Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2016-002

Gypsum Board

Finding issued
Wednesday, January 4, 2017

Reasons issued
Thursday, January 19, 2017

Canada

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

CERTAIN GYPSUM BOARD ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of gypsum board, sheet, or panel ("gypsum board") originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, composed primarily of a gypsum core and faced or reinforced with paper or paperboard, including gypsum board meeting or supplied to meet ASTM C 1396 or ASTM C 1396M or equivalent standards, regardless of end use, edge-finish, thickness, width, or length, excluding (a) gypsum board made to a width of 54 inches (1,371.6 mm); (b) gypsum board measuring 1 inch (25.4 mm) in thickness and 24 inches (609.6 mm) in width regardless of length (commonly referred to and used as "paper-faced shaft liner"); (c) gypsum board meeting ASTM C 1177 or ASTM C 1177M (commonly referred to and used primarily as "glass fiber re-enforced sheathing board" but also sometimes used for internal applications for high mold/moisture resistant applications); (d) double layered glued paper−faced gypsum board (commonly referred to and used as "acoustic board"); and (e) gypsum board meeting ISO16000-23 for sorption of formaldehyde, has caused injury or retardation or is threatening to cause injury. All dimensions are plus or minus allowable tolerances in applicable standards.

Further to the Canadian International Trade Tribunal's inquiry, and following the issuance by the President of the Canada Border Services Agency of a final determination dated December 5, 2016, that the above-mentioned goods originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, have been dumped, the Canadian International Trade Tribunal hereby finds, pursuant to subsection 43(1) of the *Special Import Measures Act*, that the dumping of the above-mentioned goods, originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, has caused injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Jean Bédard
Jean Bédard
Member

Jason W. Downey
Jason W. Downey
Member

The statement of reasons will be issued within 15 days.

Place of Hearing:	Edmonton, Alberta
Dates of Hearing:	November 28 to December 8, 2016
Tribunal Panel:	Serge Fréchette, Presiding Member Jean Bédard, Member Jason W. Downey, Member
Support Staff:	Peter Jarosz, Lead Counsel Amélie Cournoyer, Counsel Greg Gallo, Lead Analyst Joseph Long, Analyst Andrew Wigmore, Analyst Mylène Lanthier, Analyst Christiane Schuchhardt, Analyst Julie Charlebois, Data Services Advisor Jyotsna Venkatesh, Clerk

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STATEMENT OF REASONS

INTRODUCTION

1. The mandate of the Canadian International Trade Tribunal (the Tribunal) in this inquiry[1] is to determine whether the dumping of gypsum board, sheet, or panel (gypsum board) originating in or exported from the United States of America (United States), imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories (Western Canada) (the subject goods)[2] has caused injury or retardation, or is threatening to cause injury to the domestic industry.

2. As set out in more detail below, in its related and concurrent inquiry in Reference No. GC-2016-001, the Tribunal must also determine whether the imposition of provisional duties, or duties, applicable to the subject goods, is contrary to Canada's economic, trade or commercial interests, and specifically whether such an imposition has or would have the effect of substantially reducing competition in those markets, or causing significant harm to consumers of those goods or to businesses who use them. The Tribunal will set out its recommendations as a result of the inquiry in Reference No. GC-2016-001 in a report separate from these Reasons.

3. The Tribunal has determined, for the reasons that follow, that the dumping of the subject goods originating in or exported from the United States has caused injury to the domestic industry. Therefore, the Canada Border Services Agency (CBSA) will impose, subject to the implementation of the Tribunal's recommendations in Reference No. GC-2016-001, definitive anti-dumping duties on imports of the subject goods originating in or exported from the United States. In its decision in Reference No. GC-2016-001, the Tribunal makes certain recommendations regarding the amount and timing of these definitive duties.

BACKGROUND

4. This inquiry stems from a complaint filed on April 18, 2016, by CertainTeed Gypsum Canada Inc. (CTG) and the subsequent decision of the CBSA on June 8, 2016, to initiate an investigation into the alleged injurious dumping in Western Canada.

5. The CBSA's investigation triggered the initiation of a preliminary injury inquiry by the Tribunal on June 9, 2016. The Tribunal issued its preliminary determination on August 5, 2016, that the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury or was threatening to cause injury to the producer in Western Canada. In its Statement of Reasons for this determination, the Tribunal stated the following:

> 65. A number of parties made arguments regarding the impact of the potential imposition of duties on end users and consumers of the subject goods and related downstream products. These are issues which can only be addressed in a public interest inquiry after, and only if, the Tribunal makes a finding of injury or threat of injury. The Tribunal has the power to initiate a public interest inquiry if it determines that the circumstances warrant such an inquiry.
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> 66. The Tribunal, without prejudging these issues in any manner, will allow continued evidence and argument on the issue of public interest in its final injury inquiry, as long as the evidence and argument are clearly identified as relating to this issue . . . .[3]

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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. A detailed description of the goods subject to this inquiry is found under "Product".
3. *Gypsum Board* (22 August 2016), PI-2016-001 (CITT) [*Gypsum Board PI*].

6. On September 6, 2016, the CBSA made a preliminary determination of dumping, resulting in the imposition of provisional anti-dumping duties on the subject goods and the commencement of this inquiry. The provisional duties which were imposed were as follows:[4]

- Georgia-Pacific Gypsum LLC (GP US): 105.2%
- United States Gypsum Company (USG): 143.6%
- CertainTeed Gypsum and Ceilings Manufacturing, Inc. (CTG US): 125.0%
- All other exporters: 276.5%

7. On September 7, 2016, the Tribunal issued a notice of commencement of inquiry.

8. On October 13, 2016, His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 18 of the *Canadian International Trade Tribunal Act*,[5]

> (a) referred to the [Tribunal] the matter of whether the imposition of provisional duties or duties, applicable to gypsum board imported from the United States for markets in [Western Canada], is contrary to Canada's economic, trade or commercial interests, and specifically whether such an imposition has or would have the effect of substantially reducing competition in those markets or causing significant harm to consumers of those goods or to businesses who use them; and
>
> (b) directed that the Tribunal report to the Governor in Council on those matters no later than January 4, 2017, and submit to the Governor in Council, within 15 days after that date, its findings and recommendations on any remedy that could be taken.[6]

9. The Tribunal combined the two inquiries to provide for a more expeditious process in accordance with rule 6.1 of the *Canadian International Trade Tribunal Rules* and section 35 of the *CITT Act*. On October 18, 2016, the Tribunal issued a revised notice of commencement of inquiries.

10. On December 5, 2016, the CBSA made a final determination of dumping. The CBSA determined that the U.S. exporters did dump the subject goods into Canada by margins of dumping as follows[7]:

- GP US: 94.6%
- USG: 201.0%
- CTG US: 211.0%
- All other exporters: 324.1%

11. As part of making its final determination, the CBSA communicated confidential normal values to GP US and USG. These confidential normal values are model-specific "floor prices" at or above which U.S. exporters can ship to Canada from certain of their plants without incurring anti-dumping duties. Normal values or any ranges thereof are not communicated to the public.

12. Further, as the importers are parties related to the exporters and were not covering their full costs and profit on resale in Canada, the CBSA adjusted their export prices, i.e. constructed their export prices

4. Exhibit NQ-2016-002-01A, Vol. 1 at 28-31.
5. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].
6. Order in Council P.C. 2016-0879 [the Reference].
7. Exhibit NQ-2016-002-04A, Vol. 1.

under section 25 of *SIMA*.[8] Such methodology usually results in the raising of Canadian resale prices by the importers, and these constructed export prices are reviewed periodically by the CBSA.

13. The Tribunal's period of inquiry (POI) covered three years, from January 1, 2013, to December 31, 2015, as well as the interim period of January 1, 2016, to June 30, 2016.

14. On September 7, 2016, the Tribunal sent requests to complete questionnaires to domestic producers, importers, purchasers and foreign producers of gypsum board. Using the questionnaire replies and import data from the CBSA, staff of the Secretariat to the Canadian International Trade Tribunal of the Administrative Tribunals Support Service of Canada (CITT Secretariat) prepared public and protected versions of the Investigation Report that were distributed, along with the questionnaire replies, to those parties that had filed notices of participation in the inquiry.[9] Parties filed case briefs and evidence in response.

15. The parties supporting a finding of injury, or threat thereof, is the domestic producer situated in Western Canada who filed the complaint—CTG—along with Acadia Drywall Supplies Ltd. (Acadia Drywall), a producer of gypsum board in Eastern Canada; Vipco Industries Inc. (Vipco), a user of gypsum board; and the International Brotherhood of Boilermakers (IBB), the trade union representing a number of the workers in CTG's Winnipeg and Calgary factories. The supporting parties submitted evidence and argument, and provided witnesses during the Tribunal's hearing.

16. The parties in opposition to CTG's allegations who filed evidence and argument with the Tribunal are the following: the Canadian Home Builders' Association (CHBA); Continental Building Products Inc., a U.S. producer/exporter of the subject goods, and its related importer in Canada, Continental Building Products Canada Inc. (collectively, CBP); DCL Drywall Inc. (DCL Drywall); GP US, a U.S. exporter of the subject goods, and its related importer in Canada, Georgia-Pacific Canada LP (GP Canada), who was also a producer of gypsum board in Eastern Canada for part of the POI; USG, a U.S. producer/exporter of the subject goods, and its related importer in Canada, CGC Inc. (CGC), who is also a producer of gypsum board in Eastern Canada; WSB Titan; and the Western Canada Alliance of Wall and Ceiling Contractors (WCAWCC).

17. The Alberta Wall and Ceiling Association (AWCA), the Association of Wall and Ceiling Contractors of B.C. (AWCCBC), TBM Holdco Ltd./Timber Mart, the B.C. Wall and Ceiling Association (BCWCA), and National Gypsum Company, a U.S. producer/exporter of the subject goods, filed case briefs but did not file witness statements.

18. The other parties that filed notices of participation, but did not file briefs or evidence on the issue of injury or threat of injury, are Atlantic Wallboard Limited Partnership, doing business as Irving Wallboard, a producer of gypsum board in Eastern Canada; Castle Building Centres Group Ltd.; the Manitoba Wall and Ceiling Association Inc.; Sexton Group Ltd.; the U.S. Department of Commerce, per the U.S. Embassy Ottawa; and the Ministry of International Trade, Government of British Columbia. FBM Canada GSD Inc., a successor company to Allroc, withdrew from participation in the inquiry.

19. One hundred and eight other parties filed notices of participation with the Tribunal with regard to Reference No. GC-2016-001, but did not participate in Inquiry No. NQ-2016-002.

