Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2021-002

Certain Upholstered Domestic Seating

Finding issued
Thursday, September 2, 2021

Reasons issued
Friday, September 17, 2021

Canada

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

CERTAIN UPHOLSTERED DOMESTIC SEATING

FINDING

The Canadian International Trade Tribunal, pursuant to the provisions of section 42 of the *Special Import Measures Act* (*SIMA*), has conducted an inquiry to determine whether the dumping and subsidizing of the following goods have caused injury or are threatening to cause injury, as these words are defined in *SIMA*:

> Upholstered seating for domestic purposes originating in or exported from the People's Republic of China (China) and the Socialist Republic of Vietnam (Vietnam), whether motion (including reclining, swivel and other motion features) or stationary, whether upholstered with a covering of leather (either full or partial), fabric (including leather-substitutes) or both, including, but not limited to seating such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theatre seating.
>
> Excluding:
>
> (a) stationary (i.e. non-motion) seating upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl);
> (b) dining table chairs or benches (with or without arms) that are manufactured for dining room end-use, which are commonly paired with dining table sets;
> (c) upholstered stools with a seating height greater than 24 inches (commonly referred to as "bar stools" or "counter stools"), with or without backs, and/or foldable;
> (d) seating manufactured for outdoor use (e.g. patio or swing chairs);
> (e) bean bag seating; and
> (f) foldable or stackable seating.
>
> For greater certainty, the product definition includes:
>
> (a) upholstered motion seating with reclining, swivel, rocking, zero-gravity, gliding, adjustable headrest, massage functions or similar functions;
> (b) seating with frames constructed from metal, wood or both;
> (c) seating produced as sectional items or parts of sectional items;
> (d) seating with or without arms, whether part of sectional items or not; and
> (e) foot rests and foot stools (with or without storage).

On August 3, 2021, the President of the Canada Border Services Agency (CBSA), pursuant to paragraph 41(1)(a) of *SIMA*, terminated the subsidy investigation in respect of the aforementioned goods exported to Canada from China by Anji Hengrui Furniture Co., Ltd., Anji Hengyi Furniture Co., Ltd., Dongguan Tianhang Furniture Co., Ltd., Foshan DOB Furniture Co., Ltd., Foshan Xingpeichong Huitong Furniture Co., Ltd., Gu Jia Intelligent Household Jiaxing Co., Ltd., Haining Fanmei Furniture Co., Ltd., (Hangzhou) Huatong Industries Inc., HTL Furniture (China) Co., Ltd., HTL Furniture (Huai An) Co., Ltd., Jiaxing Motion Furniture Co., Ltd., Man Wah Furniture Manufacturing (Huizhou) Co., Ltd.,

Natuzzi (China) Ltd., Ruihao Furniture MFG Co., Ltd., Shanghai Trayton Furniture Co., Ltd., and Violino Furniture (Shenzhen) Ltd., and from Vietnam by Delancey Street Furniture Vietnam Co., Ltd., Koda Saigon Co., Ltd., Timberland Co., Ltd., UE Vietnam Co., Ltd., Vietnam Hang Phong Furniture Company Limited, Wanek Furniture Co., Ltd., and Wendelbo SEA JSC. On the same day, the President of the CBSA, pursuant to paragraph 41(1)(b) of *SIMA*, made a final determination of dumping in respect of the aforementioned goods and a final determination of subsidizing in respect of the aforementioned goods for which the subsidy investigation was not terminated.

Further to its inquiry, the Tribunal hereby finds, pursuant to subsection 43(1) of *SIMA*, that the dumping of the aforementioned goods, and the subsidizing of the aforementioned goods (excluding those goods exported to Canada by the above-mentioned exporters), have caused injury to the domestic industry.

Furthermore, the Tribunal hereby excludes from its finding the products described in Appendix 1.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Peter Burn

Peter Burn
Member

Georges Bujold

Georges Bujold
Member

The statement of reasons will be issued within 15 days

APPENDIX 1

PRODUCTS EXCLUDED FROM THE FINDING

1. Specialized reclining massage chairs, not intended to be used for general seating purposes, with padded seat, headrest, back, and footrest, and containing built-in motorized mechanical components that operate by way of computerized controls to provide a full body massage for a single person, including to the head and/or neck, shoulders, back, buttocks, arms, and legs and/or feet.

2. Medical lift chairs containing electric motion mechanisms and motorized positioning controls, designed to carefully lift, lower and tilt (by raising or lowering the base and back of the seating) the occupant, and otherwise adjust the occupant's seating position by adjusting one or more of the headrest, footrest, and seat; designed, manufactured, and tested to meet or exceed the requirements of Health Canada's *Medical Devices Regulations* (SOR/98-282) applicable thereto and conforming with the following, or equivalent, standards and testing methodologies: EN12182, ANSI/AAMI/ISO10993, ANSI/AAMI/ES60601-1, CAL117, BSEN1021, ISO8191, ANSI/AAMI/ES60601-1-2, ISO14971.

3. Height-adjustable ergonomic gaming chairs for use with a desk and intended to be used primarily while playing video games, upholstered in leather or a leather-substitute, with armrests, headrests, lumbar support pillows, five-star swivel bases, and wheels or castors.

Place of Hearing:	Via videoconference
Dates of Hearing:	August 3, 4, 5 and 6, 2021
Tribunal Panel:	Cheryl Beckett, Presiding Member Peter Burn, Member Georges Bujold, Member
Support Staff:	Alain Xatruch, Lead Counsel Isaac Turner, Counsel Gayatri Shankarraman, Lead Analyst Rebecca Campbell, Analyst Mylène Lanthier, Analyst Grant MacDougall, Analyst Julie Charlebois, Data Services Advisor Marie-Josée Monette, Data Services Advisor Arthur Grenon, Data Services Advisor

PARTICIPANTS:

Domestic Producers	**Counsel/Representatives**
Elran Furniture Ltd. EQ3 Ltd. Jaymar Furniture Corp. Palliser Furniture Ltd.	Jonathan O'Hara Chris Scheitterlein Lisa Page Adelaide Egan Justin Novick-Faille William Wu Thomas van den Hoogen

Importers/Exporters/Others	**Counsel/Representatives**
Ashley Furniture Industries, LLC Violino Hong Kong Ltd.	Jesse Goldman Matthew Kronby Erica Lindberg Jacob Mantle Carlota Claveron-Wilkins Daehyun (Danny) Yeo Zoey Chau Nigah Awj
Canadian Tire Corporation, Limited	Riyaz Dattu
Costco Wholesale Canada Ltd.	Richard A. Wagner Erin E. Brown Erika Woolgar Carl Farah
Dodd's Furniture and Mattress	Lovedip Dodd
Dorel Industries Inc.	Peter Kirby
Furnish Concept Plus Ltd.	Peiman Mizraei

Groupe BMTC Inc.	Ariane Hunter-Meunier Nathalie Goyette
HTL Furniture (China) Co., Ltd. HTL Furniture (Huai An) Co., Ltd. HTL Manufacturing Pte. Ltd. Wayfair LLC	Greg Kanargelidis Amy Lee Patrick Lapierre Philippe Dubois Cameron Hogg-Tisshaw Brady Gordon
IKEA Canada Limited Partnership	Jean-Marc Clement Gordon LaFortune
La-Z-Boy Ottawa & Kingston	Ron Mathurin
Modern Form Furniture Ltd.	Jesper Langballe
Nordic Holdings Ltd.	Michael Gustavsson
Octane Seating, LLC	Peter Goldstein
Restoration Hardware, Inc.	Wendy Wagner Hunter Fox David Plotkin Heather Lischak Jonathan Liu Peter Clark Barry Desormeaux
Retail Council of Canada	Darrel H. Pearson George Reid Jessica Horwitz Quentin Vander Shueren Kathleen (Kailing) Wang
Zhejiang Haozhonghao Health Products Co.	Aaron Zhang

Parties that Requested Product Exclusions	**Counsel/Representatives**
2834342 Ontario Inc. Arozzi North America Incorporated Handy Button Machine Co. (dba Handy Living)	Cyndee Todgham Cherniak
Best Buy Canada Ltd.	Katherine Xilinas Justin Kutyan Thang Trieu Chandrasekar Venkataraman
DHP Furniture	Peter Kirby
Expand Furniture Inc.	Adam Joubert
Innovation Living Inc.	Jean-Guillaume Shooner Candace Cerone Geneviève Paradis

Limitless-Calgary / Limitless-Canada	Bruce D. MacMillan
Medical Breakthrough Massage Chairs LLC	Vincent Routhier Yannick Trudel
Moe's Classic Rugs & Home Accessories Inc.	Marco Ouellet Jeffrey Goernet
Pride Corp. Pride Mobility Products Corporation	Jesse Goldman Jacob Mantle Carlota Claveron-Wilkins Daehyun (Danny) Yeo Zoey Chau Nigah Awj
Restoration Hardware, Inc.	Wendy Wagner Hunter Fox David Plotkin Heather Lischak Jonathan Liu Peter Clark Barry Desormeaux
Wayfair LLC	Greg Kanargelidis Amy Lee Patrick Lapierre Philippe Dubois Cameron Hogg-Tisshaw Brady Gordon
Zhuhai Ido Furniture Co. Ltd.	Paul. M. Lalonde Sean Stephenson

WITNESSES:

Art DeFehr Executive Chair Palliser Furniture Ltd.	Jim Hunt Vice-President of Sales – Canada Palliser Furniture Ltd.
Darren Stevenson Senior Vice President – Finance Palliser Furniture Ltd.	Peter Tielmann President and Chief Executive Officer Palliser Furniture Ltd. and EQ3 Ltd.
Diana Sisto Creative Director Brentwood Classics Ltd.	Daniel Walker Owner and President Jaymar Furniture Corp.
Brad Dawson Merchandise Manager Leon's Furniture Limited	Graeme Leon President – Furniture Division Leon's Furniture Limited

Gary Blake
Director of Merchandising
The Brick Warehouse LP

Doug Allen
Senior Director of Merchandising and Supply
The Brick Warehouse LP

Shaun Dufresne
Senior Director of Merchandising
The Dufresne Group, Inc.

Sarah Sullivan
Director of International Operations
Crate & Barrel Canada Inc.

Sara Khodja
Divisional Merchandising Manager
Crate & Barrel Canada Inc.

Sébastien Fauteux
General Merchandise Manager and Creative Director
Urban Barn Ltd.

Duncan Johnston
Chief Financial Officer
Urban Barn Ltd.

Jesse Davidson
Casegoods Buyer
Urban Barn Ltd.

Matthew Fischel
Vice-President
Struc-Tube Ltd.

Eric Knafo
President
Struc-Tube Ltd.

Johannes Kau
President
Mobilia Interiors Inc.

Brigitte Hervieu
Vice-President of Finance and Operations
Mobilia Interiors Inc.

Brian Adams
Vice-President for International Sourcing Operations, Procurement and Global Quality Systems
Ashley Furniture Industries, LLC

John Mailman
Vice-President of Sales – Canada
Ashley Furniture Industries, LLC

Carlos Bosch
President of Sales and Marketing
Violino North America

Giro Rizzuti
Vice-President, General Merchandise Manager
Costco Wholesale Canada Ltd.

Jeremy King
General Manager of Wayfair Canada
Wayfair LLC

Pierre Normandin
Vice-President of Sales – Canada
HTL International

Dubravka Ivanovic
Business Leader for Living Room Seating and Storage
IKEA Canada Limited Partnership

Katie O'Connor
Vice-President, Merchandising & Upholstery
Restoration Hardware, Inc.

Allen Bilston
Gallery Leader – Toronto, Ontario
Restoration Hardware, Inc.

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STATEMENT OF REASONS

INTRODUCTION

[1] The mandate of the Canadian International Trade Tribunal in this inquiry conducted pursuant to section 42 of the *Special Import Measures Act*[1] is to determine whether the dumping and subsidizing of certain upholstered domestic seating (UDS) originating in or exported from the People's Republic of China (China) and the Socialist Republic of Vietnam (Vietnam) (the subject goods) have caused injury or are threatening to cause injury to the domestic industry.

[2] The Tribunal has determined, for the reasons that follow, that the dumping and subsidizing of the subject goods have caused injury to the domestic industry.

BACKGROUND

[3] This inquiry stems from a complaint filed with the Canada Border Services Agency (CBSA) on October 16, 2020, by Palliser Furniture Ltd. (Palliser)[2] and the subsequent decision by the CBSA, on December 21, 2020, to initiate investigations into the alleged dumping and subsidizing of the subject goods pursuant to subsection 31(1) of *SIMA*.

[4] On December 22, 2020, as a result of the CBSA's decision to initiate the investigations, the Tribunal initiated a preliminary injury inquiry pursuant to subsection 34(2) of *SIMA*. On February 19, 2021, pursuant to subsection 37.1(1), the Tribunal determined that there was evidence that disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused or were threatening to cause injury to the domestic industry.[3]

[5] In its statement of reasons for its preliminary determination of injury, issued on March 8, 2021, the Tribunal indicated that, while it had not been persuaded that there were adequate grounds to distinguish its previous decisions concerning the characterization of like goods and the application of the principle of co-extensiveness (which requires that the scope of the like goods, i.e. the domestically produced goods that are considered "like" the imported subject goods, not be broader than the scope of the subject goods), arguments in support of defining the like goods more broadly might merit further consideration during an eventual inquiry under section 42 of *SIMA*.[4]

[6] On May 5, 2021, the CBSA made preliminary determinations of dumping and subsidizing in respect of the subject goods.[5] It also considered that the imposition of provisional duty was necessary to prevent injury.[6]

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

2 The complaint was supported by the following domestic producers: Elran Furniture Ltd. (Elran), EQ3 Ltd. (EQ3), Fornirama Inc. and Jaymar Furniture Corp. (Jaymar). See Exhibit PI-2020-007-02.01 at 3242-3248.

3 *Certain Upholstered Domestic Seating* (19 February 2021), PI-2020-007 (CITT) [*UDS PI*]. Member Burn dissented from the majority opinion.

4 *UDS PI* at paras. 22-23, footnote 19.

5 Exhibit NQ-2021-002-01 at 14-16.

6 Provisional duties in an amount equal to the sum of the margin of dumping and amount of subsidy estimated for each exporter were assessed on the importation of subject goods commencing on the date of the CBSA's preliminary determinations. Provisional duties ranged from 20.65 to 295.90 percent for subject goods originating in or exported from China and from 17.44 to 101.50 percent for subject goods originating or exported from Vietnam. See Exhibit NQ-2021-002-01 at 11-12, 16-17.

[7] On May 6, 2021, following the CBSA's preliminary determinations, the Tribunal initiated this final injury inquiry. In its Notice of Commencement of Inquiry, the Tribunal invited interested parties to file early submissions on (1) whether the previously applied principle that the like goods must be co-extensive with the scope of the subject goods is well founded in law, and (2) whether "stationary (i.e. non-motion) seating for domestic purposes upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl)" (referred to as stationary fabric UDS, or SFUDS), which is expressly excluded from the product definition, is like goods to the subject goods.[7] Submissions were due by June 4, 2021, and reply submissions were due by June 9, 2021.

[8] The Tribunal received joint submissions and reply submissions on these issues from Palliser, EQ3 and Jaymar (collectively, the Domestic Producers), as well as individual submissions and reply submissions from Ashley Furniture Industries, LLC (Ashley), Costco Wholesale Canada Ltd. (Costco), IKEA Canada Limited Partnership (IKEA), Restoration Hardware, Inc. (RHI), the Retail Council of Canada (RCC)[8] and Wayfair LLC (Wayfair). The Domestic Producers submitted that the principle of co-extensiveness should continue to apply in the present case and that the Tribunal should therefore not expand the definition of the like goods to include SFUDS. They also submitted that, in any event, SFUDS is not like goods to the subject goods. All other parties took the opposite view.

[9] On June 16, 2021, the Tribunal informed the parties that it had determined that the principle of co-extensiveness should not apply in this case and that it had made the decision to expand the definition of the like goods to include domestically produced SFUDS.[9] The full reasons for these decisions are provided further below.

[10] The Tribunal's period of inquiry (POI) covered four full years from January 1, 2017, to December 31, 2020.[10]

[11] As part of this inquiry, a number of known and potential domestic producers, importers, purchasers and foreign producers of UDS were asked to respond to questionnaires from the Tribunal by May 27, 2021. The Tribunal received 24 replies to the Producers' Questionnaire from companies stating that they produced UDS meeting the product definition and/or SFUDS in Canada during the POI and 33 replies to the Purchasers' Questionnaire from companies stating that they purchased such goods, whether domestically produced or imported.[11] It also received 26 replies to the Importers'

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7 The Notice of Commencement of Inquiry was published on the Tribunal's website and in the *Canada Gazette* (see C. Gaz. 2021.I.2109).

8 The RCC is an industry organization that represents the interests of Canadian retail businesses. In these proceedings, the RCC is supported by seven representatives participating Canadian retailers of UDS, namely, The Brick Warehouse LP (The Brick), Crate & Barrel Canada Inc., The Dufresne Group, Inc. (Dufresne), Leon's Furniture Limited (Leon's), Mobilia Interiors Inc., Struc-Tube Ltd. (Struc-Tube) and Urban Barn Ltd.

9 Exhibit NQ-2021-002-39. The like goods therefore consist of both domestically produced UDS meeting the product definition *and* domestically produced SFUDS.

10 This is consistent with the recommendation of the World Trade Organization (WTO) Committee on anti-dumping practices that "the period of data collection for injury investigations normally should be at least three years. . . ." See *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, 16 May 2000, online: <http://docsonline.wto.org>.

11 As the Tribunal issued its questionnaires at the commencement of the inquiry (i.e. before it had made the decision to expand the definition of the like goods to include domestically produced SFUDS), the questionnaires sought data on both UDS meeting the product definition and SFUDS to account for this possibility.

Questionnaire from companies that imported UDS meeting the product definition from subject and non-subject countries and 11 replies to the Foreign Producers' Questionnaire from companies indicating that they produced UDS meeting the product definition in China and/or Vietnam.

[12] Using the questionnaire responses and other information on the record, staff of the Secretariat to the Tribunal prepared public and protected investigation reports, which were issued to parties on June 24, 2021.[12] Fully revised versions of the reports were issued on July 7, 2021. Minor revisions were subsequently made to the reports on July 12, 2021, and again on August 4, 2021, following the CBSA's final determinations of dumping and subsidizing.

[13] Between June 7 and July 2, 2021, 14 parties filed a total of 67 requests for the exclusion of specific products from any eventual finding of injury or threat of injury in respect of the subject goods. The Domestic Producers filed responses opposing all of the requests, save for one for which they conditionally consented to the exclusion. The majority of requesters filed replies to the Domestic Producers' responses.

[14] On July 2, 2021, Ashley and Violino Hong Kong Ltd. (Violino), the RCC, Wayfair and HTL Furniture (China) Co., Ltd., HTL Furniture (Huai An) Co., Ltd. and HTL Manufacturing Pte. Ltd. (collectively, HTL), and RHI filed various public and protected requests for information (RFIs) with the Tribunal, which were directed at some or all of domestic producers Palliser, EQ3, Elran and Jaymar. On July 5, 2021, the Tribunal received objections to some of the RFIs from these domestic producers. On July 8, 2021, after reviewing the RFIs, and taking into account the rationale for each of them and the objections filed, the Tribunal issued directions to Palliser, EQ3, Elran and Jaymar, indicating which RFIs required responses.[13] These responses were received on July 18, 2021.

[15] On July 2, 2021, the Domestic Producers filed a case brief, four witness statements and other evidence in support of a finding of injury or threat of injury in respect of the subject goods.

[16] On July 12, 2021, Ashley and Violino, Costco, Groupe BMTC Inc. (BMTC), HTL, IKEA, the RCC, RHI and Wayfair (collectively, the parties opposed) filed case briefs, 18 witness statements and other evidence opposing a finding of injury or threat of injury.[14] The Tribunal also received public submissions and a protected submission from a number of companies and individuals that had not filed notices of participation and were therefore not parties to the proceedings.[15]

[17] On July 19, 2021, the Domestic Producers filed a reply brief, a reply witness statement and additional evidence.

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12 The protected investigation report containing information designated as confidential was distributed, along with the remainder of the protected record, to counsel who had signed the required declaration and undertaking. Staff of the Secretariat to the Tribunal had previously prepared public and protected summaries of the responses to the Purchasers' Questionnaire that pertained specifically to the issue of like goods, which were issued to parties on May 31, 2021, in order to allow them to use this information in preparing their submissions on this issue. See Exhibit NQ-2021-002-26; Exhibit NQ-2021-002-27 (protected).

13 Exhibit NQ-2021-002-RFI-01; Exhibit NQ-2021-002-RFI-01A (protected).

14 Dodd's Furniture and Mattress filed some evidence on July 15, 2021, which was three days past the deadline for doing so. Nevertheless, the Tribunal allowed the evidence to be placed on the record (see Exhibit NQ-2021-002-KK-01). The Tribunal also notes that a number of companies that filed notices of participation did not file any submissions or evidence, take a position, or otherwise participate in the inquiry.

15 Exhibit NQ-2021-002-42; Exhibit NQ-2021-002-43 (protected).

[18] On July 5, 2021, the Tribunal advised all parties that it intended to hold a videoconference hearing in this matter where it would hear both witness testimony and closing arguments on the issue of injury. It also noted that it intended to proceed with the matter of requests for product exclusions by way of written submissions only. On July 14, 2021, the Tribunal held a case management videoconference with all counsel and self-represented participants to discuss the format and logistics of the hearing.

[19] The Tribunal held a hearing via videoconference on August 3, 4, 5 and 6, 2021, which included public and *in camera* sessions. The parties presented a total of 29 witnesses and the Tribunal heard testimony from a large majority of them. The Tribunal also heard the parties' closing arguments on the issues of injury and threat of injury.

[20] The Tribunal issued its finding on September 2, 2021.

RESULTS OF THE CBSA'S INVESTIGATIONS

[21] On August 3, 2021, the CBSA, pursuant to paragraph 41(1)(a) of *SIMA*, terminated the subsidy investigation in respect of the subject goods exported to Canada from China by Anji Hengrui Furniture Co., Ltd., Anji Hengyi Furniture Co., Ltd., Dongguan Tianhang Furniture Co., Ltd., Foshan DOB Furniture Co., Ltd., Foshan Xingpeichong Huitong Furniture Co., Ltd., Gu Jia Intelligent Household Jiaxing Co., Ltd., Haining Fanmei Furniture Co., Ltd., (Hangzhou) Huatong Industries Inc., HTL Furniture (China) Co., Ltd., HTL Furniture (Huai An) Co., Ltd., Jiaxing Motion Furniture Co., Ltd., Man Wah Furniture Manufacturing (Huizhou) Co., Ltd., Natuzzi (China) Ltd., Ruihao Furniture MFG Co., Ltd., Shanghai Trayton Furniture Co., Ltd., and Violino Furniture (Shenzhen) Ltd., and from Vietnam by Delancey Street Furniture Vietnam Co., Ltd., Koda Saigon Co., Ltd., Timberland Co., Ltd., UE Vietnam Co., Ltd., Vietnam Hang Phong Furniture Company Limited, Wanek Furniture Co., Ltd., and Wendelbo SEA JSC.[16] The CBSA was satisfied that the goods of these exporters had not been subsidized or that the amount of subsidy on those goods was insignificant.[17] The dumping investigation was not terminated in respect of any goods of particular exporters as the CBSA was satisfied that all subject goods had been dumped and that the margins of dumping of the goods of all exporters were not insignificant.[18]

[22] On the same day, the CBSA, pursuant to paragraph 41(1)(b) of *SIMA*, made a final determination of dumping in respect of the subject goods and a final determination of subsidizing in

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16 Exhibit NQ-2021-002-04 at 10-13.

17 Subsection 2(1) of *SIMA* defines "insignificant," in relation to an amount of subsidy, as an amount that is less than one percent of the export price of the goods. However, in accordance with section 41.2 of *SIMA* and paragraph 10(a) of Article 27 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM), an amount of subsidy relating to goods originating in a developing country is considered insignificant for the purposes of the CBSA's subsidy investigation if it is less than 2 percent of the export price of the goods. As neither the ASCM nor *SIMA* defines "developing country," or provides any guidance as to what criteria must be met in order to be considered a "developing country," the CBSA's administrative practice is to refer to the Organisation for Economic Co-operation and Development's (OECD) Development Assistance Committee List of Official Development Assistance Recipients (DAC List), available at <http://www.oecd.org/dac/stats/daclist.htm>, and to regard a country as developing if it is listed as a least developed country, low-income country or lower middle income country or territory. As Vietnam is listed as a lower-middle income country for 2021, the CBSA extended developing country status to Vietnam for the purposes of its subsidy investigation. See Exhibit NQ-2021-002-04A at 88.

18 Subsection 2(1) of *SIMA* defines "insignificant," in relation to a margin of dumping, as a margin that is less than 2 percent of the export price of the goods.

respect of the subject goods for which the subsidy investigation was not terminated (i.e. the subject goods other than those exported to Canada from the above-mentioned exporters).[19]

[23] The CBSA's period of investigation for both the dumping and subsidy investigations was from June 1, 2019, to November 30, 2020.[20] The margins of dumping specified by the CBSA in relation to each exporter for this period ranged from 9.3 to 188.0 percent for subject goods originating in or exported from China and from 9.9 to 179.5 percent for subject goods originating in or exported from Vietnam.[21] The amounts of subsidy specified by the CBSA in relation to each exporter in respect of which the subsidy investigation was not terminated ranged from 1.1 to 81.1 percent for subject goods originating in or exported from China and from 3.7 to 5.5 percent for subject goods originating in or exported from Vietnam.[22]

PRODUCT

Product definition

[24] The CBSA defined the subject goods as follows:

> Upholstered seating for domestic purposes originating in or exported from the People's Republic of China and the Socialist Republic of Vietnam, whether motion (including reclining, swivel and other motion features) or stationary, whether upholstered with a covering of leather (either full or partial), fabric (including leather-substitutes) or both, including, but not limited to seating such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans, stools and home-theatre seating.
>
> Excluding:
>
> (a) stationary (i.e. non-motion) seating upholstered only with fabric (rather than leather), even if the fabric is a leather-substitute (such as leather-like or leather-look polyurethane or vinyl);
> (b) dining table chairs or benches (with or without arms) that are manufactured for dining room end-use, which are commonly paired with dining table sets;
> (c) upholstered stools with a seating height greater than 24 inches (commonly referred to as "bar stools" or "counter stools"), with or without backs, and/or foldable;
> (d) seating manufactured for outdoor use (e.g. patio or swing chairs);
> (e) bean bag seating; and
> (f) foldable or stackable seating.
>
> For greater certainty, the product definition includes:
>
> (a) upholstered motion seating with reclining, swivel, rocking, zero-gravity, gliding, adjustable headrest, massage functions or similar functions;

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19 Exhibit NQ-2021-002-04 at 10-13.
20 Exhibit NQ-2021-002-04A at 6.
21 Exhibit NQ-2021-002-04 at 17-18, 26. The margins of dumping are expressed as a percentage of the export price of the goods.
22 Exhibit NQ-2021-002-04 at 19-20. The amounts of subsidy are also expressed as a percentage of the export price of the goods.

(b) seating with frames constructed from metal, wood or both;
(c) seating produced as sectional items or parts of sectional items;
(d) seating with or without arms, whether part of sectional items or not; and
(e) foot rests and foot stools (with or without storage).[23]

Additional information

[25] Although not reproduced here, a great deal of additional information with respect to the product, its uses and characteristics, and its production process was provided by the CBSA in its statement of reasons for its final determinations of dumping and subsidizing.[24] Additional information of this kind often provides the context necessary for the Tribunal to understand the scope of the subject goods, the extent to which they compete with domestically produced like goods, and some of the factors which may have a bearing on the state of the domestic industry.

LEGAL FRAMEWORK

[26] The Tribunal is required, pursuant to subsection 42(1) of *SIMA*, to inquire as to whether the dumping and subsidizing of the subject goods have caused injury or retardation,[25] or are threatening to cause injury, with "injury" being defined, in subsection 2(1), as ". . . material injury to a domestic industry". In this regard, "domestic industry" is defined in subsection 2(1) by reference to the domestic production of "like goods."

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

[28] Given that the subject goods originate in or are exported from more than one country, the Tribunal must also determine if the prerequisite conditions are met in order to make an assessment of both the cumulative effect of the dumping, and the cumulative effect of the subsidizing, of the subject goods from all the subject countries on the domestic industry.

