunal finds that while there was an increase in the volume of imported Austrian subject goods in 2019, there were no price effects caused by these goods.

[168] In the circumstances, there is also no basis on which to draw a causal link between the domestic industry's performance over the POI and the Austrian subject goods. Austrian subject

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100 *Ibid.*, Table 35.

101 Exhibit NQ-2021-003-10.03C (protected) at 22–26; Exhibit NQ-2021-003-13.03B (protected) at 31–35; Exhibit NQ-2021-003-19.15 (protected) at 44–49; Exhibit NQ-2021-003-19 (protected).

102 *Ibid.*

103 Exhibit NQ-2021-003-F-02 (protected) at 32–34.

104 Exhibit NQ-2021-003-07A (protected), Tables 35, 36, 43; Exhibit NQ-2021-003-06A, Table 36.

goods were imported into the market as a result of procurements where domestic producers either did not bid or did not meet technical requirements. They were also higher-priced than like goods, and, as noted, there were no observable price effects resulting from these imports. The Tribunal therefore finds that the deteriorated performance of the domestic industry over the POI, described above in the cumulated analysis, cannot be attributed to the dumping of subject goods from Austria.

[169] The Tribunal notes that the margin of dumping of subject goods from Austria was 73.1 percent,[105] and was therefore not insignificant. However, for the reasons set out above, the Tribunal does not consider margins of dumping to be representative of the level of injurious effects caused by prices of subject goods in Canada during the POI.

Conclusion

[170] In light of the foregoing, the Tribunal concludes that the injury suffered by the domestic industry over the POI was not caused by the subject goods from Austria.

THREAT OF INJURY ANALYSIS WITH REGARD TO AUSTRIA

[171] Having found that the dumping of the subject goods from Austria has not caused material injury to the domestic industry, the Tribunal must now consider whether it is threatening to cause material injury.

[172] The Tribunal is guided in its consideration of this question by subsection 37.1(2) of the Regulations, which prescribes factors to be taken into account for the purposes of its threat of injury analysis.[106] Further, subsection 37.1(3) directs the Tribunal to consider whether a causal relationship exists between the dumping of the goods and the threat of injury, on the basis of the factors listed in subsection 37.1(2), and whether any factors other than the dumping of the goods are threatening to cause injury.

[173] Also relevant is subsection 2(1.5) of SIMA, which indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping of the goods would cause injury are clearly foreseen and imminent.

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105 Exhibit NQ-2021-003-04.A at 26.

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

[174] The Tribunal is also mindful of Article 3.7 of the WTO Anti-Dumping Agreement, which sets out the framework of obligations implemented in subsection 2(1.5) of SIMA as follows:

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

[175] As the Tribunal has previously indicated,[107] the fundamental requirement that threat of injury findings must be based on facts and not on "allegation, conjecture or remote possibility" aims to mitigate the risk that such findings may be grounded in speculation about possible future events rather than objective facts directing such a conclusion. The Tribunal has also indicated that there must be a high probability of a change in circumstances compared to those that existed during the POI, such that the subject goods would threaten to cause material injury in the very near future in the absence of measures.[108]

[176] In the present case, the Tribunal has already found that the injury suffered by the domestic industry during the POI was not attributable to the dumping of subject goods from Austria. The key question for the Tribunal's threat of injury analysis is whether the situation in the future will remain the same or similar with regard to Austrian subject goods, in respect of which no injury was found. Absent a change in the circumstances that led to the Tribunal's finding that the Austrian subject goods did not, in and of themselves, cause injury, there can be no basis upon which the Tribunal could make a finding that the dumping of the Austrian subject goods is threatening to cause injury.

[177] The Tribunal must therefore determine whether there is a high probability of a change in circumstances that will lead to a situation in which the dumping of the Austrian subject goods would, in the very near future, cause material injury to the domestic industry.

Time frame for the threat analysis

[178] In assessing threat of injury, the Tribunal typically considers a time frame of 12 to 18 months, and no more than 24 months, beyond the date of its finding, depending on the unique circumstances of each case.

[179] In this case, the Coalition submitted that a time frame of 12 to 24 months is appropriate given the long lead times between order and delivery for small SPTs. This was not contested by any of the parties opposing a finding of injury or threat of injury.

[180] In view of the time lags typical of the SPT market, the Tribunal considers that the longer time frame of 24 months would be appropriate. It will therefore look at the next 24 months in its analysis of threat of injury.

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107 *Polyethylene Terephthalate Resin* (16 March 2018), NQ-2017-003 (CITT) [*PET Resin*] at para. 167.

108 *PET Resin* at paras. 170–171.

Likelihood of increased dumped goods

[181] Import volumes of subject goods from Austria increased from 2018 to 2019. In 2020 and interim 2021, there were no imports of Austrian subject goods.[109] The Tribunal therefore considers that, overall, the evidence does not show a significant rate of increase of Austrian subject goods imported into Canada which would indicate a likelihood of substantially increased imports in the next 24 months.

[182] The evidence also does not show significant freely disposable capacity, or an imminent, substantial increase in the capacity of the sole producer of Austrian SPTs, the Linz facility, that would indicate a likely imminent substantial increase of Austrian subject goods.[110] Witnesses for Siemens also explained that the other Siemens power transformer plant in Austria, the Weiz plant, mainly produces large power transformers, and SPTs produced at this plant are generally sold in Europe.[111] As SPTs are made to order, there are also no looming inventories or stockpiles that could signal an increase in likely volumes.