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8. Exhibit NQ-2016-002-04A, Vol. 1.
9. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed the required declaration and confidentiality undertaking with the Tribunal in respect of confidential information.

20. On November 7, 2016, the parties filed requests for information (RFIs) with the Tribunal. The Tribunal issued directions to the parties on November 15, 2016, requiring responses to certain of these RFI's. The majority of the responses were received by November 22, 2016, and placed on the record of the proceedings. An RFI Report, summarizing and aggregating RFI responses, was also prepared by the Tribunal's Secretariat staff and placed on the record for ease of reference.

21. The Tribunal wishes to note the exceptional nature of some of the RFIs which the Tribunal directed parties to answer. Many of the RFIs would have normally been questions properly posed during the course of the hearing. However, the questions that were raised by parties were susceptible to application in either Inquiry No. NQ-2016-002, Reference No. GC-2016-001, or both.

22. Considering the combined and expedited nature of these proceedings, the Tribunal wanted to get as much information as possible onto the record before the hearing in order to inform the Tribunal's lines of questioning during the hearing and to provide for a more streamlined hearing process. The Tribunal does not intend to continue such a permissive approach to RFIs in future injury inquiries absent similar circumstances.

23. The process which was undertaken by the Tribunal as a combined result of the CBSA's preliminary determination and the Reference was challenging and unfolded very rapidly, and resulted in the Tribunal gathering and analyzing an unusually large amount of qualitative and quantitative information from a record number of parties. This process was followed by the issuance of two findings and two Statements of Reasons, one set for Inquiry No. NQ-2016-002 and one set for Reference No. GC-2016-001. The Tribunal wishes to express its appreciation for the cooperation of all parties and respondents especially given the extremely limited timelines embedded in this process.

24. The Tribunal's hearing was held in Edmonton, Alberta, from November 28, 2016, to December 8, 2016. It included public and *in camera* sessions.

25. Two product exclusion requests were filed by CGC: one for a lightweight 5/8-inch fire-rated gypsum board, and the second for a lightweight 1/2-inch mold- and moisture-resistant gypsum board. The first request was also made and supported by WSB Titan and five members of the WCAWCC. The second request was also made and supported by six members of the WCAWCC. Witnesses for CGC/USG, WSB Titan and the WCAWCC provided oral evidence with respect to the product exclusion requests. Witnesses for CTG testified to oppose the product exclusion requests.

26. The Tribunal, on consent of the parties, accepted four proposed expert witnesses put forward by certain parties and qualified them as experts in the field of economics. All four experts had filed reports or, in certain cases, rebuttal reports prior to the hearing. Three of them testified to the injury to the domestic industry and other matters relevant to Inquiry No. NQ-2016-002: Ms. Margaret Sanderson was called to testify by USG and CGC, and Mr. Dan Ciuriak and Dr. Seth Kaplan were called to testify by CTG. Dr. Alan Gunderson was called to testify by the Commissioner of Competition, for the exclusive purpose of Reference No. GC-2016-001, who testified on the panel composed of all of the experts.

27. The Tribunal further allowed counsel and parties who did not appear at the hearing for the purposes of making arguments to file written closing arguments along with any necessary aids to argument, subject to the limits imposed by the Tribunal. The BCWCA and the AWCA filed such written closing arguments.[10] CTG and the IBB replied to these submissions.

10. Acadia Drywall attempted to file an argument which was not within the scope of the Tribunal's directions; it was not accepted by the Tribunal.

28. The Tribunal also allowed parties to file post-hearing submissions limited to addressing any post-hearing information. CTG submitted post-hearing submissions, but the Tribunal did not accept the filing of an annex which did not deal with post-hearing information.

29. The Tribunal issued its finding on January 4, 2017. In reason of the timelines set out in the Reference, the Tribunal, on that same date, also reported to the Governor in Council its findings and recommendations in connection with the Reference.

PRODUCT

Product Definition

30. The subject goods are defined as follows:

> Gypsum board, sheet, or panel ("gypsum board") originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, composed primarily of a gypsum core and faced or reinforced with paper or paperboard, including gypsum board meeting or supplied to meet ASTM C 1396 or ASTM C 1396M or equivalent standards, regardless of end use, edge-finish, thickness, width, or length, excluding
>
> (a) gypsum board made to a width of 54 inches (1,371.6 mm);
>
> (b) gypsum board measuring 1 inch (25.4 mm) in thickness and 24 inches (609.6 mm) in width regardless of length (commonly referred to and used as "paper-faced shaft liner");
>
> (c) gypsum board meeting ASTM C 1177 or ASTM C 1177M (commonly referred to and used primarily as "glass fiber re-enforced sheathing board" but also sometimes used for internal applications for high mold/moisture resistant applications);
>
> (d) double layered glued paper‑faced gypsum board (commonly referred to and used as "acoustic board"); and
>
> (e) gypsum board meeting ISO16000-23 for sorption of formaldehyde.
>
> All dimensions are plus or minus allowable tolerances in applicable standards.

Product Information

31. In its statement of reasons for its preliminary determinations, the CBSA provided the following additional product information:[11]

> [18] For greater certainty, the gypsum board considered to be subject goods includes but is not limited to:
>
> - **Abuse-resistant gypsum board** offering greater resistance to surface indentation, abrasion and penetration than standard gypsum board.
> - **Eased edge gypsum board**, which has a tapered and slightly rounded or beveled factory edge. It may be used as an aid in custom finishing of joints.
> - **Gypsum base** for veneer plaster serves as a base for thin coats of hard, high strength gypsum veneer plaster.
> - **Impact-resistant gypsum board** offer greater resistance to the impact of solid objects from high traffic and vandalism than standard gypsum board.

11. Exhibit NQ-2016-002-01A, Vol. 1 at 3-4.

- **Mold-resistant gypsum board or Mold and moisture resistant gypsum board** has a mold/moisture resistant gypsum core and paper facing that incorporates various methods of preventing the growth of mold and mildew on the board's surface.
- **Regular gypsum board** (gypsum wallboard) is used as a surface layer on walls and ceilings.
- **Sag-resistant gypsum board** is a ceiling board that offers greater resistance to sagging than regular gypsum products used for ceilings where framing is typically spaced 24 inches.
- **Type C or Proprietary Type-X gypsum board** is available in 1/2 inch and 5/8 inch thicknesses and is required in some fire rated assemblies. Additional additives give this product improved fire resistive properties.
- **Type X gypsum board** is available in 1/2 inch and 5/8 inch thicknesses and has an improved fire resistance made possible through the use of special core additives. Type X gypsum board is used in most fire rated assemblies.

[19] Gypsum board has long been used as a building material because of its fire-resistant properties. It provides a durable, economical, non-combustible and easily decorated surfacing material for construction use. Gypsum board is the most widely used material for ceilings and interior walls for residential, commercial, and institutional buildings in developed countries. Paper-covered gypsum board is well suited to the application for which it was designed, that is interior non-load bearing construction.

LEGAL FRAMEWORK

32. 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 producers of "like goods".

33. Accordingly, the Tribunal must first determine what constitutes "like goods". Once that determination has been made, the Tribunal must then determine what constitutes the "domestic industry" for the purposes of its injury analysis (in this case, this also entails an analysis of whether a regional market exists). Finally, the Tribunal will assess whether the dumping of the subject goods has caused material injury to the domestic industry.

34. Should the Tribunal arrive at a finding that no material injury has occurred, it would then have to determine whether there exists a threat of material injury to the domestic industry.[12] As a domestic industry is already established, the Tribunal need not herein consider the question of retardation.[13]

35. In conducting its analysis, the Tribunal will also examine those other factors that might have had a negative impact on the domestic industry in order to ensure that such factors are not determinative in the

12. 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. If the Tribunal reaches a negative conclusion in respect of injury or threat thereof, it does not need to proceed with an examination of the potential exclusions.
13. Subsection 2(1) of *SIMA* defines "retardation" as "material retardation of the establishment of a domestic industry". In previous decisions, the Tribunal has consistently held that there could be no retardation if there was domestic production of like goods. *Potassium Silicate Solids* (6 March 2012), PI-2011-003 (CITT) at paras. 35, 37.

assessment of any injury experienced by the domestic industry. As explained in past Tribunal decisions, said injury must be attributable to the effects of the dumping itself, and not the result of other factors.[14]

36. The Tribunal notes at the outset that (and this observation applies to the entirety of its Reasons), since there is only one domestic producer situated in Western Canada for the purposes of the present inquiry, much of the information on the record is specific to this producer and hence confidential; this can be contrasted to cases where there are multiple producers and where the information is often aggregated and open to public disclosure without risk of jeopardizing proprietary corporate information. Recognizing this constraint, the Tribunal can only refer to data in a limited way in support of its public Reasons.

LIKE GOODS AND CLASSES OF GOODS

37. 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.

38. There were no arguments made that domestically produced gypsum board is not like goods in relation to the subject goods or that there is more than one class of goods. As it did at the preliminary injury inquiry stage of this matter, the Tribunal finds that gypsum board produced in Western Canada that is of the same description as the subject goods constitutes like goods, and will conduct its injury analysis on the basis of one class of goods.[15]

DOMESTIC INDUSTRY/REGIONAL MARKET

39. 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.

40. As noted above, this inquiry relates to dumped imports of gypsum board originating in or exported from the United States into Western Canada, and CTG is the sole complainant and the sole producer of gypsum board in Western Canada. As such, in concert with the reasoning in the section that follows, the Tribunal is satisfied that CTG constitutes the totality of the domestic industry for the purposes of this inquiry.

Regional Market

41. For the purposes of the present inquiry, the Tribunal is asked to determine whether CTG's Western Canadian production is sold in a regional market, being Western Canada.

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14. *Hot-rolled Carbon Steel Plate* (20 May 2014), NQ-2013-005 (CITT) at para. 180; *Silicon Metal* (19 November 2013), NQ-2013-003 (CITT) at para. 111; *Welded Large Diameter Carbon and Alloy Steel Line Pipe* (20 October 2016), NQ-2016-001 (CITT) at para. 86.
15. *Gypsum Board PI* at para. 19.

42. With respect to the establishment of a regional market, subsection 2(1.1) of *SIMA* provides as follows:

> (1.1) In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where
>
> (a) the producers in the market sell all or almost all of their production of like goods in the market; and
>
> (b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

43. If the Tribunal finds that a regional market exists, subsection 42(5) of *SIMA* provides as follows:

> (5) Where subsection 2(1.1) applies in respect of the dumping or subsidizing of goods to which the preliminary determination applies, the Tribunal shall not find that the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury unless
>
> (a) there is a concentration of those goods into the regional market; and
>
> (b) the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury to the producers of all or almost all of the production of like goods in the regional market.