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23 Exhibit NQ-2021-002-04A at 10.
24 See *Ibid.* at 10-15.
25 Subsection 2(1) of *SIMA* defines "retardation" as ". . . material retardation of the establishment of a domestic industry." As a domestic industry is already established, the Tribunal does not need to consider the question of retardation.

[29] In addition, since the CBSA has determined that the large majority of the subject goods have been both dumped and subsidized,[26] the Tribunal must determine whether it is appropriate in this inquiry to make an assessment of the cumulative effect of the dumping *and* subsidizing of those goods on the domestic industry (i.e. whether it will cross-cumulate the effect).

[30] The Tribunal can then assess whether the dumping and subsidizing of the subject goods have caused material injury to the domestic industry.[27] Should the Tribunal arrive at a finding of no material injury, it will determine whether there exists a threat of material injury to the domestic industry.[28]

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

LIKE GOODS AND CLASSES OF GOODS

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

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

> **(a)** goods that are identical in all respects to the other goods, or
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> **(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.

[34] In deciding the issue of like goods when goods are not identical in all respects to the other goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods (such as composition and appearance) and their market characteristics (such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs).[30] In addressing the issue of classes of goods, the Tribunal typically examines whether goods potentially included in separate classes of goods constitute "like goods" in relation to

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26 The subject goods in respect of which the CBSA terminated its subsidy investigation (i.e. the subject goods that were found not to be subsidized or for which the amounts of subsidy were insignificant) represented approximately 20 percent of total imports of subject goods over the CBSA's period of investigation. This means that approximately 80 percent of all subject goods were both dumped and subsidized. See Exhibit NQ-2021-002-04 at 27-29; Exhibit NQ-2021-002-07C (protected) at 1.

27 The Tribunal will proceed to determine the effects of the dumping and subsidizing of the subject goods on the domestic industry, for individual countries or for the cumulated countries, as appropriate.

28 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.

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

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

each other. If those goods are "like goods" in relation to each other, they will be regarded as comprising a single class of goods.[31]

Like goods

[35] As noted above, in its Notice of Commencement of Inquiry, the Tribunal invited interested parties to file early submissions on (1) whether the previously applied principle that the like goods must be co-extensive with the scope of the subject goods is well founded in law, and (2) whether SFUDS, which is expressly excluded from the product definition, is like goods to the subject goods.

[36] Following the receipt of submissions and supporting evidence from the Domestic Producers and Ashley, Costco, IKEA, the RCC, RHI and Wayfair,[32] the Tribunal informed the parties that it had determined that the principle of co-extensiveness should not apply in this case as the domestically produced goods that fall within the scope of the product definition are not "identical in all respects" to the subject goods, within the intended meaning of those words in paragraph (a) of the definition of like goods in subsection 2(1) of *SIMA*. The Tribunal also determined that, in accordance with paragraph (b) of that definition, the uses and characteristics of both domestically produced UDS meeting the product definition and domestically produced SFUDS closely resemble those of the subject goods and are therefore like goods to the subject goods. The following are the Tribunal's reasons for these determinations.

The principle of co-extensiveness

[37] During the preliminary injury inquiry phase of this matter, the Tribunal was not persuaded that there were adequate grounds to distinguish its previous decisions concerning the application of the principle that the domestically produced like goods must be co-extensive with the scope of the subject goods as defined by the CBSA in the product definition.[33] It therefore found that the like goods did not include UDS products expressly excluded from the product definition, such as SFUDS, but did not close the door to revisiting the issue during an eventual inquiry under section 42 of *SIMA*.

[38] In those "previous decisions" concerning the application of the principle of co-extensiveness, the Tribunal had stated that selecting like goods that are broader than the scope of the subject goods was not endorsed by the relevant WTO jurisprudence.[34] However, in some earlier inquiries, the

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31 *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) [*Aluminum Extrusions*] at para. 115. See also *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.

32 These parties filed separate submissions and supporting evidence. Although not all of the previously defined "parties opposed" filed submissions on the issue of like goods, the Tribunal will nonetheless, for the purposes of this section, collectively refer to those that did file submissions as the parties opposed.

33 *UDS PI* at paras. 22-23.

34 See, for example, *Unitized Wall Modules* (12 November 2013), NQ-2013-002 (CITT) [*Unitized Wall Modules*] at para. 34; *Certain Fabricated Industrial Steel Components* (25 May 2017), NQ-2016-004 (CITT) [*FISC*] at paras. 45, 47; *Gypsum Board* (20 August 2018), PI-2018-003 (CITT) [*Gypsum Board*] at para. 32; *Corrosion-resistant Steel Sheet* (16 November 2020), NQ-2019-002 (CITT) [*COR*] at para. 45. In these decisions, the Tribunal made reference to the following WTO Panel Reports: *EU – Footwear (China)*, WT/DS405/R [*EU – Footwear*] at paras. 7.302-7.315; *EC – Iron or Steel Fasteners (China)*, WT/DS397/R [*EC – Fasteners (Panel)*] at paras. 7.258-7.278; *US – Softwood Lumber (Canada)*, WT/DS264/R [*US – Softwood Lumber*] at paras. 7.139-7.158.

Tribunal had made the decision to expand the definition of the like goods to include goods falling outside the scope of the subject goods.[35]

[39] The Domestic Producers submitted that, in accordance with the disjunctive structure of the "like goods" definition in subsection 2(1) of *SIMA*, the co-extensiveness principle only applies if there exist domestically produced goods that are identical in all respects to the subject goods, failing which the Tribunal must then consider what domestically produced goods closely resemble the subject goods in their uses and other characteristics. With regard to the words "identical in all respects" in paragraph (a) of the definition of "like goods," the Domestic Producers noted that, while the Tribunal commented in *Seamless Casing* that these words imposed a "very high standard," it subsequently clarified that they mean "identical in all characteristics of a significant nature."[36]

[40] The Domestic Producers submitted that the assessment as to whether goods are identical to each other must be done at the group or aggregate level rather than at the level of individual models. They also claimed that domestically produced goods that meet the product definition (i.e. that are co-extensive with the scope of the subject goods) will typically be identical to the subject goods. In their view, the co-extensiveness principle should apply in the present case because, based on a group-to-group comparison, domestically produced UDS meeting the product definition is identical to the subject goods in all characteristics of a significant nature.

[41] The Domestic Producers contended that the parties opposed mischaracterized the jurisprudence they purported to rely on as, in *Sarco*[37] and *Seamless Casing*, the Federal Court of Appeal and the Tribunal respectively found as a fact that the domestically produced goods were not identical to the subject goods.

[42] The Domestic Producers submitted that, since products that are identical in all respects are the most likely to directly compete against each other, the co-extensiveness principle appropriately concentrates the injury analysis on the products (and the producers) that are likely to be the most directly injured by the subject goods. They maintained that extending the scope of the like goods to include closely resembling goods would systemically limit the domestic industry's ability to obtain an injury finding and therefore undermine the intended purpose of *SIMA*. They also submitted that the application of the principle provides greater certainty to the parties and the Tribunal as it provides a practical limit for the scope of the like goods and allows complainants to know at the outset the scope of the domestic industry from which they need to seek support.

[43] The Domestic Producers further submitted that the co-extensiveness principle was endorsed by the WTO Panel in *US – Softwood Lumber* and that the Tribunal has consistently applied the

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35 See, for example, *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) [*Seamless Casing*] at paras. 51-71; *Oil Country Tubular Goods* (23 March 2010), NQ-2009-004 (CITT) [*OCTG*] at paras. 82-83. The Tribunal maintained the expanded definition of the like goods in subsequent expiry reviews of both of these findings. See *Seamless Carbon or Alloy Steel Oil and Gas Well Casing* (28 November 2018), RR-2017-006 (CITT) [*Seamless Casing Review*] at paras. 24-32; *Oil Country Tubular Goods* (10 December 2020), RR-2019-005 (CITT) [*OCTG Review*] at paras. 22-27.

36 *Seamless Casing* at para. 58; *Greenhouse Bell Peppers* (19 October 2010), NQ-2010-001 (CITT) [*Bell Peppers*] at footnote 16; *Steel Piling Pipe* (30 November 2012), NQ-2012-002 (CITT) [*Piling Pipe*] at para. 161.

37 *Sarco Canada Ltd. v. Canada (Anti-dumping Tribunal)*, 1978 CarswellNat 76 (FCA) [*Sarco*].

principle in the past, even though it has not always referred to it as such.[38] They stated that, while the Tribunal is not strictly bound by its prior decisions, it should strive for general consistency and, in the case that it does depart from these decisions, it faces the burden of justifying such a departure.[39]

[44] The parties opposed submitted that there is no requirement under *SIMA* or the WTO agreements that like goods must be co-extensive with the subject goods and that starting from the conclusion of co-extensivity subverts the Tribunal's jurisdiction and renders the "like goods" analysis superfluous. They noted that, in *Sarco*, the Federal Court of Appeal concluded that, in defining "like goods," the Tribunal is required to consider all of the characteristics or qualities of the goods and that the question of like goods is fundamentally a question of whether the domestically produced goods compete in the marketplace with the subject goods. They submitted that the definition of the "like goods" therefore does not turn on which products the domestic industry perceives to be causing it more injury, but rather on which products are truly "like goods."

[45] The parties opposed also submitted that the words "identical in all respects" in paragraph (a) of the definition of "like goods" are clear and unambiguous and that, as stated by the Tribunal in *Seamless Casing*, they create a "very high standard." They submitted that, in the present case, the domestically produced goods meeting the product definition are not identical in all respects to the subject goods because UDS is a consumer good that always differs in style, variety, features, compositional material and manufacturing processes. In their view, these are not "minor differences of an insignificant nature."[40] They also added that there are no technical standards that circumscribe the scope of the product definition in the present case such that one might conclude that goods are identical to each other.

[46] The parties opposed asserted that the Tribunal has defined like goods more broadly than subject goods in numerous inquiries and recent expiry reviews, including in cases in which the Tribunal concluded that goods specifically excluded from the scope of the subject goods were like the subject goods.[41] They added that, in *Seamless Casing*, the Tribunal stated that failing to consider whether any other domestically produced goods also closely resemble, and are in competition with the subject goods, "would constitute a disregard for the commercial reality of the market on which the Tribunal's inquiry is based."[42] They also submitted that, when the Tribunal has applied co-extensive definitions of like goods and subject goods, these determinations were actually based on factual assessments that certain domestically produced goods falling outside the scope of the subject goods were not "like" subject goods, rather than any statutory provision or judicial decision requiring that they be co-extensive.[43]

[47] The parties opposed further submitted that the statement made by the Tribunal in *Unitized Wall Modules* regarding WTO jurisprudence was unfounded in law and based on a misreading of that jurisprudence. They submitted that, in the cases cited by the Tribunal, WTO panels observed that the

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38 For example, the Domestic Producers note that, in *Piling Pipe*, the Tribunal concluded that the like goods were limited to those domestically produced goods identical to the subject goods. They added that the Tribunal then used the "co-extensiveness" phraseology in other cases, including in *FISC* and *Gypsum Board*.

39 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 129-131.

40 *Bell Peppers* at footnote 16.

41 They make specific reference to *Seamless Casing*, *Seamless Casing Review*, *OCTG*, *OCTG Review* and *Certain Flat Hot-rolled Carbon Steel Sheet Products* (31 May 1993), NQ-92-008 (CITT).

42 *Seamless Casing* at para. 61.

43 The RCC referred to, among others, the Tribunal's decisions in *Unitized Wall Modules*, *FISC* and *Gypsum Board*.

definitions of the like goods and subject goods were co-extensive, not that they must or should be co-extensive. In their view, this jurisprudence can, at most, be taken as standing for the proposition that, where the like goods are co-extensive with the scope of the subject goods, there is no *per se* inconsistency with the relevant provisions of the WTO Anti-dumping Agreement (ADA) and ASCM.

[48] The Tribunal has previously described the principle of co-extensiveness as a requirement that the scope of the domestically produced like goods not be broader than the scope of the subject goods.[44] However, to the extent that this principle was intended to be strictly and universally applied, it would subvert the Tribunal's jurisdiction and deprive the definition of "like goods" in subsection 2(1) of *SIMA*, and in the corresponding provisions of the WTO ADA and ASCM,[45] of any meaning. This definition allows for the domestically produced "like goods" to be defined as goods that have uses and other characteristics that closely resemble those of the subject goods when there is an absence of domestically produced goods that are *identical in all respects* to the subject goods. Therefore, if the Tribunal finds that there is an absence of such identical goods, it will proceed to define the domestically produced like goods using an approach that may result in their scope being broader than that of the subject goods.

[49] It is not disputed that, if there are no domestically produced goods that are of the same description as the subject goods (i.e. that meet the product definition), there can be no identical goods within the meaning of paragraph (a) of the definition of "like goods" and the domestically produced like goods will, as a result, necessarily be broader than the scope of the subject goods. However, if there are domestically produced goods that are of the same description as the subject goods, then the Tribunal must determine whether the goods are identical in all respects to each other. This is a question of fact to be determined on a case-by-case basis.[46] Identicalness cannot be presumed by the operation of the co-extensiveness principle as this would effectively subvert the Tribunal's jurisdiction. In other words, while co-extensivity can result from a finding of identicalness by the Tribunal, it cannot compel such a finding. The WTO jurisprudence cited by the Tribunal in *Unitized Wall Modules* does not compel such a finding either.[47]

[50] Accordingly, the Tribunal finds that the strict and universal application of the principle of co-extensiveness is not well founded in law. There is simply no imperative rule in *SIMA* or, for that matter, in the WTO ADA and ASCM, requiring that the scope of the domestically produced like goods not be broader than the scope of the subject goods. The Tribunal cannot therefore presume that the scope of the domestically produced like goods must be co-extensive with the scope of the subject goods as defined by the CBSA in the product definition. The Tribunal must first perform the analysis mandated by subsection 2(1) of *SIMA* by examining whether there exists domestically produced goods that are identical in all respects to the subject goods and, if not, determining which domestically produced goods closely resemble the subject goods in their uses and other

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44 *Unitized Wall Modules* at para. 34.

45 See Article 2.6 of the WTO ADA and footnote 46 at Article 15.1 of the WTO ASCM. These agreements use the terms "like product" and "product under consideration" rather than "like goods" and "subject goods."

46 *Bell Peppers* at footnote 16.

47 See *EU – Footwear*; *EC – Fasteners (Panel)*; *US – Softwood Lumber*. The Tribunal agrees with the parties opposed that the WTO panels in those disputes simply observed that the scope of the like goods was co-extensive with that of the subject goods and made no statement to the effect that co-extensiveness was mandatory. Although the Domestic Producers maintained that the WTO Panel's decision in *US – Softwood Lumber* is supportive of the application of the co-extensiveness principle, they acknowledged that the principle only applies if there exist domestically produced goods that are identical in all respects to the subject goods. This is in fact an acknowledgement that co-extensiveness follows a finding of identicalness, but cannot compel such a finding.

characteristics. While, in certain cases, the evidence may indicate that the universe of domestically produced goods that closely resemble the subject goods is limited to goods that are of the same description as the subject goods, the evidence may show otherwise in other cases. In that sense, the principle of co-extensiveness serves no useful purpose, except perhaps as standing for the proposition that the *starting point* in determining the scope of the like goods should be the scope of the subject goods.

[51] It is clear that, in the present case, there are domestically produced goods that are of the same description as the subject goods. The Tribunal must therefore determine whether the goods are "identical in all respects" to each other. As the Tribunal stated in *Seamless Casing*, these words create a "very high standard." The Tribunal is not convinced that its subsequent lowering of that standard to allow for "minor differences of an insignificant nature"[48] was appropriate given the very clear and unambiguous language of paragraph (a) of the definition of "like goods" in subsection 2(1) of *SIMA*.[49]

[52] The Tribunal also questions how the assessment as to whether goods are identical in all respects to each other can be done at the group or aggregate level, as the Domestic Producers argued should be done, rather than at the level of individual models.[50] Without comparing each and every single model of domestically produced goods and subject goods to each other, a finding that these goods are identical could only be made on the basis that each group meets the same product definition, regardless of the fact that the terms of this definition may be very broad and contain no reference to any technical standards. It is difficult to conceive how such large groups may be found to be identical *in all respects* to each other under such circumstances (i.e. when *all* characteristics of the goods are not circumscribed by the product definition).

[53] In any event, the Tribunal need not definitively settle the issues of the exact standard imposed by the words "identical in all respects" and the level at which the assessment must be done as, regardless of which standard is adopted and at which level the assessment is done, the only finding that can reasonably be made in the present case is that there is no domestically produced UDS meeting the product definition that is identical in all respects to the subject goods. UDS is a consumer good that differs greatly in style, colours, shapes, features, compositional material and dimensions, even within a single producer's offering. The Tribunal is of the view that such differences are clearly of a significant nature and is thus unable to find that the domestically produced goods are identical in all respects, or even in all characteristics of a significant nature, to

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48 *Bell Peppers* at footnote 16; *Piling Pipe* at para. 161.

49 The Tribunal does not believe that the words "identical in all respects" should be given a meaning that they cannot reasonably bear in order to concentrate the injury analysis on the products and producers that are likely to be the most directly injured by the subject goods. Extending the scope of the like goods should not be perceived as limiting the domestic industry's ability to obtain an injury finding but rather as a reflection of the commercial reality of the market on which the Tribunal's injury inquiry is based.

50 As the Tribunal noted in *Seamless Casing* at footnote 15, there is a distinction between defining the like goods for injury purposes and defining them for other purposes under *SIMA*, such as for the determination of normal values by the CBSA pursuant to section 15. Under this provision, the normal values for a particular exporter are determined by reference to the selling price of like goods when they are sold by that exporter in its own domestic market. Since the CBSA establishes normal values for individual models, it is clear that the goods will often be identical in all respects to the subject goods (i.e. the exported goods), as they are actually produced by the same entity. The fact that the domestically produced like goods cannot be practically defined in this same manner may suggest that, except in rare circumstances, there cannot be domestically produced goods that are identical in all respects to the subject goods.

the subject goods. At the level of individual models, there is no evidence that the goods produced in Canada are identical in all respects to imports of subject goods. At the group or aggregate level, the lack of any specificity in the product definition with respect to the materials, dimensions, features, style, shapes and colours of the goods, as well as the absence of any technical standards, means that a finding of identicalness is not possible.

[54] In light of the foregoing, the Tribunal finds that the domestically produced UDS that falls within the scope of the product definition is not "identical in all respects" to the subject goods, within the intended meaning of those words in paragraph (a) of the definition of like goods in subsection 2(1) of *SIMA*.

Is domestically produced SFUDS like goods to the subject goods?

[55] Having determined that domestically produced UDS meeting the product definition is not identical in all respects to the subject goods, the Tribunal must now establish, in accordance with paragraph (b) of the definition of "like goods," what domestically produced UDS closely resembles the subject goods in its uses and other characteristics. Despite not being identical in all respects to the subject goods, there is no question, in view of the evidence on the factors that the Tribunal typically considers in deciding the issue of like goods, that domestically produced UDS meeting the product definition is like goods to the subject goods.[51] The remaining question that the Tribunal must therefore answer is whether domestically produced SFUDS should also be included as part of the like goods, notwithstanding the fact that SFUDS is expressly excluded from the product definition. Although the Tribunal must determine whether domestically produced SFUDS is like goods to the subject goods, it is in essence determining whether all SFUDS and UDS meeting the product definition are like goods in relation to each other. For the purposes of this section, the use of the term UDS will refer to UDS meeting the product definition.

[56] The Tribunal notes that the product definition essentially covers (1) motion leather UDS, (2) stationary leather UDS and (3) motion fabric UDS, but not stationary fabric UDS (i.e. SFUDS).[52]

[57] The Domestic Producers submitted that SFUDS is not like goods to the subject goods because, while UDS is part of a higher-complexity category of products, which are covered in leather or include motion functions, or both, SFUDS is part of a lower-complexity category of products without leather or motion functions. In their view, while UDS and SFUDS share some similarities, there are important differences in their physical characteristics and the most important market characteristics.

[58] With respect to physical characteristics, the Domestic Producers contended that UDS with a leather covering and/or motion features has a different appearance from SFUDS. In terms of market characteristics, they submitted that UDS is generally more expensive than lower-complexity SFUDS due to the cost of the leather and motion mechanisms and that they therefore cater to different customers. They noted that 21 of 34 respondents to the Tribunal's Purchasers' Questionnaire

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51 RHI did contend that there are no domestic products that can be considered "like goods" due to the astounding variation in product characteristics, pricing and distribution channels. The Tribunal is not persuaded that this is the case as the totality of the evidence on the record supports the conclusion that domestically produced UDS meeting the product definition closely resembles the subject goods in its uses and other characteristics and that both compete with each other in the Canadian marketplace.

52 The product definition actually covers all UDS, whether motion or stationary, whether upholstered with a covering of leather, fabric or both, but then expressly excludes SFUDS.

confirmed that they do not view UDS and SFUDS as interchangeable, and 19 of 34 respondents stated that their customers did not consider the two interchangeable.[53] They added that, although UDS and SFUDS have the same end use and are typically distributed through the same channels of distribution, these factors should not be given significant weight in the present case because many other products serve the same primary end use and retailers selling UDS and SFUDS also generally sell a broad selection of other goods.

[59] On the probative values of the responses to the Tribunal's Purchasers' Questionnaire, the Domestic Producers noted that at least 8 of the 13 responses indicating that UDS and SFUDS were interchangeable came from purchasers that argued in favour of SFUDS being like goods. They therefore suggested that the Tribunal ascribe more weight to the other responses.

[60] The parties opposed submitted that, because the tests for like goods and classes of goods are the same, the Tribunal's finding from the preliminary injury inquiry that all UDS are part of a "continuum" of items within a single class of goods logically leads to the conclusion that SFUDS must also be part of the same continuum. They reasoned that, if motion fabric UDS is like motion leather UDS, and if motion leather UDS is like stationary leather UDS, then all three must also be like SFUDS.

[61] The parties opposed submitted that the responses to the Tribunal's Purchasers' Questionnaire reveal that the respondents shared no consistent understanding, or did not appreciate the purpose of the questions they were being asked, which produced contradictory responses and therefore limits the usefulness of the information.

[62] With respect to physical characteristics, the parties opposed contended that there are no meaningful differences in the composition of UDS and SFUDS and that, while some types of coverings are distinguishable visually from others, the average consumer cannot readily distinguish between genuine leather and leather substitutes. As for market characteristics, they submitted that price differences between UDS and SFUDS are not always large and that, when considered across various retailers (both high-end and low-end), pricing distinctions between UDS and SFUDS disappear. They added that UDS and SFUDS are fully interchangeable and substitutable in the marketplace as many consumers are prepared to consider different types of products within their price range, whether they are motion or stationary, fabric or leather. Finally, they submitted that UDS and SFUDS are sold through the same channels of distribution, have the same end use and are marketed to the same customers.

[63] Going beyond the questions asked by the Tribunal in its Notice of Commencement of Inquiry, RHI submitted that it was premature for the Tribunal to make a final "like goods" determination before the full evidentiary record was available and that the definition of the like goods should be expanded to include commercial seating.

[64] In its preliminary injury inquiry, the Tribunal found that the various types of UDS that fall within the scope of the product definition have similar physical and market characteristics and thus represent a continuum of like goods that comprise a single class of goods.[54] In other words, the Tribunal was satisfied that motion leather UDS, stationary leather UDS and motion fabric UDS are

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53 Exhibit NQ-2021-002-26, Table 1.

54 *UDS PI* at paras. 32, 37.

like goods in relation to each other and that there is in effect no clear dividing line between any of them as they form part of a continuum of goods.

[65] Therefore, if motion fabric UDS is like motion leather UDS, and if motion leather UDS is like stationary leather UDS, then it can be inferred that, all other things being equal, fabric UDS is like leather UDS and motion UDS is like stationary UDS. This means that SFUDS is, at the very least, like goods in relation to motion fabric UDS and stationary leather UDS, and thus forms part of the continuum of like goods described by the Tribunal in the preliminary injury inquiry. As such, there is no clear dividing line between UDS and SFUDS. On this basis alone, the Tribunal finds that domestically produced SFUDS is like goods to the subject goods. The fact that the first part of the CBSA's product definition covers all UDS, whether motion or stationary, leather or fabric, but then expressly excludes SFUDS also suggests that SFUDS naturally belongs, and is viewed as, part of the group comprising all other UDS.

[66] A closer examination of the physical and market characteristics of UDS and SFUDS also confirms that they are like goods to each other. SFUDS is excluded from the product definition because it has both a fabric covering *and* lacks any motion components. It logically follows that it would not be excluded if it had either a leather covering or a motion component. The Tribunal considers that these differences have very little impact on the overall composition and general appearance of the goods. Indeed, the Tribunal notes that, in accordance with the product definition, fabric includes leather substitutes, which, according to the CBSA, are constructed from chemicals but designed to create the feel or visual look of leather.[55] Furthermore, leather coverings are described by the CBSA as including genuine leather (i.e. top grain leather) but other lower-cost types of leather as well, such as bonded leather, which is described as a leather substitute with leather shavings glued to the back as a marketing strategy to allow for the use of the word "leather."[56] Therefore, in some circumstances leather UDS and SFUDS are visually indistinguishable.

[67] In terms of market characteristics, the Domestic Producers concede that UDS and SFUDS have the same end use and are typically sold through the same channels of distribution. As for pricing, the Tribunal recognizes that UDS is generally more expensive than SFUDS. However, this is to be expected and is a function of where the goods fall on the continuum, with motion leather UDS generally being the most expensive, SFUDS being the least expensive, and the remaining two others somewhere in between.[57] This does not mean that there is no overlap between the different types of UDS. As the evidence demonstrates, in some cases, UDS with high-quality fabric coverings can be more expensive than leather UDS.[58] There is also likely to be less, or very little, difference in price between certain types of "leathers," such as bonded leather, and "fabrics" such as leather substitutes.

[68] In terms of substitutability, the Tribunal accepts that, from a consumer point of view, UDS and SFUDS are generally interchangeable depending on other factors such as quality and price, and provided the consumer has not definitively decided to purchase one type of UDS over another.[59] The evidence does indicate that retailers market SFUDS alongside other UDS in order to provide consumers with many choices and options.[60] The evidence also indicates that, when presented with

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55 Exhibit NQ-2021-002-04A at 10, 13.
56 *Ibid.* at 12-13. See also *Transcript of In Camera Hearing* at 308-309.
57 Exhibit NQ-2021-002-29.01 (protected) at 29.
58 Exhibit NQ-2021-002-29.04 (protected) at 10-11.
59 See Costco's response at Exhibit NQ-2021-002-26 at 6.
60 Exhibit NQ-2021-002-28.04 at 105, 126, 162; Exhibit NQ-2021-002-28.05 at 19.

such choices and options, some consumers can easily change their minds.[61] While more than half of respondents to the Tribunal's Purchasers' Questionnaire indicated that they, or their customers, did not view UDS and SFUDS as interchangeable,[62] the Tribunal interprets this to mean that, once retailers or customers have made a definitive decision on which type of UDS to purchase, they are no longer interchangeable. However, that does not mean that UDS and SFUDS are not interchangeable at some point in their decision-making process.

[69] In light of the foregoing, the Tribunal finds that domestically produced SFUDS is like goods to the subject goods as it shares physical and market characteristics with, has the same end use and generally competes with the subject goods in the Canadian marketplace. Accordingly, for the purposes of its injury analysis, the Tribunal will consider the impact of the subject goods on the domestic industry producing both UDS meeting the product definition and SFUDS.

[70] Turning to RHI's submissions, the Tribunal does not agree that it was premature for it to make a final determination on the issue of "like goods" at an earlier stage of the proceedings before the "full evidentiary record" was available, as claimed by RHI. At the outset of the present inquiry, the Tribunal invited interested parties to make early submissions, accompanied by supporting evidence, on the issue of like goods, as the issue had been raised by parties during the preliminary injury inquiry, as well as during the Tribunal's questionnaire consultation process. Being a threshold issue that can have an important impact on the Tribunal's investigation report and the submissions to be made by parties on the issue of injury, it was to everyone's benefit to have the matter settled early. The Tribunal did receive numerous submissions, witness statements and other evidence addressing the issue. It also prepared public and protected summaries of the responses to the Purchasers' Questionnaire that pertained specifically to the issue of like goods. In these circumstances, the Tribunal fails to see how its decision on like goods was premature.

[71] As for RHI's contention that the like goods should be expanded to include commercial seating, the Tribunal was not persuaded, on the basis of the evidence on the record during the preliminary injury inquiry, that this was an issue that merited further consideration during the injury inquiry. There is nothing on the record of the present inquiry that suggests to the Tribunal that commercial seating competes directly with UDS on a large-scale basis.