[183] The evidence also does not indicate that the demand for Austrian SPTs is set to increase substantially in the near- to medium-term.[112]

[184] There was also no evidence of anti-dumping or countervailing measures in other jurisdictions in respect of Austrian goods of the same or similar description as the subject goods.

[185] The Coalition submitted that the conclusion of new blanket agreements to be tendered or negotiated by major purchasers in the coming 12 to 24 months constitutes a "change in circumstances" in the foreseeable future that will impact likely volumes of subject goods from Austria.[113] The Coalition argued that price competition from dumped goods could lock domestic producers out of these critical opportunities, or into unsustainable pricing, for years under these long-term agreements.

[186] For the upcoming blanket agreements to result in increased volumes of subject goods from Austria, Siemens would have to bid successfully under the blanket agreements and be awarded purchase orders. In this regard, the evidence shows that Siemens was pre-qualified to provide Austrian SPTs during the POI under multiple blanket agreements but received no purchaser orders under these agreements.[114] On balance, the Tribunal is of the view that increased volumes from sales of Austrian subject goods under such agreements are too remote of a possibility to alone indicate that

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109 The Tribunal notes that Siemens made a small number of sales of Austrian SPTs for delivery sometime after the POI, but as these sales were made during the POI, they were accounted for in the injury analysis of Austrian subject goods above.

110 Exhibit NQ-2021-003-G-04 at paras. 17–23; Exhibit NQ-2021-003-G-03 (protected) at paras. 17–23; *Transcript of In Camera Hearing* at 209–213, 228–230, 247–248, 254; Exhibit NQ-2021-003-07A (protected), Table 53.

111 *Transcript of Public Hearing* (evidence) at 117–119, 122; *Transcript of In Camera Hearing* at 167, 244–248; Exhibit NQ-2021-003-G-04 at paras. 8–10; and Exhibit NQ-2021-003-G-03 (protected) at paras. 8–10.

112 *Transcript of In Camera Hearing* at 286–288; Exhibit NQ-2021-003-18.15 at 13.

113 *Transcript of Public Hearing* (evidence) at 47, 107; *Transcript of In Camera Hearing* at 61; Exhibit NQ-2021-003-19 (protected); Exhibit NQ-2021-003-A-06 (protected) at para. 69; Exhibit NQ-2021-003-C-06 (protected) at para. 30.

114 Exhibit NQ-2021-003-F-03 (protected) at paras. 15, 18, 22, 31–35.

there is a likelihood of substantially increased volumes of subject goods from Austria in the next 24 months.

[187] In conclusion, the Tribunal finds that the evidence does not indicate a likelihood of substantially increased imports of subject goods from Austria into Canada in the next 24 months.

Likely price effects

[188] The Tribunal found that Austrian subject goods did not undercut, depress or suppress the prices of like goods over the POI.

[189] To recall, Austrian subject goods in this inquiry are produced by a single supplier, the Linz facility. The Tribunal also accepts that this supplier serves a "high-priced niche market", focussing on custom design and specialized requirements.[115] Furthermore, in the transactions examined, the primary determinant for purchasers to select Austrian goods was the producer's ability to meet specific technical specifications. Altogether, as discussed in these reasons above, the evidence indicates that Austrian subject goods are high-priced goods that do not compete on price.

[190] There is no positive evidence to suggest that these circumstances will change in the next 24 months.

[191] Therefore, the Tribunal finds that the evidence does not indicate that the Austrian subject goods will have a significant undercutting, depressing or suppressing effect on the price of the like goods in the next 24 months.

Likely impact on the domestic industry

[192] The Tribunal found, as set out above, that the domestic industry suffered injury during the POI, which was caused by subject goods from Chinese Taipei and South Korea. In contrast, the Tribunal found that the injury suffered by the domestic industry was not attributable to subject goods from Austria, largely due to the higher prices of Austrian subject goods, the absence of their imports after 2019, and their limited and specific presence in the market.

[193] In the absence of any evidence suggesting a change, in the next 24 months, in the circumstances relating to the likely volumes and price effects of Austrian subject goods, and given the Tribunal's findings that imports of Austrian subject goods are not likely to increase substantially or have a significant depressing or suppressing effect on the price of like goods in this time frame, the Tribunal can only conclude that any injury that may be suffered by the domestic industry will not be caused by the dumping of Austrian subject goods. Therefore, the Tribunal finds that the evidence does not indicate that the subject goods from Austria will have a significant depressing or suppressing effect on the price of the like goods in the next 12 to 18 months.

Conclusion

[194] On the basis of the foregoing, the Tribunal finds that the dumping of the subject goods from Austria is not threatening to cause injury to the domestic industry in the next 12 to 24 months.

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115 *Transcript of Public Hearing* (evidence) at 101–102; *Transcript of Public Hearing* (arguments) at 143.

CONCLUSION

[195] The Tribunal finds, pursuant to subsection 43(1) of SIMA, that the dumping of the subject goods from Chinese Taipei and South Korea (excluding those goods exported from South Korea by Hanchang) has caused injury to the domestic industry. The Tribunal also finds that the dumping of the subject goods from Austria has not caused injury and is not threatening to cause injury to the domestic industry.

Frédéric Seppey

Frédéric Seppey
Presiding Member

Susan D. Beaubien

Susan D. Beaubien
Member

Serge Fréchette

Serge Fréchette
Member