44. On the basis of these provisions, the Tribunal will consider two issues as prescribed by the above statutory provisions in order to determine whether it should apply a regional market analysis to the case at hand. Specifically, and to clarify any misunderstanding as to these issues, it will consider:

- Whether all or almost all of the like goods were sold in the Western Canadian market, and whether Western Canadian demand was to any substantial degree supplied by like goods from Eastern Canada (this two-pronged analysis is referred to as the isolation requirement, and establishes whether there is a regional market); and
- Whether there was a concentration of dumped goods in the Western Canadian market (this is referred to as the concentration requirement, and is a prerequisite for finding injury in a regional market).

45. If these requirements are met, the Tribunal will then conduct its injury analysis based on its finding of a regional market, which will include a conclusion with respect to paragraph 42(5)(b) of *SIMA*.

Whether All or Almost All of the Like Goods Were Sold in Western Canada

46. The Tribunal notes, with respect to this first condition, that it has in previous decisions interpreted the phrase "all or almost all" of paragraph 2(1.1)(a) of *SIMA* as representing at least 80 percent of the sales of like goods by domestic producers[16] in the given regional market. It is not disputed that CTG is the only producer of gypsum board in Western Canada and that it sold the vast majority (between 96 and 98 percent from 2013 to 2015) of its Western Canadian production in the Western Canadian market during the POI.[17]

47. GP raised the argument that CTG does not sell "all or almost all" of its production in Western Canada because it is in fact a national producer, that also has operations that produce and sell gypsum board in Eastern Canada.[18] According to GP, the requirement set out in paragraph 2(1.1)(a) of *SIMA* requires that

16. *Certain Whole Potatoes* (10 September 2010), RR-2009-002 (CITT) at para. 92.
17. Exhibit NQ-2016-002-07 (protected), Table 15, Vol. 2.1.
18. Exhibit NQ-2016-002-K-01, Vol. 13A at paras. 26-33.

CTG, considered as a whole (its Eastern and Western production together) sells "almost all of its total production into Western Canada".[19]

48. The Tribunal considers that such an interpretation of paragraph 2(1.1)(a) of *SIMA* is not supported by the language or the purpose of the provision, nor by any relevant jurisprudence.

49. Paragraph 2(1.1)(a) of *SIMA* requires that "producers *in the market* sell all or almost all of their production of like goods *in the market*" [emphasis added]. This prescribes a test that assesses whether producers located in *a specific market* sell their production in *that same market*. This understanding is reflected in the Tribunal's decision in *Solid Urea* stating that the first two conditions of the regional market test describe conditions in a territory that is isolated from those in other regions of the territory: "This independence translates into little or no movement of goods *across the regional boundary*"[20] [emphasis added]. To interpret this section otherwise would potentially void it of its actual purpose.

50. There is no requirement that a producer be exclusively located in the market in question. There is also no indication that it could be relevant that other production facilities belonging to the same corporate entity sell the like goods in other parts of Canada. This point is supported by the Tribunal's decision in *Beer* where a regional market was found to exist in British Columbia, even though it was clear that the regional producing entities in that market, notably both Labatt and Molson, were part of a larger corporate entity which had other breweries and sales throughout Canada.[21]

51. GP referred to Article 4.1(ii)(a) of the *WTO Anti-Dumping Agreement* in support of its argument. The provision states, in relevant part, that producers within a market may be regarded as a separate industry "if (a) the *producers within such market* sell all or almost all of their production of the product in question *in that market* . . ." [emphasis added]. The language of this provision is very similar to the test in paragraph 2(1.1)(a) of *SIMA* and neither its plain wording nor its context suggests that it applies to the sales and production of an entire corporate entity rather than to a producer's operations located within a specific market;[22] GP's argument would in fact lead to nonsensical results.

52. If GP's interpretation was adopted, CTG would actually be denied *SIMA* protection merely because it chose not to separately incorporate its Western Canadian operations. Similarly, in a scenario where the only difference from the present situation was that there were many production facilities in Western Canada,

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19. Exhibit NQ-2016-002-K-01, Vol. 13A at para. 32.
20. *Solid Urea* (1987), 15 C.E.R. 277 (CIT).
21. The Tribunal stated therein that Labatt Breweries of British Columbia was an operating division of Labatt Breweries of Canada and thus not a separate legal entity. Molson Brewery B.C., Ltd. was a wholly owned subsidiary of Molson Breweries. The other regional producer, Pacific Western Brewing Company, operated as a single corporation with a brewery in B.C. and Ontario until February 28, 1991. *Beer* (2 October 1991), NQ-91-002 at 3.
22. GP referred to the report of the panel in *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities* (WT/DS341). The Tribunal fails to see the relevance of that case for the interpretative question at issue here in relation to Article 4.1(ii)(a) of the *WTO Anti-Dumping Agreement*. The panel in *Mexico – Olive Oil* examined whether an enterprise could be considered a "producer" and thus be part of the "domestic industry", as defined in Article 16.1 of the *Agreement on Subsidies and Countervailing Measures*, when it did not actually produce output at the time when an application for the imposition of duties was filed (para. 7.188). At the outset of its interpretation of the term "producer", the panel stated a dictionary definition of that term so as to derive its ordinary meaning (para. 7.192). There is nothing in that definition or in the panel's interpretation suggesting that the word "producer" should be understood either as a corporate legal entity or as including several production facilities, especially as applied to determining whether a regional market exists.

owned by many different owners (who also operated facilities in Eastern Canada), all of the Western Canadian facilities could not be extended *SIMA* protection even if all of the other necessary statutory requirement were met. These potential outcomes show the flaws in interpreting these provisions as advocated by GP.

53. The Tribunal is therefore satisfied that the first part of the isolation test is met—all or almost all of CTG's production of gypsum board was sold in Western Canada during the POI.

Whether Demand in Western Canada Was Not, to Any Substantial Degree, Supplied by Like Goods From Eastern Canada

54. Based on protected record evidence, sales of gypsum board from Eastern Canada in Western Canada during the POI were not "substantial". In *Certain Whole Potatoes*, the Tribunal found that sales by growers located elsewhere in Canada supplying 14 percent of the demand in British Columbia were not substantial.[23]

55. USG suggested that "demand" in subsection 2(1.1)(b) of *SIMA* is to be construed as demand for domestically produced product and referred to the decision in *Solid Urea* by the Tribunal's predecessor, the Canadian Import Tribunal (the CIT).[24] Thus, Western Canada would not be a regional market under the second part of the isolation test.[25] The Tribunal does not accept this argument.

56. In *Solid Urea*, Western Canadian producers increased their market share in the Eastern Canadian market for solid urea from 0 to 11.5 percent over the period of review. As a result, Western producers' share of the market was almost the same as that of the complainant. Based on these facts, the CIT considered that demand for *domestic product* in the Eastern market was supplied to a substantial degree by Western producers although the *total demand* in that market was not.[26] The use of this methodology raises the threshold for the second test on isolation. Instead of asking whether the *demand in the market* was to any substantial degree supplied by producers of like goods located elsewhere in Canada, it asks whether the demand in the market *supplied by the domestic producers* was to any substantial degree supplied by other producers of like goods located elsewhere in Canada.

57. The Tribunal is cognizant of the statutory text of this part of the isolation test. To recall, subsection 2(1.1)(b) of *SIMA* requires that "the demand in the market" not be to any substantial degree supplied by producers of like goods located elsewhere in Canada. The statutory provision is specific that the assessment is to be done on the basis of "demand". This includes all goods purchased in the market including imports. This is also the approach used by the Tribunal in other cases involving a regional market.

58. Nevertheless, according to either methodology, the inflow of gypsum board from Eastern Canada would still not be substantial compared to the levels in *Solid Urea* and well below the 14 percent level adopted in *Certain Whole Potatoes*.

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23. *Certain Whole Potatoes* (10 September 2010), RR-99-005 (CITT) at 11.
24. Exhibit NQ-2016-002-K-01, Vol. 13A at paras. 34-37; Exhibits NQ-2016-002-C-03 and NQ-2016-002-J-03, Vol. 13 at para. 18.
25. This argument was made by parties opposing despite the fact that one expert witness of the parties opposing, Dr. Gunderson, was of the opinion that a regional market did exist based on economic considerations.
26. *Solid Urea* (1987), 15 C.E.R. 277 (CIT) at 10. The decision does not state the percentage of Western Canadian sales in relation to demand for domestic product. However, in view of the fact that the market share of Western Canadian sales during the POR almost reached that of the complainant (p. 9), the resulting percentage would be significantly higher than 11.5 percent.

59. Opposing parties also submitted that the Tribunal should base its analysis of whether a regional market exists on data during and subsequent to the POI.[27] Opposing parties advanced that, after the imposition of provisional duties, a shift in demand in Western Canada occurred, leading to a substantial inflow of gypsum board from Eastern Canada. They argued that, on this "dynamic" basis, the Tribunal should conclude that a regional market does not exist in Western Canada.[28] While the Tribunal does not treat the assessment of a regional market as purely a mathematical exercise based entirely on the POI (indeed, the assessment is sometimes referred to as "an art, not a science"),[29] the Tribunal does not accept the above proposition of the opposing parties.

60. Fundamentally, the assessment of whether a regional market exists is made for the purposes of assessing injury due to dumping. This analysis usually cannot be appropriately and reliably performed in a period after the POI, i.e. a period where there are provisional antidumping duties and therefore protection from the effects of dumping.

61. As well, a "dynamic" analysis of whether there is a regional market becomes a self-fulfilling prophecy after the imposition of provisional duties, i.e. a situation the dynamics of which will usually tend to negate the appearance of a regional market. This is because, as prices rise, inflows (being shipments from Canada outside of the regional market) will usually increase, as they have done in this case. This is a consequence of the duties; to rely on this phenomenon to assess whether there is a regional market or not would undermine the very purpose of subsections 2(1) of *SIMA* and is therefore misguided. The proper test is to look at the behaviour of the market in the absence of duties.

62. The Tribunal also held in *Certain Grain Corn* that "it is required to determine whether the regional market exists during the period of inquiry, not whether it will exist based on projections which are, by their nature, uncertain."[30] The same reservation applies in this case.

63. The Tribunal collected additional confidential information for the period of July to October 2016 showing an increase of shipments/sales of gypsum board from Eastern Canada to Western Canada. However, this information covers only a short time period. It is also derived at a time the Western Canadian market is being affected by the imposition of provisional duties, which do not constitute a normal market force. The Tribunal therefore considered data collected during the POI to determine the existence of a regional market.

64. On this basis, the Western Canadian market was not supplied in any substantial degree with gypsum board originating from Eastern Canada during the POI. The Tribunal is therefore satisfied that the second part of the isolation test is met.