Classes of goods

[72] As indicated above, in its preliminary injury inquiry, the Tribunal found that the various types of UDS that fall within the scope of the product definition represent a continuum of like goods that comprise a single class of goods. The Tribunal made this determination after having directed parties to address the issue of classes of goods in their submissions and after having conducted a teleconference with interested parties in order to ask questions and gather evidence on this issue.[63]

[73] Nevertheless, Wayfair maintained in the present inquiry that there are several classes of goods, such as sofas, chairs, loveseats, sofa-beds, day-beds, futons, ottomans and home theater seating. However, the Tribunal finds that Wayfair has not presented any new evidence which casts

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61 Exhibit NQ-2021-002-26 at 11; Exhibit NQ-2021-002-28.04 at 134.

62 Exhibit NQ-2021-002-26, Table 2.

63 *UDS PI* at para. 28. The Tribunal's objective was to make possible the early resolution of this issue in order to potentially simplify an eventual final injury inquiry under section 42 of *SIMA*.

doubt on its determination, made in the preliminary injury inquiry, that there is a single class of goods.

[74] Given its decision to now expand the definition of the like goods to include domestically produced SFUDS on the basis that these goods share physical and market characteristics with UDS meeting the product definition, the Tribunal can only conclude that domestically produced SFUDS also falls along the same continuum of like goods that comprise a single class of goods. The Tribunal will therefore conduct its analysis on the basis that domestically produced UDS meeting the product definition and domestically produced SFUDS constitute "like goods" in relation to the subject goods and that there is a single class of goods.

DOMESTIC INDUSTRY

[75] 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.

[76] The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, to the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods. The decision of whether to assess injury to the domestic industry as a whole or a major proportion thereof is a matter of Tribunal discretion and turns on the facts that arise during the course of the inquiry, including the presence of structural and behavioural differences among producers and the availability of evidence.[64] While the term "major proportion" is not defined in *SIMA*, or in the WTO ADA and ASCM, it has been interpreted to mean an important, serious or significant proportion and not necessarily a majority.[65]

[77] In its preliminary injury inquiry, the Tribunal found, on the basis of the evidence available to it at the time, that Palliser accounted for more than 20 percent, by value, of the total domestic production of the like goods and that, because the domestic industry was very fragmented and appeared to include many small producers, this was sufficient to be considered a major proportion at that stage of the proceedings.[66] Of course, the Tribunal had determined, in its preliminary injury inquiry, domestically produced like goods to be co-extensive with the scope of the subject goods.

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64 *Dry Wheat Pasta* (26 July 2018), NQ-2017-005 (CITT) at para. 41; *Essar Steel Algoma Inc. v. Jindal Steel and Power Limited*, 2017 FCA 166 (CanLII) at para. 26. See also *Decorative and Other Non-structural Plywood* (19 February 2021), NQ-2020-002 (CITT) [*Decorative Plywood*] at para. 47, where the Tribunal stated that an inquiry with less than full participation or cooperation from domestic producers is fully contemplated under *SIMA*.

65 *Japan Electrical Manufacturers Assn. v. Canada (Anti-Dumping Tribunal)*, [1986] F.C.J. No. 652 (F.C.A); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (F.C.A.); Panel Report, *China – Automobiles* (*US*), WT/DS440/R [*China – Automobiles*] at para. 7.207; Appellate Body Report, *EC – Fasteners* (*China*), WT/DS397/AB/R [*EC – Fasteners*] at paras. 411, 412, 419; Panel Report, *Argentina – Poultry* (*Brazil*), WT/DS241/R [*Argentina – Poultry*] at para. 7.341.

66 *UDS PI* at para. 45.

[78] Having now determined at the inquiry stage that the strict adherence to the principle of co-extensiveness enunciated in certain previous decisions is not well founded in law and that this principle should not apply in this case, and having made the decision to expand the definition of the like goods to include domestically produced SFUDS, the composition of the domestic industry must be addressed anew.

[79] As part of this inquiry, the Tribunal sent questionnaires to 58 known and potential domestic producers of like goods.[67] The Tribunal used several sources of information to identify the major domestic producers of UDS meeting the product definition and SFUDS, including information on the Tribunal's record for its preliminary injury inquiry, information received from parties during the Tribunal's questionnaire consultation process, the results of a mini survey conducted prior to the initiation of the present inquiry, information on the CBSA's administrative record, as well as input from domestic producers.[68]

[80] The Tribunal received responses to its producer questionnaire from 24 domestic producers of like goods, 21 of which provided information that could be included in the investigation report.[69] All of these 21 domestic producers provided information regarding their production of like goods and, while only 14 provided their financial results for domestic sales and 13 provided information with respect to other performance indicators, these producers still accounted for well over 80 percent, by volume, of the collective production of the like goods by those 21 respondents over the POI.[70]

[81] On July 1, 2021, the RCC requested that the Tribunal issue subpoenas or orders compelling the remaining domestic producers on its initial mailing list, and as many other producers as staff of the Secretariat to the Tribunal could identify, to provide the Tribunal with at least their production volumes and income statements in respect of sales from domestic production over the POI. It asserted that, since only a fraction (36 percent) of the domestic producers surveyed by the Tribunal adequately responded to the questionnaire, the data received by the Tribunal did not accurately represent the production of like goods in Canada and was therefore insufficient to permit the Tribunal to conduct its injury analysis.[71] It added that the 58 known and potential domestic producers on the Tribunal's mailing list may already have been under-representative of the totality of Canadian producers of like goods, as Palliser's complaint noted that there are 157 companies listed by Statistics Canada under North American Industry Classification System (NAICS) code 337121, which covers "upholstered household furniture manufacturing."[72]

[82] While the RCC recognized that many of the remaining domestic producers may be relatively small in size, it submitted that this had to be confirmed by, at a minimum, collecting production volume information from them, which it claimed is required to determine whether the domestic producers that establish they have suffered injury, or are threatened with injury, represent a major proportion of the total domestic production of the like goods.

[83] On July 5, 2021, the Tribunal denied the RCC's request.[73] It indicated, as noted above, that it had used several sources of information to identify the major domestic producers of like goods and

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67 Exhibit NQ-2021-002-08.
68 Exhibit NQ-2021-002-06A at 9.
69 *Ibid.*
70 *Ibid.*, Table 2; Exhibit NQ-2021-002-07A (protected), Table 18.
71 Exhibit NQ-2021-002-44.
72 See Exhibit PI-2020-007-02.01 at 3232.
73 Exhibit NQ-2021-002-45.

ensure that they were surveyed during the course of this inquiry. The Tribunal indicated that it was satisfied that those producers that did respond to its questionnaire included all of the major domestic producers of like goods. It added that, because the domestic industry was very fragmented in this case and the Tribunal's resources were finite, it was neither practically feasible nor necessary for it to take measures to ensure that it obtained responses from every single potential domestic producer.

[84] Notwithstanding its decision to deny the RCC's request, the Tribunal indicated that, if the RCC, or any of the other parties, were in possession of information which suggested that *major* domestic producers of like goods had not been surveyed or had not responded to the Tribunal's questionnaire, they were invited to provide this information to the Tribunal without delay. It added that all parties opposing a finding of injury were free to include, as part of their submissions on the issue of injury, any arguments as to whether the domestic producers who did respond to the Tribunal's questionnaire represent a major proportion of the total domestic production of the like goods and should therefore constitute the "domestic industry" for purposes of the Tribunal's injury analysis.

[85] In their case brief filed on July 2, 2021, the Domestic Producers submitted that, in 2020, the net sales value of like goods by those domestic producers for which the Tribunal obtained information represented over half of all sales of goods manufactured in Canada under NAICS code 337121, which totalled $512 million.[74] They noted that, since this code applies to "establishments primarily engaged in manufacturing upholstered household furniture,"[75] it may be somewhat over-inclusive by including ancillary production or activities that are not the production of like goods. They therefore submitted that the domestic producers who responded to the Tribunal's questionnaire in this case exceed the major proportion threshold under *SIMA*.

[86] In its case brief, the RCC repeated its prior submissions on this issue and added that the "major proportion" definition of the "domestic industry" is specific to individual producers such that, when assessing injury on this basis, the Tribunal must consider whether the collective production of the like goods by those domestic producers individually suffering injury caused by the dumping and subsidizing of the subject goods constitutes a major proportion of the total domestic production of the like goods. It submitted that a case-by-case assessment of injury and causation is all the more critical in this case given that some domestic producers are apparently not suffering any injury caused by the dumping and subsidizing of the subject goods.

[87] The RCC further submitted that, while the domestic producers whose information is included in Tables 82 and 83 of the Tribunal's investigation report had, in 2020, combined domestic and export sales of like goods from domestic production that represented barely more than half of the reported $512 million in sales of goods manufactured under NAICS code 337121, there remains a full 43 percent of domestic production that is not accounted for in the investigation report data. In response to the Tribunal's invitation contained in its letter of July 5, 2021, the RCC noted that it was aware of at least two major domestic producers who did not respond to the Tribunal's questionnaire and that this represented only a single anecdotal example from one retailer.[76]

[88] Finally, the RCC submitted that domestic producers who did not respond to the Tribunal's questionnaire cannot be presumed to be injured, as Article 3.1 of the WTO ADA requires that a

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74 Exhibit NQ-2021-002-06A, Tables 82, 83; Exhibit NQ-2021-002-A-03 at 81.
75 Exhibit NQ-2021-002-A-03 at 76-78.
76 Exhibit NQ-2021-002-D-13 (protected) at para. 38.

finding of injury be supported by positive evidence. It added that, even if the responses received from domestic producers other than Palliser, Jaymar and Brentwood Classics Ltd. (Brentwood) show poor financial performance, these producers did not provide positive evidence of the causal connection between this performance and price competition from subject imports.

[89] In reply, the Domestic Producers, citing the decision of the WTO Appellate Body in *EC – Fasteners*, submitted that the definition of "domestic industry" allows for an injury analysis to be conducted based on a major proportion, which is a reflection of the total domestic industry.[77] They submitted that there is no presumption that other domestic producers not included in the major proportion are injured or not, as the major proportion is treated as representative of the whole domestic industry.

[90] The Domestic Producers also submitted that domestic producers representing the major proportion must be evaluated collectively and that, although understanding individual producer circumstances can be relevant, particularly for the Tribunal's causation analysis, there is no need to assess the extent to which each domestic producer is injured individually. They added that the injury analysis of the major proportion must be objective and thus cannot favour weaker or stronger parts of the domestic industry.

[91] There is no dispute that the definition of "domestic industry" in subsection 2(1) of *SIMA* provides the Tribunal with the discretion to assess injury to the domestic industry as a whole or a major proportion thereof and that, in the particular circumstances of this inquiry, the lack of questionnaire responses from a significant number of potential domestic producers means that the Tribunal must consider whether the collective production of the like goods by those domestic producers who responded to the questionnaire and provided information constitutes a major proportion of the total domestic production of the like goods.

[92] As previously explained, the Tribunal made considerable efforts to identify the major domestic producers of like goods and ensure that they were surveyed. Taking into consideration the fact that the Canadian UDS industry is very fragmented and includes many small producers, the Tribunal is of the view that these efforts were appropriate in the circumstances. Indeed, in *EC – Fasteners*, the Appellate Body recognized that obtaining information from domestic producers may be difficult in special market situations, such as a fragmented industry with numerous producers, and that the use of a "major proportion" in such special cases "provides an investigating authority with some flexibility to define the domestic industry in the light of what is *reasonable and practically possible*" [emphasis added].[78] In addition to not being necessary, the issuance of subpoenas or production orders to dozens, or more, potential domestic producers that are likely small in size would clearly not have been reasonable and practically possible given the Tribunal's finite resources and the tight legislative time frame within which it had to complete its inquiry.[79]

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77 *EC – Fasteners* at para. 412.

78 *Ibid.* at para. 415.

79 See *Decorative Plywood* at para. 46, where the Tribunal explained that it had denied a request for it to issue orders compelling some domestic producers to respond to the producers' questionnaire as it did not believe that the absence of such responses limited its ability to fulfil its statutory mandate to inquire into whether the dumping and subsidizing of the subject goods had caused injury, or were threatening to cause injury, to the "domestic industry." This is the case here as well. The Tribunal notes that 136 of the 157 companies listed by Statistics Canada under NAICS code 337121 had fewer than 50 employees (see Exhibit NQ-2021-002-44 at 4). To put this in perspective, of the questionnaire respondents that provided employment figures, those that had fewer than 50 employees represented together approximately one percent, by volume, of the total domestic production of the like goods by all respondents in 2020.

[93] On the basis of the evidence on the record, the Tribunal is satisfied that the collective production of the like goods by those domestic producers who responded to the questionnaire and provided information constitutes a major proportion of the total domestic production of the like goods. This is attested to by the fact that, in 2020, the 14 domestic producers who provided their financial results had a combined total of $291.9 million in domestic and export sales of like goods, which represented 57 percent of all sales of goods manufactured in Canada under NAICS code 337121, which totalled $512.8 million.[80] For the entire POI, this figure averaged 54 percent.

[94] The Tribunal also calculated the total value of domestic and export sales of like goods for the 21 domestic producers who responded to the questionnaire and provided information, and found that it represented approximately 65 percent of the total value of all sales of goods manufactured in Canada under NAICS code 337121 in 2020 and an average of 61 percent for the entire POI.[81] This means that, depending on which tables of the investigation report are consulted, the domestic producers whose data are included in those tables likely accounted, on average, for between 54 and 61 percent, by value, of the total sales of domestically produced like goods over the POI.

[95] The Tribunal recognizes that using the total value of all sales of goods manufactured in Canada under NAICS code 337121 as a proxy for the total domestic production of the like goods does not provide the same degree of assurance as if it had obtained actual production volumes or values from all domestic producers. However, the Tribunal has previously used alternative methods to establish total domestic production of like goods and finds it appropriate to do so here again.[82] Moreover, as the Domestic Producers suggest, NAICS code 337121 may be over-inclusive as it appears to cover goods that are not like goods to the subject goods.[83] It can thus be inferred that the shares of total domestic production held by the questionnaire respondents, as calculated above, are likely underestimated. Overall, the Tribunal considers the total value of all sales of goods manufactured in Canada under NAICS code 337121 to be a sufficiently reliable estimate for the purpose of establishing the composition of the domestic industry in this inquiry.

[96] As mentioned above, the term "major proportion" has been interpreted to mean an important, serious or significant proportion and not necessarily a majority. Indeed, WTO panels have previously accepted percentages of total domestic production below 50 percent as sufficient to constitute a

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80 Exhibit NQ-2021-002-06A, Tables 82, 83; Exhibit NQ-2021-002-A-03 at 81. Only 9 of the 14 domestic producers who provided their financial results reported export sales over the POI (see Exhibit NQ-2021-002-06A, Table 2).

81 The Tribunal calculated the total value of domestic sales of like goods for the 21 domestic producers by using the volume and unit value of domestic sales from domestic production as reported in the investigation report and by adding an estimate of the value of domestic sales for the domestic producers who only provided production volumes, which was obtained by applying the average domestic market unit value to their volumes to calculate a sales value. The total value of export sales of like goods for the 21 domestic producers was calculated by using export sales values as reported in the investigation report and adding export sales data contained in the questionnaire responses of those domestic producers who did not provide their financial results. Exhibit NQ-2021-002-06A, Tables 2, 83; Exhibit NQ-2021-002-06B, Tables 23, 41; Exhibit NQ-2021-002-10.28 (protected) at 13; Exhibit NQ-2021-002-10.29B (protected) at 15; Exhibit NQ-2021-002-10.31 (protected) at 12, 15; Exhibit NQ-2021-002-10.11B (protected) at 15, 17; Exhibit NQ-2021-002-10.32 (protected) at 2-3; Exhibit NQ-2021-002-A-03 at 81.

82 See, for example, *Photovoltaic Modules and Laminates* (25 March 2021), RR-2020-001 (CITT) at para. 46; *Decorative Plywood* at para. 81.

83 See Exhibit NQ-2021-002-A-03 at 76-78. NAICS code 337121 covers goods such as "chair and couch springs" and "spring cushions," which are ostensibly not UDS meeting the product definition or SFUDS.

major proportion.[84] More importantly, in *EC – Fasteners*, the Appellate Body did not exclude the possibility that, in the case of a fragmented industry with numerous producers, such as is the case here, a figure as low as 27 percent of total domestic production could potentially constitute a major proportion.[85]

[97] Viewing the term in context also provides support for the conclusion that major proportion was not meant to establish a "majority" requirement. The term appears in subsection 2(1) of *SIMA* as an alternative to the domestic producers "as a whole". The definition reflects the reality in many investigations that it will not be possible to obtain the requested information from all domestic producers of the like goods, and confirms that an injury inquiry and finding would not be rendered inadequate simply because the Tribunal was unable to obtain information from all such producers. Neither *SIMA* nor the WTO agreements establish a numerical benchmark for what constitutes a "major" proportion of the domestic production. It will vary from case to case.

[98] Although the RCC appears to suggest that the percentage of domestic production that is accounted for in the investigation report data is too low, it has not directed the Tribunal to any jurisprudence supporting the proposition that domestic producers whose collective production of the like goods represent more than half of the estimated total domestic production of the like goods cannot be considered as accounting for a major proportion of that production. The RCC also contended that, since only 21 of the 58 known and potential domestic producers surveyed by the Tribunal adequately responded to the questionnaire, the data received by the Tribunal did not accurately represent the production of like goods in Canada. However, the Tribunal does not find this argument persuasive as the "major proportion" is established on the basis of production (either by volume or value) and not the number of producers.

[99] In light of the foregoing, the Tribunal finds that those domestic producers who responded to the Tribunal's questionnaire and whose information is contained in the investigation report constitute the domestic industry for purposes of this inquiry. Since their production serves as a substantial reflection of the total domestic production of like goods,[86] the question as to whether those domestic producers who did not respond to the Tribunal's questionnaire have suffered injury is irrelevant.

[100] The Tribunal has also not been persuaded by the RCC's argument that the collective production of the like goods by those domestic producers *individually* suffering injury must constitute a major proportion of the total domestic production of the like goods.

[101] There is nothing in *SIMA* or in the WTO agreements that suggests that, once the domestic industry has been defined using one of the two methods (i.e. domestic producers "as a whole" or a "major proportion" thereof), those producers within that domestic industry that are individually injured must also account for a major proportion of the total domestic production of like goods. If this was the case, it would render the language of subsection 2(1) meaningless as there would be no purpose in taking what would be the preliminary step of defining the domestic industry using one of

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84 See *China – Automobiles* at paras. 7.221, 7.229, where the panel failed to see why domestic producers whose collective output ranged between 33.54 and 54.15 percent of total domestic production during the period of investigation could not be considered as accounting for a major proportion of that production. See also *Argentina – Poultry* at para. 7.342, where the panel found that there was nothing on the record to suggest that, in the circumstances of that case, 46 percent of total domestic production was not an important, serious or significant proportion.

85 *EC – Fasteners* at paras. 415, 419, 422, 430.

86 *Ibid.* at para. 412.

the two methods provided. The definition of "domestic industry" would instead simply impose, as a sole requirement, that those domestic producers who have been found to be individually injured account for a major proportion of the total domestic production of the like goods.

[102] To the extent that, as in this case, the defined subset of the domestic industry is significant or important enough to represent all domestic producers, and in the absence of compelling evidence that the aggregate data on the performance of the producers representing a major proportion of the total domestic production of the like goods only shows one side of the picture,[87] *SIMA* contemplates that the impact of the subject goods on the so defined domestic industry must be assessed collectively. In other words, injury must be assessed against the performance of the domestic producers representing a major proportion of total domestic production, considered as a whole.

[103] Accordingly, the Tribunal will proceed with its injury analysis by evaluating, on a collective basis, the domestic producers who constitute the domestic industry. However, circumstances relating to individual producers may be relevant and will be considered by the Tribunal as part of its assessment of other factors (i.e. causation) and materiality.

CUMULATION

[104] Subsection 42(3) of *SIMA* directs the Tribunal to make an assessment of the cumulative effect of the dumping or subsidizing of goods that are imported into Canada from more than one subject country if it is satisfied that (1) the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible, and (2) such an assessment would be appropriate taking into account the conditions of competition between the goods from any of those countries and the goods from any other of those countries or the domestically produced like goods.

Insignificance and negligibility

[105] Subsection 2(1) of *SIMA* defines "insignificant," in relation to a margin of dumping, as a margin that is less than 2 percent of the export price of the goods and, in relation to an amount of subsidy, as an amount that is less than 1 percent of the export price of the goods. This subsection also defines "negligible" as meaning a volume that represents less than 3 percent of the total volume of goods meeting the product definition that are released into Canada from all countries. However, for developing countries such as Vietnam,[88] subsection 42(4) of *SIMA* and paragraph 12 of Article 27 of the WTO ASCM have the effect of increasing, for the purposes of the Tribunal's cumulative assessment, the thresholds for an insignificant amount of subsidy and a negligible volume of subsidized goods to 2 and 4 percent, respectively.

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87 The RCC asserted that the data in the Tribunal's investigation report likely overrepresented the poorly performing parts of the domestic industry and overlooked positive developments in other parts. However, it failed to substantiate this claim. In fact, there is evidence that certain domestic producers who provided responses to the questionnaire performed relatively better than others during the POI. This strongly suggests that analyzing, in the aggregate, the performance of the producers representing a major proportion of total domestic production who provided the requested information is an objective and even-handed exercise. There is insufficient evidence for the Tribunal to conclude that such an analysis would favour weaker or stronger parts of the domestic industry.

88 The Tribunal follows the same administrative practice as the CBSA, which, as explained above, is to regard a country as developing if it is listed as a least developed country, low-income country or lower middle income country or territory on the OECD's DAC List. For 2021, Vietnam is listed as a lower-middle income country.

[106] The CBSA reported, along with its final determinations of dumping and subsidizing, countrywide margins of dumping of 135.4 percent for China and 171.2 percent for Vietnam, and countrywide amounts of subsidy of 12.7 percent for China and 4.7 percent for Vietnam.[89] These margins and amounts exceed the above stated thresholds and are thus not "insignificant."

[107] In assessing whether the volume of dumped or subsidized goods from a country is negligible, the Tribunal typically considers import volumes during the CBSA's period of investigation,[90] which in this case spanned the 18-month period from June 1, 2019, to November 30, 2020. The Tribunal notes that, in this case, import values rather than volumes had to be used for this assessment.[91] During the CBSA's period of investigation, both the values of dumped and subsidized goods from each of the subject countries, as reported by the CBSA in its final determinations, were greater than 3 percent (or 4 percent in the case of the value of subsidized goods from Vietnam) of the total value of all imports meeting the product definition and therefore not "negligible."[92]

Conditions of competition

[108] Having determined that the margins of dumping and amounts of subsidy were not insignificant and that the values of dumped and subsidized goods were not negligible, the Tribunal will now determine whether an assessment of both the cumulative effect of the dumping, and the cumulative effect of the subsidizing, of the subject goods from China and Vietnam is appropriate taking into account the conditions of competition between the goods of each of those countries and/or between those goods and the domestically produced like goods.

[109] Factors the Tribunal typically considers in assessing conditions of competition between subject goods and like goods include interchangeability, quality, pricing, distribution channels, modes of transportation, timing of arrivals and geographic dispersion. The Tribunal may also consider other factors in deciding whether the exports of a particular country should be cumulated, and no single factor is determinative.[93]

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89 Exhibit NQ-2021-002-04 at 25-28. The margins of dumping and amounts of subsidy are both expressed as a percentage of the export price of the goods.

90 See, for example, *Heavy Plate* (5 February 2021), NQ-2020-001 (CITT) [*Heavy Plate*] at para. 66; *COR* at para. 58; *Cold-rolled Steel* (21 December 2018), NQ-2018-002 (CITT) at para. 33. This approach is consistent with Canada's notification to the WTO Committee on Anti-Dumping Practices, which provides that it will normally make this assessment with reference to the volume of dumped imports during the period of data collection for the dumping investigation, i.e. the CBSA's period of investigation (see *Notification Concerning the Time-Period for Determination of Negligible Import Volumes Under Article 5.8 of the Agreement*, G/ADP/N/100/CAN). Although there is not a parallel notification to the WTO Committee on Subsidies and Countervailing Measures with respect to the assessment of the volume of subsidized imports, the Tribunal's practice in this regard is the same as with the volume of dumped imports.

91 The CBSA reported the import values of the dumped and subsidized goods in its final determinations due to the fact that import volume information on customs documentation was reported in various units of measure, which meant that it was not feasible for it to estimate the import volume of all subject goods using the same unit of measure. See Exhibit NQ-2021-002-05 (protected) at 32, 34.

92 Exhibit NQ-2021-002-07C (protected) at 1.

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

[110] In its preliminary injury inquiry, the Tribunal found that the evidence available at that stage of the proceedings reasonably indicated similar conditions of competition among the subject goods, and between the subject goods and the like goods.[94]

[111] None of the parties opposing a finding of injury presented any evidence or made any submissions on the issue of cumulation in this inquiry. For their part, the Domestic Producers submitted that a cumulative assessment is appropriate in light of the information contained in the Tribunal's investigation report, which they claimed indicates that the domestically produced like goods and the subject goods from China and Vietnam all compete against each other for the same accounts, are substitutable between each other, are sold through the same channels of distribution and are affected by comparable non-price factors.

[112] The Tribunal agrees with the Domestic Producers that the conditions of competition in this case support a cumulative assessment of the effects of the subject goods from China and Vietnam. The information in the investigation report does confirm that Canadian distributors and retailers both purchased subject goods from China and Vietnam, as well as domestically produced like goods, throughout the POI and that they generally viewed them as interchangeable.[95] For the most part, purchasers considered that the subject goods and the like goods were comparable to each other in terms of product quality and their ability to meet technical specifications, and that the subject goods were comparable to each other in terms of net price.[96]

[113] The subject goods are shipped to Canada using the same mode of transportation (i.e. ocean freight) and, although typical delivery times were on average longer than for purchases of domestically produced like goods,[97] the difference was not so large as to prevent competition between them as evidenced by the fact that they were both present and competing in the market at the same time. Finally, the evidence indicates that domestically produced like goods and imported goods meeting the product definition were both sold in the same geographic markets within Canada, and in roughly the same relative proportion, over the POI.[98]

[114] In light of the foregoing, the Tribunal is satisfied that an assessment of both the cumulative effect of the dumping, and the cumulative effect of the subsidizing, of the subject goods from China and Vietnam is appropriate in the circumstances.

CROSS-CUMULATION

[115] As noted above, since the CBSA determined that the large majority of the subject goods were both dumped and subsidized, the Tribunal must decide whether to make an assessment of the cumulative effect of the dumping *and* subsidizing of those goods (i.e. whether to cross-cumulate).

[116] There are no legislative provisions that directly address the issue of cross-cumulation. However, as noted in previous cases, the effects of dumping and subsidizing of the same goods from a particular country are manifested in a single set of injurious price effects and it may not be possible, or practicable, to isolate the effects caused by the dumping from the effects caused by the

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94 *UDS PI* at para. 51.
95 Exhibit NQ-2021-002-06A, Tables 7-8, 10.
96 *Ibid.*, Tables 11-13.
97 *Ibid.*, Table 10.
98 *Ibid.*, Table 90.

subsidizing.[99] In reality, the effects are so closely intertwined that it may not be possible to allocate discrete portions to the dumping and the subsidizing respectively.

[117] Given the foregoing, and taking into account the fact that no party made submissions against a cross-cumulative assessment in this case, the Tribunal will follow its usual practice and make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods.

INJURY ANALYSIS

[118] Subsection 37.1(1) of the *Special Import Measures Regulations*[100] prescribes that, in determining whether the dumping and subsidizing have caused material injury to the domestic industry, the Tribunal is to consider the volume of the dumped and subsidized goods, their effect on the price of like goods in the domestic market, and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider whether a causal relationship exists between the dumping and subsidizing of the goods and the injury on the basis of the factors listed in subsection 37.1(1), and whether any factors other than the dumping and subsidizing of the goods have caused injury.

[119] Before proceeding with its injury analysis, the Tribunal will present a general overview of the UDS market in Canada in order to provide context for its analysis, which, in this inquiry, centers on issues related to the importance of price in purchasing decisions and causation. The Tribunal will also address the issue of injury to the domestic industry that is claimed to have existed at the beginning of the POI.

Overview of the Canadian UDS market

[120] According to the Domestic Producers, imports from China and Vietnam have been a major contributor to the significant decline in Canadian production of like goods that began after China acceded to the WTO in 2001. In 2002, sales of goods manufactured in Canada under NAICS code 337121 stood at approximately $1.67 billion (in real 2020 dollars).[101] By 2020, that number was down to $512.8 million, representing a drop of nearly 70 percent. However, by 2007, total sales, by value, had already dropped by more than 50 percent from 2002 levels. Although the domestic industry saw a period of modest growth from 2011 to 2017, it came to an end in 2018 with a decline in total sales of more than 25 percent, followed by additional declines in 2019 and 2020. Mr. Art DeFehr, Executive Chair of Palliser, highlighted the domestic industry's overall decline by reference to the fact that the three regular furniture shows, which used to be held in Montreal, Toronto and Western Canada, died several years ago.[102]

[121] As previously discussed, the domestic industry is very fragmented with a handful of larger domestic producers and potentially dozens of smaller producers. Important domestic producers over

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99 See, for example, *Unitized Wall Modules* (3 July 2019), RR-2018-002 (CITT) at para. 47; *Steel Piling Pipe* (4 July 2018), RR-2017-003 (CITT) at para. 42; *FISC* at paras. 72-73; *Silicon Metal* (2 November 2017), NQ-2017-001 (CITT) at para. 59.

100 SOR/84-927 [*Regulations*].

101 Exhibit NQ-2021-002-A-03 at 81. See also Exhibit NQ-2021-002-D-28 at 9, where the RCC calculated inflation-adjusted sales values that differed slightly from those calculated by the Domestic Producers.

102 Exhibit NQ-2021-002-A-05 at para. 5.

the POI include Palliser, Elran, Dynasty Furniture Manufacturing Inc. (Dynasty) and Decor-Rest Furniture Ltd.[103]

[122] The composition of the Canadian UDS market changed significantly over the POI. In 2017, sales of all imports meeting the product definition accounted for just over half of the total market.[104] By 2020, that share had increased to over two thirds of the total market. According to Mr. DeFehr, Chinese and Vietnamese producers typically sell large volume orders, which are mass-produced in certain standardized colors, cover materials and styles, at very low price points.[105] This pushed many Canadian producers out of the volume part of the market and forced them to focus on higher quality and luxurious products, and to shift toward customizable products as opposed to "stock" products.[106]

[123] The data in the investigation report indicate that the majority of sales of domestically produced like goods and imports of UDS meeting the product definition are made directly to retailers, with many large retailers being importers of subject goods themselves.[107] Buying power in Canada relating to UDS is concentrated with a small number of large retailers, most notably Leon's and The Brick, who hold a significant degree of control over the domestic market and are effectively the price setters.[108] Some retailers also seek increased control over the products they sell and the margins they make by wanting more input into the design of products, desire for exclusivity, or arranging direct supply chains for the manufacturing of UDS under their own in-house brands.[109] Although there are many factors that affect purchasing decisions for UDS, price is a key factor (see further below for a more detailed discussion on the importance of price).

[124] Many retailers employ a "good, better, best" assortment strategy with respect to product pricing. From a terminology standpoint, these terms are equivalent to "low-end, mid-range and high-end."[110] Items in the opening price point "good" category are used to attract customers to the store, whereas offerings in the "better" and "best" categories include premium furniture at incrementally higher quality, features and price points.[111] The price of items in the "good" category is used as a value reference point for the pricing of items in the other two categories.[112] As such, low prices in the "good" category have the effect of lowering prices in the "better" and "best" categories.

[125] Large retailers need to offer a complete assortment of UDS (i.e. stationary fabric, stationary leather and motion UDS) that covers each category or market segment in order to cater to all price points and satisfy a wide range of customer demands.[113] As for suppliers, Palliser, Brentwood, Jaymar and most other domestic producers fall broadly into the "better" and "best" categories, but

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103 Exhibit NQ-2021-002-07A (protected), Table 18; Exhibit NQ-2021-002-D-22 at para. 17.
104 Exhibit NQ-2021-002-06A, Table 25.
105 Exhibit NQ-2021-002-A-05 at para. 21.
106 *Ibid.* at para. 38; Exhibit NQ-2021-002-A-09 at paras. 6, 18; *Transcript of Public Hearing* at 51.
107 Exhibit NQ-2021-002-07A (protected), Table 35; Exhibit NQ-2021-002-06A, Table 3.
108 Exhibit NQ-2021-002-A-05 at paras. 32-34; Exhibit NQ-2021-002-A-04 (protected) at 166; Exhibit NQ-2021-002-A-07 at para. 18.
109 *Transcript of Public Hearing* at 275-276, 312, 378, 397, 418, 432, 436-437; *Transcript of In Camera Hearing* at 209-211, 221, 233-234, 236.
110 *Transcript of Public Hearing* at 210.
111 Exhibit NQ-2021-002-D-22 at para. 12; Exhibit NQ-2021-002-D-12 at para. 21; Exhibit NQ-2021-002-D-18 at para. 7; *Transcript of Public Hearing* at 336.
112 Exhibit NQ-2021-002-D-22 at para. 22.
113 Exhibit NQ-2021-002-D-14 at paras. 6-7; Exhibit NQ-2021-002-D-22 at para. 12; *Transcript of Public Hearing* at 335.

there are some, like Dynasty, who fall in the "good" category.[114] Imports of subject goods fall into all three categories.[115] Domestically produced goods and imported products both compete for "floor spots" in retailers' showrooms in order to increase sales.[116] The evidence indicates a clear competitive overlap between the subject goods and the like goods across all categories.

[126] An important change that has taken place over the POI is the rise in retail e-commerce sales. According to a study published by Statistics Canada, "furniture and home furnishings stores" have seen their proportion of e-commerce sales steadily increase from 2.2 percent of total sales in 2016 to 6.6 percent in 2019, and then leap to 16.4 percent in the January to May 2020 period as a result of the COVID-19 pandemic.[117] As part of their e-commerce strategy, manufacturers may consider selling directly to consumers through their own websites (direct-to-consumer sales), or through an e-commerce service provider ("marketplaces"), such as Wayfair or Amazon.[118] They may also choose to rely on retailers who have their own e-commerce platforms, or work directly with retailers to help establish a centralized platform.[119] Retailers who have both brick-and-mortar and e-commerce channels must themselves compete with e-commerce giants, such as Wayfair and Amazon, who can offer an endless assortment of goods that compete in both style and price.[120]

[127] Finally, the COVID-19 pandemic affected most businesses in 2020 (the last year of the POI), particularly from late March onwards, as restrictive measures were imposed by governments in Canada and around the world. This was reflected in the total Canadian UDS market, which decreased by 5 percent in 2020 following two years of relatively solid growth.[121]

Injury present at the beginning of the POI

[128] The Domestic Producers contended that both China and Vietnam have been major contributors to the long and steady decline in the production of like goods, which, as discussed above, began in the early 2000s. In their view, there is no legal requirement that the first year of a POI be treated as a baseline against which injury in subsequent years is assessed. They submitted that, in the present case, the domestic industry had been losing significant market share and experiencing negative price effects since before 2017 and that, as such, 2017 should not be viewed as an injury-free starting point. They added that, while the domestic industry could, or even should, have sought protection years ago, this does not negate the injury that the subject goods have caused during the POI.

[129] The RCC submitted that there is no evidence that goods imported prior to the POI were dumped or subsidized, and no allegations that the dumping or subsidizing caused injury. It submitted that injury caused by a continuance of trends that were already present in the marketplace is not injury caused by the subject goods.

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114 *Transcript of Public Hearing* at 59, 134-135, 158, 166, 182, 189-190, 461-462; Exhibit NQ-2021-002-D-22 at para. 13; Exhibit NQ-2021-002-D-24 at para. 21.

115 Exhibit NQ-2021-002-FF-05 at para. 20; Exhibit NQ-2021-002-D-22 at para. 13; *Transcript of Public Hearing* at 76, 247, 361, 526-527, 568; *Transcript of In Camera Hearing* at 257.

116 *Transcript of Public Hearing* at 29-33.

117 Exhibit NQ-2021-002-E-07 at 9.

118 Exhibit NQ-2021-002-E-03 at para. 12.

119 *Transcript of Public Hearing* at 117, 122.

120 Exhibit NQ-2021-002-D-24 at para. 8.

121 Exhibit NQ-2021-002-06B, Table 24.

[130] Ashley and Violino submitted that, while it is not necessarily fatal to a domestic industry's case that it came into the POI already injured, the Tribunal has previously stated that an affirmative finding of injury must "be based on injurious effects that crystallized (i.e. became manifest) during the POI."[122]

[131] For their part, RHI, Wayfair and HTL submitted that any submissions regarding alleged injury to the domestic industry prior to the POI are irrelevant to the present inquiry and cannot be taken into account by the Tribunal in its injury analysis. They also submitted that, as the Tribunal concluded in *Decorative Plywood*, it can only consider the impact of subject imports during the POI.

[132] In *Decorative Plywood*, the Tribunal dealt with the same argument that is now being made by the Domestic Producers. While it agreed that there is no explicit legal requirement for injury to have started or worsened over the POI in order for a domestic industry to benefit from the protection afforded by *SIMA*, and that a domestic industry can, in theory, already be injured at the beginning of the POI, the Tribunal found that it did not have the means to establish whether that injury was material and whether it was caused by the dumping and subsidizing of the subject goods because it did not have any data with respect to the period preceding the POI and the CBSA had not made a determination that subject imports were dumped or subsidized during that time.[123]

[133] The Domestic Producers find themselves in exactly the same predicament. The Tribunal has not collected any data, and there is no information on the record, with respect to the volumes and prices of the subject goods and like goods, and to the state of the domestic industry, prior to the POI.[124] The CBSA has also not made a determination that the subject goods were dumped or subsidized during that same time period. As such, the Tribunal is unable to establish that the domestic industry was injured prior to the POI, that this injury was still present at the beginning of the POI, and that the injury was caused by the dumping and subsidizing of the subject goods, in and of themselves.

[134] Therefore, just as it did in *Decorative Plywood*,[125] the Tribunal will determine whether the dumping and subsidizing of the subject goods have caused injury to the domestic industry by considering changes in the volume of the goods, their effect on the price of the like goods, and their resulting impact on the state of the domestic industry, *during* the POI, which, in the present case, covers four full years from January 1, 2017, to December 31, 2020.

Import volume of dumped and subsidized goods

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

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122 *Liquid Dielectric Transformers* (22 June 2012), PI-2012-001 (CITT) at para. 32.

123 *Decorative Plywood* at paras. 99, 101. The Tribunal emphasized the fact that, pursuant to subsection 3(1) and paragraph 42(1)(a) of *SIMA*, there is a requirement to establish, on the basis of an objective examination of positive evidence, that the dumping and subsidizing of the goods have *caused* injury.

124 The Tribunal's practice is to select, at a minimum, a three-year POI in an injury inquiry. For the purposes of the present inquiry, it selected a four-year POI to ensure that it had three full years of data unaffected by the COVID-19 pandemic.

125 *Decorative Plywood* at para. 103.

[136] In absolute terms, the volume of subject imports increased year over year throughout the POI. Subject imports increased by 36 percent in 2018, by 21 percent in 2019 and by 1 percent in 2020.[126] Although the rate of increase noticeably slowed over the POI, the volume of subject imports nonetheless increased by a total of 66 percent over this period.[127] By comparison, the total Canadian market increased by a total of only 10 percent during this time, this figure being pulled down by a decrease of 5 percent in the market in 2020.[128]

[137] The share of total imports meeting the product definition held by the subject goods increased throughout the POI, from 67 percent in 2017 to 78 percent in 2020, for a total increase of 11 percentage points.[129] This increase was gained at the expense of non-subject imports from the United States, whose share of total imports decreased from 31 percent to 20 percent over the same period. The share of total imports held by non-subject imports from other countries was negligible throughout the POI. The subject goods were therefore by far the largest source of imports into Canada throughout the POI.

[138] Relative to domestic production, the volume of subject imports more than doubled over the POI, going from a ratio of 65 percent in 2017 to 144 percent in 2020.[130] Relative to domestic sales of domestic production, the volume of subject imports also more than doubled over this period, going from a ratio of 74 percent in 2017 to 165 percent in 2020. The Tribunal notes that the rates of increase in both measures of relative imports also slowed over the POI, but remained significant throughout, including in 2020.

[139] On the basis of the foregoing, the Tribunal finds that, over the POI, there was a significant increase in the volume of subject imports, both in absolute and relative terms.

Price effect of dumped and subsidized goods

[140] Paragraph 37.1(1)(b) of the *Regulations* directs the Tribunal to consider the effect of the dumped or subsidized goods on the price of like goods and, in particular, whether the dumped or 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 effect of the dumped or subsidized goods from any price effects that have resulted from other factors affecting prices.

[141] However, before addressing the price effect of the dumped and subsidized goods on the price of like goods, the Tribunal must first determine the relative importance of price in purchasing decisions for UDS, as well as address arguments raised by the parties opposed regarding the reliability and probative value of the unit price data in the Tribunal's investigation report.

Importance of price in purchasing decisions

[142] Unlike cases involving commodity products that are fully interchangeable and compete in the market almost entirely on the basis of price, this case concerns UDS, a consumer product for which factors other than price can have an impact on purchasing decisions. Despite finding above that

126 Exhibit NQ-2021-002-06B, Table 20.
127 *Ibid.*, Table 19.
128 *Ibid.*, Tables 23-24.
129 Exhibit NQ-2021-002-06A, Table 21.
130 *Ibid.*, Table 22.

domestically produced SFUDS and UDS meeting the product definition are like goods to the subject goods on the basis that they closely resemble each other in their uses and other characteristics, and that they generally compete with each other in the Canadian marketplace, the Tribunal must still determine the extent to which that competition occurs on the basis of price. Since, in the circumstances of this case, it is ultimately the *price undercutting* by the dumped and subsidized goods that may have led to the domestic industry suffering injury on its overall performance, establishing the relative importance of price in purchasing decisions for UDS is paramount. It follows that, if price is not an important consideration for purchasers of UDS, the dumping and subsidizing of the subject goods can hardly be a cause of material injury.

[143] The Domestic Producers submitted that the retail market for the like goods and subject goods is price competitive and that the clearest illustrations of this come from the marketing materials of the largest Canadian retailers, which essentially guarantee low prices. They noted that purchasers acknowledged the importance of price as 9 of the 32 respondents to the Tribunal's Purchasers' Questionnaire indicated that the lowest net price was a very important factor in purchasing decisions and 19 respondents indicated it was somewhat important.[131] The Domestic Producers contended that, even though other factors (i.e. non-price factors) were more commonly rated as very important, purchaser responses suggest that these factors were not a meaningful discriminator between the like goods and the subject goods, thereby leaving price as the most important factor in purchasing decisions.

[144] The parties opposed generally regarded price as a less important factor in purchasing decisions. For example, IKEA submitted that, based on the responses to the Tribunal's Purchasers' Questionnaire, non-price factors are the most important factors in purchasing decisions. Wayfair noted that the large majority of respondents to the Tribunal's Purchasers' Questionnaire indicated that the lowest-priced goods never or only sometimes won contracts or sales.[132] The RCC added that, while products do not need to be identical to perform a price comparison, non-price factors must be taken into account.

[145] The Tribunal is of the view that the evidence on the record supports a finding that price is a key factor in purchasing decisions for UDS. The majority of respondents to the Tribunal's Purchasers' Questionnaire indicated that the lowest net price was a very important or somewhat important factor used in purchasing decisions and that the lowest-priced goods always, usually or sometimes won contracts or sales.[133] Although the majority of respondents also indicated that other factors, such as product quality, reliability of supplier and aesthetics of the products, were more important than price in purchasing decisions and were reasons for not purchasing the lowest-priced goods, the respondents generally viewed the like goods and subject goods as comparable to each other with respect to these factors.[134]

[146] Certainly, there are some factors where either the like goods or the subject goods were viewed as having a distinct advantage over the other. For example, a majority of respondents indicated that China and Vietnam had an advantage with respect to the range of product line, but that Canada had an advantage with respect to delivery cost and after-sales service or warranties.[135] On

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131 *Ibid.*, Table 15.
132 *Ibid.*, Table 14.
133 *Ibid.*, Tables 14-15.
134 *Ibid.*, Tables 11-12, 14-15.
135 *Ibid.*, Tables 11-12.

balance, the Tribunal interprets the responses to the Purchasers' Questionnaire as supportive of the view that price is generally a very important consideration in purchasing decisions, assuming that other factors such as product quality and aesthetics are comparable, or that certain advantages enjoyed by either the like goods or the subject goods are offset by advantages enjoyed by the other goods.

[147] The view that price is a key consideration in purchasing decisions is supported by the fact that many retailers define themselves with a particular value proposition of offering great prices which becomes a driving factor in how they do business, from their marketing to their sourcing strategies. For example, Struc-Tube explains on its website that its mission is to offer its customers "the most incredible assortment of modern furniture and accessories at the lowest possible prices" and Leon's states that it "continues to sell high quality brand name furniture . . .at guaranteed low prices."[136] As for The Brick, its motto is "[a]t The Brick, we're dedicated to saving you more."[137] Retailers also advertise low prices for goods at their opening price points, or sale items, in print media, television, or online.[138] In order to deliver on these promises and meet customers' attendant price expectations, retailers must ensure that they purchase UDS from their suppliers at the lowest possible prices.

[148] This was corroborated by many witnesses for retailers who testified that the industry is indeed price sensitive. Mr. Matthew Fischel, Vice-President of Struc-Tube, confirmed that retail pricing and customers' price expectations are critical to Stuc-Tube's sourcing decisions.[139] Mr. Blake acknowledged that, for The Brick, when comparing like goods and subject goods that are of the same quality, pricing is definitively an important consideration.[140] For his part, Mr. Shaun Dufresne, Senior Director of Merchandising for Dufresne, explained that Dufresne works backwards from its customers' retail price point expectations to source merchandise that allows it to cover its necessary operating margins.[141] The parties opposed argued that it is consumers that set pricing in the market through their expectations and that retailers have no choice but to be price sensitive as a result.

[149] In particular, the RCC submitted that the price pressure does not come from imports but rather from consumers. In its view, the price that retail consumers are willing to accept is the ceiling that determines the price at which UDS can be sourced from manufacturers, and it is this ceiling, not the subject goods *per se*, that may cause adverse price effects. However, the Tribunal is of the view that the reasons for which price may be an important consideration in retailers' purchasing decisions are not relevant for the purpose of its injury analysis. Once it is determined that price is a key consideration in purchasing decisions, as is clearly implied, if not explicitly recognized, by the

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136 Exhibit NQ-2021-002-A-03 at 79-80. See also Exhibit NQ-2021-002-J-02 at paras. 6-7.

137 Exhibit NQ-2021-002-A-03 at 79. Mr. Gary Blake, Director of Merchandising for The Brick, explained that the "saving you more" part of the motto means that The Brick is saving its customers more in terms of time, convenience and money (see *Transcript of Public Hearing* at 318-319). In the Tribunal's view, this meaning is not obvious from the actual words used and the message that likely resonates the most with customers is that The Brick is saving them more money.

138 *Transcript of Public Hearing* at 40-41, 233-234.

139 Exhibit NQ-2021-002-D-24 at para. 13; *Transcript of Public Hearing* at 420.

140 *Transcript of Public Hearing* at 322. See also Exhibit NQ-2021-002-J-02 at para. 26, where Mr. Paul Bernard, Director General of Purchasing for BMTC, stated that, while price is not the only factor considered, market changes have created pressure on prices.

141 Exhibit NQ-2021-002-D-22 at para. 11; *Transcript of Public Hearing* at 336-337. See also Exhibit NQ-2021-002-D-14 at para. 13; *Transcript of Public Hearing* at 249, 262-263.

RCC's own argument and evidence, it can be assumed that low-priced dumped and subsidized goods will likely lead to lost sales and/or reduced prices for the domestic industry.

[150] In fact, the Tribunal has previously stated that it does not have the authority under section 42 of *SIMA* to deny a domestic industry the protection to which it is entitled under the Act on the basis that downstream producers or other consumers need to procure dumped and subsidized goods in order to be competitive in markets for downstream products.[142] Therefore, any argument that the so-called "price pressure" or price "ceiling" for retailers comes from downstream consumers or users is beside the point. What matters is that, based on the evidence, competitive trends in the retail market force large retailers to be highly price sensitive. Put simply, the fact that retailers need to procure dumped and subsidized goods to make sales to their customers or be competitive in the retail market because "Canadian consumers will not tolerate paying more than the prices they think an article is worth" or "vote with their wallets"[143] provides confirmation that, as a rule, the retailers' own purchasing decisions are largely driven by price.

[151] There is also evidence from domestic producers that confirms that pricing is one of the main concerns raised by large retailers in negotiations.[144] The Tribunal heard that, for a given product that they seek to fill a gap in their assortment, retailers will provide a list of specifications and a price target that the supplier will need to meet in order to make a sale.[145] Therefore, for all intents and purposes, this results in competition between domestic and foreign suppliers on the basis of price for products of similar quality and comparable characteristics.

[152] In light of the foregoing, the Tribunal finds that price is a key factor in purchasing decisions for UDS and that dumped and subsidized goods sold at lower prices than domestically produced like goods will have adverse effects on the price of like goods.

Reliability and probative value of unit price data in the investigation report

[153] The Tribunal's investigation report contains aggregated unit price data for imports, total sales in the domestic market, sales by trade levels (distributors/wholesalers/buying groups and retailers), sales of 11 benchmark products and sales to common accounts.[146]

[154] The RCC contended that it is not probative or reliable to examine aggregated unit price data from an evidentiary perspective because it cannot be assumed that purchases of imports and sales from domestic production during the POI reflected the same product mix. It added that, even within a benchmark product category, there is no distinction between items of vastly different features or quality (e.g. grade of leather, manual or powered reclining mechanism). It therefore argued that the Tribunal cannot assume that any of the datasets relating to benchmark products represent an "apples-to-apples" comparison, or that a price gap between like goods and subject goods is related to dumping or subsidizing instead of inherent differences in the characteristics of the underlying product.

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142 *Silicon Metal* (19 November 2013), NQ-2013-003 (CITT) [*Silicon Metal*] at para. 64.

143 Exhibit NQ-2021-002-D-10 at paras. 74, 80.

144 Exhibit NQ-2021-002-A-09 at paras. 16, 19, 29; Exhibit NQ-2021-002-FF-05 at para. 19; *Transcript of Public Hearing* at 112, 114, 172, 176; *Transcript of In Camera Hearing* at 142-143, 189.

145 Exhibit NQ-2021-002-D-22 at para. 20; *Transcript of Public Hearing* at 34-36, 358-360.

146 See Part VII of the Tribunal's investigation report (Tables 39 to 81). The Tribunal also selected three additional benchmark products covering only domestic sales of SFUDS (see Table 58).

[155] Wayfair and HTL submitted that price comparisons cannot be relied upon for the purposes of determining whether there are price effects because the Domestic Producers are largely focused on custom-made goods, which causes an inherent price difference from subject imports, which are stock goods. They argued that, as in *Decorative Plywood*, there is arguably a lack of competition because the like goods and subject goods are serving different market needs.

[156] IKEA similarly submitted that domestic producers have shifted production to higher-cost leather motion products, which skews the unit price data and creates the false impression that there is a significant price difference between the like goods and the subject goods. It added that, as a result, the Tribunal has no objective and verifiable "positive evidence" on which to make an injury finding.

[157] The Domestic Producers agreed that aggregated average unit price data are of limited probative value in the context of the present inquiry. However, they submitted that the unit price data gathered for sales of benchmark products are quite probative because they remove product mix variability from comparisons by controlling for the type of seating (e.g. chair versus sofa), the type of covering (leather versus fabric) and whether the seating is motion or stationary seating. They added that the wide basis for the information contained in the investigation report and the internal consistency of the data support the investigation report as a reliable and probative part of the record before the Tribunal.

[158] As part of its inquiry, the Tribunal collected pricing information relating to sales of UDS from a large number of domestic producers and importers. This information was then compiled together into the investigation report. Contrary to the view expressed by IKEA, the Tribunal believes that this information does constitute affirmative, objective and verifiable positive evidence from which it can draw inferences. The question that needs to be addressed is how much weight should be placed on this evidence given the particular circumstances of this case.

[159] The Tribunal recognizes that broad product definition in this case has caused inevitable product mix issues which suggests that the Tribunal should place less weight on the result of comparisons between the selling prices of like goods and subject goods performed using aggregated average unit price data. However, the Tribunal is of the view that the result of comparisons performed using unit price data pertaining to sales of benchmark products should be regarded as sufficiently probative for the purpose of assessing the price effect of the subject goods for a number of reasons.

[160] First, although there are certainly some product mix issues with the 11 benchmark products selected by the Tribunal, this does not mean that the unit price data for these benchmarks should be discarded entirely. The Tribunal regularly collects information with respect to the sale of benchmark products in injury inquiries, and this information is rarely without issue. There is no requirement that, within each benchmark product category, the mix of products for the subject goods be demonstrated to be identical to that of the like goods in order for the unit price data to constitute positive evidence.

[161] In the present case, the Tribunal took steps to ensure that the products defined as benchmarks were sufficiently similar such that each benchmark product competed against one another in the marketplace and the price difference remained informative despite the varying specific features of the products. It selected benchmark products that controlled for the type of seating (chair, sofa or loveseat), the type of covering (leather or fabric) and whether the seating was motion or stationary

seating.[147] In doing so, it addressed the most significant and relevant differences between the physical characteristics of the subject and like goods. In the Tribunal's opinion, this is sufficient to satisfy its obligation to ensure price comparability in the analysis of the price effect of the subject goods.

[162] Other evidence suggests that, despite the fact that they are not identical products, unit price data collected for benchmark products are probative, do not understate the price of the subject goods relative to the price of the like goods or result in an "apples-to-oranges" comparison. While many domestic producers are seemingly focused on more luxurious and custom-made goods, there are still others, at least one of which responded to the Tribunal's Producers' Questionnaire, that appear to sell products that fall in the opening price point or "good" category.[148] Custom-made products are also not inherently different from stock products, except that, in Canada, they tend to fall in the "better" and "best" categories, whereas stock products can fall in all three categories.[149] As noted above, imports of subject goods fall into the "good, better and best" categories. Moreover, there are some product features, such as reclining mechanisms that can be manual or powered, which should naturally tend to balance each other out over large datasets. Other features, such as cup-holders or USB chargers,[150] should arguably have a minimal impact on selling prices.

[163] Second, the Tribunal notes that its finding in *Decorative Plywood*, that the subject goods and the like goods did not directly compete with one another, was based in part on the fact that, despite the pricing data showing consistent and very significant price undercutting by the subject goods at all levels throughout the POI, this had not led the domestic industry to lose market share to the subject goods.[151] This is manifestly not the case here. As will be discussed further below, the domestic industry did lose significant market share to the subject goods over the POI. While not determinative, this greatly reduces the likelihood that the like goods and subject goods are not directly competing with one another, at least at the benchmark product level.

[164] Finally, and most importantly, the Tribunal is of the view that the consistent and significant price undercutting by the subject goods observed in respect of all benchmark products, which will be further analyzed below, indicates that the unit price data are reliable and can thus be given much more weight than the parties opposed argued should be the case. While anomalies may certainly have made their way into the datasets and while variations in product features do exist, the Tribunal finds that the pervasiveness and magnitude of the observed price undercutting is probative in itself. It also somewhat serves to validate the results of price comparisons performed using aggregated average unit price data, which also show significant price undercutting by the subject goods, despite the fact that unit price data for the domestically produced like goods include sales of generally lower-priced SFUDS, whereas the unit price data for the subject goods do not.[152]

[165] For the above reasons, the Tribunal considers that the unit price data pertaining to sales of benchmark products are reliable and probative, and that aggregated average unit price data, although less reliable, still merit consideration.

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147 Exhibit NQ-2021-002-06A at 43. The Tribunal also selected a sofa bed and a sofa bed loveseat. These benchmark products did not control for the type of covering (i.e. leather or fabric).

148 *Transcript of Public Hearing* at 135, 158.

149 *Ibid.* at 43-44, 180-190, 336, 367, 462.

150 *Transcript of Public Argument* at 69.

151 *Decorative Plywood* at paras. 130-131.

152 See Exhibit NQ-2021-002-06A at 6. The Tribunal notes that, based on questionnaire responses, domestic sales of SFUDS by domestic producers represented well over 50 percent of total domestic sales of like goods.

Price undercutting

[166] In order to determine the extent to which the subject goods have undercut the price of like goods, the Tribunal must first determine the level at which this comparison should be made and whether a domestic price premium must be taken into account.