Whether There Was a Concentration of Dumped Goods in Western Canada

65. As the Tribunal has previously noted in *Fresh Iceberg (Head) Lettuce*,[31] industries and their relevant markets vary tremendously and, therefore, the concentration of dumped imports in a regional market must be assessed according to the circumstance of each case.

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27. Exhibits NQ-2016-002-H-01 and NQ-2016-002-I-01, Vol. 13A at paras. 55-60; Exhibit NQ-2016-002-K-01, Vol. 13A at paras. 38-42.
28. Exhibits NQ-2016-002-H-01 and NQ-2016-002-I-01, Vol. 13A at para. 57.
29. *Certain Whole Potatoes* (9 September 2015), RR-2014-004 (CITT) at para. 49.
30. *Certain Grain Corn* (7 March 2001), NQ-2000-005 (CITT) at 17.
31. *Fresh Iceberg (Head) Lettuce* (30 November 1992), NQ-92-001 (CITT) at 9.

66. The Tribunal has traditionally analyzed three indicators, alone or in combination, to measure whether there is a concentration of dumped goods in the regional market.[32] In previous cases, the Tribunal has thus considered the distribution indicator to assess the value of the subject goods relative to the value of imports from the rest of Canada, the density indicator to consider the percentage of subject goods relative to the domestic market and the ratio indicator to compare the import penetration in the regional market vis-à-vis the import penetration into the whole of Canada.

67. Under the distribution indicator, evidence shows that during the POI subject imports into Western Canada represented well over half (between 57 to 67 percent) of the total imports into Canada[33].

68. In *Certain Whole Potatoes*, a density indicator ranging from 43 to 53 was found to satisfy the requirements of the test.[34] Protected data in the present case yielded similar results.[35]

69. Likewise, under the ratio indicator, the penetration of imports from the United States into Western Canada as compared to the rest of Canada is high. Record evidence shows that the ratio of subject imports between the Western Canadian market and the total Canadian market was 1:78 in 2013, 1:57 in 2014 and 1:54 in 2015. In previous cases, the Tribunal found concentration having a range of different ratios (e.g. 1:22 in *Fresh Iceberg (Head) Lettuce*[36] to 5:1 in *Certain Grain Corn*).[37]

70. On balance, the Tribunal is satisfied that the third statutory requirement is met—there was a concentration of the subject goods imported into Western Canada during the POI.

71. In summary, the Tribunal determines that Western Canada is a regional market and will conduct its injury analysis on this basis. The Tribunal will thus consider whether the dumping of the subject goods is likely to cause injury to the producer of all or almost all of the production of like goods, i.e. to CTG, in the regional market, being Western Canada, in its analysis of the likelihood of injury as set out below.

INJURY ANALYSIS

72. As the Tribunal determined that Western Canada is a regional market for the purposes of this inquiry, it will consider in its injury analysis whether the dumping of the subject goods has caused injury to the producer of all or almost all of the production of like goods[38] in the regional market during the POI.

73. In order to determine whether the dumping has caused material injury to the domestic industry, subsection 37.1(1) of the *Special Import Measures Regulations*[39] instructs the Tribunal 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) directs the Tribunal to consider whether a causal relationship exists between the dumping of the goods and the injury on the basis of such factors.

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32. *Certain Grain Corn* (22 March 2001), NQ-2000-005 (CITT) at 19.
33. Exhibit NQ-2016-002-07 (protected), Table 15, Vol. 2.1.
34. *Certain Whole Potatoes* (10 September 2010), RR-2009-002 (CITT) at para. 98.
35. Exhibit NQ-2016-002-07 (protected), Table 15, Vol. 2.1.
36. *Fresh Iceberg (Head) Lettuce* (30 November 1992), NQ-92-001 (CITT) at 9.
37. *Certain Grain Corn* (22 March 2001), NQ-2000-005 (CITT) at 19.
38. As CTG is the sole domestic producer in this case, a reference to CTG in these reasons is also a reference to the domestic industry or the domestic producer, unless the context dictates otherwise.
39. S.O.R./84-927 [*Regulations*].

74. In determining whether the dumping has caused material injury to the domestic industry, the Tribunal must also consider whether any factors other than the dumping of the subject goods have caused injury, with the injury caused by such other factors not to be attributed to the subject goods.

75. To that end, the Tribunal will assess the impact of the subject goods on CTG's performance over the POI. At the same time, it will weigh the relative impact that factors unrelated to the subject goods may have had on CTG to ensure that any injury or threat of injury attributable to the subject goods is material in and of itself.

76. The Tribunal will consider the period between 2013 and 2015 when analyzing the volumes, price effects and impacts of the subject goods on the domestic industry. The Tribunal will also consider the interim periods of January 1 to June 30, 2015, and January 1 to June 30, 2016 (interim 2015 and interim 2016), as an indication of annual trends and for comparative purposes. Data for the period of July 1, 2016, to October 31, 2016, was also collected during the RFI process. The Tribunal will consider this information where necessary.

77. In terms of the evidence offered regarding the above factors, the Tribunal finds it important to note that at times during the hearing it found Messrs. Walker and Edgecombe, witnesses for CTG, to be unhelpful and resistant during their testimony. Many responses, even in respect of questions that should have been easy to respond to for witnesses in their position within their company, were evasive and less than transparent. Needless to say that the Tribunal would have expected more openness and transparency on their part.

Import Volume of Dumped Goods

78. 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.

Positions of Parties

79. CTG submitted that there was a significant increase in the volume of sales from subject goods over the POI. CTG also argued that market share gained by subject goods over the POI equalled market share lost by CTG and was at CTG's expense.

80. Parties opposed argued that import volumes of subject goods have only increased modestly and inconsistently over the POI and were trending away from injury. GP, CGC and USG submitted that the volume of subject goods declined towards the end of the POI in 2015. Some opposing parties argued that CTG lost market share to sales from Eastern Canada, rather than to imports of subject goods.

Tribunal's Analysis

81. The volumes of U.S. subject imports increased in absolute and in relative terms over the POI. The Investigation Report shows that, over the course of the POI, absolute volumes of imports of subject goods increased by 14 percent from 2013 to 2014.[40] Although imports slightly decreased by 4 percent from 2014 to 2015, they remained well above the 2013 baseline.[41] The reduction in comparative volumes between

40. Exhibit NQ-2016-002-06, Table 17, Vol. 1.1.
41. Exhibit NQ-2016-002-06, Table 17, Vol. 1.1; Exhibit NQ-2016-002-07 (protected), Table 16, Vol. 2.1.

interim 2015 and interim 2016 can be explained by the facts that the complaint was known to have been filed by May 2016, by seasonal factors, as well as by a reduction in overall market volumes.[42]

82. It is important to note that volumes of subject U.S. exports continued to increase at the same time as the U.S. home market recovered in terms of demand and decreased in terms of nameplate capacity, and despite a much more advantageous price in the U.S. market.

83. The evidence of the parties established that, because of high relative freight costs, most gypsum board production is sold within a limited geographic radius near the gypsum board plant.[43] These nearest markets are key to the profitability of each one of the local plants. Since Canada is the farthest significant market for U.S. producers, lower prices which U.S. exporters obtain in the Western Canadian market do not materially affect the prices obtained in their main U.S. markets, i.e. those near their U.S. plants. Because of the distance of Canadian markets and high transportation costs, as well as the manufacturers' own selling policies,[44] there are also no re-exports of low-priced imports back into the United States.

84. Thus, it became apparent to the Tribunal that U.S. exporters treat their North American sales as part of a single continental operation.[45] Specifically, U.S. exporters will export goods to Canada and treat these sales as profitable as assessed on the basis of their sales price to their related importers (but not necessarily based on the price from the importer to the next level of trade). This is because these sales still provide the benefit of contributing to the fixed costs of their U.S. factories.[46] This strategy partly explains the increases in import volumes throughout the POI.

85. When the volume of imports of the subject goods is examined relative to total domestic production or total domestic sales from domestic production, it is clear that the volume of imports of the subject goods increased between 2013 and 2015.[47] While relative imports decreased in interim 2016, they remained notably higher than in 2013.[48] The Tribunal has previously considered increases within ranges similar to those observed in this case as being significant.[49] It is therefore plain that CTG lost market share throughout the POI, while subject goods substantially gained market share between 2013 and 2014, maintaining that level in 2015.[50] Although market share of subject goods was lower in interim 2016 than in interim 2015, it stayed very close to the overall 2015 level.

86. Imports from Eastern Canada moderately gained market share during the POI with a slightly stronger increase between 2014 and 2015.[51] However, the Tribunal considers Eastern Canadian imports to be of lesser importance as they started from an insignificant level at the beginning of the POI in 2013.

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42. Exhibit NQ-2016-002-07 (protected), Tables 16 and 20, Vol. 2.1.; Exhibit NQ-2016-002-06, Table 17, Vol. 1.1.
43. *Transcript of Public Hearing*, Vol. 6, 5 December 2016, at 611-12, 754, 774, 777.
44. *Transcript of Public Hearing*, Vol. 4, 1 December 2016, at 375.
45. *Transcript of Public Hearing*, Vol. 3, 30 November 2016, at 324; *Transcript of Public Hearing*, Vol. 4, 1 December 2016, at 384.
46. *Transcript of Public Hearing*, Vol. 3, 30 November 2016, at 324.
47. As there is only one domestic producer in this case, the precise increase in the volume of the subject goods relative to domestic production and relative to domestic sales from domestic production cannot be stated publicly in these reasons. The same applies with regard to market share information. Where applicable, reference is made to the relevant tables in the protected version of the Investigation Report.
48. Exhibit NQ-2016-002-07 (protected), Table 19, Vol. 2.1.
49. *Circular Copper Tube* (2 January 2014), NQ-2013-004 (CITT) at para. 78.
50. Exhibit NQ-2016-002-07 (protected), Table 22, Vol. 2.1.
51. Exhibit NQ-2016-002-07 (protected), Table 22, Vol. 2.1.

87. In this case, evidence was adduced that there was no dumping in 2013 based on average prices from U.S. exporters to Canada.[52] Even though this evidence is not sufficient in and of itself to make this determination (which is the CBSA's purview in any event), the Tribunal's conclusions as to injury apply even if there was no dumping in 2013.

88. The evidence, therefore, demonstrates that there was an increase in the volume of imports of the subject goods in absolute and in relative terms throughout the POI.

Price Effects of the Dumped Goods

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

90. To that end, the Tribunal collected data from the domestic producer, importers, purchasers and foreign producers regarding sales by trade level, sales by product type and specification, sales of benchmark products and sales to common accounts.