[167] As previously mentioned, the majority of sales of domestically produced like goods and imports of UDS meeting the product definition are made directly to retailers, with many large retailers being importers of subject goods themselves. Since a certain proportion of the domestic industry's sales of like goods are made to distributors[153] and retailers who import subject goods, the Tribunal could perform the comparison by using import *purchase* prices (i.e. the prices at which the subject goods are purchased from exporters or foreign producers). However, this comparison would fail to account for the margins and hence the higher prices of subject goods sold by distributors to retailers that are not importers and to which the domestic industry also sells. If the Tribunal instead performed the comparison by using import *selling* prices (i.e. the prices at which the subject goods are sold in the domestic market after importation), this would then fail to account for lower prices of subject goods purchased by distributors from exporters or foreign producers.[154] The Tribunal is of the view that, in these circumstances, it is best to use import *selling* prices as this approach is more conservative and is less likely to overestimate the level of price undercutting.

[168] On the issue of a domestic price premium, 21 of 30 respondents to the Tribunal's Purchasers' Questionnaire indicated that they were willing to pay a premium for products made in Canada.[155] The average price premium paid by those respondents who provided an estimate was 19 percent. While this amount was not disputed by the Domestic Producers, Mr. DeFehr did state that the larger retailers, which represent the majority of the market, typically focus on selling at the lowest price and are generally unwilling to pay any price premium.[156] However, during the hearing, several witnesses for large retailers testified that they did pay a domestic premium, which fluctuated from retailer to retailer.[157] On the basis of this testimony, and taking into consideration the fact that nearly one third of respondents to the Tribunal's Purchasers' Questionnaire were not willing to pay any premium, the Tribunal finds that a domestic price premium of 10 to 15 percent is both appropriate and reasonable in the circumstances.

[169] The data concerning average selling prices indicate that, at the aggregate level, the subject goods undercut the prices of domestically produced like goods throughout the POI by amounts ranging from 28 to 32 percent when expressed as a percentage of the selling prices of the like goods.[158] This level of undercutting exceeded the aforementioned domestic price premium. Non-subject imports from the United States also undercut the prices of domestically produced like goods throughout the POI, albeit at lower levels, with the amounts of undercutting ranging from 1 to 11 percent. Non-subject imports from other countries were always priced higher than the

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153 Reference to "distributors" in these reasons means distributors, wholesalers and buying groups.

154 For the purpose of the Tribunal's investigation report, retailers that import UDS meeting the product definition are deemed to have an import selling price that is equal to their import purchase price.

155 Exhibit NQ-2021-002-06A, Table 10.

156 Exhibit NQ-2021-002-A-05 at para. 36.

157 *Transcript of Public Hearing* at 250, 365; *Transcript of In Camera Hearing* at 194, 235-236, 255-256, 349.

158 Exhibit NQ-2021-002-06B, Table 41. The magnitude of the undercutting is further highlighted by the fact that the selling prices of the subject goods were below the domestic industry's cost of goods sold (COGS) throughout the POI. See Exhibit NQ-2021-002-06A, Table 82.

domestically produced like goods. Consequently, the subject goods were the price leaders in every year of the POI.[159]

[170] Looking at average selling prices for both trade levels, the subject goods also undercut the prices of domestically produced like goods in every year of the POI.[160] For sales to retailers, the undercutting ranged from 25 to 29 percent, and for sales to distributors, it was significantly higher, thereby exceeding the domestic price premium in both cases. The Tribunal notes that total sales to retailers represented between 93 and 96 percent of the apparent market during the POI.[161]

[171] As previously discussed, the Tribunal collected quarterly data on 11 benchmark products purchased and/or sold in 2019 and 2020 (i.e. the last eight quarters of the POI). It also collected quarterly data for three benchmark products covering only domestic sales from domestic production of SFUDS during the same period. These data, which cover a major proportion of the total reported sales from domestic production and from imports over this period,[162] reveal the existence of significant and widespread price undercutting by the subject goods. The Tribunal notes that, given the extremely low volumes of sales from domestic production and from subject imports for Benchmark Product 11,[163] meaningful comparisons could not be performed for that product.

[172] Quarterly comparisons were possible between sales of subject goods and sales from domestic production in 80 instances (i.e. in all eight quarters for each of the remaining 10 benchmark products). In all of these 80 instances, the subject goods undercut the prices of domestically produced like goods and, in 78 of these 80 instances, the level of price undercutting was greater than 15 percent (i.e. the upper range of the domestic price premium), and usually much greater.[164]

[173] In 16 of the 80 instances mentioned above, non-subject imports from the United States and/or other countries undercut the prices of domestically produced like goods by a greater amount than the subject goods.[165] However, in nearly all of these 16 instances, the volumes of sales from these non-subject imports were orders of magnitude smaller than the volumes of sales from subject imports.[166]

[174] As for the three domestic benchmark products for SFUDS (chair, sofa and loveseat), a comparison with the three equivalent *reclining* fabric benchmark products (Benchmark Products 1, 4 and 8) reveals that the subject goods undercut the domestically produced like goods in all 24 instances (i.e. in all eight quarters for each of the three sets of products compared).[167] In all of these instances, the level of price undercutting was significant and easily exceeded the domestic price premium. In other words, *motion* fabric subject goods consistently and significantly undercut the

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159 The Tribunal notes that BMTC made some arguments with respect to the price effect of the subject goods from China and Vietnam, each considered separately. When the Tribunal is satisfied that an assessment of the cumulative effect of the dumping and subsidizing of the subject goods from more than one country is appropriate, as it has been satisfied here, it considers the volumes and prices of subject goods from all subject countries on a cumulative basis. Accordingly, BMTC's arguments in this regard were not considered by the Tribunal.

160 Exhibit NQ-2021-002-07A (protected), Table 43; Exhibit NQ-2021-002-07B (protected), Table 45.

161 Exhibit NQ-2021-002-06B, Tables 23, 31.

162 Exhibit NQ-2021-002-06A, Table 37.

163 *Ibid.*; Exhibit NQ-2021-002-07A (protected), Schedule 11.

164 Exhibit NQ-2021-002-07A (protected), Table 60.

165 *Ibid.*

166 *Ibid.*, Schedules 1-10.

167 *Ibid.*, Tables 47, 50, 54; Exhibit NQ-2021-002-6A, Table 58.

price of equivalent *stationary* fabric like goods, despite the fact that motion functionality increases production costs.[168] The Tribunal notes that stationary *leathe*r subject goods were, on average, priced higher than the equivalent stationary *fabric* like goods.[169] However, given the choice, some consumers could choose to pay a modest premium to purchase stationary leather subject goods instead of domestically produced SFUDS. This is corroborated by the evidence of Ms. Diana Sisto, Creative Director for Brentwood, according to which the price of motion and/or leather subject goods can actually be cheaper than Brentwood's price for its SFUDS and, in any case, consumers are likely to pay a bit extra to upgrade to leather or add motion features.[170]

[175] For sales to common accounts, the Tribunal observes significant price undercutting by the subject goods in most instances where comparisons were possible.[171] However, given the very low volumes of sales from domestic production and/or from subject imports for nearly all accounts,[172] and given the absence of any distinction made for the types or categories of products being sold, the Tribunal considered that these comparisons were not reliable and were thus given little weight.

[176] Finally, both Palliser and Brentwood made a total of 22 account-specific injury allegations, mainly of reduced sales volumes or sales lost to subject goods.[173] They claimed that the sales were lost or the volumes reduced because they were unable to compete with unfairly low pricing, which, based on the information they provided, appears to be in the same range as the level of price undercutting established by the unit price data in the Tribunal's investigation report.

[177] IKEA and RHI both submitted that the evidence presented by Palliser in support of its injury allegations appears to have been prepared after the fact for the purpose of this inquiry and, as such, is not credible and cannot be relied upon to establish a causal relationship between subject imports and the alleged lost sales or reduced volumes. IKEA added that the evidence presented is also generally deficient as many key details regarding the accounts and the transactions are not included.

[178] Ashley and Violino similarly submitted that the Tribunal should accord little weight to Palliser's allegations as they are vague and lack critical details, such as whether the products offered were "merchandized" with other UDS products and, in some cases, whether they were made of upholstered fabric or leather. They further submitted that the allegations made against them are simply wrong because Ashley or Violino did not sell the alleged products to the accounts in question, the alleged products involve what amounts to apples-to-oranges comparisons, or the allegations are impossible to refute because they fail to provide sufficient information.[174]

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168 Exhibit NQ-2021-002-A-05 at para. 23.

169 Exhibit NQ-2021-002-07A (protected), Tables 49, 52, 56; Exhibit NQ-2021-002-6A, Table 58.

170 Exhibit NQ-2021-002-A-09 at para. 15.

171 Exhibit NQ-2021-002-07A (protected), Tables 65-81.

172 *Ibid.*, Schedules 13-29.

173 Exhibit NQ-2021-002-10.21A (protected) at 60-62; Exhibit NQ-2021-002-A-08 (protected) at paras. 21-35, 39-43; Exhibit NQ-2021-002-A-10 (protected) at paras. 28-30. The large majority of the allegations were made by Palliser. The Tribunal also notes that Palliser made 11 allegations that pertained to competition with imports of SFUDS, which are not subject goods. Paragraph 37.1(1)(b) of the *Regulations* directs the Tribunal to consider the effect of the *dumped or subsidized goods* (i.e. the subject goods) on the price of like goods. These allegations were therefore not taken into consideration by the Tribunal.

174 Exhibit NQ-2021-002-T-04 at paras. 35-48; Exhibit NQ-2021-002-T-05 (protected) at paras. 35-48.

[179] For its part, HTL submitted that none of the allegations made against it are valid as it made no sales to any of the named customers during the POI and, in some cases, never made any sales at all.[175]

[180] The Domestic Producers responded that the claims attempting to discredit Palliser's account-specific injury allegations are flawed because Palliser undertakes extensive retail account engagement that provides reliable and credible market intelligence. They also provided publicly available information, made submissions and provided testimony which they believe rebut Ashley and Violino's claims that Palliser's allegations are wrong, or that they provided improper comparisons or insufficient information.[176] In their view, Palliser's allegations are probative evidence of the injury caused by subject imports.

[181] The Tribunal has previously recognized that account-specific injury allegations are necessarily the result of commercial intelligence gathered by domestic producers who do not always have access to primary sources of information and that, as such, it would be unreasonable to expect absolute precision.[177] However, in the present case, the allegations made by Palliser are admittedly far from meeting that standard. In fact, the allegations and the evidence presented in support thereof were thoroughly challenged during the hearing by some of the parties who responded to the allegations made against them.[178] Although there were doubts raised over some of these challenges,[179] by and large, they did appear to discredit a certain number of the allegations.

[182] That being said, the Tribunal notes that the deficiencies present in Palliser's account-specific injury allegations were not necessarily the result of Palliser's poor information gathering techniques or a lackadaisical approach to the whole endeavour. The testimony given by Mr. Jim Hunt, Vice-President of Sales for Palliser, did shed some light on some of the difficulties faced by Palliser in gathering information and arriving at the estimates upon which the allegations were based.[180] The Tribunal finds that Mr. Hunt's testimony in this regard was credible.

[183] The Tribunal is of the view that these difficulties demonstrate that making account-specific injury allegations in the context of inquiries involving non-commodity products can prove difficult. This was recognized by counsel for the Domestic Producers who noted that putting together allegations for UDS was much more complicated than for commodity steel products and candidly acknowledged that this was not the strongest part of their case.[181]

[184] The RCC noted that the non-commodity nature of UDS means that there is not direct competition between individual items, but that it is instead a value proposition evaluation on the basis of each specific product.[182] The Tribunal agrees. Indeed, its attempt at collecting model-specific information for comparable products through its Purchasers' Questionnaire (i.e. information similar to what is normally provided as part of account-specific injury allegations made by domestic producers) was not met with success, with some retailers indicating that this type of comparison did

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175 Exhibit NQ-2021-002-R-03 at paras. 17-18; Exhibit NQ-2021-002-R-10 (protected) at 3-5.
176 Exhibit NQ-2021-002-A-11 at paras. 114-121; Exhibit NQ-2021-002-A-12 (protected) at paras. 114-121; *Transcript of Public Hearing* at 160-162.
177 *Concrete Reinforcing Bar* (4 June 2021), NQ-2020-004 (CITT) at para. 79.
178 *Transcript of In Camera Hearing* at 272-285, 315-325.
179 See, for example, *Ibid.* at 326-328, 338.
180 *Transcript of In Camera Hearing* at 69-73, 77.
181 *Transcript of Public Argument* at 25-26.
182 *Ibid.* at 67.

not reflect how they purchased UDS.[183] This is not to say that price is not an important factor in purchasing decisions. To the contrary, as the Tribunal has already found above, price is a key factor in purchasing decisions. However, the Tribunal is of the view that, ultimately, price is a consideration for retailers when deciding which supplier to purchase from in order to fill a gap in their assortment, not necessarily when comparing two specific models with similar specifications. In these circumstances, it is understandable that Palliser could not reach the standard normally expected for allegations made in inquiries involving commodity products.

[185] The Tribunal notes that, aside from the model-specific details and information provided by Palliser as part of its account-specific injury allegations, it did hear credible testimony to the effect that both Palliser and Brentwood lost sales to subject goods at certain specific accounts because of price.[184] Therefore, while the Tribunal does not place much weight on the allegations made by Palliser, it does not discount them entirely either. They do provide some support for, and are consistent with, the price undercutting already demonstrated by the unit price data in the Tribunal's investigation report and, in particular, the unit price data pertaining to the sales of benchmark products. At the very least, they do not call into question the validity of those data. Moreover, while the evidence of the parties opposed cast doubt on the accuracy of certain elements of the account-specific injury allegations made by Palliser, the Tribunal finds that this evidence does not rebut the domestic producers' evidence that major retailers expect them to meet the low prices of the subject goods for comparable UDS or a similar value proposition.[185]

[186] In light of the foregoing, the Tribunal concludes that the subject goods consistently and significantly undercut the prices of the like goods over the POI.

Price depression

[187] The average selling prices of domestically produced like goods increased by 4 percent in 2018 and by 6 percent in 2019, but then decreased by 2 percent in 2020.[186] Over the POI as a whole, domestic prices increased by 8 percent.[187] In contrast, the average selling prices of subject goods increased in every period, for a total increase of 11 percent over the POI as a whole.

[188] For sales to retailers, which represent the majority of the domestic industry's sales, changes in the prices of like goods were almost identical to those above; they increased by 3 percent in 2018

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183 See, for example, Exhibit NQ-2021-002-19.19 (protected) at 18; Exhibit NQ-2021-002-19.20 (protected) at 18; Exhibit NQ-2021-002-19.21 (protected) at 15.

184 See, for example, *Transcript of Public Hearing* at 34-36; *Transcript of In Camera Hearing* at 78-79, 151.

185 Exhibit NQ-2021-002-A-09 at para. 16. See also Exhibit NQ-2021-002-A-07 at para. 18 where Mr. Hunt states that major retailers can purchase subject goods that are designed similarly to domestically produced UDS for a fraction of the price and, in effect, create a price ceiling that domestic producers are unable to surpass without risking a reduced or loss sales volume. At the hearing, Mr. Hunt added that retailers use imported goods' pricing as benchmarks against which Palliser's offering is measured. See *Transcript of Public Hearing* at 34. Ms. Sisto corroborated Palliser's evidence that retailers have an expectation of what the domestic producers' pricing, including Brentwood's, needs to be. See *Transcript of Public Hearing* at 52. Based on the totality of the evidence, it is undeniable that this expectation is rooted in the availability of comparable or even higher-value subject goods at low prices. Therefore, it is undeniable that the prices of subject goods generally undercut the prices of the like goods and that retailers compare domestic pricing to competitive subject goods' pricing in their purchasing decisions.

186 Exhibit NQ-2021-002-06B, Table 42.

187 *Ibid.*, Table 41.

and by 6 percent in 2019, but then decreased by 2 percent in 2020.[188] For sales to distributors, prices increased by 5 percent in 2018, by 7 percent in 2019 and by 1 percent in 2020.[189]

[189] The pricing data with respect to benchmark products confirm this general upward trend in prices as, although average domestic selling prices for all 14 benchmark products fluctuated from quarter to quarter, prices rose over the two-year period for which data were collected, at least when compared from end point to end point (i.e. from the first quarter of 2019 to the fourth quarter of 2020).[190]

[190] Overall, the Tribunal finds that prices of domestically produced like goods generally increased over the POI and, while there was a decrease in prices at the aggregate level in 2020, it was not significant by any measure. The Tribunal therefore concludes that the subject goods did not significantly depressed the prices of the like goods over the POI.

Price suppression

[191] In order to assess whether the subject goods have suppressed the prices of domestically produced like goods, the Tribunal typically compares the domestic industry's average unit COGS or costs of goods manufactured (COGM) with its average unit selling values in the domestic market to determine whether the domestic industry has been able to increase selling prices in line with increases in costs.[191]

[192] The domestic industry's per-unit COGS for domestic sales increased by 7 percent in 2018 and by 4 percent in 2019, before decreasing by 2 percent in 2020.[192] Average unit selling values for those domestic producers that provided their COGS increased by 4 percent in each of 2018 and 2019, before decreasing by 1 percent in 2020. Therefore, the only year during which an increase in COGS was not clearly met by an equivalent increase in domestic selling prices was 2018.[193] This price suppression, which the Tribunal cannot qualify as significant, resulted in a 2-percentage-point reduction in the domestic industry's gross margin in 2018. The margins remained unchanged in 2019 and 2020.

[193] The Domestic Producers submitted that price suppression as contemplated in the *Regulations* is not limited to "classic" price suppression which entails an inability to increase prices in the face of rising costs, but encompasses any situation where price increases "would otherwise likely have occurred." They claimed that domestic prices were already suppressed at the beginning of the POI and that, if it were not for the low-priced subject goods, the domestic industry could, and would, have raised its prices to obtain a more sustainable return on sales.

[194] While the Tribunal agrees that price suppression as described in paragraph 37.1(1)(b) of the *Regulations* is not limited to situations where an increase in costs is not met by an equivalent increase in selling prices, the Domestic Producers did not present any evidence as to what level of net income

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188 *Ibid.*, Table 46.

189 Exhibit NQ-2021-002-06A, Table 44.

190 Exhibit NQ-2021-002-07A (protected), Tables 47-58.

191 *Heavy Plate* at para. 118.

192 Exhibit NQ-2021-002-06A, Table 82. The changes in the domestic industry's per-unit COGM were identical once rounded.

193 The Tribunal notes that, in 2019, the increase in COGS was actually just over a half-percentage point more than the increase in selling prices. However, when the numbers are rounded, the increases are the same.

the domestic industry was earning prior to the POI, or should be earning above and beyond the level it was earning at the beginning of the POI. As indicated above, the Tribunal has not collected any information with respect to the volumes and prices of the subject goods and like goods, and with respect to the state of the domestic industry, prior to the POI. It is therefore unable to establish that domestic selling prices were suppressed in the manner claimed by the Domestic Producers.

[195] The Tribunal therefore concludes that the subject goods did not significantly suppress the prices of the like goods over the POI.

Conclusion

[196] The Tribunal finds that the subject goods significantly undercut the prices of domestically produced like goods over the POI, but that they did not significantly depress or suppress those prices.

Resulting impact on the domestic industry

[197] Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped or subsidized goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry.[194] These impacts are to be distinguished from the impact of other factors also having a bearing on the domestic industry.[195] Paragraph 37.1(3)(a) requires the Tribunal to consider whether a causal relationship exists between the dumping or subsidizing of the goods and the injury 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.

Sales and market share

[198] The total Canadian market expanded in volume by 8 percent in 2018 and by 7 percent in 2019, before contracting by 5 percent in 2020, for an overall increase of 10 percent over the POI.[196] The domestic industry underperformed relative to the market as domestic sales from domestic production declined by 13 percent in 2018, by 5 percent in 2019 and by a further 10 percent in 2020, for a total decline of 26 percent over the POI. By comparison, sales of subject goods increased by 67 percent over the POI.

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

195 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.

196 Exhibit NQ-2021-002-06B, Tables 23-24.

[199] The domestic industry's underperformance is clearly reflected in its market share, which fell from 48 percent in 2017 to 32 percent in 2020, a drop of 16 percentage points, or one third of the market share it held at the beginning of the POI.[197] The Tribunal notes that the rate of decline in the domestic industry's market share slowed over the POI as it decreased by 9 percentage points in 2018, by 4 percentage points in 2019 and then by 2 percentage points in 2020.[198]

[200] Conversely, the market share held by the subject goods increased from 35 percent in 2017 to 53 percent in 2020, a swing of 18 percentage points.[199] The subject goods therefore captured the entirety of the market share lost by the domestic industry over the POI. Similar to the trend shown in the domestic industry's decline in market share, the increase in the market share held by the subject goods also slowed over the POI as it increased by 9 percentage points in 2018, by 5 percentage points in 2019 and then by 4 percentage points in 2020.[200] The subject goods thus gained market share at approximately the same rate at which the domestic industry lost market share over the POI, indicating there is a strong correlation between the two. The market share held by non-subject imports remained relatively stable, decreasing by only 2 percentage points over the POI.

[201] Wayfair submitted that, as with import volumes, the rate of increase of the subject goods' market share steadily decreased over the POI, thereby suggesting that the resulting impact on the domestic industry has been on a declining trend.

[202] The Tribunal is of the view that this does not have an important bearing on the present case as the domestic industry's loss of market share over the POI as a whole was significant. In addition, even if a larger proportion of the domestic industry's market share was lost in 2018 and 2019, the domestic industry nonetheless continued to lose market share in 2020.

[203] In light of the foregoing, the Tribunal finds that the evidence demonstrates that the domestic industry lost sales and significant market share to the subject goods throughout the POI.

Financial performance

[204] As the Tribunal found that the subject goods significantly undercut the prices of domestically produced like goods but that they did not significantly depress or suppress those prices, the impact of the price undercutting was primarily limited to volume effects, leading, as seen above, to the domestic industry losing substantial sales and market share to the subject goods throughout the POI.[201] This was recognized by the Domestic Producers who submitted that, because the domestic industry already had very little margins to cut at the beginning of the POI, it was difficult for it to offer deeper price discounts or absorb cost increases, which resulted in lost sales and market share.[202] These volume effects, and the absence of any significant price depressive or suppressive effects, are readily apparent when examining the domestic industry's financial performance with respect to domestic sales.

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197 Exhibit NQ-2021-002-06A, Table 25.

198 *Ibid.*, Table 26. Due to rounding, these percentage-point decreases do not equal the aforementioned 16-percentage-point drop.

199 Exhibit NQ-2021-002-06A, Table 25.

200 *Ibid.*, Table 26.

201 The Tribunal has previously explained that it is not price undercutting *per se* that is injurious, but rather the volume and price effects that it engenders (see *Decorative Plywood* at para. 131).

202 Exhibit NQ-2021-002-A-01 at paras. 58-59.

[205] The domestic industry's per-unit gross margin decreased from $116 per piece in 2017 to $111 per piece in 2018, then increased marginally to $112 per piece in 2019 and remained at that level in 2020.[203] The 4 percent decrease in per-unit gross margin in 2018 was likely the result of price suppression, which the Tribunal did not qualify as significant. Although the Tribunal found that there was some minor price depression in 2020, it had no impact on the domestic industry's per-unit gross margin as its COGS decreased by a greater amount that year. Therefore, the subject goods had little overall impact on the domestic industry's per-unit gross margin over the POI.

[206] In contrast, the domestic industry's per-unit net income decreased from $29 per piece in 2017 to $5 per piece in 2020. This decline is the result of a significant increase in combined per-unit general, selling, administrative and financial expenses over the POI. These expenses increased by a total of 23 percent over the POI, whereas net sales value and COGS increased by 7 and 10 percent, respectively, over this period. As general, selling, administrative and financial expenses do not tend to vary in direct proportion to revenue, a loss of sales volume does not necessarily lead to a reduction, or as large of a reduction, in these expenses, which, as a result, increase on a per-unit basis. Therefore, the domestic industry's loss of sales volume in this case could be the reason for this drop in per-unit net income. However, given that many factors can have an impact on general, selling, administrative and financial expenses, the Tribunal will focus on the domestic industry's performance at the gross margin level.[204]

[207] On an aggregate basis, the domestic industry's gross margin decreased from $71.2 million in 2017 to $59.2 million in 2018, $57.1 million in 2019 and finally $50.6 million in 2020, for a total decrease of 29 percent over the POI, which is largely the result of the 26 percent decrease in net sales volume the domestic industry experienced over this period. The Tribunal considers this deterioration in the domestic industry's financial performance as significant, especially considering that lower gross margins ultimately lead to lower net income.

[208] The RCC noted that, in *Colour Television Receiving Sets*, the fact that the bulk of the financial losses were reported by only one producer was a factor that caused the Tribunal's predecessor to reach a no injury finding.[205] It claimed that, in the present case, most or all of the domestic industry's poor financial performance over the POI is attributable to Palliser. In order to support its claim, the RCC provided a table showing a summary of Palliser's costs, gross margin and net income as a percentage of its sales revenue, contrasted with the same data for the domestic industry, both with and without Palliser.[206] It submitted that, with Palliser's financial data removed, the decline in the financial performance of the domestic industry is not material.

[209] The Domestic Producers replied that, even if Palliser's financial performance were completely discounted from the rest of the domestic industry, there would still be injury in the form

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203 Exhibit NQ-2021-002-06A, Table 82. Unless otherwise indicated, all discussion pertaining to the domestic industry's financial performance in this section of the Tribunal's reasons is based on the information contained at Table 82 of the investigation report.

204 Ashley and Violino submitted that the greater or lesser absorption of amounts like general, selling, administrative and financial expenses often depend on the industry's production of non-like goods, business decisions and/or commercial environments unrelated to its production of like goods, and liabilities that were assumed prior to the period of investigation and that, for these reasons, the Tribunal benefits from examining the domestic industry's performance at the gross margin level (see Exhibit NQ-2021-002-T-04 at para. 52). The Tribunal generally agrees.

205 *Colour Television Receiving Sets*, CIT-13-85 [1986], C.I.T. No. 18 at 8.

206 Exhibit NQ-2021-002-D-11 (protected) at para. 167; Exhibit NQ-2021-002-D-29 (protected) at 3-4.

of reduced sales volume, revenue and profitability. They added that the RCC's analysis in which it removes Palliser from the domestic industry is misleading because it presents only percentages of revenue, which ignores the fact that domestic producer sales, even excluding those from Palliser, shrunk dramatically despite the growing market. They noted that, while Palliser attempted to maintain sales (i.e. volume) at the expense of margins (i.e. prices), the data suggest that the rest of the domestic industry attempted to hold margins and sacrifice sales.

[210] The Tribunal finds that the evidence on the record does not support the RCC's claim that most or all of the domestic industry's poor financial performance is attributable to Palliser. As the Domestic Producers noted, the RCC's analysis is misleading because it presents gross margin and net income as a percentage of sales revenue (i.e. net sales value). Presenting the information in this manner highlights the relative changes in costs and margins, in essence capturing the *price effect* of the subject goods. In other words, if there is price depression or suppression, this effectively creates a price-cost squeeze, which results in lower margins when expressed as a percentage of net sales value. However, presenting the information only in this manner does not provide a complete picture of the situation as it fails to account for the effect of lost sales on aggregate margins, i.e. the *volume effect* of the subject goods resulting from price undercutting.[207]

[211] The Tribunal has already indicated above that the impact of the price undercutting in this case has been primarily limited to volume effects and that the subject goods had little overall impact on the domestic industry's per-unit gross margin over the POI.[208] It logically follows that, if the Tribunal has already found that the subject goods had minimal price effects on the financial performance of the domestic industry with Palliser included, the fact that there were even fewer price effects with Palliser removed proves nothing.[209]

[212] As noted above, on an aggregate basis, the domestic industry's gross margin decreased by 29 percent over the POI as its net sales volume fell by 26 percent.[210] The evidence on the record shows that, even with Palliser removed, the domestic industry's gross margin and net sales volume declined significantly over the POI.[211] In fact, the domestic producers other than Palliser accounted for what the Tribunal considers to be a major proportion of the decline in gross margin and net sales volume experienced by the domestic industry. In any event, the Tribunal has already stated that it would proceed with its injury analysis by evaluating, on a collective basis, the domestic producers who constitute the domestic industry, but consider circumstances relating to individual producers as part of its assessment of other factors and materiality. There is no question that, on a collective basis, the domestic producers who constitute the domestic industry have seen a significant deterioration in their financial performance as it relates to domestic sales.

[213] The domestic industry's financial performance as it relates to export sales was noticeably better. While its per-unit gross margin decreased from 2017 to 2020, its total gross margin did the

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207 For example, a 20 percent gross margin on sales revenue of $1 million is quite different than the same margin on sales revenue of $10 million. In both scenarios, the gross margin is the same when expressed in percentage terms. However, when expressed in dollar terms, the difference is tenfold.

208 Changes in gross margins on a per-unit and percent share basis both capture price effects.

209 The Domestic Producers indicated that, even though Palliser attempted to maintain sales at the expense of margins, it ultimately was not able to maintain either. See Exhibit NQ-2021-002-A-11 at para. 95.

210 The difference of three percentage points between the decreases in the domestic industry's gross margin and its net sales volume is attributable to minor price suppression resulting from the subject goods in 2018.

211 Exhibit NQ-2021-002-D-29 (protected) at 3. The Tribunal has confirmed the accuracy of the RCC's data showing the financial results of the domestic industry without Palliser.

opposite and increased slightly over this same period.[212] The decline in the former appears to be the result of minor price suppression occurring over the POI, whereas the increase in the latter is due to an increase in net sales volume, which more than offset the decrease in per-unit gross margin. The Tribunal notes that the domestic industry's per-unit gross margins for its export sales were significantly higher than those for its domestic sales throughout the POI.[213]

Other performance indicators

[214] The domestic industry's production volumes for domestic sales declined by 12 percent in 2018, by 6 percent in 2019 and by a further 10 percent in 2020, for a total decline of 26 percent over the POI.[214] This total decline corresponds exactly to the total decline observed above for domestic sales from domestic production. As for the domestic industry's total production, it decreased by a total of 24 percent over the POI as production for export sales increased in 2018 and 2019, but then fell back to 2017 levels in 2020.

[215] Capacity utilization rates for production for domestic sales decreased by 13 percentage points over the POI as practical plant capacity remained relatively flat over the same period, save for a 2 percent increase in 2019.[215] Excess capacity was significant throughout the POI.

[216] The RCC submitted that the capacity utilization figures in the investigation report must be viewed with a critical eye in light of the consistent experience of retailers during the POI that domestic producers have been unable in practice to deliver on their promised lead times. It noted that this inability could be connected to raw material or labour shortages rather than practical plant capacity limitation.

[217] RHI submitted that many of the domestic producers that provided capacity utilization figures to the Tribunal did not explain how practical plant capacity was calculated as was required in the Producers' Questionnaire.

[218] The Tribunal heard testimony that the capacity utilization rates provided in response to the Tribunal's questionnaire were based on production taking place seven days a week, 365 days a year, and were thus theoretical rather than real.[216] The Tribunal is therefore unwilling to rely on the capacity utilization rates reported in the investigation report as an indication of the domestic industry's actual or real excess capacity. That being said, regardless of the manner in which practical plant capacity was calculated by questionnaire respondents, the 13-percentage-point drop in the domestic industry's capacity utilization rate over the POI remains representative of the actual decline in its production volumes. The question as to whether factors other than the dumping and subsidizing of the subject goods, such as raw material and labour shortages, are the cause of the domestic industry's inability to maintain its production volumes and capacity utilization rates at 2017 levels throughout the POI, or even increase them to track the growth witnessed in the Canadian market for UDS in 2018 and 2019, will be addressed further below.

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212 Exhibit NQ-2021-002-06A, Table 83.

213 The domestic industry's total gross margins on export sales were smaller than those for its domestic sales due to comparatively lower net sales volume.

214 Exhibit NQ-2021-002-06A, Table 88; Exhibit NQ-2021-002-07A (protected), Table 88.

215 *Ibid.*

216 *Transcript of In Camera Hearing* at 37, 106.

[219] Turning to indicators related to direct employment, the domestic industry's number of employees increased by 1 percent in each of 2018 and 2019, before declining by 2 percent in 2020 and effectively returning to 2017 levels.[217] There is evidence on the record indicating that some domestic producers received COVID-related wage subsidies in 2020, which likely explains why the number of employees did not decrease by a larger amount. However, hours worked and wages paid both declined in 2018, increased slightly in 2019 and then declined more significantly in 2020, for a net decrease over the POI. This indicates that, on average, each employee was generally working fewer hours in 2020 than in 2017. Productivity in terms of pieces per hour worked also generally declined over the POI.

[220] Inventories held by domestic producers increased substantially over the POI, although, in absolute terms, they still represented a relatively minor proportion of the domestic industry's total annual production volumes.[218] After increasing in 2018, investments made by the domestic industry fell in 2019 and 2020.

[221] Finally, some domestic producers claimed that the increased presence of the subject goods in the Canadian market had negative effects on their return on investment, cash flow, growth, ability to raise capital and/or production development efforts during the POI.[219]

Magnitude of the margin of dumping and amount of subsidy

[222] The margins of dumping calculated by the CBSA for Chinese and Vietnamese exporters ranged from 9.3 to 188.0 percent and the amounts of subsidy for those exporters in respect of which the subsidy investigation was not terminated ranged from 1.1 to 81.1 percent.[220] The Tribunal notes that these are margins of dumping and amounts of subsidy of a considerable magnitude. While this factor generally supports the view that the subject goods had a negative impact on the domestic industry, the Tribunal does not consider that these margins of dumping and amounts of subsidy necessarily represent the level of the injurious effects caused by the actual prices in Canada of the subject goods during the POI. Accordingly, the Tribunal placed less weight on this factor in its injury analysis.

Conclusion

[223] On the basis of the factors above, the Tribunal finds that the domestic industry suffered injury throughout the POI in the form of lost sales and market share, which, in turn, had a negative impact on domestic production, profitability and, to a lesser extent, employment, inventories and investments.

Other factors and causation

[224] As stated earlier, paragraph 37.1(3)(a) of the *Regulations* requires the Tribunal to consider whether a causal relationship exists between the dumping or subsidizing of the goods and the injury, on the basis of the volume, the price effect, and the impact on the domestic industry of the subject goods. In order to do so, the Tribunal must distinguish the impact of the subject goods from the

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217 Exhibit NQ-2021-002-06A, Tables 85-86.
218 *Ibid.*
219 Exhibit NQ-2021-002-07A (protected), Table 91.
220 Exhibit NQ-2021-002-04 at 17-20.

impact of other factors also having a bearing on the state of the domestic industry.[221] In other words, the Tribunal must determine whether the subject goods, *in and of themselves*, caused injury to the domestic industry. The Tribunal cannot assume that the mere presence and availability of the subject goods in the Canadian market resulted in material injury to the domestic industry.[222]

[225] However, the previous analysis of the impact of the subject goods on the state of the domestic industry reveals more than a correlation between the increased presence of subject goods and injury to the domestic industry during the POI. It is indicative of a relationship of cause and effect between them and the injury. The Tribunal's task is to complete the analysis by considering whether, and to what extent, any factors other than the dumping and subsidizing of the subject goods have also injured the domestic industry over this period. The question is whether, despite the losses suffered by the domestic industry that may be attributable to other factors, the dumping and subsidizing of the subject goods remain a cause of material injury.[223]

[226] The parties opposed raised an array of factors other than the dumping and subsidizing of the subject goods, which they claimed have caused any injury Palliser and the domestic industry may have suffered over the POI. In fact, the parties opposed adopted an "everything but the kitchen sink" approach to the issue of other factors. While the Tribunal is cognizant of the fact that this was likely a function of the large number of parties opposed in this case and their varied experiences as purchasers within the Canadian market, the number of other factors raised, in and of itself, has no bearing on the Tribunal's causation analysis. The Tribunal must only take into account those factors for which the evidence indicates they caused injury to the domestic industry during the POI.

[227] On this last point, the Tribunal notes that, just as the domestic industry may, in theory, already be injured by the subject goods at the beginning of the POI, it may also already be injured by other factors. As the Tribunal stated above, it is unable to establish that the domestic industry was injured prior to the POI because it has not collected data, and there is no information on the record, with respect to the volumes and prices of the subject goods and like goods, and with respect to the state of the domestic industry, during this period. In the absence of such information, the Tribunal is also unable to determine the impact, if any, of other factors on the state of the domestic industry prior to the POI. Therefore, just as the Tribunal's injury analysis was performed by considering *changes* in the volume of the goods, their effect on the price of like goods and their resulting impact on the state of the domestic industry *during* the POI, its assessment of other factors must be conducted on that same basis.

[228] This issue was addressed by the WTO Panel in *EU – Biodiesel* who, in considering Argentina's claim that the European Union had improperly concluded that domestic producers' lack of vertical integration and access to raw materials were not a cause of injury, stated the following:

> . . . The concept of injury envisaged by Article 3 [of the WTO ADA] relates to negative ***developments*** in the state of the domestic industry. Article 3 is not intended to address differences in the structure of the domestic industry as compared to that of the exporting

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221 See paragraph 37.1(3)(b) of the *Regulations.*

222 *Silicon Metal* at para. 109.

223 In the words of the WTO's Appellate Body, an investigating authority is required to determine whether, in light of the effects of other known factors, the subject imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry. See Appellate Body Report, *EU – Polyethylene Terephthalate (Pakistan)*, WT/DS486/AB/R at para. 5.226.

> Member. Rather, it is clear from the text of Article 3.5 and from its indicative list of such "other factors" – which all pertain to ***developments*** in the situation of the domestic industry – that the authority is not required to conduct a non-attribution analysis with respect to features that are inherent to the domestic industry and have remained unchanged during the period considered by the investigating authority for purposes of its injury analysis.[224]
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> [Footnotes omitted, emphasis in original]

[229] The Tribunal carefully considered all of the other factors which the parties opposed claimed caused injury to the domestic industry. However, the Tribunal ultimately found that a significant number of these factors were related to features that are inherent to the domestic industry, or to circumstances that predated the POI and remained unchanged during that period, and thus could not have been the cause of any injury that became manifest during the POI.[225] These other factors are the following:[226]

- The domestic industry is extremely fragmented and, as such, individual domestic producers are constrained in their production capacity and cannot achieve economies of scale, which forecloses the possibility of supplying major Canadian retailers on a mass market scale.

- Domestic producers have decided to focus on the higher-end and custom segment of the market.

- Domestic producers have performed poorly in addressing retailer needs for design innovation or for exclusive designs.

- Domestic producers are limited in the scope and breadth of UDS styles they are capable of offering, which precludes them from supplying design-centric retail brands.

- Domestic producers are cost inefficient because they are forced to import most of their materials and lack the necessary infrastructure to build products competitively in Canada (i.e. lack of vertical integration).

- Domestic producers lack unique technical capabilities and skills required to produce certain complex products.

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224 Panel Report, *EU – Biodiesel (Argentina)*, WT/DS473/R [*EU – Biodiesel*] at para. 7.522.

225 Where the parties opposed raised other factors, but failed to provide specific details or present evidence indicating that there had been a change *during* the POI, the Tribunal assumed that there had not been such a change. The Tribunal notes that, even if there had been a change with respect to some of these factors during the POI, it would not view their impact on the state of the domestic industry as significant compared to that of the subject goods.

226 The Tribunal notes that the RCC acknowledged that numerous other factors predate the POI. See Exhibit NQ-2021-002-D-10 at para. 90. The Tribunal further notes that there was contested evidence on these alleged shortcomings of the domestic industry and their impact on its overall state. For example, the claim that the domestic industry is limited in terms of design aesthetics is not very credible in view of the evidence that certain domestic producers supply retailers such as Dufresne and JC Perreault that place an emphasis on style. On balance, even assuming that these alleged adverse trends were present in the marketplace before the POI, the Tribunal is not persuaded that their continuance would have contributed, in a material way, to the deterioration of the overall performance of the domestic industry during the POI.

- Domestic producers lack particular environmental certifications, such as the Forest Stewardship Council (FSC).

- By deciding to set up UDS manufacturing operations in Mexico nearly two decades ago, Palliser abandoned the Canadian market for lower-end UDS to foreign production.

- Domestic producers refuse to sell to some retailers, such as Costco, due to concerns related to existing relationships with other customers.

- Domestic producers have not approached, and have no interest in supplying, some retailers such as IKEA.

- Certain retailers are foreclosed from purchasing from domestic producers for contractual reasons or because of their decision to procure UDS on a global basis for reasons of brand consistency and supply chain efficiency.

[230] The other factors which the Tribunal was of the view merited further consideration are addressed below.

Non-subject imports

[231] The Domestic Producers recognized that imports of SFUDS from China and Vietnam likely injured the domestic industry to some extent during the POI. However, they contended that the subject goods likely had a more significant impact as they represented a larger share of the broader market for UDS (i.e. the market that includes sales of SFUDS imported from all sources). They also submitted that there is downward substitutability between UDS meeting the product definition and SFUDS, which means that the subject goods directly caused injury to domestic producers of both UDS meeting the product definition and SFUDS, whereas imports of SFUDS from China and Vietnam likely caused injury only to domestic producers of SFUDS.

[232] The Domestic Producers proposed to allocate injury between the subject goods and imports of SFUDS from China and Vietnam by looking at their relative growth by value over the POI. They did this by using the shares of the broader market held by the subject goods and imports of SFUDS from China and Vietnam at the beginning of the POI and holding them constant across 2018, 2019 and 2020.[227] This enabled the Domestic Producers to calculate yearly sales volumes of subject goods and imports of SFUDS from China and Vietnam in a hypothetical scenario where neither gained market share at the expense of the domestic industry. The difference between these hypothetical volumes and actual historical volumes are the sales volumes lost by the domestic industry, which the Domestic Producers then multiplied by the domestic industry's unit values for UDS meeting the product definition and SFUDS to obtain the total value of the lost sales. Using this methodology, the Domestic Producers estimated that, from 2018 to 2020, 70 to 75 percent of the total value of lost sales was attributable to the subject goods.

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[227] The Domestic Producers fully explained their methodology and results in their case brief. They also updated their results to account for revisions that were made to the investigation report during the inquiry. See Exhibit NQ-2021-002-A-01 at paras. 99-108; Exhibit NQ-2021-002-A-02 (protected) at paras. 106-107; Exhibit NQ-2021-002-A-11 at paras. 36-37; Exhibit NQ-2021-002-A-12 (protected) at para. 37.

[233] IKEA argued that the Domestic Producers distinguished, without justification, SFUDS from China and Vietnam from SFUDS from any other country. It submitted that, since these must all be treated as fairly traded products, there is no reason to exclude data concerning SFUDS from the United States and other countries, especially when those data show that SFUDS from these sources increased significantly during the POI.

[234] The RCC similarly submitted that the evidence on the record demonstrates that there are substantial imports of UDS meeting the product definition from non-subject countries and imports of SFUDS from countries other than China and Vietnam. It added that these imports are competitive in price with the subject goods.

[235] The Tribunal is of the view that the data in the investigation report indicate that non-subject imports and imports of SFUDS from countries other than China and Vietnam could not reasonably have injured the domestic industry over the POI. Sales of non-subject imports from the United States declined over the POI, and while sales of non-subject imports from other countries increased, their market share did not.[228] Prices of all non-subject imports were also significantly higher than those of the subject goods at the aggregate level.[229] As for imports of SFUDS from the United States and other countries, although their sales increased over the POI, the increase in sales of imports of SFUDS from China and Vietnam accounted for the large majority of the total increase in sales of imports of SFUDS from all sources.[230] The share of the broader market held by imports of SFUDS from China and Vietnam increased over the POI, whereas the shares held by imports of SFUDS from the United States and from other countries remained essentially flat. Moreover, imports of SFUDS from China were priced lower than all other imports of SFUDS, and imports of SFUDS from Vietnam were mostly lower priced than imports of SFUDS from the United States.[231]

[236] On the basis of the above, the Tribunal is satisfied that, other than the subject goods, only imports of SFUDS from China and Vietnam injured the domestic industry to a perceptible extent during the POI. In terms of attempting to estimate the proportion of the injury suffered by the domestic industry that should be attributed to each of the subject goods and imports of SFUDS from China and Vietnam, the Tribunal is of the view that the Domestic Producers' approach described above is reasonable in the circumstances.[232] As argued by the Domestic Producers, there is downward substitutability between UDS meeting the product definition and SFUDS, such that the subject goods likely injured domestic producers of both UDS meeting the product definition and

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228 Exhibit NQ-2021-002-06B, Table 23; Exhibit NQ-2021-002-06A, Table 25.

229 Exhibit NQ-2021-002-06B, Table 41. As previously noted, for benchmark products, non-subject imports from the United States and/or other countries were priced lower than the subject goods only in one fifth of the instances were comparisons were possible and, in nearly all of those instances, the volumes of non-subject imports were much smaller than the volumes of subject imports. See Exhibit NQ-2021-002-07A (protected), Table 60; Exhibit NQ-2021-002-07A (protected), Schedules 1-10.

230 Exhibit NQ-2021-002-07B (protected), Table 23.

231 *Ibid.*, Table 41.

232 The Tribunal performed its own calculations following the Domestic Producers' approach described above and, although it arrived at slightly different unit values of domestically produced UDS, the results were substantially the same.

SFUDS, but imports of SFUDS from China and Vietnam likely only injured domestic producers of SFUDS.[233]

[237] In light of the foregoing, the Tribunal finds it appropriate to consider that up to 25 percent of the injury suffered by the domestic industry over the POI may be attributable to imports of SFUDS from China and Vietnam.

The rise of e-commerce

[238] The RCC submitted that, with the rise of e-commerce, consumers now demand and expect a wide range of product options at the lowest prices and that the products be available immediately and with convenient and inexpensive delivery. It submitted that these trends have increased price pressure across the board on retail products, including furniture.

[239] Wayfair noted that all of the Domestic Producers whose websites do not allow for online shopping by customers suffered a loss in market share during the POI. It submitted that Palliser, Elran and Jaymar failed to develop or implement a coherent e-commerce strategy, which has caused them to miss out on the growth of online sales and materially contributed to their loss of market share and lagging sales.

[240] RHI similarly submitted that a failure of the domestic industry to successfully adapt to the change to e-commerce cannot be blamed on the subject goods.

[241] The Domestic Producers responded that, as much as consumers may want low prices, they are not entitled to them as expectations of low prices do not excuse dumping and subsidizing. They submitted that by sourcing, advertising and selling dumped and subsidized products, major retailers have created and reinforced consumer expectations of injuriously low prices.

[242] The Domestic Producers submitted that lack of e-commerce sales channels cannot be an explanation for the subject goods gaining market share at the expense of domestically produced goods as there is no evidence that exporters of subject goods have their own e-commerce channels. They noted that, in fact, the largest Chinese and Vietnamese UDS producers are all manufacturers that sell wholesale to Canadian retailers, just like most domestic producers.

[243] The Domestic Producers also noted that the parties opposed took inconsistent positions as Wayfair faulted the domestic producers for not operating their own e-commerce channels, while the retailers represented by the RCC indicated that they would drop domestic producers like Palliser if they were to develop e-commerce strategies that compete with them.

[244] On the issue of consumers' expectation of low prices, the Tribunal has already indicated above that the reasons for which price may be an important consideration in retailers' purchasing decisions are not relevant for the purpose of its injury analysis. As such, the Tribunal agrees that

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233 As noted above, this was corroborated by the evidence of Ms. Sisto, who indicated that the price of motion and/or leather subject goods can actually be cheaper than Brentwood's price for its SFUDS. See Exhibit NQ-2021-002-A-09 at para. 15.

consumers are not *entitled* to low prices. Their expectations of low prices, regardless of how they might have come about, do not excuse the injurious dumping and subsidizing of the subject goods.[234]

[245] With respect to the domestic industry's lack of e-commerce sales channels or failure to adequately adapt to the rise of e-commerce, the Tribunal is not persuaded that this has contributed to any of the injury suffered by the domestic industry over the POI. As previously mentioned, the majority of sales of domestically produced like goods and imports of UDS meeting the product definition are made directly to retailers, many of which import the subject goods themselves. Domestic producers therefore compete head-to-head with exporters or foreign producers to make sales to these retailers, who can be e-commerce services providers like Wayfair and Amazon or traditional retailers that also make online sales to consumers.[235] Despite there being no evidence that these exporters or foreign producers have their own e-commerce channels, sales of subject goods nonetheless increased by 67 percent over the POI and gained 18 percentage points in market share at the expense of the domestically produced like goods.[236] This suggests that, contrary to what the parties opposed have claimed, the lack of e-commerce sales channels does not appear to have played an important role in the domestic industry's poor performance over the POI.

[246] The Tribunal notes that, while domestic producers could have increased sales made through e-commerce channels by being more proactive in developing or implementing various e-commerce strategies,[237] doing so could also have potentially resulted in the loss of sales to retailers who do not want to find themselves in direct competition with their suppliers.[238] Domestic producers would not risk their core business to win a small percentage of direct e-commerce sales.

[247] There is also evidence which indicates that it is generally more difficult to sell UDS online given that some consumers still prefer to be able to touch, feel and sit in the product in a physical showroom before deciding to make a purchase.[239] While consumers increasingly go online in order to research products and compare designs and prices, the data show that a large proportion of them still went to a brick-and-mortar store to make the final purchase during the POI.[240]

[248] As such, while e-commerce is certainly slated to keep growing at a rapid pace in the years ahead, and the manner in which the industry operates may fundamentally change as a result, the

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234 As the Tribunal has noted before, even where imports are simply meeting or tracking falling domestic prices, they are not entitled to "cross the line" into injurious dumping. See *Flat Hot-Rolled Carbon and Alloy Steel Sheet Products* (2 July 1999), NQ-98-004 (CITT) at 29. Thus, the line is clearly crossed where, as is the situation in this case, the subject goods are the price leaders and, as such, are an important factor contributing to the consumers' low-price expectations.

235 Domestic producers and exporters are therefore both wholesale suppliers to retailers. Domestic producers do also compete head-to-head with exporters or foreign producers to make sales to distributors, who then make sales to retailers.

236 Exhibit NQ-2021-002-06B, Table 23; Exhibit NQ-2021-002-06A, Table 25.

237 Palliser recently hired Mr. Steve Ambeau as its first Chief Marketing Officer, whose role will include the development and implementation of an e-commerce strategy. See Exhibit NQ-2021-002-P-01 at 87; *Transcript of Public Hearing* at 117-118, 122.

238 Exhibit NQ-2021-002-A-15 at para. 49; Exhibit NQ-202-002-D-20 at para. 32; *Transcript of In Camera Hearing* at 201.

239 *Transcript of Public Hearing* at 280-281, 303; Exhibit NQ-2021-002-A-15 at para. 48.

240 *Transcript of Public Hearing* at 377, 506-507; Exhibit NQ-2021-002-E-07 at 7-10. The Tribunal acknowledges that an increasing number of consumers made purchases online during the POI, especially in 2020 due to COVID-19-related store closures. However, the evidence indicates that the majority of purchases of UDS during the POI were still made in-store.

Tribunal is of the view that the domestic industry's lack of e-commerce sales channels or failure to develop effective e-commerce strategies was not a cause of the injury it suffered over the POI.

Changes to the composition of the retail market

[249] The RCC submitted that there have been a number of notable bankruptcies and exits of furniture retailers in recent years that have redistributed UDS purchasing patterns at the mass merchandiser level and exerted downward pressure on retail prices, the most notable being the disappearance of Sears Canada Inc. (Sears), who closed all of its stores in Canada in early 2018.

[250] The RCC and many of the other parties opposed submitted that, since Sears was one of Palliser's most important customers, to which it sold a significant amount of UDS between 2015 and 2017, the loss of the account had an important impact on Palliser's financial performance during the POI.

[251] The Domestic Producers submitted that Sears' closure did not remove demand for UDS from the market as the demand formerly served by Sears would have been redistributed to other retailers when it closed. They added that Palliser was therefore in a position to continue serving that demand by making sales to those other retailers, but that increased volumes of low-priced subject goods likely took those sales away.

[252] The Tribunal finds that, even without the presence of the subject goods in the market, Palliser would likely not have been able to recapture all of the sales it lost as a result of the loss of the Sears account by selling to those retailers who ultimately benefitted from Sears' demise. Therefore, the loss of the account had an undeniable impact on Palliser's sales and financial performance during the POI. That being said, the parties opposed have exaggerated that impact by taking the total sales Mr. DeFehr indicated Palliser made to Sears from 2015 and 2017[241] and making incorrect assumptions with respect to how those sales were distributed.

[253] The evidence on the record demonstrates that the large majority of the sales made to Sears by Palliser in that three-year period were made in the first two years.[242] Consequently, the decline in Palliser's net sales value from 2017 to 2018, the only year-over-year comparison falling within the Tribunal's POI, was much lower than the parties opposed suggested and did not account for the totality of the decline in Palliser's net sales value during that one-year span.[243]

[254] While the RCC alluded in its brief to the exits of other furniture retailers in recent years, the focal point of its arguments and evidence was the bankruptcy of Sears. Therefore, the Tribunal is unable to conclude that the other changes in the composition of retail sector had the effect of redistributing demand in such as manner as to have a significant adverse impact on the overall performance of the domestic industry.

[255] In light of the foregoing, the Tribunal finds that some of the injury suffered by Palliser in 2017-2018 is attributable to the loss of the Sears account. However, as the Tribunal noted above, even with Palliser removed, the domestic industry's financial performance declined significantly over the POI.

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241 Exhibit NQ-2021-002-A-06 (protected) at para. 33.
242 See PI-2020-007-03.01 (protected) at 225.
243 Exhibit NQ-2021-002-10.21A (protected) at 29, 40.

Failed relationships with major customers

[256] The RCC submitted that interpersonal relationships and poor business decisions on the part of the domestic producers have caused major customer relationships to fail. In particular, it points to Palliser's experience with Leon's as an example of a relationship that ended poorly based on such issues as quality standards, missed delivery commitments and Palliser's unilateral decision to terminate its custom upholstery program with Leon's.[244] According to the RCC, Palliser's decision resulted in lost sales volume that cannot be attributed to the subject goods. It added that, when news about the Leon's program circulated in the marketplace, this soured Palliser's relationship with other customers.

[257] The Domestic Producers replied that the insurmountable point of contention between Palliser and Leon's has been price. They submitted that Leon's expectations regarding low prices arising from the availability of subject imports made it unsustainable for Palliser to continue selling to Leon's. They added that this was not a mutually beneficial or even respectful arrangement in which Palliser was willing to continue.

[258] Palliser and Leon's have a long history dating back to the 1970s, but which, according to Leon's, became acrimonious in the late 1990s and early 2000s as a result of a contract dispute.[245] According to Palliser, the relationship ended in the mid-2000s after it could no longer compete on price with Chinese imports.[246] In 2017, a new Palliser vice-president, Mr. Mark Wiltshire, who previously worked for Leon's, managed to reconcile the relationship, and the companies eventually signed a supplier agreement for a new custom UDS program in which the customer could choose among a selection of covering materials and frames, and Palliser would deliver the product within 30 days.[247] Palliser gave notice to Leon's in February 2020 that it was terminating the program effective May 2020.[248]

[259] According to Palliser, it terminated the program because Leon's would not accept to renegotiate or adjust the pricing which Mr. Wiltshire had offered Leon's to conclude the agreement, which Palliser now viewed as too low to be sustainable.[249] For its part, Leon's viewed Palliser's attempts to renegotiate the terms of their agreement as opportunistic given that Leon's had achieved a certain level of success and invested heavily in rolling out the program.[250] Mr. Graeme Leon, President of Leon's furniture division, also testified that, after the termination of the program by Palliser, Leon's set up custom programs with various other domestic producers in order to be able to deliver custom UDS to customers in 30 days as imports take too long to deliver.[251]

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244 The RCC also raised the issue of Palliser's relationship with The Brick. However, the Tribunal notes that, according to the RCC, The Brick no longer purchased UDS from Palliser well before the start of the POI. Since this relationship ended prior to the POI, it cannot be said that this was the cause of any injury suffered by Palliser during the POI.

245 Exhibit NQ-2021-002-D-14 at paras. 26-27.

246 Exhibit NQ-2021-002-A-15 at paras. 13-14.

247 *Ibid.* at paras. 15-16; Exhibit NQ-2021-002-D-14 at paras. 28-29; *Transcript of Public Hearing* at 222.

248 Exhibit NQ-2021-002-A-15 at para. 28; Exhibit NQ-2021-002-D-14 at para. 40.

249 Exhibit NQ-2021-002-A-15 at paras. 17, 21-24; Exhibit NQ-2021-002-A-16 (protected) at para. 18; *Transcript of In Camera Hearing* at 28. Mr. Wiltshire left Palliser in August 2019 (see Exhibit NQ-2021-002-A-15 at para. 18).

250 Exhibit NQ-2021-002-D-14 at paras. 37, 43.

251 *Transcript of Public Hearing* at 238, 277.