Positions of Parties

91. CTG argued that the prices of the subject goods significantly undercut, depressed and suppressed the prices of the like goods during the POI.

92. CTG alleged that gypsum board is price-sensitive and pointed to record evidence as indicating that price is the main factor affecting the purchasing decision of gypsum board. On the issue of price undercutting, CTG argued that the prices of the subject goods undercut the prices of the like product on an aggregate basis as well as at the product-specific and the customer-specific level.

93. The opposing parties alleged that price was not the most important factor in the purchasing decision, but one of several considerations. Opposing parties argued that record evidence demonstrated that other factors, such as product quality, customer service, and reliability of supply were very important.

94. On the issue of price depression and suppression, CTG alleged that, in order to adequately assess price depression and suppression during the POI, a distinction must be made between nominal and real prices, especially where significant inflation or deflation exists in the market place.

95. CTG argued that inflation in Western Canadian gypsum board production was particularly acute because CTG sources paper, an important input, from the United States and is thus exposed to the higher U.S. dollar value. In CTG's view, inflation-adjusted real price data shows significant price suppression caused by subject imports. CTG further argued that while prices in Canadian dollars increased during the

52. Exhibit NQ-2016-002-A-12 (protected), Vol. 12A at 20. Generally, as to the argument by parties opposing that there is no determination of dumping as to goods imported in years prior to 2015, the Tribunal notes that it is highly unlikely that dumping begins on Day 1 of the CBSA's POI or ends on its last day. The Tribunal's longer analysis (usually for a three-year period) therefore assumes, absent evidence to the contrary, that there is dumping in other parts of the Tribunal's POI.

POI, they in fact fell when converted to U.S. dollars, considering the annual exchange rate between the U.S. and Canadian dollars, which increased over the POI.

Tribunal's Analysis

– Introduction

96. In the sale of gypsum board in Canada, price is the most important factor. The Tribunal is convinced that the subject and like goods are generally equivalent and that price is the determining factor in the decision to buy domestically produced or imported goods.

97. In this context, some of the largest Canadian purchasers of gypsum board obtained dumped U.S. prices from USG's production. These prices were so low that their levels were the subject of some candid and eye-opening protected evidence by the USG/CGC witness.[53]

98. As indicated earlier, U.S. exporters view their business on a North American basis, to some extent disregarding the border between both countries. Mills are essentially set up to serve a defined radius that can encompass regions on both sides of the border. Both USG and GP sell goods in Canada through their related importers. Each sale, regardless whether it is profitable on resale by the Canadian importer, brings profits for the U.S. manufacturer which produced the goods notwithstanding that it may constitute dumping and may cause injury in the Western Canadian market.

99. The entire Western Canadian market was affected by these prices made possible by this North American strategy of the U.S. producers, which dictated that they absorb most of the currency fluctuations during period of the POI where the Canadian dollar depreciated when compared to the U.S. dollar. The pricing to these large customers led and set the pricing in the Western Canadian market, which the participants viewed as normal "competitive" pricing.

100. In assessing whether the subject goods have undercut, depressed or suppressed the prices of the like goods, the Tribunal examined the allegations of the price effects of the subject goods, both in terms of average unit values and benchmark product prices as set out in the Investigation Report.

– Price Undercutting

101. As stated above, the evidence on the record is conclusive that the gypsum board market is price driven. The data collected during the POI show that the price of gypsum board is an important factor in the purchasing decision.[54] Data collected after the imposition of provisional duties confirm that when prices of gypsum board increased when adjusting to the provisional duties,[55] the volumes of sales from imports decreased.[56]

102. When the average unit prices (being a macro-comparison level) for sales of the subject goods are compared to those of the like goods, the evidence demonstrates that the subject goods significantly undercut the like goods during the POI.[57]

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53. For protected details, refer to *Transcript of In Camera Hearing*, Vol. 4, 1 December 2016, at 378-80.
54. Exhibit NQ-2016-002-06, Table 13, Vol. 1.1.
55. Exhibit NQ-2016-002-06G, Table 21, Vol. 1.1; Exhibit NQ-2016-002-07G (protected), Table 20, Vol. 2.1.
56. Exhibit NQ-2016-002-06G, Table 15, Vol. 1.1; Exhibit NQ-2016-002-07G (protected), Table 14, Vol. 2.1.
57. Exhibit NQ-2016-002-07 (protected), Table 41, Vol. 2.1.

103. When prices are examined at the product benchmark level (being a micro-comparison level), this strongly confirms that the prices of the subject goods undercut prices of the like goods during the POI.[58]

104. The Tribunal does not need to and will not rely on specific lost sales allegations to corroborate average pricing comparisons, as it was not satisfied that the evidence provided by CTG's witness relating to a significant portion of the allegations was credible and reliable.[59] This is one instance where the witness was particularly evasive and resistant in his answers, to a point where the Tribunal cannot give much weight to this part of his testimony.

105. Therefore, the Tribunal concludes that the subject goods competed head-to-head with domestically produced goods using lower prices, took sales as a result and limited any price increases in the pricing of gypsum board as reflected in overall market prices during the POI.

– Price Depression

106. In order to determine whether price depression occurred, the Tribunal examined whether the prices of the subject goods forced CTG to lower its prices in order to maintain sales or market share. In that respect, the Tribunal found that the evidence does not demonstrate that price depression occurred. Rather, the evidence demonstrates that the average domestic selling price has increased during the POI.

– Price Suppression

107. The rapid appreciation of the U.S. dollar in the POI played an important part in the pricing of gypsum board sold in Canada. There are two notable aspects of the appreciation in this case.

108. The Tribunal would have expected the prices of U.S. subject goods to have increased greatly as a result of the appreciation. This did not happen to the full extent of the appreciation.

109. As well, CTG had major inputs denominated in U.S. dollars. It should have been able to recover their increased costs had it not been faced with dumped low-priced competition. While CTG was somewhat able to do so, its price increases were not sufficient to allow it to improve its financial position.

110. In order to assess price suppression, the Tribunal typically compares the changes in the domestic industry's consolidated $/tonne cost of goods manufactured to the changes in the weighted average selling prices of the like goods to determine if domestic producers have been able to increase selling prices in step with increases in their cost of goods manufactured.

111. Confidential record information shows the details of how CTG was facing rising costs of goods manufactured during the POI.[60] Public record information demonstrates that its prices moderately increased throughout the POI.[61] At the same time, CTG attempted, in vain, to implement further price increases and other measures in the year 2014 in order to counter the decline in its financial position and recover market share.[62] The company attempted to raise prices again in 2015.[63]

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58. Exhibit NQ-2016-002-07 (protected), Table 57, Vol. 2.1.
59. *Transcript of In Camera Hearing*, Vol. 1, 28 November 2016, at 88-100.
60. Again, due to the constraints of confidentiality of much of the record information in these proceedings, the Tribunal is not in a position to discuss in detail the detailed facts relating to price suppression.
61. Exhibit NQ-2016-002-06, Table 9, Vol. 1.1.
62. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 17-18.
63. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 24.

112. Testimony from CTG's witnesses during the public hearing confirms that CTG failed at its attempts to increase prices. Mr. Walker stated that in 2013, 2014 the company "could not increase price to even offset inflation."[64] According to the witness, similar conditions applied again in 2015. Mr. Mazzaferro stated that "[w]e had, in 2015, an inflationary increase that was well known in the currency fall of the Canadian dollar which was a prime indicator for a price increase. Several attempts of price increases did not stand, and customers did not accept it due to the amount of availability of imported dumped board."[65]

113. The Tribunal notes that the paper used by CTG as input was priced in U.S. dollars and that the depreciation of the Canadian dollar over the POI raised the pressure of increasing input costs. Facts on the public record also indicate that, faced with increasing costs of goods sold and a worsening financial position over the POI, CTG was unable to implement necessary price increases due to resistance from its customers and the presence of dumped imports. In addition, CTG was under pressure to refrain from price increases because it needed to counter further losses of market share during the period.

114. On balance, there is evidence that CTG passed along some of the increase in the cost of goods sold to customers, but did not increase prices in 2014 and 2015 as much as it would have needed in order to prevent further deterioration of its financial position. This was due to competition from low-priced subject goods. Therefore, the Tribunal is satisfied that the subject goods have significantly suppressed the price of like goods.

– Summary

115. In sum, the Tribunal finds that the subject goods significantly undercut and suppressed the price of the like goods over the POI when prices are examined at both the average and product benchmark-specific levels.

Resultant Impact on the Domestic Industry

116. 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.[66] These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.[67] Paragraph 37.1(3)(a) requires the Tribunal to consider whether a causal relationship exists between the dumping or subsidizing of

64. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 17-18.
65. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 24.
66. 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 program.
67. Paragraph 37.1(3)(b) of the *Regulations* directs the Tribunal to consider whether any factors other than dumping or subsidizing of the subject goods have caused injury. The factors which are prescribed in this regard are (i) the volumes and prices of imports of like goods that are not dumped or subsidized, (ii) a contraction in demand for the goods or like goods, (iii) any change in the pattern of consumption of the goods or like goods, (iv) trade-restrictive practices of, and competition between, foreign and domestic producers, (v) developments in technology, (vi) the export performance and productivity of the domestic industry in respect of like goods, and (vii) any other factors that are relevant in the circumstances.

the goods and the injury, retardation or threat of injury, on the basis of the volume, the price effect and the impact on the domestic industry of the dumped or subsidized goods.

Positions of Parties

117. CTG argued that the increased volumes and the price effects of the subject goods caused material injury by drastically decreasing its market share and negatively impacting its gross margins, profitability and capacity utilization rates.

118. For their part, parties opposed submitted that the subject goods did not cause material injury to the domestic industry. They argued that CTG's overall performance was negatively impacted because of the following factors: poor customer relations, increased costs including some imposed by its corporate parent, depreciation of the Canadian dollar, etc.

Tribunal's Analysis

– Production Decline

119. Overall, total domestic production of the like goods for domestic sale steadily decreased between 2013 and 2015.[68] At the same time, the level of imports significantly increased from 2013 to 2014, by 14 percent, and only slightly decreased by 4 percent from 2014 to 2015, to a level above 2013.[69] Notably, during 2014 to 2015, the level of sales from imports still increased by 2 percent.[70]

– Sales and Market Share

120. The market expanded somewhat from 2013 to 2015.[71] However, the evidence shows that CTG's market share decreased throughout this period.[72] CTG's initial decrease in market share in 2014 occurred at the same time as the subject goods began increasing their market share, which they continued to do in 2015[73].

121. The Tribunal has already found that the subject goods have significantly and consistently undercut the prices of the like goods during the POI, taking sales and reducing the domestic industry's market share. Also, as previously mentioned, data on the record show that there was a decrease in the volume of imports when the average unit selling prices for the subject goods increased after the imposition of provisional duties.[74]

122. In sum and overall, CTG's sales and market share fell between 2013 and 2015, while the market share of the subject goods increased by a very similar, albeit slightly smaller, amount (the balance being taken by sales from Eastern Canadian production).

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68. Exhibit NQ-2016-002-06, Table 69, Vol. 1.1.; Exhibit NQ-2016-002-07 (protected), Table 68, Vol. 2.1.
69. Exhibit NQ-2016-002-06, Table 17, Vol. 1.1.
70. Exhibit NQ-2016-002-06, Table 21, Vol. 1.1.
71. Exhibit NQ-2016-002-06, Table 20, Vol. 1.1.
72. Exhibit NQ-2016-002-A-03, at paras. 14, 42, Vol. 11; Exhibit NQ-2016-002-07 (protected), Table 22, Vol. 2.1.
73. The Tribunal notes that while import volumes dropped somewhat in 2015 as compared to 2014, sales from imports actually continued to increase in this period and as compared to 2013. Exhibit NQ-2016-002-06, Tables 17 and 21, Vol. 1.1.
74. Exhibit NQ-2016-002-06G, Table 15, Vol. 1.1.; Exhibit NQ-2016-002-06G, Table 21, Vol. 1.1.

– Profitability

123. Protected data reveals that CTG suffered financially during the POI. On a $/MSF basis, its profitability on domestic sales of like goods was poor and declining. CTG's gross and net margins substantially worsened in 2015.[75] This is directly attributable to the price undercutting and price suppression effects of the subject imports. It is clear to the Tribunal that CTG has suffered injury in 2015, and it is also clear that this injury is material.

– Capacity Utilization

124. The capacity utilization rate of the domestic industry decreased steadily between 2013 and 2015.[76] The Tribunal finds that capacity utilization generally follows the trends discussed above for domestic production from 2013 to 2015 and was similarly affected, in part at least, by the lower-priced subject goods entering the Canadian market as a result of lost sales. As such, CTG had substantial unutilized capacity.

Tribunal's Conclusions on Injury

125. On the basis of the above analysis, the Tribunal finds that the dumping of the subject goods did, in and of itself, cause material injury to CTG. In 2014 and 2015 especially, the subject goods entered the domestic market at high volumes in both absolute and relative terms, and they did so at low, dumped prices, which had significant negative financial effects.

126. Parties opposed have argued that any negative or less than adequate economic performance on the part of CTG during periods prior to the Tribunal's POI cannot be attributed to dumping of gypsum board from the United States. The Tribunal agrees with that position and has considered irrelevant any allegations or evidence in these prior periods for the purpose of its injury analysis.

Causation/Other Factors

127. While many allegations were made about factors other than dumping which could have caused such injury, the Tribunal is not persuaded that these negate its conclusions on injury, as discussed below in more detail.

– Depreciation of the Canadian Dollar

128. An argument was made that exchange rates may have affected CTG's profitability. A major part of CTG's costs is paper purchased in the United States in U.S. dollars.[77] However, in financial terms, it represents a very small proportion of what may have caused the drastic change in financial performance in 2015. More importantly, CTG testified that there is no longer a Canadian source of this input so it has no choice but to buy it from U.S. manufacturers.[78]

129. GP also made the argument that this case is a "currency dumping case", not a predatory pricing case, and that what was seen in the market is an "exchange rate shift". There is no question for the Tribunal that exchange rates played an important role in shaping the economic and commercial environment within

75. Exhibit NQ-2016-002-A-03, Vol. 11 at paras. 14, 42; Exhibit NQ-2016-002-07 (protected), Table 68, Vol. 2.1.
76. Exhibit NQ-2016-002-A-03, Vol. 11 at paras. 14, 42; Exhibit NQ-2016-002-07 (protected), Table 68, Vol. 2.1.
77. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 18.
78. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 18.

which subject goods were traded across the border, particularly in 2015 when the dumping was found by CBSA to have occurred. GP suggested that it engaged in a passive rather than an aggressive trading strategy.

130. GP suggested that this passive behaviour could be a reason not to attribute the injury suffered by the domestic producer to the dumped subject goods. In closing argument, GP suggested that U.S. exporters should not be expected to raise prices "in lock step with currency movement, irrespective of Canadian market realities", as if somehow to suggest that currency movements should be a valid excuse for U.S. exporters' dumping practices in Canada.

131. The Tribunal cannot accept such a suggestion. There is no "good" or "bad", "passive" or "aggressive" dumping. There is only dumping as it is defined under *SIMA* and the underlying international agreement.[79] If it is found to cause material injury, consequences as set out in *SIMA* and the underlying international agreement will follow.

132. There is no question for the Tribunal that it is the sole responsibility of the exporter to ensure that its pricing practices do not result in dumping in the importing country. As such, it is its sole responsibility to consider how currency fluctuations may affect its pricing practices. If the exporter does not adjust to those fluctuations and it results in dumping, then antidumping duties may be imposed.

133. In this case, the fact that dumping may have resulted from fluctuations in exchange rates does not dissociate such dumping from the injury that it may have caused. Currency fluctuation cannot be considered as a non-attribution factor in that sense.

134. As a general note, some of the other allegations and arguments as to other factors were nothing more than a second-guessing of how CTG manages its day-to-day business, a complex business that was acknowledged by witnesses of parties opposing to have "its ups and downs". However, the Tribunal will nonetheless address some of the additional arguments that have been raised in respect of non-attribution factors.

– Poor Customer Relations

135. The Tribunal also heard on many occasions the opposing parties' evidence about the poor performance of CTG in terms of its relations with customers and potential customers. Examples are the fact that CTG's personnel have had very few contacts with certain key players (direct or indirect purchasers of gypsum board), even including those that are in close geographical proximity. Examples included late or non-existent responses to important communications, lack of easily accessible intelligence regarding customers' needs and apparent lack of responsiveness to market demand. The Tribunal did not hear persuasive evidence opposing that view and the testimony of CTG's witnesses did nothing to provide evidence that would provide a more favourable picture even though this issue had clearly been identified by parties opposed in their submissions.

136. The evidence suggests that there is an obvious problem in the manner in which CTG treats its actual or potential direct and indirect customers. The impression left from overwhelming testimony heard from purchasers and end users is that CTG behaves like a company that takes the Canadian Western market for granted.

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79. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1868 U.N.T.S. 201 (entered into force 1 January 1995) [*Antidumping Agreement*], available at <http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm>.

137. A producer that is well positioned in the market and that cannot produce enough to satisfy that market should not allow its clients to formulate such an impression. On the contrary, one would expect a producer to do everything it can to compete in the market and maintain its market share. This starts with a positive and constructive presence in the market place.

138. However, in this case, it is impossible to quantify the negative impact that this behaviour could have had on CTG's performance during the POI, but it seems logical to think that it has probably affected its level of sales to a certain degree. Considering all of the evidence on hand and the above injury analysis, the likely impact of this behaviour does not reach a level which would allow the Tribunal to modify its conclusions that the material injury suffered by CTG was caused in and of itself by the dumping of the subject goods.

– Lack of Exports

139. Parties opposing argued that CTG contributed to its own injury through its failure to seize upon export opportunities in the U.S. market, and attributed this situation to company policy and the existence of its related producer in the United States.

140. Unfortunately, opposing parties provided no cogent evidence as to how the Tribunal should assess these potential export opportunities and how this could affect CTG, even if they were successfully and profitably converted into sales in the U.S. market.

141. More evidence would have been necessary to convince the Tribunal as to the accuracy of the allegations of export-related self-injury, especially given uncontroverted evidence that CTG's plants were established with a view of servicing the local Canadian markets, especially as relating to its Winnipeg and Calgary facilities. These allegations of potential export opportunities were not substantiated or credibly supported; the Tribunal could only speculate as to the available market, the volumes involved and the financial viability of such exports.

142. Where parties raised the argument of the additional attractiveness of the U.S. market in view of a devaluated Canadian dollar, this only paints part of the portrait as it does not account for additional costs related to shipping and handling of gypsum board over greater distances and different jurisdictions. Without a clearer picture of these potential export opportunities and the availability of actual data to cost-out the delivery of gypsum board to different regions of the northern United States, the Tribunal is not in a position to give credence to these unsubstantiated arguments.

143. The Tribunal's Investigation Report does set out protected information about historical CTG exports in 2014 and 2015. Even assuming that CTG could have exported more in 2015 (for example, along the lines of its higher 2014 export levels), the Tribunal's analysis shows this would not have removed the material injury caused by the subject goods and would not change the Tribunal's conclusions with respect to injury.

– Conclusions on Causation/Other Factors

144. While the evidence in this inquiry has demonstrated the existence of certain issues in the manner in which CTG's business is operated in Western Canada, on balance, the parties opposed failed to convincingly demonstrate and substantiate that the subject goods did not, in and of themselves, cause injury to CTG.

145. On the contrary, the evidence as to the impact of the other factors is dispelled by CTG's financial performance after the imposition of the provisional duties. Since then, CTG has been able to implement a successful price increase and its sales volume increased. As a result, CTG's financial performance has already improved. CTG's witness testified that since the provisional duties were put in place, CTG "started to see a gradual improvement in [its] profitability so that, by October, [CTG was] at a semi-healthy start—a semi-healthy level of profitability."[80]

146. Having considered the effects of the above non-attribution factors, the Tribunal remains convinced that, despite the effects that these factors may have had on the performance of CTG during the POI and in particular during 2015, the dumping of the subject goods remains in itself a cause of material injury for CTG. The connection between the volume of imports, the price effects of these imports and the magnitude of the injury suffered is such that the causal relationship is clearly present.

147. The Tribunal finds that the evidence on the record constitutes a probative demonstration of a causal relationship between the subject goods and the material injury suffered by the domestic industry during the POI. CTG's negative financial performance took place during the last year of two years' worth of increases in sales from imports of subject goods that have been found by the CBSA to be dumped in 2015 with considerable margins of dumping. This dumping was conceded by GP to go back to 2014. The subject goods caused CTG to experience lost sales and market share, price suppression, reduced production and capacity utilization, which resulted in declining gross and net margins. Absent the injurious effects of the subject goods, CTG would have performed better during the POI, as it started to do in the provisional period.

148. Because 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. As such, when the Tribunal makes a finding of injury, as it does in this instance, it does not usually consider the issue of threat of injury. The Tribunal will not detract from its usual practice in this matter.

REQUEST FOR ADVICE TO THE PRESIDENT OF THE CBSA

149. CTG requested that the Tribunal advise the President of the CBSA under section 46 of *SIMA*[81] that there was evidence that gypsum board from the United States has been or is being dumped in Eastern Canada and that the evidence discloses a reasonable indication that the dumping has caused injury.