[260] On the basis of the evidence on the record, the Tribunal finds that Leon's expectations regarding low prices arising from the availability of low-priced subject imports precluded Palliser from increasing its prices and thus made it unsustainable for it to continue selling to Leon's. The evidence indicates that Palliser sought price increases from Leon's and wanted to discontinue its opening price point UDS frame, but Leon's viewed this as critical to its assortment and believed that it would be at a competitive disadvantage without it.[252] The Tribunal understands this to mean that Leon's had to be price-competitive with other retailers who have access to subject goods at this opening price point. The Tribunal finds that this is likely the key reason why Leon's entered into an agreement with Palliser on the basis of what turned out to be unsustainably low prices.[253] The fact that the prices expected by Leon's were unsustainably low is well supported by the evidence.[254] Moreover, while Mr. Leon testified that Leon's set up custom programs with other domestic producers, the evidence suggests that the gap left by Palliser may have been partially filled by subject imports.[255]

[261] As for the souring of Palliser's relationship with other customers, the evidence indicates that Dufresne, upon learning of the preferential delivery and pricing terms offered to Leon's, also requested a pricing discount from Palliser to match the prices it was offering to Leon's.[256] However, given its finding that the low prices offered to Leon's by Palliser were influenced by low-priced subject imports, the Tribunal also finds that any discount Palliser may have offered to Dufresne to maintain sales and their relationship was also indirectly the result of subject imports.

[262] In light of the foregoing, the Tribunal finds that the sales volume lost by Palliser as a result of its failed relationship with Leon's and any reduced pricing offered to Dufresne were the result of the subject goods.

COVID-19 and supply constraints

[263] In addition to the COVID-19 pandemic itself, the parties opposed raised a number of other factors, the effects of which appear to have been exacerbated with the onset of the pandemic. Given their interrelatedness, and their occurrence during the same time period (i.e. in 2020), the Tribunal addressed them together.

[264] The RCC submitted that the COVID-19 pandemic caused demand for UDS to spike, but that this has not necessarily translated into higher sales because of supply constraints resulting from forced shutdowns of manufacturers and retailers, both in Canada and abroad, as well as material shortages and constrained shipping availability. It added that certain domestic producers, which

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252 Exhibit NQ-2021-002-D-15 at paras. 36, 38-39.

253 Although Mr. Leon and Mr. Brad Dawson, Merchandise Manager for Leon's, both stated that no mention was ever made of imports from Asia when the parties were negotiating the program or when Palliser terminated the program (see Exhibit NQ-2021-002-D-14 at para. 40; *Transcript of Public Hearing* at 225-226), the Tribunal does not take this to mean that they did not have expectations regarding low prices arising from the availability of subject imports. On balance, the Tribunal accepts Mr. DeFehr's evidence, according to which it is the availability of large volumes of unfairly priced subject goods and its ability to turn to alternative low-price sources that enabled Leon's to resist price increases and, ultimately, made it unsustainable for Palliser to continue selling to Leon's. Exhibit NQ-2021-002-A-16 at paras. 19-29.

254 *Transcript of In Camera Hearing* at 30-31, 141-142.

255 *Transcript of Public Hearing* at 239-240, 296.

256 Exhibit NQ-2021-002-D-23 at paras. 46-47; *Transcript of Public Hearing* at 340-342.

include Palliser, have been challenged for years in meeting promised delivery times to their customers, but that this has been exacerbated by the pandemic.

[265] Wayfair submitted that the evidence establishes that the COVID-19 pandemic has had a distorting effect on the data generated for 2020 and that any injury suffered during that year should be properly attributed to the pandemic. It also noted that the average delivery time for domestic producers is longer than for imports from the United States and only slightly shorter than for non-subject imports from other countries.

[266] RHI noted that the vast majority of domestic producers who responded to the Tribunal's Producers' Questionnaire indicated that the COVID-19 pandemic had adverse impacts on production. It added that these negative impacts were not only related to government-mandated shutdowns, but other issues as well.

[267] The Domestic Producers submitted that, despite a modest drop in the total market in 2020, volumes of subject goods continued to increase and take market share from the domestic industry, which suggests that the COVID-19 pandemic was not likely a significant factor in the domestic industry's performance in 2020. They added that, even if the Tribunal were to disregard 2020, the largest increases in subject goods and the largest decreases in domestic industry performance occurred from 2017 to 2019. With respect to delivery times, the Domestic Producers submitted that, other than during the pandemic and during an anomalously long delay in the first half of 2019, Palliser has had respectable delivery times.

[268] There is no question that domestic producers were adversely impacted by the COVID-19 pandemic. Responses to the Tribunal's Producers' Questionnaire confirm that domestic producers were impacted in many ways, including by having to close their manufacturing facilities, in some cases for up to two months, by facing employee retention and absenteeism issues once reopened, reduced productivity, lack of access to raw materials and transportation delays. During the hearing, the Tribunal heard testimony from witnesses for domestic producers indicating how they were impacted by the pandemic and how this negatively affected their ability to effectively utilize their capacity and to maintain lead times.[257] Testimony from witnesses for retailers also confirmed that retailers generally had difficulty sourcing from domestic producers due to the pandemic.[258]

[269] With respect to lead times specifically, while the evidence discussed above does clearly show that they deteriorated due to the effects of the COVID-19 pandemic, the evidence on the record also indicates that lead times were generally acceptable prior to the pandemic, when domestic production and sales volumes were *higher*.[259] In fact, the data in the Tribunal's investigation report show average delivery times for domestically produced goods as being one to two months shorter than those of subject imports.[260] As for the data presented by the RCC regarding average lead times

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257 *Transcript of Public Hearing* at 46, 53, 90-91, 184; *Transcript of In Camera Hearing* at 80, 107-108, 112-113, 149-151.

258 *Transcript of Public Hearing* at 240-241, 244, 304, 400; *Transcript of In Camera Hearing* at 348-349.

259 See, for example, *Transcript of Public Hearing* at 178-180, 400; *Transcript of In Camera Hearing* at 267.

260 Exhibit NQ-2021-002-06A, Table 10.

encountered by Dufresne and Leon's in the last few years, the Tribunal is of the view that they primarily show that lead times only really became an issue after the onset of the pandemic.[261]

[270] As seen from the evidence mentioned above, domestic producers were clearly impacted by the COVID-19 pandemic. However, the pandemic not only had an impact on producers in Canada, it also had an impact on producers in the rest of the world, including in Asia. Indeed, the Tribunal heard testimony to the effect that retailers also had difficulty sourcing UDS products from other countries during this time.[262] Overall, the Tribunal finds that there is no clear evidence that the situation faced by the domestic producers was not also faced by foreign producers and exporters.

[271] The Tribunal adds that, if the COVID-19 pandemic had had a disproportionate impact on domestic producers, this would have been reflected in the trends observed in the data from the investigation report. As discussed above, the rate of decline in the domestic industry's market share slowed over the POI. If the rate had *increased* in 2020, the Tribunal might have been inclined to consider that some of that injury should be attributed to the effects of the pandemic. However, in this case, the data suggest that 2020 simply represented a continuation of previously observed trends, with the pandemic likely affecting domestic and foreign producers to the same general degree.

[272] In light of the foregoing, the Tribunal sees no reason that would prevent it from attributing the injury suffered by the domestic industry in 2020 to the dumping and subsidizing of the subject goods.

Miscellaneous other factors

[273] Ashley and Violino submitted that there is no evidence that the domestic industry exited the high-volume stock products segment of the market during the POI, which they claimed is the segment that grew during this period. They also submitted that, contrary to the Domestic Producers' assertions, the subject goods have not moved up into the higher-end segments of the market in which the domestic industry has been operating.

[274] The Tribunal does not find this argument compelling. As it indicated above, there is a clear competitive overlap between the subject goods and the like goods across all categories or price points (i.e. good, better and best).

[275] Wayfair submitted that a review of the responses to the Producers' Questionnaire points to domestic producers having inefficient business operations, making ineffective business decisions, or both.

[276] The Tribunal is of the view that the statistics to which Wayfair referred are likely the result of anomalous situations that would need further probing in order to fully understand. In any event, the Tribunal finds that these are very unlikely to have had any real impact on the state of the domestic industry over the POI.

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261 Exhibit NQ-2021-002-D-23 (protected) at para. 36; Exhibit NQ-2021-002-D-15 (protected) at para. 24. With respect to Palliser specifically, the Tribunal is of the view that Mr. DeFehr provided an adequate explanation for the longer than usual lead times in the first half of 2019. See Exhibit NQ-2021-002-RI-01A (protected) at 41; *Transcript of In Camera Hearing* at 64-65.

262 *Transcript of Public Hearing* at 240-241, 255, 296.

[277] The RCC submitted that there is evidence on record that shows that some of the lost sales volumes suffered by certain domestic producers went to other domestic producers.

[278] Although intra-industry competition can lead to price depression and price suppression as domestic producers compete with each other by lowering prices, the Tribunal has already determined that the domestic industry suffered injury over the POI mainly in the form of lost sales and market share, rather than through price effects. Therefore, intra-industry competition in this case would not change the market share held by the domestic industry relative to that held by the subject goods.

[279] The RCC also submitted that there is ample evidence that UDS producers worldwide have been contending with increases in raw material and freight costs throughout the POI, which is particularly problematic for domestic producers who it claimed import costly leather and motion mechanisms, or UDS parts as "kits" to be assembled in Canada. IKEA made similar submissions.

[280] The Tribunal finds that there is no evidence that increases in raw material and freight costs have had a disproportionate impact on domestic producers. Moreover, the Tribunal found above that domestic selling prices had not been significantly depressed or suppressed over the POI. In fact, the domestic industry's per-unit gross margins remained relatively stable throughout the POI as COGS generally moved in tandem with net sales values.[263]

[281] Finally, the RCC argued that a company-by-company examination of causation is required because each individual producer has its own story. This is legally incorrect. As previously noted, a finding of injury must be made with respect to the defined domestic industry, considered as a whole. The Tribunal is under no obligation to consider the situation of individual producers to determine if, individually, they showed signs of injury. Consequently, while the Tribunal *may* consider circumstances relating to a subset of the domestic industry or to a specific producer in its examination of other factors, as was done above, there is no requirement to examine the particular situation of *each* individual producer in order to determine causation.

[282] The implication of the RCC's argument is that the Tribunal would be obliged, as part of its causation analysis, to seek out other factors that may have injured particular producers on its own initiative. However, a WTO panel made it clear that, under the WTO ADA, the obligation of an investigating authority is to address *known* factors, other than the subject imports.[264] While these include factors clearly raised by interested parties in the course of an inquiry and that are deemed relevant by the Tribunal, there is no obligation for investigating authorities to seek out and examine, in each case on their own initiative, the effects of *all* possible factors other than imports that may have caused injury to the domestic industry under investigation. *SIMA* should therefore not be interpreted as imposing such an onus on the Tribunal.

Conclusion

[283] The Tribunal concludes that the evidence, as a whole, establishes that, while imports of SFUDS from China and Vietnam, and the loss of the Sears account by Palliser, were the cause of some injury to the domestic industry over the POI, the dumping and subsidizing of the subject goods, in and of themselves, were a cause, if not the main cause, of injury to the domestic industry.

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263 Exhibit NQ-2021-002-06A, Table 82.

264 Panel Report, *Thailand – Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams (Poland*), WT/DS122/R at para. 7.273.

Materiality

[284] The Tribunal will now determine whether the injury caused by the dumping and subsidizing of the subject goods is "material," as contemplated in the definition of "injury" under subsection 2(1) of *SIMA*. While *SIMA* does not define the term "material," the Tribunal has in the past considered this to mean something more than *de minimis* but not necessarily serious injury.[265] Ultimately, the Tribunal determines the materiality of any injury on a case-by-case basis, having regard to the extent (i.e. severity), timing and duration of the injury.[266]

[285] In the present case, the evidence indicates that the domestic industry suffered injury caused by the dumping and subsidizing of the subject goods throughout the POI mainly in the form of lost sales, a decline in market share and reduced gross margins. While the rate at which this injury occurred decreased progressively over the POI, the state of the domestic industry was at its worst at the end of the POI, coinciding with the CBSA's period of investigation. The Tribunal is therefore satisfied that the extent, timing and duration of the injury in this case are such that it can be considered material.

[286] As the Tribunal has concluded that the dumping and subsidizing of the subject goods caused injury to the domestic industry, it need not address the question as to whether the subject goods are threatening to cause injury.

EXCLUSIONS

[287] As noted previously, the Tribunal received a total of 67 requests for product exclusions from 14 parties. It received 1 request from 2834342 Ontario Inc., 1 from Arozzi North America Incorporated (Arozzi), 2 from Handy Button Machine Co. (dba Handy Living), 1 from Best Buy Canada Ltd. (Best Buy), 2 from DHP Furniture, 1 from Expand Furniture Inc. (Expand Furniture), 13 from Innovation Living Inc. (Innovation Living), 3 from Limitless-Calgary/Limitless-Canada (Limitless), 2 from Medical Breakthrough Massage Chairs LLC (MBMC), 13 from Moe's Classic Rugs & Home Accessories Inc. (Moe's), 1 from Pride Mobility Products Corporation (Pride Mobility), 9 from RHI, 3 from Wayfair, and 15 from Zhuhai Ido Furniture Co. Ltd. (Zhuhai Ido).

[288] Given the large number of requests received in this case and the very short time frames within which the Tribunal must issue its findings and reasons, the Tribunal advised all parties on July 5, 2021, that it intended to proceed with the matter of requests for product exclusions by way of written submissions only.[267] As such, the Tribunal did not allocate any time at the hearing for this matter.

[289] In addressing the requests for product exclusions, the Tribunal will first outline the general principles upon which it relied in determining whether to grant product exclusions in the context of the current inquiry. The Tribunal will then address specific requests based on the following different categories in which they have been grouped: (1) UDS exceeding specified price points, (2) sofa beds/daybeds/sleepers/futons, (3) massage chairs, (4) medical lift chairs, (5) motion fabric chairs and sofas, (6) benches, (7) ottomans, (8) leather chairs and sofas, (9) ready-to-assemble furniture,

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265 *ABS Resin* (15 October 1986), CIT-3-86; *Unitized Wall Modules* at para. 58.

266 *Concrete Reinforcing Bar* (3 May 2017), NQ-2016-003 (CITT) at para. 184. See also *Certain Hot-rolled Carbon Steel Plate* (27 October 1997), NQ-97-001 (CITT) at 13, where the Tribunal suggested that the concept of materiality could entail both temporal and quantitative dimensions.

267 Exhibit NQ-2021-002-46.

(10) gaming chairs, and (11) rocking chairs. The Tribunal will subsequently turn to the requests made by Costco and RHI for a determination, pursuant to subsection 43(1) of *SIMA*, that its finding not apply to goods imported by, or from, these two companies.[268]

[290] For the reasons set out further below, the Tribunal has decided to grant exclusions for massage chairs, medical lift chairs, and gaming chairs as described in Appendix 1 of the finding and to dismiss all of the other requests.

General principles

[291] *SIMA* implicitly authorizes the Tribunal to grant exclusions from the scope of a finding.[269] Exclusions are an extraordinary remedy that may be granted at the Tribunal's discretion, i.e. when the Tribunal is of the view that the exclusions will not cause injury to the domestic industry.[270] The Tribunal has indicated in previous decisions that exclusions are granted only in exceptional circumstances.[271]

[292] Indeed, the general conclusion that the dumping and subsidizing of the subject goods have caused injury to the domestic industry means that imports of *all* products captured by the product definition are, presumptively, injurious. In view of this finding, cogent case-specific evidence concerning the non-injurious effect of imports of specific products covered by the definition of the subject goods is required for exclusions to be granted.

[293] Ultimately, the Tribunal must be guided by the overarching principle that exclusions must not undermine the remedial effect of its finding. This means that caution should be exercised before granting exclusions. The Tribunal cannot ignore that any exclusion from the scope of the finding may incentivize importers to switch, to a significant extent, from the dumped and subsidized goods subject to the finding to substitutable goods, that are also dumped and subsidized, but covered by an exclusion.

Relevant injury factors

[294] In order to determine whether the granting of an exclusion will cause injury to the domestic industry, the Tribunal considers such factors as whether the domestic industry produces, actively

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268 At the hearing, RHI indicated that this particular request was not a request for an exclusion. However, the Tribunal finds that both RHI's and Costco's requests in this regard are tantamount to a request for a company- or importer-specific exclusion, which, in principle, the Tribunal has discretion to grant under subsection 43(1) of *SIMA*. In that sense, while, strictly speaking, they may not be labelled as requests for the exclusion of a specific product, they are nevertheless requests that may be characterized as requests for the exclusion of certain subject goods from the scope of the finding. Therefore, the Tribunal will address those requests on that basis.

269 *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 In or Exported 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.

270 See, for example, *Aluminum Extrusions* at para. 339; *Stainless Steel Wire* (30 July 2004), NQ-2004-001 (CITT) at para. 96.

271 *Aluminum Extrusions* at para. 337.

supplies or is capable of producing like goods in relation to the subject goods for which the exclusion is requested.[272]

[295] The Tribunal usually denies exclusion requests if the domestic industry already produces the same products, even if that production is limited.[273] However, this factor is not relevant in this case given that, as noted above, the domestic industry does not produce UDS that is identical in all respects to the subject goods. As such, it is clear that the domestic industry does not produce products that are identical to any of those for which exclusions are being requested.

[296] The next factor considered by the Tribunal was whether the domestic industry currently produces products that are substitutable for, or compete with, the products for which exclusions are requested. In this regard, the Tribunal is mindful of its findings that domestically produced UDS meeting the product definition and SFUDS are like goods in relation to the subject goods and that there is a single class of goods. This implies that, broadly considered, the subject goods and the goods produced by the domestic industry have similar physical characteristics and end uses, fulfil the same customer needs and, in a general or collective sense, compete with each other.

[297] This was the most important factor in the context of this inquiry. In order to address the requests, the Tribunal essentially performed a case-specific like-goods analysis, i.e. an analysis that is specific to each product in question. It reviewed the specific evidence on the record regarding the physical characteristics and market characteristics (such as quality, price, market segment and end uses) of the products and the alleged substitutable "made in Canada" products to gauge the degree of competition between them.

[298] Ultimately, the Tribunal found that, contrary to the claims made by the requesters, most of the products for which exclusions were requested are not items or niche products that can be used for some specific application, or to fulfil a particular or unique customer need, or otherwise they would not compete in the marketplace with the products made by the domestic producers. The crux of many of the requests was that the imported products were different, better or superior products in relation to the domestically produced goods in terms of design, quality, constituent materials or otherwise. While it may be true, this fact is not sufficient for the Tribunal to conclude that excluding such products will not cause injury to the domestic industry. It does not negate the more crucial fact that there are products manufactured in sufficiently large volumes by the domestic producers that compete in the marketplace with those imported products. From the perspective of the purchaser or the end-user (i.e. the consumer), that the perhaps superior imported products benefit from the unfair pricing advantage conferred by the dumping and subsidizing of the subject goods is not trivial. It is reasonable to conclude that this advantage is an important consideration that could result in the purchaser or the end-user purchasing these subject goods over the like goods. The purpose of the finding is to remedy this situation by levelling the playing field.

[299] On balance, the Tribunal has not been persuaded by the evidence filed by most of the requesters that there is an absence of domestically produced UDS that would be substitutable or interchangeable with the products for which exclusions were requested. This is therefore not a

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272 *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) [*Fasteners*] at para. 245.

273 See, for example, *Concrete Reinforcing Bar* (12 January 2000), NQ-99-002 (CITT) at 26, where the Tribunal stated that "there is no requirement in SIMA for the industry to supply the totality of the market's needs."

situation where there are exceptional circumstances warranting the granting of many exclusions.[274] Accordingly, the demonstration, on the facts of this case, of probable competition between domestically produced UDS and those products for which the exclusions were requested leads to the conclusion that the granting of the large majority of the exclusions would likely cause injury to the domestic industry and thus undermine the remedial effect of the finding.

[300] In this regard, the Tribunal notes that, in upholding a Tribunal decision to deny exclusion requests in another inquiry under section 42 of *SIMA*, the Federal Court of Appeal has previously stated as follows:

> . . . There is no challenge to the tribunal's determination that the evidence indicates Globe is capable of producing substitutable products. On this basis alone, it was open to the tribunal to deny Owen's exclusion requests. The refusal to grant Owen's exclusion requests was not unreasonable.[275]

[301] To the extent that capacity to produce substitutable goods may be sufficient to deny requests for product exclusions, *a fortiori*, evidence of actual production, at levels of production that are not insignificant, of substitutable domestic products provides an adequate and compelling basis to deny a request for exclusion.

Burden of proof

[302] The onus is upon the requester to demonstrate that imports of the specific goods for which the exclusion is requested are not injurious to the domestic industry.[276] Thus, there is an evidentiary burden on the requester to file evidence in support of its request. However, there is also an evidentiary burden on the domestic producers to file evidence in order to rebut the evidence filed by the requester.[277] Ultimately, the Tribunal must 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.[278]

[303] It is with these overarching considerations in mind that the Tribunal examined the specific requests made by the parties.

Product exclusion requests

UDS exceeding specified price points

[304] The Tribunal received eight requests from RHI for the exclusion of products sold directly to consumers prior to importation and exceeding various net retail price points (net of all sales and discounts), inclusive of duty but exclusive of tax and all shipping and delivery fees.

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274 For the reasons discussed below, the Tribunal is of the view that the high threshold for granting exclusions in the context of an inquiry pursuant to section 42 of *SIMA* is, however, met in the case of the products that it decided to exclude from the scope of its finding. Those products are very different compared to the products that form the core business of the Domestic Producers. The Tribunal is satisfied that the Domestic Producers are not active suppliers of products fulfilling these specific customers' needs and do not intend to become active suppliers of such products.

275 *Owen & Company Limited v. Globe Spring & Cushion Co. Ltd.*, 2010 FCA 288 at para. 14.

276 *Fasteners* at para. 243.

277 *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) at para. 194.

278 *Ibid.* at para. 195.

[305] RHI submitted that the products for which it requested exclusions are sold in the Canadian market at a substantially higher retail price point than domestically produced like goods with similar characteristics. It added that its products are not sold through the same channel of distribution as the like goods (i.e. wholesale), are sold in low volumes to a niche clientele at very high prices, and are transported on a largely "one off" special-order basis with significant lead times.

[306] RHI further submitted that the evidence provided by the Domestic Producers indicates that the pricing of domestically produced like goods is nowhere near the price points above which exclusions are being sought. It also submitted that the Domestic Producers ignored the fact that RHI's exclusion requests are not based solely on the products exceeding specified price points, but also define specific characteristics of the products, including the channel through which they are distributed. Finally, RHI argued that the Domestic Producers' suggestion that "indexing" of the price points specified in the requests ought to have been proposed is misplaced and unsupported.

[307] The Domestic Producers opposed RHI's requests for product exclusions for two main reasons. First, they argued that, as a conceptual matter, product exclusions based on price points are inherently likely to cause injury because allowing dumped and subsidized goods above a certain price imposes a ceiling on prices for domestic producers. They argued that, if dumped and subsidized products could be freely sold above certain price points, the domestic industry would be inhibited from selling higher-end products near or above those price points, both now and for the life of the finding. On this point, they noted that RHI had not proposed any mechanism to index the specified price points in accordance with inflation or to adjust them to account for future developments which may increase the prices of domestically produced goods.

[308] Second, the Domestic Producers argued that they sell products with retail prices that, at least, approach the price points of the products for which RHI is seeking exclusions. In their view, domestically produced goods are substitutable for RHI's products, and the retail prices of these products are not so different from certain domestically produced goods so as to prevent them from competing with one another.

[309] There is no persuasive evidence that the high prices set by RHI for its products reflect a high cost of production, due to unique materials, enabling a unique application or specifications enhancing the products' characteristics (e.g. durability). Rather the evidence suggests that the high prices commanded by RHI are attributable to the value placed by customers on the RHI "shopping experience," the advice and expertise of RHI staff and the prestige of owning RHI-branded products.

[310] While the evidence indicates that the Domestic Producers sell products with retail prices that do not exceed the price points of the products for which RHI is requesting exclusions, it also indicates that, in some instances, the differences are relatively small.[279] This means that, if the requested exclusions were granted, consumers could, given the right circumstances, decide to upgrade from a domestic product to the "shopping experience" offered by RHI and thus cause injury to the domestic industry.

[311] The Tribunal is also of the view that, as argued by the Domestic Producers, granting the exclusions would impose a ceiling on prices for domestic producers and effectively inhibit selling higher-end products near or above those price points. The impact of this "ceiling" would be made worse by the fact that RHI did not propose any mechanism to provide for the indexation or

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279 Exhibit NQ-2021-002-48.01 (protected) at 10-12.

adjustment of the specified price points over the life of the finding.[280] The Tribunal has previously stated that it does not have jurisdiction to increase an exclusion price point in a subsequent review of a finding.[281] Therefore, there is a doubt as to whether exclusions based on price points that, while may provide an acceptable level of protection for the domestic industry today, will continue to do so in the future as inflation inevitably causes prices to rise and slowly erodes that level of protection. As such, the Tribunal is unwilling to grant an exclusion that could, absent an appropriate method of indexation, over time come to include goods which compete directly with domestically produced goods and undermine the remedial effect of the finding.

[312] In light of the foregoing, the Tribunal denies RHI's eight requests for the exclusion of products exceeding specified price points.

Sofa beds/daybeds/sleepers/futon

[313] The Tribunal received 33 exclusion requests from five parties for sofa beds, daybeds, sleepers, and futons. Two requests were received from DHP Furniture, 1 from Expand Furniture, 1 from Handy Living, 12 from Innovation Living, 2 from Moe's, and 15 from Zhuhai Ido. Expand Furniture, Moe's, Innovation Living, and Zhuhai Ido requested product exclusions for sofa beds. Innovation Living and Zhuhai Ido also requested product exclusions for daybeds and sleepers, respectively. DHP Furniture requested product exclusions for futons. Handy Living requested a product exclusion for its "Convert-A-Couch."

[314] Expand Furniture, Moe's, Innovation Living, and Zhuhai Ido submitted that the products for which they requested exclusions could be distinguished from domestically produced goods based on such factors as function, quality, style, and design. Innovation Living and Zhuhai Ido further submitted that their products could be distinguished based on price. Innovation Living submitted that the suggested retail prices of its products are significantly higher than comparable domestically produced goods and Zhuhai Ido submitted that the suggested retail prices of its products are lower than comparable domestically produced goods.

[315] DHP Furniture submitted that upholstered futons are not viewed by the domestic industry and consumers as being in the same category as the subject goods because they are built for small spaces and serve as temporary sleeping surfaces and have a short product lifecycle, whereas sofa beds are frequently used in living rooms and guest rooms as both a sofa and standard-sized bed, and have a longer anticipated product lifecycle. It further submitted that, during the Tribunal's preliminary injury inquiry, Mr. DeFehr stated that futons did not compete with Palliser's product line and consented to their exclusion. DHP Furniture also submitted that price differences between futons and domestically produced sleeper sofas are so significant that it cannot reasonably be argued that a consumer who is in search of a futon would consider a sofa bed.

[316] Handy Living submitted that, to the best of its knowledge, the domestic industry does not manufacture smaller-dimension beds that can be converted into a couch like its Convert-A-Couch,

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280 Under *SIMA*, findings of injury expire five years from the date of the finding unless the Tribunal initiates an expiry review before that date. Following the conduct of an expiry review pursuant to section 76.03 of *SIMA*, the Tribunal may make an order continuing the finding, which then expires in another five years. There are no limits to the number of expiry reviews that can be conducted and, hence, the length of time that a finding can be in place.

281 See *Bicycles and Frames* (3 July 1997), RR-97-003 (CITT) at 6 (Member Close dissenting on the issue of the Tribunal's jurisdiction to revisit price points in subsequent reviews).

which is a trademarked product. It added that, since the Domestic Producers characterized its Convert-A-Couch as a sofa bed, it was unable to meaningfully respond because the arguments related to sofa beds are not applicable. It further submitted that the Domestic Producers had failed to meet their burden and that the Tribunal should therefore grant a product exclusion for its Convert-A-Couch.

[317] The Domestic Producers submitted that sofa beds are an important category of goods for them. They argued that, while the requesters generally attempted to draw distinctions between domestically produced goods and the products for which they requested exclusions, they failed to explain why they were not substitutable for each other. The Domestic Producers added that, even if domestically produced sofa beds do not have all the attributes of the products for which exclusions were requested, they fulfill most of the same customer needs.