150. This request was not made in CTG's brief but was instead raised in a letter as part of the Notice of Matters Arising process,[82] which stated that related submissions would be made in argument at the hearing. This seems to be an improper manner to raise such an important issue. The alleged dumping in the East was

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80. *Transcript of Public Hearing*, Vol. 1, 28 November 2016, at 19.
81. Section 46 of *SIMA* states as follows:
"Where, during an inquiry referred to in section 42 respecting the dumping or subsidizing of goods to which a preliminary determination under this Act applies, the Tribunal is of the opinion that
(a) there is evidence that goods the uses and other characteristics of which closely resemble the uses and other characteristics of goods to which the preliminary determination applies have been or are being dumped or subsidized, and
(b) the evidence discloses a reasonable indication that the dumping or subsidizing referred to in paragraph (a) has caused injury or retardation or is threatening to cause injury,
the Tribunal, by notice in writing setting out the description of the goods first mentioned in paragraph (a), shall so advise the President."
82. Letter from counsel for CTG, dated November 15, 2016.

obviously not an issue that came as a surprise to CTG. More importantly, parties opposed did not have the opportunity to submit written evidence and legal submission on this issue.

151. CTG attempted to elicit evidence in support of the request at the hearing by raising this in cross-examination; the Tribunal refused to allow such questioning based on considerations of fairness.

152. The Tribunal is of the view that section 46 of *SIMA* should not be used as a means of circumventing the normal process for filing a complaint. As well, procedural fairness dictates that the issue be raised properly, including being communicated as soon as possible. Nevertheless, the Tribunal cannot simply ignore the evidence that it has collected in the context of the existing inquiries, which could be possibly relevant to the request. The Tribunal will therefore briefly address this request and evidence below.

153. From the context of the submissions, the Tribunal understands that this request applies to Eastern Canada as a regional market.

154. The Tribunal acknowledges that the average prices of U.S. domestic sales and export sales to Canada in the years of 2015 and part of 2016 do disclose an indication of dumping. However, the Tribunal understands that the CBSA calculates dumping on a model-specific, transactional basis, so an average price analysis which includes all models and all customers is not wholly acceptable as evidence of dumping.

155. More importantly, even if the Tribunal was to accept that the evidence on the record disclosed dumping of gypsum board in Eastern Canada, it is of the view that the evidence has not disclosed a reasonable indication of injury or threat thereof.

156. There is a rapidly evolving market situation in Western Canada post-imposition of the duties, prior the Tribunal's final injury finding. Furthermore, there are continued differences between the market in Western Canada and what is observed in Eastern Canada.[83] In that context, the request did not present the Tribunal with contemporaneous and convincing evidence as to some basic threshold issues, such as the existence of a regional market in Eastern Canada and the composition of the regional industry.

157. Notably, the request did not explain how the Tribunal could find a regional market existed in Eastern Canada given the requirements of concentration of imports in Eastern Canada; the Tribunal has found concentration of imports in Western Canada, and by logical extension, not in the rest of Canada.[84]

158. Further, due to the largely protected nature of the evidence, the Tribunal can only state that there are other key gaps in the evidence and analysis contained in the request, such as whether:

- any regional industry was *materially* injured;
- "all or almost all" production was injured; or
- the cause of any injury was the dumped imports.

159. More evidence, such as evidence that would normally be found in a properly documented complaint, and analysis would be necessary on these factors before the Tribunal could reach a conclusion of reasonable indication of injury. While the threshold for a finding of reasonable indication of injury is a low

83. These differences include Eastern Canada having a larger number of domestic producers (including CGC who is also an importer), production capabilities (e.g. 54-inch gypsum board which is not made in Western Canada), etc.
84. Exhibit NQ-2016-002-06, Table 15, Vol. 1.1.

threshold, it must nonetheless be met whether the Tribunal has to assess the evidence in the context of a preliminary inquiry or in the context of a request pursuant to section 46 of *SIMA*.

160. The Tribunal therefore declines to so advise the President of the CBSA.

EXCLUSIONS

161. Having found that the subject goods caused material injury to the domestic industry, the Tribunal will now turn to the two requests to exclude products from the finding.

General Principles

162. It is well established that exclusions are exceptional discretionary measures. The Tribunal's authority to grant exclusions from the scope of a finding lies implicitly in subsection 43(1) of *SIMA*.[85] Exclusions are not granted automatically upon request; they are extraordinary remedies that may be granted in exceptional circumstances at the Tribunal's discretion, specifically when the Tribunal is of the view that such exclusions are not likely to cause injury to the domestic industry.[86] The rationale for granting an exclusion is that, despite the conclusion that dumped goods have caused or are threatening to cause injury, there may be evidence that certain imports of specific products captured by the definition of the goods have not caused or do not threaten to cause injury.

163. In determining whether an exclusion is likely to cause injury to the domestic industry, the Tribunal typically considers such factors as whether the domestic industry produces, actively supplies or is capable of producing identical or substitutable products that would potentially be in direct competition with the subject goods for which the exclusion is requested.[87] Additionally, when deciding whether to exercise its discretion to grant exclusions, the Tribunal is mindful of the objectives of *SIMA*, which are to provide protection, in appropriate circumstances, for companies that produce goods in Canada.

164. In Expiry Review No. RR-2013-003, the Tribunal was clear that every party must submit its best evidence either in support of or against an exclusion request. In this way, the evidentiary burden is to be shared by all parties so that the Tribunal can determine whether it will exercise its discretion to grant product exclusions on the basis of its assessment of the totality of the evidence on the record.[88] Therefore, parties are expected to file probative, compelling and case-specific evidence in support of or against the granting of exclusions, so that the Tribunal can reach an informed decision on the issue of whether the importation of particular products covered by the definition of the subject goods for which exclusions are requested is likely to cause injury to the domestic industry.

165. It is with these principles in mind that the Tribunal will consider the product exclusion requests received in this case.

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85. *Hetex Garn A.G. v. The Anti-dumping Tribunal*, [1978] 2 F.C. 507 (FCA); *Sacilor Aciéries v. Anti-dumping Tribunal* (1985) 9 C.E.R. 210 (CA); Binational Panel, *Induction Motors Originating From the United States of America (Injury)* (11 September 1991), CDA-90-1904-01; Binational Panel, *Certain Cold-rolled Steel Products Originating or Exported From the United States of America (Injury)* (13 July 1994), CDA-93-1904-09.
86. The Federal Court of Appeal, in *Owen & Company Limited v. Globe Spring & Cushion Co. Ltd.*, 2010 FCA 288 (CanLII) at para. 13, stated that the Tribunal has "a very broad discretion to grant exclusions as the nature of the matter may require." *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 339; *Certain Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.
87. *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) at para. 245.
88. *Aluminum Extrusions* (28 March 2014), RR-2013-003 (CITT) at paras. 193-95; *Certain Fasteners* at para. 199.

Analysis of Product Exclusion Requests

166. As noted above, the Tribunal received two requests for product exclusions from CGC. These were also made and supported by other parties.

167. The first request was for the exclusion of USG's Sheetrock® Brand lightweight 5/8-inch Type X gypsum board and was supported by WSB Titan[89] and five members of the AWCWCC.[90] The second request, also submitted by CGC[91] and supported by six members of the AWCWCC,[92] was for the exclusion of USG's Sheetrock® Brand ultralight 1/2-inch moisture- and mold-resistant panels with tapered edges intended for use in areas where moisture and mold resistance is desired.

Sheetrock® Brand Lightweight 5/8-inch Type X Gypsum Board

168. This product is produced by USG, CGC's U.S. affiliate. It is not produced in Canada. CGC asserted that this patented product retains all of the properties of standard gypsum board, but is 20 percent lighter. Thus, it is easier to use and to ship, and can be used in projects where weight restrictions are crucial.[93] CGC charges a 6 to 10 percent price premium over standard 5/8-inch fireguard gypsum board.[94]

169. CGC asserted that CTG does not produce this product, cannot produce a directly substitutable good, nor is it capable of producing this product.

170. CTG asserted that although it does not produce an identical product, its products are substitutable. CTG submitted that it produces a standard weight gypsum board product which meets the same specifications as the USG product, but is not as light.[95]

171. The Tribunal is of the view that the request for exclusion is for a good that is interchangeable with the like goods. The Tribunal understands, based on record information, that CGC's Sheetrock® Brand ultralight Firecode® X 5/8-inch gypsum board (CGC Type X 5/8-inch board) and CTG's Type X 5/8-inch fire-resistance-rated board (CTG Type X 5/8-inch board) compete on price, are sold through the same channels of distribution, have very similar performance characteristics, meet the same specification requirements (i.e. ASTM standards) and are used in identical applications.[96] This, in the Tribunal's view,

89. Exhibit NQ-2016-002-29.01, Vol. 1.3.
90. DVS Drywall Contractors Ltd. (Exhibit NQ-2016-002-29.03, Vol. 1.3); Power Drywall 2005 Ltd. (Exhibit NQ-2016-002-29.04, Vol. 1.3); Gallagher Bros. Contractors Ltd. (Exhibit NQ-2016-002-29.05, Vol. 1.3); TDL Drywall Inc. (Exhibit NQ-2016-002-29.06, Vol. 1.3); and Gypsum Drywall (Southern) Ltd. (Exhibit NQ-2016-002-29.07, Vol. 1.3).
91. Exhibit NQ-2016-002-29.02, Vol. 1.3.
92. DVS Drywall Contractors Ltd. (Exhibit NQ-2016-002-29.03, Vol. 1.3), Power Drywall 2005 Ltd. (Exhibit NQ-2016-002-29.04, Vol. 1.3), Gallagher Bros. Contractors Ltd. (Exhibit NQ-2016-002-29.05, Vol. 1.3), TDL Drywall Inc. (Exhibit NQ-2016-002-29.06, Vol. 1.3), Gypsum Drywall (Southern) Ltd. (Exhibit NQ-2016-002-29.07, Vol. 1.3), and Peninsula Wall & Ceiling Ltd. (Exhibit NQ-2016-002-29.08, Vol. 1.3).
93. Exhibit NQ-2016-002-29.02, Vol. 1.3 at 29.
94. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 894; Exhibit NQ-2016-002-30.02 (protected), Vol. 2.3 at 32; Exhibit NQ-2016-002-30.01 (protected), Vol. 2.3 at 7
95. Exhibit NQ-2016-002-31.01, Vol. 1.3A at 62.
96. Exhibit NQ-2016-002-31.01B, Vol. 1.3A, Tables 1 and 2, at 81-82; CGC's witness Mr. Brandt also testified that both products meet the same regulatory standard and have the same technical specifications. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 878, 880.

makes the products interchangeable. The parties requesting the product exclusion failed to submit adequate evidence to counter these facts.