[318] The Tribunal finds that, although not identical in all respects to the products for which exclusions have been requested, the sofa beds produced by the domestic industry generally fulfill the same customer needs as they are used for both sitting and sleeping. While sofa beds may function differently than sleepers, futons and Handy Living's Convert-A-Couch, they nonetheless perform the same basic functions. The Tribunal therefore considers that the domestically produced sofa beds and all of the products for which exclusions have been requested are substitutable for one another.

[319] With respect to prices, the evidence on the record indicates that domestically produced sofa beds can vary significantly in price such that they may be offered for sale at different price points and thus compete with most of the products for which exclusions have been requested.[282] Even if some products such as futons may be lower-priced than domestically produced sofa beds, with the finding in place, the differences in price may be sufficiently narrowed such that a consumer would consider moving up to a sofa bed. Therefore, the granting of an exclusion for this type of product would have the potential to undermine the remedial effect of the finding. That there is potential for the domestic industry to suffer injury is made more apparent by the fact that domestic producers had significant sales volumes for sofa beds in 2019 and 2020.[283]

[320] As for the mention by Handy Living that its Convert-A-Couch is a trademarked product,[284] the Tribunal notes that it is well established that a product being subject to intellectual property protection does not mean that it will be granted an exclusion.[285] Put simply, the fact that a product is subject to intellectual property protection may mean that the domestic industry cannot produce identical goods. It does not, however, preclude the domestic industry from producing substitutable and competing products, as is the case here.

[321] Finally, the Tribunal notes that, while Mr. DeFehr consented to the exclusion of futons from any eventual finding during the preliminary injury inquiry, the Tribunal determined that it would be premature for it to grant exclusions at that stage of the proceedings.[286] Palliser and Mr. DeFehr were well within their rights to revoke that consent during the present injury inquiry. As indicated above,

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282 Exhibit NQ-2021-002-48.01 (protected) at 51-52; Exhibit NQ-2021-002-49.09 at 16. See also Exhibit NQ-2021-002-07A, Table 53.

283 Exhibit NQ-2021-002-07A (protected), Schedules 7, 11.

284 Exhibit NQ-2021-002-40.05 at 19-21.

285 See, for example, *Aluminium Extrusions* at paras. 353-354; *Fasteners* at para. 249.

286 *UDS PI* at paras. 24-25.

the Tribunal is of the view that daybeds, sleepers and futons are substitutable for, and compete with, domestically produced sofa beds.

[322] Accordingly, the Tribunal concludes that the granting of the requested exclusions would cause injury to the domestic industry. The Tribunal therefore denies the requests for the exclusion of sofa beds, daybeds, sleepers and futons.

Massage chairs

[323] The Tribunal received five exclusion requests from four parties for massage chairs. One request was received from 2834342 Ontario Inc., one from Best Buy, two from MBMC, and one from Wayfair.

[324] 2834342 Ontario Inc., Best Buy, MBMC, and Wayfair submitted that the domestic industry does not produce any substitutable or competing products. Best Buy submitted that massage chairs are not intended to be used for general seating purposes, as they are not comfortable to sit in for long periods of time due to the mechanical components underneath the covering. 2834342 Ontario Inc., Best Buy, MBMC, and Wayfair further submitted that the products for which they requested exclusions include features that are more extensive than air bladders or heating pads and are not "minor components."

[325] Best Buy further submitted that, although a customer who decides to purchase a recliner may be swayed to purchase a recliner with basic massage and heat components as an added value, the customer looking to purchase a massage chair understands that this equipment is very bulky and accepts function over appearance. MBMC added that the significant price premium commanded for massage chairs distinguishes them from the recliners described by the Domestic Producers.

[326] The Domestic Producers submitted that all massage and wellness chairs covered by the exclusion requests have a recliner chair as their base structure and have certain additional massage and heating functions. They submitted that a significant amount of the UDS produced in Canada is recliner chairs and that the massage chairs that are the subject of the requests can be "down-substituted" for domestically produced recliner chairs given the unfair price advantage they enjoy. They added that the domestic industry also produces substitutable massage and wellness chairs that incorporate massage and heating features.

[327] The Tribunal is of the view that the evidence provided by the Domestic Producers does not indicate that the domestic industry produces substitutable or competing massage chairs. The massage chairs for which exclusions are requested are very specialized reclining chairs whose main purpose is to provide a *full* body massage. Moreover, their appearance is markedly different than that of a typical reclining chair such that a consumer would never consider substituting one for the other.[287] In the Tribunal's opinion, the heating and massage options offered for some of Elran's chair models and the heating function offered with Palliser's "Zero Gravity" recliner chairs are not sufficient to compete with the requesters' massage chairs.[288] Accordingly, the Tribunal concludes that granting the requested exclusions would not cause injury to the domestic industry.

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287 See, for example, NQ-2021-002-49.02 at 4. The types of massage chairs that are the subject of the requests for product exclusions generally have a spaceship-like appearance and, in the Tribunal's opinion, would not be purchased by consumers seeking to use them for general seating purposes.

288 Exhibit NQ-2021-002-47.01 at 155-164.

[328] The Tribunal therefore grants the requests for the exclusion of massage chairs, as set out in Appendix 1 to the finding.

Medical lift chairs

[329] The Tribunal received one exclusion request for medical lift chairs from Pride Mobility.

[330] Pride Mobility submitted that, to the best of its knowledge, the domestic industry does not produce and cannot currently produce or otherwise supply medical lift chairs, and that its medical lift chairs are distributed exclusively through authorized home medical equipment providers and are generally sought by patients referred by physicians and other licensed health care providers.

[331] Pride Mobility further submitted that, other than being motion chairs, the wellness chairs produced by the Domestic Producers do not share any relevant physical or market characteristics with its medical lift chairs. It submitted that its chairs are regulated by Health Canada as Class I medical devices, which means that its products are specifically designed, manufactured and tested for use in the treatment, mitigation, diagnosis or prevention of a disease or physical condition. It added that to adhere to international standards and maintain medical device certification, its medical lift chairs require ongoing compliance efforts, preparation for and participation in Health Canada audits, and post-market surveillance for incidents of adverse effects.

[332] The Domestic Producers categorized Pride Mobility's medical lift chairs as wellness chairs but made no submissions specifically addressing the request for product exclusion.

[333] There is no evidence on the record to indicate that the domestic industry produces and sells substitutable and competing goods. The Tribunal notes that the Domestic Producers did submit marketing materials from Elran that included chairs that have a lifting function.[289] However, these materials appear to have been provided in response to the requests for the exclusion of massage chairs (addressed above) to show that Elran offers heating and massage options for some of its chair models.[290] Elran was not an active participant in these proceedings and provided no evidence that the lift chairs described in its marketing materials are actually sold in Canada or that they have received the same regulatory approvals as the products for which Pride Mobility has requested exclusions. As a result, the Tribunal concludes that granting the requested exclusion would not cause injury to the domestic industry.

[334] The Tribunal therefore grants Pride Mobility's request for the exclusion of medial lift chairs, as set out in Appendix 1 to the finding.

Motion fabric chairs and sofas

[335] The Tribunal received four exclusion requests from two parties for motion fabric chairs and sofas. Three requests were received from Limitless and one from Moe's.

[336] Limitless and Moe's submitted that the products for which they requested exclusions are unique and not produced by the domestic industry. Limitless further submitted that its products are at the upper end of the market and do not compete on price with domestically produced goods.

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289 *Ibid.* at 164.
290 *Ibid.* at 74.

[337] The Domestic Producers submitted that each of the requests concerning motion fabric chairs relate to a swivel chair upholstered with fabric, which is fundamentally the same as the motion fabric chairs produced by the domestic industry. They further submitted that the softness or firmness of a sofa is not, as alleged by Limitless, enough to make an imported product non-substitutable for domestically produced goods.

[338] The Tribunal is of the view that there is nothing inherently special about the products for which exclusions were requested that would preclude them from competing with domestically produced goods. While domestically produced goods may differ slightly in style, this does not constitute a sufficient basis upon which to grant an exclusion. Moreover, similar to the Tribunal's reasoning for rejecting RHI's request for price-point exclusions, the granting of an exclusion to Limitless on the basis that its product is higher-priced would effectively prevent the domestic industry from competing at that higher end of the market.

[339] As such, the Tribunal concludes that the granting of the requested exclusions would cause injury to the domestic industry. The Tribunal therefore denies the requests for the exclusion of certain motion fabric chairs and sofas.

Benches

[340] The Tribunal received three requests for product exclusions from two parties for benches. Two requests were received from Moe's and one from Wayfair.

[341] Moe's submitted that the products for which it requested exclusions are unique and not produced by the domestic industry. Wayfair similarly submitted that it believes that its product does not compete with goods manufactured by the domestic industry. Wayfair further submitted that, given that the Domestic Producers were able to name only one domestic producer who produces any indoor benches, and offered no evidence to indicate that any other domestic producers can or plan to manufacture indoor benches, granting this exclusion is not likely to materially injure the domestic industry. Wayfair also submitted that granting this product exclusion would prevent any confusion and unnecessary administrative burden on the importers and the CBSA in trying to determine which indoor benches are within the scope of the subject goods because the product definition excludes "dining table chairs or benches (with or without arms) that are manufactured for dining room end-use . . . ."

[342] The Domestic Producers submitted that EQ3 produces and sells in Canada benches that are substitutable for those covered by the above product exclusion requests.

[343] There is evidence on the record that the domestic industry produces and sells products that are substitutable for those that are the subject of the product exclusion requests.[291] As such, the Tribunal concludes that granting these exclusions would cause injury to the domestic industry. The Tribunal also notes that the prevention of any confusion and unnecessary administrative burden on importers and the CBSA is not a relevant consideration in determining whether to grant a product exclusion.

[344] The Tribunal therefore denies the requests for the exclusion of certain benches.

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291 *Ibid.* at 103.

Ottomans

[345] The Tribunal received one exclusion request from Innovation Living for ottomans.

[346] Innovation Living submitted that the products for which it requested an exclusion could be distinguished from domestically produced goods based on aesthetics, size, functionality, price points and target market. Regarding price, Innovation Living submitted that the suggested retail price of its ottomans is significantly higher than that of any other products sold at retail by the Domestic Producers.

[347] The Domestic Producers submitted that Palliser and EQ3 produce and sell ottomans that are substitutable for Innovation Living's ottomans for which exclusions were requested.

[348] There is evidence on the record indicates that the domestic industry produces and sells products that are substitutable for those covered by the exclusion request.[292] Accordingly, the Tribunal concludes that granting this exclusion would cause injury to the domestic industry. The request for the exclusion of certain ottomans is therefore denied.

Leather chairs and sofas

[349] The Tribunal received eight exclusion requests from two parties for leather chairs and sofas. Seven requests were received from Moe's and one from RHI.

[350] Moe's submitted that the products for which it requested exclusions are unique and not produced by the domestic industry. RHI submitted that it is unaware of any other genuine sheepskin pelt furniture available within the Canadian market, nor is there any Canadian producer producing or intending to produce a comparable product. RHI also submitted that sheepskin hair products do not and should not be considered to fit within the scope of subject goods because sheepskin is a "skin" with hair attached, and is not a "leather" or a fabric.

[351] The Domestic Producers submitted that the domestic industry, including Palliser, produce and sell in Canada leather chairs that are substitutable for the goods for which the exclusions were requested. Regarding RHI's request for the exclusion of its YETI sheepskin collection, the Domestic Producers argued that sheepskin, being an animal hide, is merely a particular type of leather covering and such products are substitutable for other types of leather chairs, sofas, ottomans, and stools.

[352] There is evidence on the record which indicates that the domestic industry produces and sells products that are substitutable for the leather chairs and sofas for which Moe's and RHI requested exclusions.[293] While products that are part of RHI's YETI sheepskin collection may have physical characteristics that differ from those of domestically produced goods, the Tribunal is of the view that they accomplish the same function and fulfill the same customer needs. Accordingly, the Tribunal concludes that granting product exclusions for these chairs and sofas would cause injury to the domestic industry.

[353] While there is a question as to whether products that are part of RHI's YETI sheepskin collection are covered by the definition of the subject goods, this will ultimately be a matter for the

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292 Exhibit NQ-2021-002-47.01 at 98-102, 141-143; Exhibit NQ-2021-002-48.01 (protected) at 41, 43-44.

293 Exhibit NQ-2021-002-47.01 at 112-140, 144-154.

CBSA to address upon importation. For the purposes of disposing of RHI's request, the Tribunal treated these products as subject leather chairs and sofas.

[354] The Tribunal therefore denies the requests for the exclusion of certain leather chairs and sofas.

Ready-to-assemble furniture

[355] The Tribunal received one exclusion request from Handy Living for ready-to-assemble (RTA) seating that is not assembled at the time of importation and that is boxed for potential delivery by small-parcel couriers.

[356] Handy Living submitted that RTA seating is not interchangeable with traditional seating manufactured by the domestic industry as it is sold through different channels of distribution and has different target markets. It submitted that RTA seating is designed to be assembled by the home consumer, typically constructed using lighter materials to make products lighter for small-parcel shipping, and sold through online retailers.

[357] Handy Living further submitted that the Domestic Producers offered no evidence regarding their own production of RTA seating or substitutable goods. It submitted that none of the goods in Palliser's promotional materials are designed to be delivered by small-parcel courier companies. It similarly submitted that the Domestic Producers' response suggested that EQ3 sells RTA seating by way of e-commerce, but EQ3 did not provide any evidence to demonstrate that their goods are designed to be delivered by small-parcel courier or that their goods are sold through any online retailer.

[358] The Domestic Producers submitted that Handy Living did not explain how a chair that was sold as RTA, and then assembled by a consumer, is not substitutable for a domestically produced pre-assembled chair. They also submitted that sales made online directly to consumers are similar to other sales of UDS, such as through Wayfair or through EQ3's online store. They further argued that there is no evidence of how the target market for RTA seating is completely distinct from that in which consumers buy from major brick-and-mortar or other online retailers. In their view, RTA seating as a sweeping category should not be excluded.

[359] In the Tribunal's view, RTA seating and domestically produced like goods are substitutable for and compete with each other as, once assembled, they have the same physical characteristics and fulfil the same customer needs. The manner in which goods are packaged or delivered to a consumer should have little impact if the goods ultimately perform the same function and fulfil the same customer needs. In fact, when unassembled goods are imported, they are treated as finished goods for tariff classification purposes.

[360] The Tribunal agrees with the Domestic Producers that sales made directly to consumers through online retailers are similar to sales made through Wayfair, Amazon or EQ3's online store. There is also no reason why RTA seating of the type for which Handy Living requests an exclusion could not be sold through brick-and-mortar retailers. Furthermore, the Tribunal is concerned that the granting of an exclusion for RTA seating could lead to circumvention issues by enticing exporters of subject goods to switch to selling unassembled goods and thus undermine the remedial effect of its finding.

[361] In light of the foregoing, the Tribunal concludes that the granting of an exclusion for RTA seating would cause injury to the domestic industry. The Tribunal therefore denies Handy Living's request for the exclusion of RTA seating.

Gaming chairs

[362] The Tribunal received two exclusion requests from two parties for gaming chairs. One request was received from Arozzi and one from Wayfair.

[363] Arozzi submitted that gaming chairs are not similar to the subject goods and are not being produced by the domestic industry. It also submitted that the Domestic Producers consented to a product exclusion for gaming chairs during the preliminary injury inquiry and then withdrew that consent without warning in these proceedings.

[364] Wayfair submitted that gaming chairs do not compete with goods manufactured by the domestic industry. Both Arrozi and Wayfair submitted that the Domestic Producers did not argue that they manufacture identical goods or substitutable goods, and no promotional materials were filed in evidence.

[365] The Domestic Producers submitted that, if gaming chairs are subject goods, they do not consent to the exclusions as presented because they are too vague (Wayfair) or incomplete (Arozzi). They acknowledged that gaming chairs are not currently being treated as subject goods by the CBSA.

[366] There is no evidence that the domestic industry produces gaming chairs similar to the ones for which Arozzi and Wayfair have requested exclusions. Furthermore, there is no evidence that gaming chairs compete with traditional UDS chairs as these are typically neither height-adjustable nor used with a desk for gaming. Accordingly, the Tribunal concludes that the granting of an exclusion for height-adjustable gaming chairs for use with a desk would not cause injury to the domestic industry.

[367] Therefore, to the extent that gaming chairs may be treated as subject goods by the CBSA, they are to be excluded from the application of the Tribunal's finding. The Tribunal grants the requests for product exclusions made by Arozzi and Wayfair, as set out in Appendix 1 to the finding.

Rocking chairs

[368] The Tribunal received one exclusion request from Moe's for a rocking chair.

[369] Moe's submitted that the product for which it requested an exclusion is unique and not produced by the domestic industry.

[370] The Domestic Producers submitted that they are unsure as to whether the rocking chair that is the subject of Moe's exclusion request is a subject good. They noted that the rocking chair only has curved bars that rest on the ground and facilitate a rocking movement, rather than allowing rocking through a motion "mechanism." They therefore submitted that, if the rocking chair is a subject good, and subject to a clearly drafted product exclusion, they would consent to its exclusion because they do not make substitutable and competing products.

[371] There is evidence on the record of domestic production of rocking chairs similar to the rocking chair for which Moe's requested an exclusion.[294] Accordingly, the Tribunal is of the view that granting this exclusion would cause injury to the domestic industry. Whether or not Moe's rocking chair is actually a subject good will be a matter for the CBSA to address upon importation.

[372] The Tribunal therefore denies Moe's request for the product exclusion.

Company-specific exclusion requests

Costco

[373] Costco requested that all of its imports of subject goods be excluded from any finding of injury on the basis that these imports have not caused or contributed to any injury suffered by the domestic industry. It submitted that, in this case, the evidence clearly demonstrates that, despite its best efforts to purchase domestically produced goods, domestic producers were either unable or unwilling to supply Costco. Costco noted that such an exclusion would be limited in scope given that the UDS it imports is sold only to members due to its membership model.

[374] The Domestic Producers submitted, in response to the criticism that the domestic industry does not have the production capacity to supply retailers, that it does have significant and unused capacity and that, in any event, there is no requirement that a domestic industry seeking protection be able to serve the entire market.

[375] The evidence on the record indicates that many domestic producers refused to supply Costco during the COVID-19 pandemic, which suggests that they would otherwise have considered the possibility of doing so.[295] The evidence also indicates that supplying Costco is a target for at least one domestic producer. Prior to the pandemic, domestic producers such as Palliser appear to have been unwilling to supply Costco with branded products due to their policy of low margins and the negative impact this would have had on their relationships with other retailers.[296] However, Palliser does appear willing to supply Costco with white label (i.e. unbranded) products.[297] The granting of a company-specific exclusion to Costco would force Palliser or other domestic producers to compete with unfairly traded UDS for Costco's business. This would cause injury to the domestic industry and, thus, defeat the purpose of the finding.

[376] In addition, even if the issues faced by Costco in purchasing domestically produced goods were not transitory, the Tribunal is of the view that the granting of a company-specific exclusion to Costco in this case would provide it with an unfair advantage over other retailers with which it competes. As the Tribunal has previously stated, importer or company-specific exclusions are rarely granted in order to avoid the creation of an unfair competitive advantage or trade distortion.[298] The present circumstances do not merit an exception.

[377] In light of the foregoing, the Tribunal denies Costco's request for a company-specific exclusion.

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294 Exhibit NQ-2021-002-10.11 (protected) at 55-57; Exhibit NQ-2021-002-F-04 (protected) at paras. 76-77.
295 *Transcript of In Camera Hearing* at 112-113, 348-349.
296 *Transcript of Public Hearing* at 167-168.
297 *Ibid.* at 184.
298 *Carbon and Alloy Steel Line Pipe* (29 March 2016), NQ-2015-002 (CITT) at para. 251.

RHI

[378] RHI requested that the Tribunal make a finding of no injury with respect to its exports and supply of subject goods from the United States to Canada.[299] It submitted that it has a unique business model with no comparator in Canada and that its exports are non-injurious and will not cause injury in the future. RHI also repeated many of the same arguments it made with respect to its requests for product exclusions.

[379] Having denied all of RHI's requests for product exclusions on the basis that their granting would cause injury to the domestic industry, the Tribunal sees no reason to grant it a company-specific exclusion which would be broader in scope and potentially cause the domestic industry even more injury. Moreover, for the reasons mentioned above in rejecting Costco's request, the granting of a company-specific exclusion to RHI would also provide it with an unfair advantage over any potential competitors.[300]

[380] In light of the foregoing, the Tribunal denies RHI's request for a company-specific exclusion.

REQUEST FOR THE TRIBUNAL TO ADVISE THE PRESIDENT OF THE CBSA

[381] The Domestic Producers included, as part of their case brief, a request that the Tribunal advise the President of the CBSA, pursuant to section 46 of *SIMA*, that it is of the opinion that there is evidence that SFUDS originating in or exported from China and Vietnam have been or are being dumped and subsidized, and the evidence discloses a reasonable indication that the dumping and subsidizing have caused injury, or is threatening to cause injury, to the domestic industry.

[382] Section 46 of *SIMA* reads 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.

[383] Therefore, in order to warrant advising the President of the CBSA pursuant to section 46 of *SIMA*, the evidence in the present case must indicate that: (1) SFUDS is like goods to the subject goods, (2) there have been, or there are, actual imports of SFUDS into Canada, (3) the imported SFUDS has been or is being dumped or subsidized, and (4) there is a reasonable indication that the dumping or subsidizing of these goods has caused injury or is threatening to cause injury.

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299 RHI imports subject goods into the United States and then exports them to Canada. These are considered subject goods as they still originate in the subject countries.

300 See *Transcript of Public Hearing* at 576.

[384] As the Tribunal has already determined that SFUDS is like goods to the subject goods and the investigation report clearly indicates that there were substantial imports of SFUDS from China and Vietnam during the POI, the first and second conditions are met. However, the Tribunal does not find it necessary to take a position with respect to the third condition as it is of the opinion that the fourth condition has not been met.

[385] The Domestic Producers submitted that, while the subject goods are an important cause of the injury suffered by the domestic industry over the POI, imports of SFUDS from China and Vietnam are also, in and of themselves, a cause of this injury. Using the results of the approach that was discussed above in the "other factors" section to estimate the proportion of the injury suffered by the domestic industry that should be attributed to each of the subject goods and imports of SFUDS from China and Vietnam, the Domestic Producers contended that approximately 25 to 30 percent of the domestic industry's injury over the POI was caused by the latter.[301]

[386] In analyzing the issue of non-subject imports as part of its causation analysis, the Tribunal found that the Domestic Producers' approach in this regard was reasonable and therefore found it appropriate to consider that up to 25 percent of the injury suffered by the domestic industry over the POI may be attributable to imports of SFUDS from China and Vietnam. In order to meet the fourth condition mentioned above to warrant advising the President of the CBSA, the Tribunal must be of the opinion that the evidence discloses a reasonable indication that the alleged dumping and subsidizing of SFUDS from China and Vietnam has caused "injury," with this term being defined under subsection 2(1) of *SIMA* as "material injury to a domestic industry."

[387] The Tribunal is of the view that 25 percent of the injury that was found to have been suffered by the domestic industry over the POI is not sufficient to be considered material in the unique circumstances of this case. By the Domestic Producers' own admission, imports of SFUDS from China and Vietnam were less injurious to the domestic industry than the subject goods. The Tribunal agrees and adds that the difference, in terms of extent, between the injurious effects that can be attributed to imports of SFUDS during the POI and those that can be attributed to the subject goods is, in fact, substantial. All things considered, the Tribunal finds that the evidence with respect to the severity of the injury caused by imports of SFUDS is insufficient to disclose a reasonable indication that these imports caused material injury. Moreover, in light of the much more significant injurious effects of the subject goods on the performance of the domestic industry that manifested themselves during the same period of time, the Tribunal is not convinced that, in and of themselves, imports of SFUDS from China and Vietnam can be considered a genuine and substantial cause of injury.

[388] The Domestic Producers submitted that there need only be "some evidence" of injury, even if there is also contradictory evidence, and that the threshold for a reasonable indication of injury under section 46 of *SIMA* is low.[302]

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301 In their case brief, the Domestic Producers submitted that approximately 20 percent of the domestic industry's injury over the POI was caused by imports of SFUDS from China and Vietnam. However, as a result of the Tribunal issuing a revised investigation report, the Domestic Producers changed that figure to a range of 25 to 30 percent, but only in their submissions on the issue of causation. The Tribunal assumes that the Domestic Producers intended to also make the change in their submissions concerning their section 46 request.

302 The Domestic Producers referenced the Federal Court's decision in *Ronald A. Chisholm Ltd. v. Deputy M.N.R.C.E.* (1986), 11 CER 309 (FCTD), as well as the Tribunal's decisions in *Gypsum Board* (4 January 2017), NQ-2016-002 (CITT) and *Stainless Steel Round Bar* (4 September 1998), NQ-98-001 (CITT).

[389] The particular circumstances in this inquiry are unusual because the Tribunal has the benefit of the extensive information it collected on the production, importation and sale of SFUDS in Canada. In other words, the Tribunal has at its disposal in this case detailed and comprehensive evidence regarding the domestic industry that it would not otherwise have in situations where it is tasked with determining whether the evidence discloses a reasonable indication of injury. It follows that, if the evidence of the kind that the Tribunal would ultimately have at its disposal in the context of a final injury inquiry does not support a finding of injury, there can be no basis upon which the Tribunal can find that the same information discloses a reasonable indication of injury.

[390] Accordingly, the Tribunal is unable to form the opinion that the evidence discloses a reasonable indication that the alleged dumping and subsidizing of SFUDS from China and Vietnam have caused injury to the domestic industry. Since the Domestic Producers made no submissions and provided no evidence to support their claim that the alleged dumping and subsidizing of SFUDS from China and Vietnam are threatening to cause injury to the domestic industry, the Tribunal is unable to form an opinion in that regard.

[391] The Tribunal therefore denies the Domestic Producers' request that it advise the President of the CBSA pursuant to section 46 of *SIMA*.

REQUEST FOR THE INITIATION OF A PUBLIC INTEREST INQUIRY

[392] Costco requested that, in the event the Tribunal makes a finding of injury and does not exclude Costco from its application, the Tribunal initiate a public interest inquiry pursuant to section 45 of *SIMA*. Costco simply claimed that the application of significant duties will make it difficult, if not impossible, for it to import UDS to meet the demands of its members and will severely limit its ability to compete for sales of UDS in Canada.

[393] Subsection 45(1) of *SIMA* provides that, if the Tribunal makes a finding of injury or threat of injury, it must initiate, on its own initiative or on the request of an interested person that is made within the prescribed period and in the prescribed manner, a public interest inquiry if it is of the opinion that there are reasonable grounds to consider that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount, would not or might not be in the public interest. Subsection 40.1(1) of the *Regulations* provides that a request for the Tribunal to initiate a public interest inquiry is to be made within 45 days after the issuance of a positive finding. Subsection 40.1(2) provides a list of information to include, and factors to address, in the request.

[394] Costco's request for the Tribunal to initiate a public interest inquiry consisted of two paragraphs in its case brief, which did not contain any of the information, or address any of the factors, prescribed under subsection 40.1(2) of the *Regulations*. For example, it did not include a statement of the public interest affected by the imposition of duties, as required by paragraph 40.1(2)(b). While Costco did claim that the imposition of duties would make it difficult for it to import UDS and compete for sales of UDS in Canada, it did not explain how the interests of the public at large, or those of a segment of that public, would be affected. As the Tribunal has previously stated, the basic premise is that the imposition of duties following an inquiry under section 42 of *SIMA is* in the public interest.[303] The Tribunal also notes that its injury finding does not prohibit the importation of subject goods. It simply requires that they be imported at the applicable normal values calculated by the CBSA and/or that the applicable duties be paid. As the market

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303 *Concrete Reinforcing Bar* (22 December 2015), PB-2014-001 (CITT) [*Rebar*] at para. 85.

adjusts following the imposition of duties, new prices and/or sources of supply are likely to emerge for all market participants.[304]

[395] Accordingly, Costco's request is denied. However, it remains open to Costco, or any other interested person for that matter, to file a request that complies with the informational requirements set out in the *Regulations* within 45 days of September 2, 2021, the date on which the Tribunal's finding was issued.

CONCLUSION

[396] The Tribunal finds, pursuant to subsection 43(1) of *SIMA*, that the dumping of the subject goods, and the subsidizing of the subject goods (excluding those goods exported to Canada by the exporters mentioned at paragraph 21 of these reasons), have caused injury to the domestic industry. The Tribunal excludes from its finding the products described in Appendix 1.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Peter Burn

Peter Burn
Member

Georges Bujold

Georges Bujold
Member

304 *Rebar* at para. 33.