172. CGC and other requesters provided evidence demonstrating that CGC Type X 5/8-inch board is lighter than CTG Type X 5/8-inch board.[97] During the public hearing, contractors testified that the principal benefit from using lighter 5/8-inch board are health benefits for the installers of the gypsum board due to less weight being lifted.[98] The contractors also pointed to lower costs of waste disposal, productivity increases as well as handling and loading of materials as additional benefits of the lighter material.[99] Some of the contractors thus expressed a preference for lightweight gypsum board, where it is available.

173. While the Tribunal is not insensitive to the arguments concerning the potential health benefit and environmental benefits, these features are not sufficient by themselves to make the products non-substitutable or different products. A difference in weight does not result in a different good where all other physical characteristics and the end use of the like goods are the same. The Tribunal came to a similar conclusion in *Laminate Flooring* when rejecting an exclusion request because certain product characteristics were "simply features of the basic product that serve to differentiate it within the laminate flooring group."[100]

174. CGC pointed to the Tribunal's decisions in *Refined Sugar*, *Hot-rolled Carbon Steel Plate* and *Stainless Steel Sinks*. CGC derived from these decisions the principle that products fulfilling specific engineering necessities, that are niche products or "higher-end" products, are not substitutable and suggested that the Tribunal take a similar approach in this case.[101] However, CGC and other requesters submitted only little or no evidence supporting the allegation that CTG Type X 5/8-inch board falls within any of these categories.

175. The issue whether CGC's Type X 5/8-inch board may be a high-end product was addressed in the public part of the hearing by the contractors. Mr. Brandt explained that CGC's "ULIX" gypsum board and CTG's standard 5/8-inch (fire-rated) gypsum board are not directly substitutable because the "ULIX product is a high-end product."[102] However, there was no explanation for the "high-end" nature of the product, other than the benefit of lower weight. As stated above, the weight difference claimed by CGC is not sufficient a factor to affect interchangeability with CTG's Type X 5/8-inch board.

176. On the issue of price, Mr. Shoemaker testified that there is a 6 to 10 percent price premium on "ultralight" CGC Type X 5/8-inch board.[103] The Tribunal notes, firstly, that a price differential between two products does not necessarily lead to the conclusion that those products do not compete on price and are therefore not interchangeable. This applies in particular where the price differential is minor, as in this case.

177. Secondly, the circumstances of this case militate against attributing much relevance to the existence of a 6 to 10 percent price premium on CGC's Type X 5/8-inch board. Before the CBSA imposed duties,

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97. Exhibit NQ-2016-002-34.01 (protected), Vol. 2.3 at 137; *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 849 (witness Mr. Brandt), at 856-58 (witness Mr. Gallagher), at 871-72 (witness Mr. Sager), and at 874 (witness Mr. Pollock).
98. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 850, 858 (witness Mr. Brandt), at 859-60 (witness Mr. Gallagher), at 868 (witness Mr. Paulsen), at 872-73 (witness Mr. Sager), and 873 (witness Mr. Pollock).
99. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 854, 861-63.
100. *Laminate Flooring* (30 June 2005), NQ-2004-006 (CITT) at para. 168.
101. Exhibit NQ-2016-002-29.02, Vol. 1.3 at 30-31; Exhibit NQ-2016-002-33.01, Vol. 1.3A at 95-96.
102. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 851.
103. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 894.

subject imports, including CGC's lightweight product, were entering the Western Canadian market at dumped prices, significantly undercutting the price of CTG's standard weight gypsum board. Tribunal protected information regarding Benchmark Product 2 evidences this fact.[104] Under such conditions, a 6 to 10 percent price premium has little effect on price competition (nor does it help distinguishing lightweight product as "high-end" from standard product based on price).[105] If the exclusion request was granted and CGC's Type X 5/8-inch board were to enter the Western Canadian market free of dumping duty, a 6 to 10 percent price premium would be insignificant given the level of price increases already made by CTG for standard product. The price premium is therefore not a factor that distinguishes ultralight gypsum board from standard gypsum board in view of market conditions in Western Canada.

178. The Tribunal also notes Mr. Sager's testimony that his company had gone back to using standard gypsum board again since the imposition of duties[106]. Contractors may use CGC Type X 5/8-inch board where it is available, but switch to standard weight gypsum board where it is not. Such a pattern of use strongly suggests interchangeability between the two products.

179. Finally, when asked directly about the competitive relationship between the products, the contractors' statements were contradictory. One witness, when asked if 5/8-inch ultralight gypsum board and 5/8-inch standard weight gypsum board are interchangeable to the end user, denied that this was the case.[107] By contrast, another contractor stated that CGC's 5/8-inch lightweight ULIX product and 5/8-inch standard weight Fireguard product produced by CTG Canada are competitive products.[108]

180. The requesters have not demonstrated, in view of the evidence discussed above, that CTG does not manufacture a substitutable product. The Tribunal is satisfied that CTG's Type X 5/8-inch board is a substitutable product that directly competes with CGC's Type X 5/8-inch board. The Tribunal will therefore not address the question whether CTG may be capable of producing an identical product, an issue which is part of the confidential record in these proceedings.[109]

181. The Tribunal concludes that if an exclusion was granted, imports of CGC's Type X 5/8-inch board would cause injury to the like goods. For this reason, the Tribunal denies the request for product exclusion.

Sheetrock® Brand Ultralight 1/2-inch Moisture- and Mold-resistant Panels

182. This product is produced by USG and is also produced by CGC in Eastern Canada, but not in Western Canada.[110] It is distinct from gypsum board meeting ASTM C 1177 or ASTM C1177M standard, referred to as glass-fibre reinforced sheeting gypsum board,[111] which is already excluded under the product definition.[112]

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104. Exhibit NQ-2016-002-07 (protected), Table 57, Vol. 2.1.
105. The Tribunal notes that the use of a product as a benchmark product for purposes of price comparison at the micro level is hardly a distinction justifying a product exclusion, which is what CGC seems to be suggesting. Exhibit NQ-2016-002-33.01, Vol. 1.3A at 98-99.
106. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 887.
107. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 910.
108. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 877-78.
109. This includes the arguments made by CGC in Exhibit NQ-2016-002-29.02, Vol. 1.3 at 31-32, and Exhibit NQ-2016-002-33.01, Vol. 1.3A at 140-42.
110. Exhibit NQ-2016-002-29.02, Vol. 1.3 at 22.
111. See, for example, Power Drywall 2005 Ltd., Exhibit NQ-2016-002-29.04, Vol. 1.3 at 167-68.
112. See section entitled "Product definition".

183. CGC alleged that neither this lightweight gypsum board of 1/2-inch thickness nor any similar or substitutable product is produced by CTG. It asserted that the product is only available from CGC, and that it became available in Western Canada earlier this year.[113]

184. CTG asserted that although it does not produce an identical product, its products are substitutable. CTG submitted that it produces a standard weight gypsum board product which meets the same specifications as the USG product, but is not as light.[114]

185. For reasons largely similar to those set out above for Sheetrock® Brand lightweight 5/8-inch Type X gypsum board, the Tribunal is of the view that this request for exclusion is for a good that is interchangeable with the like goods.[115] The Tribunal understands, based on record information, that Sheetrock® Brand ultralight 1/2-inch moisture- and mold-resistant gypsum board (CGC 1/2-inch moisture- and mold-resistant board) and CTG's 1/2-inch M2Tech moisture- and mold-resistant gypsum board (CTG 1/2-inch moisture- and mold-resistant board) compete on price, are sold through the same channels of distribution, have very similar performance characteristics, meet the same specification requirements (i.e. ASTM standards) and are used in identical applications.[116] This, in the Tribunal's view, makes the products interchangeable. The parties requesting the product exclusion failed to submit adequate evidence to counter these facts.

186. The only distinction that requesters can demonstrate is, again, a difference in weight. CGC thus submitted evidence demonstrating that CGC 1/2-inch moisture- and mold-resistant board is 16 percent lighter than CTG 1/2-inch moisture- and mold-resistant board.[117] The witnesses for the requesters provided further testimony in this regard in the public portion of the hearing.[118] As set out above, the weight difference claimed by CGC is not sufficient a factor to affect interchangeability with CTG's 1/2-inch moisture- and mold-resistant board; the Tribunal's further considerations regarding the requesters' other arguments based on the weight difference of the products equally apply here.

187. The requesters have not demonstrated that CTG does not manufacture a substitutable product to CGC's 1/2-inch moisture- and mold-resistant board. The Tribunal is satisfied that CTG's 1/2-inch moisture- and mold-resistant board is a substitutable and directly competitive product.

188. The Tribunal concludes that if an exclusion was granted, imports of CGC's 1/2-inch moisture- and mold-resistant board would cause injury to the like goods. For this reason, the Tribunal also denies the request for exclusion of this product.

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113. See, for example, Power Drywall 2005 Ltd., Exhibit NQ-2016-002-29.04, Vol. 1.3 at 174.
114. Exhibit NQ-2016-002-31.01, Vol. 1.3A at 62.
115. The Tribunal notes that the arguments raised by the requesters and CTG regarding product substitutability are very similar for Sheetrock® Brand lightweight 5/8-inch Type X gypsum board and Sheetrock® Brand ultralight 1/2-inch moisture- and mold-resistant panels. See, for example, Exhibits NQ-2016-002-29.02, Vol. 1.3 at 23-24, 28-31, NQ-2016-002-31.01, Vol. 1.3A at 61 *et seq*., NQ-2016-002-33.01, Vol. 1.3A at 94 *et seq.*
116. Exhibit NQ-2016-002-31.01B, Vol. 1.3A at 80-83; CGC's witness Mr. Brandt also testified that both products meet the same regulatory standard and have the same technical specifications. *Transcript of Public Hearing*, 6 December 2016, Vol. 7 at 878-79.
117. Exhibit NQ-2016-002-29.02, Vol. 1.3 at 23.
118. *Transcript of Public Hearing*, Vol. 7, 6 December 2016, at 852, per Mr. Brandt, according to whom the weight difference is 20 percent, while pursuant to Mr. Gallagher's calculation, at 857, the weight difference would be 18.5 percent.

CONCLUSION

189. Pursuant to subsection 43(1) of *SIMA*, the Tribunal finds that the dumping of the subject goods originating in or exported from the United States has caused injury to the domestic industry.

Serge Fréchette
Serge Fréchette
Presiding Member

Jean Bédard
Jean Bédard
Member

Jason W. Downey
Jason W. Downey
Member